STATE OF WEST VIRGINIA

Report

of the

Court of Claims

For the Period from July 1, 1989

to June 30, 1991

By

CHERYLE M. HALL

Clerk

Volume XVIII

(Published by authority W.Va. Code § 14-2-25)

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Letter of Transmittal

To His Excellency
The Honorable Gaston Caperton
Governor of West Virginia

Sir:

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

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OPINION ISSUED AUGUST 8, 1989

JAMES STEPHEN DENT
VS.
DEPARTMENT OF MOTOR VEHICLES

(CC-89-34)

No appearance by claimant.
Janet F. Steele, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $45.00, the cost of a towing fee. Claimant's vehicle was stopped on January 18, 1989, in Putnam County as he was driving with an inoperative headlight. His car was towed as the police officer received inaccurate information that claimant was driving with a suspended driver's license. In actuality claimant's driver's license had been reinstated at the time of this incident. The respondent neither admits nor denies the validity of the claim, and states that it was not paid because the respondent does not have a fiscal method to pay it.

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

Award of $45.00.

OPINION ISSUED AUGUST 8, 1989

T.H. COMPTON, INC.
VS.
DEPARTMENT OF MOTOR VEHICLES

(CC-88-293)

Lucien G. Lewis, Attorney at Law, for claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $15,580.65 for excessive sales taxes paid on vehicles during the time period of 1984 through March of 1986. W.Va. Code §§17A-3-4 provides that "A tax is hereby imposed upon the privilege of effecting the certification of title of each vehicle in the amount equal to five percent of the value of said motor vehicle at the time of such certification..." In this instance the five percent sales tax was erroneously computed based upon the total price of the vehicles inclusive of Federal excise taxes, and, in some instances the West Virginia Gross tax, when the sales tax should have been levied on the sales price exclusive of these additional taxes.

Respondent admits the validity of the claim, but states that the amount owed to claimant is $12,377.24. Respondent further states that there is no fiscal method for respondent to make a refund to the claimant.

Claimant has indicated its agreement to accept the sum of $12,377.24 as full settlement of its claim. Therefore, the Court makes an award to claimant in the amount of $12,377.24.

Award of $12,377.24.

OPINION ISSUED OCTOBER 4, 1989

THOMAS R. BURGESS AND THOMAS R BURGESS, II
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-37)

Claimants appeared in person.
Terry Ridenour, Attorney at Law, for respondent.

PER CURIAM:

On December 25, 1988, claimant Thomas R. Burgess, II, sustained personal injuries when he fell through Bridge 2, on Toney Fork, in Raleigh County, West Virginia. This bridge is owned and maintained by respondent. Claimant Thomas R. Burgess incurred medical expenses on behalf of his son in the amount of $545.71. The Court, on its own motion, added Thomas R. Burgess as a party claimant as he is the father of Thomas R. Burgess, II.

Thomas R. Burgess, II, eighteen years of age at the time of this incident, testified that his father had parked the automobile which he was driving on part of the bridge to pick up a cousin

and himself. They had been playing basketball at a community center. Claimant, Thomas R. Burgess, II, approached the automobile to open the door when he felt the board of the bridge floor break from under his feet. He let go of the door handle and tried to catch the runner on the bridge, but it was not nailed down. He then fell approximately five feet into the creek below the bridge. The runner from the bridge landed on top of him. He was taken to the hospital by an ambulance. It was determined that he had suffered damage to the cartilage in his knee. He used crutches for three weeks and spent two months rehabilitating his knee.

Respondent's witnesses described the bridge as a wooden structure, twenty feet long and sixteen feet wide, and approximately ten-to-twelve years old. Bridge inspections were made on a routine basis of approximately every two months. The bridge inspector found no problems with the bridge, "except for maybe a loose board or two on it."

From the evidence in this claim, the Court has determined that respondent had constructive notice of the condition of the bridge deck. Claimant, Thomas R. Burgess, II, stated that the bridge deck appeared to be rotten from underneath the bridge. There was no negligence on the part of claimant, Thomas R. Burgess, II, when he stepped onto the bridge and suddenly fell through the bridge deck. This Court has found negligence on the part of respondent for maintenance of wooden bridges in circumstances similar tot he claim herein. See *Paula H. Merideth v. Dept. of Highways*, Opinion issued January 27, 1987.

Therefore, the Court is of the opinion to, and does, make awards in the amount of $545.71 to Thomas R. Burgess for medical expenses which he incurred on behalf of his son and $750.00 to Thomas R. Burgess, II, for the injuries which he received as a result of this incident.

Award of $545.71 to Thomas R. Burgess.

Award of $750.00 to Thomas R. Burgess, II.

OPINION ISSUED OCTOBER 4, 1989

CAPITOL BUSINESS INTERIORS
VS.
TAX DEPARTMENT

(CC-89-234a)

Fred F. Holroyd, Attorney at Law, for claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $600.00 for interior decorating consulting and travel expenses rendered to respondent. The invoice for these services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds in the appropriate fiscal year with which the claim could have been paid.

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

Award of $600.00

OPINION ISSUED OCTOBER 4, 1989

BENJAMIN F. CLANSY AND BULA D. CLANSY
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-172)

Claimants appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon an oral stipulation presented the Court on July 13, 1989.

Claimants are the owners of property located on West Virginia State Route 10 in the vicinity of Logan. Sometime prior to April 10, 1989, respondent was engaged in the continuous maintenance of a hole on State Route 10 in front of claimants' house. The cold mix placed in the hole by employees of the respondent was cast out by vehicles onto claimants' house which caused damage to the siding of the house, an aluminum door, a window, and trim on the house. The cost of repair was estimated to be approximately $1,256.10. Respondent admits negligence in the maintenance of the road and that the amount of $1,256.10 is a fair and reasonable amount for the repairs.

In view of the foregoing, the Court makes an award to claimants in the amount of $1,256.10.

Award of $1,256.10.

OPINION ISSUED OCTOBER 4, 1989

HARRY LEE CLAYTON
VS.
STATE OF WEST VIRGINIA

(CC-89-235)

William L. Jacobs, Attorney at Law, for claimant.
Janet F. Steele, Assistant Attorney General, and
Jan Fox, Deputy Attorney General, for respondent.

HANLON, JUDGE:

The claimant brought this action under W.Va. Code §14-2-13a, claims for unjust arrest and imprisonment or conviction and imprisonment.

Claimant Harry Lee Clayton was arrested on December 17, 1970, for the armed robbery of Evelyn Henthorn. He was indicted by the grand jury on January 11, 1971. He was tried and convicted of this offense in Wood County Circuit Court. He served approximately 32 months for this conviction in the West Virginia Penitentiary, at Moundsville, West Virginia, and in Huttonsville Correctional Facility, at Huttonsville, West Virginia.

A petition for Writ of Habeas Corpus in the United States District Court, for the Norther District of West Virginia was considered by that Court, whereupon the Court ordered that the conviction for armed robbery was null and void. The writ of habeas corpus was stayed for a reasonable time for the State to determine whether the claimant should be retried.

On April 15, 1976, the Circuit Court of Wood County entered an order that claimant "go hence without day" as the prosecuting attorney declined to further prosecute the claimant.

Documentation presented at the hearing established that Bernard Duane Adkins, also known as Berman Duane Adkins, was indicted with the claimant for the armed robbery of Evelyn Henthorn. He was convicted on January 19, 1972 and sentenced on March 8, 1972 subsequent to claimant's conviction, but prior to claimant's release from prison on the Writ of Habeas Corpus.

Claimant testified that he denied any part in the armed robbery of Evelyn Henthorn. He was with Bernard Duane Adkins at several drinking establishments in Parkersburg on the date of the robbery, but he was not with him at the time of the robbery. He again met Mr. Adkins subsequent to the robbery at the Navy Club, where the two departed that establishment to ride around in a taxi. They were stopped by the police at approximately 8:00 - 9:30 a.m., at which time they were both arrested for the armed robbery of Evelyn Henthorn.

Evelyn Henthorn Whitehead testified before this Court that she remembered the robbery incident. She was employed at Greiner's Bakery on December 17, 1970, when a man came into the store with duct tape over his face and a sweatshirt with a hood on over his head. She stated that claimant Harry Lee Clayton was not the man who robbed her. She made this determination based upon the size of the man who robbed her.

Claimant suffered direct economic loss for attorney fees and bail bonds in the amount of $6,500.00. He also lost employment while he was confined, and he was not steadily employed after his confinement. He is presently retired.

The Court is of the opinion that claimant has established that he was unjustly arrested and convicted and served part of a sentence for a crime for which another individual was tried and convicted. His judgment of conviction was vacated, and he was not retired. The Court, having considered all of the evidence presented is of the opinion that claimant is entitled to an award in accordance with the provisions of W.Va. Code §24-2-13a, and the Court makes an award to claimant in the amount of $35,000.00.

Award of $35,000.00.

OPINION ISSUED OCTOBER 4, 1989

RUBY E. CUMMINGS
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-346)

Ronald Anderson, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

Claimants brought this action to recover compensation for personal injuries which she received when her automobile was struck by rocks on West Virginia Route 60. She alleges negligence on the part of respondent in its maintenance of the hillside adjacent to Route 60. She seeks $10,000.00 as her damages.

Respondent contends that there had been no problems with rock fails in this area of Route 60 and further that respondent was not performing any work in this area which would have caused a rock fall.

Claimant testified that she was operating her 1974 Plymouth on West Virginia Route

60 East in Huntington, West Virginia on March 7, 1988. Route 60 is a four-land highway in this area. She noticed a tree coming from the hillside to her left, but she was unable to avoid hitting it as there were vehicles in the other lanes of travel. Rocks came off of the hillside and struck her automobile. She sustained injuries to her neck and head for which she was treated at St. Mary's Hospital in Huntington, West Virginia. The automobile was damaged beyond economical repairs. Claimant still experiences headaches as a result of her injuries.

The testimony established that this area of Route 60 experiences rock falls on occasion, but the berm is ten to fifteen feet wide. The rocks fall onto the berm and remain there until respondent's employees clean the area. There had been routine maintenance performed in this area in November 1987. Respondent's Assistant District Maintenance Engineer, Ivan B. Browning, testified that respondent had not performed any work on this particular hillside on or before March 7, 1988, the date of this incident. He traveled this route daily and noticed rocks in the berm area, but rocks had not fallen onto the highway.

A geologist for respondent, Glenn R. Sherman, testified that the cut in this area of Route 60 is approximately fifteen years old. In his opinion, weathering of the shale beneath the sandstone on the cut caused the rockslide. This condition would not have been detected in a routine inspection as there were trees between the rockfall and the road, and the slide area was some 70 feet above the roadway.

After reviewing all of the evidence in this claim, the Court is of the opinion that negligence on the part of respondent has not been established. Respondent did not have actual or constructive notice that a rockfall would occur. See *Stout vs. Dept. of Highways*, Opinion issued February 19, 1986. Therefore, the Court is of the opinion to, and does, deny this claim.

Claim disallowed.

OPINION ISSUED OCTOBER 4, 1989

JAMES F. EDWARDS, ADMINISTRATOR OF THE
ESTATE OF RICHARD LEE EDWARDS, DECEASED
VS.
DEPARTMENT OF HIGHWAYS
(CC-87-333)

Francis Curnutte, III, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

HANLON, JUDGE:

Claimant James F. Edwards brought this action in his capacity as Administrator of the Estate of Richard Edwards, his son. Richard Edwards was killed on September 27, 1985, in a

vehicular accident, on W.Va. Route 3, in Boone County. Claimant alleges that Route 3 was defective in that there was a dip in the road surface which caused Richard Edwards to lose control of his vehicle. The vehicle proceeded onto a defective berm and then swerved across the road into the path of an oncoming vehicle which struck the vehicle, resulting in Richard Edwards' death. Claimant alleges respondent had notice of the defective conditions existing on State Route 3.

Respondent contends that the proximate cause of this accident was the negligence of the driver in operating his vehicle at too great a speed for the curve at this section of State Route 3. Respondent also contends that the driver was familiar with the road and that there was nothing unusual about the road surface or the berm of State Route 3 at the accident site.

The facts of the claim reveal that Richard Edwards was operating his 1979 Chevrolet Chevette on September 27, 1985, at approximately thirty to forty miles per hour. He was proceeding west on Route 3 to Comfort, West Virginia, where he was employed at the V-Mart. He drove this stretch of Route 3 on a daily basis and was familiar with the road. As he drove around a curve on Route 3 and the, apparently, into a dip on the road surface, he lost control of his vehicle. The vehicle went onto a right berm, came back onto the road, and then crossed the road into the oncoming traffic lane where a pickup truck driven by George Henry Milam, Jr., struck the Edwards vehicle.

The testimony revealed that the dip on Route 3 had existed for some time at an area where a culvert was located under the road. The combination of the curve and the dip had cause numerous accidents. One resident had experienced vehicles coming into her yard when drivers lost control of their vehicles on this section of Route 3. She complained to respondent and requested that a guardrail be placed at the berm, which was done. Another resident, John Gobble, testified that he had observed vehicles "bottom out" on the dip in the road. He observed the Edwards vehicle at the time of the accident, but the vehicle was already on the berm when he saw it.

There was disagreement among the witnesses as to the presence of a curve sign and a 25 miles per hour sign located just prior to the curve at this accident scene. The presence of these signs is immaterial in the instant claim. The driver of the vehicle, Richard Edwards, was familiar with Route 3 at this locale and was aware of the curve. He certainly was cognizant of the speed with which he could safely operate his vehicle in the curve.

The defect in the surface of the road, ie., the dip at the accident scene, was in the actual knowledge of respondent. Employees of respondent drove over this section of Route 3 on a frequent or daily basis. The testimony from the witnesses was that they drove around the curve carefully as they were aware of the curve and the dip. Richard Edwards was also aware of the surface conditions of Route 3 on the date of this accident.

In view of the evidence in this claim, the Court is of the opinion that respondent was negligent in the maintenance of Route 3 when it allowed a dip in the road to exist over a long period of time without correcting this condition. Claimant established that the respondent knew or should have known of the defect in the surface of Route 3 which may have caused Richard Edwards to lose

control of his vehicle when coming out of the curve. The condition of the berm of Route 3, where Richard Edwards went off the road, was not in such a state of disrepair that this Court will attribute negligence to respondent for failure to maintain the berm. Richard Edwards had already lost control of his vehicle at the time that he drove onto the berm. The Court is of the opinion that Richard Edwards was negligent in the operation of his vehicle. The Court has determined that his negligence was equal to or greater than that of the respondent.

For these reasons the Court is of the opinion to, and does, deny this claim.

Claim disallowed.

OPINION ISSUED OCTOBER 4, 1989

LYNDA SPRINGSTON
VS.
DEPARTMENT OF EDUCATION

(CC-89-147)

No appearance by claimant.
Janet F. Steele, Attorney at Law, for respondent.

PER CURIAM:

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

Claimant seeks $700.00 as she fulfilled the educational requirements for a salary increase, but was not granted the increase. Claimant earned her Masters Degree plus fifteen hours in August 1988, but did not receive the commensurate salary for the pay period of September 15, 1988 through December 15, 1988. The paperwork for the salary increase was not processed in the proper fiscal year; therefore, claimant's salary was not increased.

The respondent admits the validity of the claim and that claimant is owed the sum of $666.87. Respondent also states that there were sufficient funds in the appropriate fiscal year with which claimant could have been paid.

In view of the foregoing and the fact the claimant agrees to accept $666.87 as full settlement of this claim, the Court makes an award in the amount of $666.87.

Award of $666.87.

OPINION ISSUED OCTOBER 4, 1989

SARAH J. WINCHESTER
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-200)

Jennifer f. Bailey, Attorney at Law, for claimant.
Terry Ridenour, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover for personal injuries which occurred when she fell on broken concrete at the rest area on Interstate 79 near Burnsville, West Virginia. When she fell, she sustained injuries to her forehead and chest and broke her prescription glasses. She seeks compensation for medical expenses for her personal injuries and for losses experienced by a business by a business owned and operated by her and her husband.

The evidence revealed that claimant had stopped at the rest area, at approximately 11:00 a.m., near Burnsville, West Virginia, on April 27, 1987, in order to let her dogs out. After she put the dogs back in the automobile, she went to purchase a soft drink from a vending machine outside of the building. As she stepped from the first machine to the second machine, she fell on broken concrete. She landed on her face and sustained bruises to her forehead and chest and broke her prescription glasses. She was unable to work for at least one week. She experienced pain and discomfort for two to two and one-half months from the injury to her forehead. She incurred medical expenses in the amount of $214.60.

The evidence in this claim established that the concrete pad at the rest area was deteriorated and created a hazardous condition for unsuspecting pedestrians attempting to purchase merchandise from the vending machines on the concrete pad. The respondent has attendants at the rest area as well as a supervisor who visited the rest areas on a regular, or daily, basis. The respondent had constructive, if not actual, notice of the deteriorated condition of the concrete pad at this rest area.

For these reasons, the Court is of the opinion to, and does, make an award to claimant in the amount of $650.00 for her injuries. The Court denies any loss of business at this item of damages is too speculative in nature.

Award of $650.00.

OPINION ISSUED OCTOBER 27, 1989

STEVENS & GRASS FUNERAL HOME
VS.
DEPARTMENT OF HUMAN SERVICES

(CC-89-267)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $400.00 for funeral services rendered pursuant to respondent regulations. The invoice for the funeral services was not processed for payment in the proper fiscal year; therefore, claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds in the appropriate fiscal year with which the claim could have been paid.

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

Award of $400.00.

OPINION ISSUED NOVEMBER 8, 1989

BRENT WALKER AND RUTH WALKER
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-139)

Fred A. Jesser, III, Attorney at Law, for claimants.
Jeff Miller, Attorney at Law, for respondent.

HANLON, JUDGE:

Claimants are the owners of property located at Deepwater in Fayette County. A two-story frame general store and post office with four apartments were constructed by the claimants on this property in 1983 when the prior structure was destroyed. Claimants began operating a general store in the new building in December of 1983. During 1987, the Department of Highways engaged in a contractor to replace the bridge over Loop Creek and relocate Route 61. Claimants allege that

this construction operation prevented customers from frequenting their general store, resulting in a loss of profits. Claimants allege a direct loss of income of $39,875.14 during the construction period, and a loss of future profits in the amount of $500,000.00.

Respondent contends that it provided access to the general store at all times. It also contends that while Route 61 was being relocated, access was provided by grading the relocated areas at all times during the construction.

Claimant Brent Walker testified that the general store operated as a convenience store. The store sold hunting and fishing licenses, fishing supplies, food products and building materials. Claimants employ other individuals to operate the store on a daily basis. Claimants granted the State a right-of-way in front of and adjacent to their property for the relocation of Route 61. Prior to construction, claimants leased a portion of the property adjacent to the building as an office trailer for the contractor to use during construction. A smaller trailer was also locate don that property for testing purposes. Contractors placed a crane on the right-of-way for the dismantling of two bridges over Loop Creek. Claimant Brent Walker stated that the contractor placed several pieces of steel on the right-of-way. When the steel was delivered, the vehicles would block the entrance to the store. During the months of June, July, August, and September, 1987, the relocation work on Route 61 blocked the access to the store on a continuous basis. Delivery trucks were unable to pull into the parking area to deliver stock. Claimants lost most of their business during those months, and therefore suffered a loss of profits.

Respondent's witnesses described the progress of the project during 1987. Traffic was maintained by respondent at all times over old Route 61 and relocated Route 61. Diary entries used to record daily reports revealed that the claimants had filed objections to the parking situation. There were complaints from residents which were recorded in this diary. Respondent's employees also explained that flagmen were on the project at all times during the relocation of Route 61 to flag the traffic in front of the claimants' store. The witnesses also stated that they had frequented the store to purchase various and sundry items. Stock in the general store appeared to be depleted and unavailable for purchase during the month of August 1987.

The Court has reviewed all of the evidence in this claim and is of the opinion that the respondent attempted to maintain the traffic during the construction project in such a way as to provide the public with access to claimants' general store. In any construction project for new bridges or new roads, there will necessarily be inconveniences to residents in the area. Merchants may suffer losses but, hopefully, after the construction, business should return to normal, if not improved. It is unfortunate that claimants herein were unable to continue the operation of their general store after the relocation work was completed; however, this Court may not speculate as to the loss of profits experienced by claimants as a result of the inconvenience to the public during this construction project. The patrons of the post office obtained their mail, and apartment dwellers had ingress and egress to the building. It is apparent to the Court that claimants' general store may have suffered a loss of business during the construction. However, this Court has held in many previous claims that it will not resort to speculation in order to compensate a claimant.

For these reasons, the Court is of the opinion to the does disallow this claim.

Claim disallowed.

OPINION ISSUED NOVEMBER 28, 1989

HARRY G. CAMPER, JR.
VS.
NONINTOXICATING BEER COMMISSION

(CC-89-366)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $639.00 for travel expenses incurred in his capacity as Commissioner of the respondent State agency. As Finance and Administration has no receipt of the required transmittal, the claim was not processed for payment in the proper fiscal year; therefore, claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds in the appropriate fiscal year with which the claim could have been paid.

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

Award of $639.00.

OPINION ISSUED NOVEMBER 28, 1989

BETHEL CHILDERS AND THOMAS CHILDERS
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-202)

Larry G. Kopelman, Attorney at Law, for claimants.
Nancy J. Aliff, Attorney at Law, for respondent.

HANLON, JUDGE:

Claimant Bethel Childers was involved in an automobile accident on March 21, 1986, while she was on her way to work at the Guthrie Center, Department of Agriculture, in Charleston, West Virginia. Her vehicle was struck by an oncoming care being driven by Melinda F. Good which had slid on ice causing the driver to lose control. As a result of this accident, she received severe injuries resulting in hospitalization. She was eventually able to return to her employment. She and her husband brought this action to recover medical expenses, replacement service loss, and pain and suffering.

The issue of liability was heretofore been determined by this Court in the claim of Gregory C. Good, as Committee for *Melinda F. Good v. Dept. of Highways*, Opinion issued January 18, 1988. The question before the Court is the issue of damages.

Bethel Childers suffered a concussion, lacerations to her face requiring plastic surgery, one broken rib, both femurs were fractured in 17 places, both knees were broken, a fractured right heel, three broken bones in the left foot, and one little finger was broken. She was in traction for the broken femur bones for eight weeks. Pins were placed in her knees to assist in the traction treatment. A pin was also placed in her foot. She remained in the hospital for three months. She suffered not only pain, but also severe emotional strain throughout her hospitalization. She was in physical therapy for four weeks to learn to walk and to learn how to use a wheelchair. She was confined to a wheelchair for three months while she was in a body cast. After her release from the hospital, she used a walker and then a cane to assist her in walking when the cast was removed. She had to walk with the cane until June 1988. She was able to return to work in October 1986.

She was hospitalized again on November 11, 1987, for surgery to straighten her right leg. She was off work until January 15, 1988. She experienced pain and suffering from this surgery which she described as "very, very painful."

She retired from her position with the Department of Agriculture on December 31, 1988, when she opted for early retirement.

She is able to perform light housework, but is unable to perform more difficult tasks such as using a vacuum cleaner, painting, wallpapering, cleaning windows, etc. She is also unable to do much gardening. She had spent much of her time in gardening as this was an activity which she considered a hobby and which she had previously enjoyed very much. She is now unable to take part in gardening due to the physical constrains from her injuries. She is unable to dance, play tennis or perform aerobic exercises which she had previously enjoyed. she is able to play golf to some extent although she is unable to play as she once did. She still experiences pain and suffering from her injuries.

Claimant Thomas Childers testified as to the changes in their lives brought about by the injuries to his wife. He must assist her in housework and gardening. Their social life is

curtailed. Many of their activities are now limited due to her physical condition. He has adapted his life style to conform to her limitations.

The Court is award of the serious injuries which claimant Bethel Childers received in this accident. These injuries were the direct result of the combined negligence of the respondent and Melinda Good. Claimant Bethel Childers has suffered extreme pain throughout this ordeal. She will suffer pain throughout her life. The Court is of the opinion that she is entitled to an award of $380,000.00. The Court also makes an award to claimant Thomas Childers in the amount of $15,000.00. Claimant Bethel Childers has received a total of $230,000.00 from other sources. Therefore, the Court reduces the award to $150,000.00

Award to Bethel Childers of $150,000.00.

Award to Thomas Childers of $15,000.00.

OPINION ISSUED NOVEMBER 28, 1989

KANAWHA COUNTY COMMISSION
VS.
DEPARTMENT OF CORRECTIONS

(CC-87-489 & CC-87-724)

Gary A. King, Attorney at Law, for claimant.
Janet Frye Steele, Assistant Attorney General, for respondent.

HANLON, JUDGE:

The above-styled claims were submitted to the Court upon written stipulations and briefs filed by the parties. There are several issues in this claim which must be considered individually by the Court.

1) The parties stipulated that Claim No. CC-87-724 may be dismissed by the Court. The Court hereby dismisses that claim.

2) The claim for medical services rendered to State prisoners and paid by claimant in the amount of $13,720.39 has been admitted by respondent in its Answer. These medical expenses were not paid by respondent in the proper fiscal year. The Court will make an award to the claimant in this amount.

3) The issue before the Court involving the question of whether the respondent is

liable to a county for housing a prisoner who is confined to a county jail as the result of the issuance of a writ or a stay of execution or similar order entered by a circuit court requiring that an inmate be housed in a county jail to allow his or her participation in another trial or his or her assistance in the preparation of an appeal has been decided by this Court as follows.

The Court is of the opinion that the respondent is not liable for payment for the housing of a prisoner who is confined in a county jail as a result of the issuance of a writ or a stay of execution or similar order entered by a circuit court requiring that an inmate continue to be housed in the county jail to allow him or her to participate in another trial or to allow him or her to assist in the preparation for trial. Therefore, this portion of the claim is denied.

4) The next issue involves expenses for parolees held in jail on a parole revocation warrant pending a revocation hearing, and work release center inmates held in the county jail pending disciplinary action before the Department of Corrections' magistrate. The respondent normally receives an invoice from the county to reimburse the county for the costs of housing prisoners in these categories. The claimant herein failed to invoice the respondent prior to the end of the proper fiscal year in which certain of these expenses were incurred. The parties stipulated that respondent is liable to claimant for $35,150.00 for those expenses incurred by claimant during the 1986-87 fiscal year. The Court will include this amount in its award to the claimant.

5) The next issue before the Court is whether the respondent is liable to a county for housing prisoners moved to a State penal institution from the date of sentencing until the date the prisoner is transferred from the county jail to the facility under the control of the respondent. The parties herein stipulated that the average number of days for the transfer by respondent after the sentencing Order was entered in Kanawha County was fourteen (14) days. The Court is of the opinion that fourteen (14) days in a reasonable period of time for the claimant to hold a prisoner prior to transfer to a State penal institution. The parties are directed to calculate the monies due the claimant based upon this fourteen-day time frame allowed to the respondent and to stipulate the amount in order that an award may be made to the claimant.

6) The last issue before the Court involves the question of whether the respondent is liable to the claimant for each day a prisoner remains in the county jail after the Governor of the State issues a reprieve wherein the language of the reprieve requires the Sheriff of a county to hold the prisoner in the county jail. The respondent contends that it is not liable for those days which were incurred by the claimant prior to the decision of the West Virginia Supreme Court of Appeals rendered in *The County Comm'n of Mercer County v. A.V. Dodrill, Comm'r., Dept. of Corrections, or his named successor,* April 19, 1989. The Supreme Court granted a writ of mandamus requiring the Department of Corrections to reimburse counties for those prisoner days incurred by a county after a reprieve by the Governor. The Court held that "... the financial responsibility for individuals lawfully sentenced to the State Department of Corrections must be borne by the state and not the county." The Supreme Court did not resolve the issue of liability for prisoner days incurred by

counties prior to this decision.[1] This Court is of the opinion that it is a moral obligation on the part of respondent to reimburse the claimant for expenses incurred for prisoners held in the county jail under reprieves granted by the Governor prior to April 19, 1989. The claimant and respondent are directed to calculate the amount of these expenses taking into consideration the fourteen-day provision mentioned hereinabove. The parties shall submit the amount so calculated in a stipulation to be filed within thirty days after the issue date of this opinion, in order that the Court may make an award.

The Court therefore makes a partial award in the amount of $48,870.89 for the two items determined by this opinion.

Partial award of $48,870.89.

OPINION ISSUED NOVEMBER 28, 1989

USF&G COMPANY, AS SUBROGEE OF ROBERT J. AND
VIRGINIA L MARGOLIS; ROBERT J MARGOLIS,
INDIVIDUALLY; AND VIRGINIA L. MARGOLIS, INDIVIDUALLY
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-20)

Rosalee Juba Plumley, Attorney at Law, for claimants.
Nancy J. Aliff, Attorney at Law, for respondent.

HANLON, JUDGE:

This action was brought by United States Fidelty & Guarantee Company (hereinafter referred to as USF&G), claimant subrogee, and claimants Robert J. Margolis and Virginia Lea Margolis, individually, to recover for vehicular loss and personal injuries to claimant Virginia Lea Margolis, which occurred when the Margolis' were involved in an accident on October 13, 1986, on Route 33 in the vicinity of Buckhannon, West Virginia.

Claimant Robert J. Margolis was operating his 1985 Chevrolet Suburban on Route 33 west. His wife, claimant Virginia Lea Margolis, was a passenger. Claimants had spent a long

[1] In the *Mercer County* decision the Supreme Court stated as dicta, "We also recognize that many state prisoners who have been in county jails in a reprieve status are now in one of the state correctional facilities or perhaps on parole. We will not require the state or reimburse the counties for those prisoners who passed through the county jails. Nor will we require the state to reimburse the counties to this date for those prisoners who are now in the county jails under reprieve." It is the opinion of this Court that the Supreme Court would not grant such a retroactive award when the proper forum for the consideration and grant of such awards is the Court of Claims.

weekend at their second home in Harmon, West Virginia, and were proceeding to Hurricane, West Virginia. It was approximately 10:00 a.m. There was a slight drizzle of rain. Route 33 in this area is a two-lane, blacktopped highway. Claimant Robert Margolis alleges that the edge of the pavement broke and his vehicle went into a sixteen-inch depression at the edge of the payment. The steering mechanism "locked up" and he was unable to steer at that point in time. The vehicle then crossed the highway to the other side where it went off the travel portion of the highway into a field and struck a tree where it came to rest. Mr. Margolis described the accident as follows: "... I'm under the opinion that the shoulder broke, I dropped down into the, there was a large ditch there... it was just wide enough for a tire track to go in and I felt at that time comfortable that I was going to be able to recover because I knew to try to run it out rather then try to bring it back. But all of a sudden the car ... catapulted out of the ditch and the steering mechanism seemed to be locked and I went across the road at an angle. I found out later that a car coming the other direction that I clipped his headlight. I had totally no control over the car, hit a tree, sort of slipped over and rolled over the bank." Mr. Margolis explained that it was his opinion that the control arm had come up against the inside of the wheel and locked the wheel up, and that fact explains the apparent loss of control.

Louis Lester Anderson, a Deputy Sheriff with the Upshur County Sheriff's Department, testified that he investigated this accident. He filed a West Virginia Uniform Traffic Accident Report form on which he had taken a statement from Mr. Margolis at the scene. The statement was as follows: "I was traveling west on 33. My right front tire dropped down into a ditch along the pavement. And the rear of the vehicle came around putting me out of control. And the vehicle was heading into the oncoming vehicle. I tried to gain control, but was unable, striking a tree head on and rolled over the embankment on the opposite side of the road." He testified that he did not observe any defects in the traveled portion of Route 33 at this area. He also testified from the report as to the statement of the driver of the vehicle struck by the Margolis vehicle. Mr. Durst provided the following description of the accident to Deputy Sheriff Anderson: "I was traveling east on 33, and I saw the other vehicle run off the right side of the road. Then it came back on the road and it crossed in front of me and hit right rear of the vehicle - hit my right front of vehicle."

Virginia Lea Margolis described the accident in her testimony. She stated that the vehicle went off the road, started fishtailing, and went across the road end over end.

Respondent alleges that claimant Robert Margolis had no reason to drive onto the berm as there were no defects on Route 33 in this area to cause the driver to proceed onto the berm.

The testimony from respondent employees responsible for maintaining this area of Route 33, revealed that routine maintenance during the spring and fall of each includes ditching and pulling the shoulders which alleviates the drop off from the paved portion of the road to the berm. Each lane on this highway was approximately eleven to twelve feet in width. The drop off at the edge of the pavement was described as being sixteen inches. Marvin Murphy, Assistant District Engineer for maintenance for respondent, testified upon reviewing photographs of the area, that the condition of the berm warranted placing hazard boards along the shoulder "to keep people directed properly away from the edge of the pavement, or make them aware of it when they come in there not to get to the edge of the pavement."

This Court has ben consistent in its opinions on berm cases. The respondent is held liable for failure to maintain the berm when a driver is placed in a position to have to use the berm. *Cecil vs. Dept. of Highways*, 15 Ct.Cl. 73 (1984). Where a driver proceeds onto the berm without justification, the Court has found no liability on the part of the respondent. *Cole vs. Dept. of Highways*, (January 17, 1986). It is the opinion of the Court that claimant, Robert J. Margolis, negligently drove too close to the pavement edge.

On the other hand, the evidence in this claim clearly established that the respondent was negligent in the maintenance of the berm at the accident site. The evidence is equally clear that claimant Robert J. Margolis drove his vehicle past the white line at the edge of the pavement surface of Route 33.

Claimant contends the edge of the pavement gave way causing his front wheel to drop into the rut at the pavement edge. The photographic evidence fails to support this contention which in turn leads the Court to conclude that for whatever reason, claimant was driving too close to the edge of the highway, and his own carelessness caused his wheel to leave the highway.

Thus, claimant Robert J. Margolis' negligence equaled respondent's negligence in failing to properly maintain the berm. Accordingly, the claim of Robert J. Margolis is denied.

On the other hand, claimant Virginia L. Margolis was an innocent passenger who suffered injuries as a result of the combined negligence of her husband and respondent. Mr. Margolis has incurred medical expenses in the amount of $1,335.18, which amount was paid by claimant USF&G. Claimant also continues to suffer pain and limitation of motion to her shoulder.

It is the opinion of the Court that claimant Virginia L. Margolis has suffered injuries and is entitled to an award of $3,500.00. Inasmuch as the Court believes that the negligence of claimant's husband was equal to that of respondent, the Court denies any award to him.

As the negligence of the subrogor, Robert Margolis, is attributed to the subrogee, the claimant of USF&G is also denied.

Claim of USF&G, as subrogee of Robert and
Virginia Margolis, disallowed.

Claim of Robert J. Margolis disallowed.

Award of $3,500.00 to Virginia L. Margolis.

OPINION ISSUED NOVEMBER 28, 1989

MARTHA WOLFE
VS.

DEPARTMENT OF PUBLIC SAFETY

(CC-89-323)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney at Law, for respondent.

PER CURIAM:

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

Claimant seeks $395.00 for damages to her personal property. Trooper 1st Class R.J. Hicks, who was injured, entered claimant's residence on April 15, 1989. As a result of this officer's injury, claimant's sofa was severely damaged by blood. In its Answer, respondent admits the validity and amount of the claim and states that it was not paid because the respondent does not have a fiscal method available with which to pay this claim.

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

Award of $395.00.

OPINION ISSUED DECEMBER 20, 1989

RITA BROCK
VS.
DEPARTMENT OF MOTOR VEHICLES

(CC-89-414)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $28.46 for damage to an article of her clothing. Claimant was in respondent's office on or about June 12, 1989, when her skirt became hooked on a file cabinet, and was ripped. The respondent admits the validity of the claim and states that it was not paid because the respondent does not have a fiscal method to pay it.

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

Award of $28.46.

OPINION ISSUED DECEMBER 20, 1989

COLE BUSINESS FURNITURE, A DIVISION
OF JOYCE INTERNATIONAL, INC.
VS.
DEPARTMENT OF ENERGY

(CC-89-244)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $465.00 for two file cabinets provided respondent. The invoice for two cabinets was not processed for payment in the appropriate fiscal year; therefore, claimant has not been paid. The respondent admits the validity and the amount of the claim and states that there were sufficient funds in the appropriate fiscal year with which the claim could have been paid.

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

Award of $465.00.

OPINION ISSUED DECEMBER 20, 1989

EASTERN PANHANDLE TRANSIT AUTHORITY
VS.
PUBLIC EMPLOYEES INSURANCE AGENCY

(CC-89-88)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,344.00 for insurance premiums paid from November, 1987, until May, 1988 for a former employee, Margarita Manco. Ms. Manco was placed on Workers' Compensation on June 8, 1984. Claimant paid the required health insurance premiums for the employee. However, the employee received a settlement from Workers' Compensation and claimant was not informed of this settlement. Claimant was no longer responsible for paying the health premiums after November, 1987. Thereupon, claimant made a request for a refund of the premiums from respondent. The request for refund was received after the close of the fiscal year; therefore, claimant has not been paid.

The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

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

Award of $1,344.00.

OPINION ISSUED DECEMBER 20, 1989

KARL E. KOENIG AND JONI CAROL KOENIG
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-220)

W. Henry Sanders, III, Attorney at Law, for claimants.
Jeff Miller, Attorney at Law, for respondent.

GRACEY, JUDGE:

These claims were consolidated for hearing. The two accidents which are the subject of these claims occurred on February 28, 1987, between 7:00 and 7:30 p.m. Both accidents involved a rock fall which occurred on W.Va. Route 20 approximately 30 yards north of the Bluestone Bridge. Claimants allege respondent failed to maintain the area to prevent rock falls. As a result of this failure, claimant Joni Carl Koenig's vehicle was struck by falling rocks causing claimant Karl Koenig, who was driving, to lose control of the vehicle. As a result of the contact with the rocks, the vehicle was damaged beyond repair and Joni Carol Koenig suffered injuries to her back. Claimant Virginia L. Ellison Foss struck the rocks some minutes after the rock fall, lost control of her vehicle whereupon the vehicle knocked over two wooden posts and then went over a cliff. It

landed at the edge of the Bluestone Lake. She suffered injuries to her head and back. Her vehicle was also damaged beyond repair.

Respondent contends that the claimants were both aware of the potential of rocks to fall in this particular stretch of Route 20, and that the area was, in fact, posted as a falling rock area.

The claimants Koenig were traveling from their home in Hinton proceeding to Concord College in Athens on February 28, 1987, at approximately 7:00 p.m. to 7:15 p.m. It was a dark, rainy night with patchy fog. Claimants were traveling in claimant Joni Carol Koenig's 1977 Chevrolet Malibu Station wagon. It had been raining off and on all day. As claimants proceeded through the three-mile stretch from the Bluestone Dam to the Bluestone Bridge, claimant Karl Koenig observed rocks the size of golf balls and baseballs striking the pavement. He then noticed a large, dark object which the vehicle struck. The object was a large rock described as being the approximate size of a small compact automobile. Claimants' vehicle rolled over other rocks in the left lane and came to a stop in a pull-off area on the left side of the road. Claimants got out of their vehicle and attempted to wave at on-coming vehicles approaching from the south. An individual in a pick-up truck stopped and then left for the driver to send a tow truck. Claimants were standing in the pull-off area with their backs to the road and were observing the extent of the rock fall. Claimant Karl Koenig decided to get some fuzees from his vehicle to place at the scene to warn drivers approaching from the south. When he turned around, he saw a vehicle approaching at 35 to 40 miles per hour. He was unable to warn the driver of the rock fall. He watched the vehicle strike the boulder and veer to the driver's right side of the road where the vehicle went over two wooden posts, teetered on the edge of the cliff, and then went end over end over the cliff. The vehicle landed against a tree several feet from the edge of the Bluestone Lake.

The vehicle which went over the cliff was driven by claimant Virginia L. Ellison Foss. She was proceeding from her home in Athens to Salt Sulphur Springs. She was alone in her vehicle, a 1980 Subaru. she described the weather as very dark, rainy and foggy. She had her vehicle lights on low beam as she approached the rock fall area. She noticed lights from a vehicle on the right side of the road, but assumed someone had just pulled off into one of the pull-off areas. She was driving at approximately 35 to 40 miles per hour. She slowed down when she saw the lights. Her vehicle then struck debris and rocks in the road and began to slide. She applied the brakes in an attempt to stop her vehicle. The vehicle hit the large rock which was covering the road. It then went to the right, struck and broke two wooden posts, and went over the cliff landing at the edge of the Bluestone Lake.

Claimant Joni Carol Koenig went to Summers County Hospital that evening for treatment. She was released that same night. She suffered injuries to her lower back. She was treated by a chiropractor for back pain off and on until September 1987. She still experiences pain and discomfort in her back. She also suffers from severe headaches. She is unable to perform many household tasks such as using the vacuum or carrying heavy loads of laundry. She also experiences pain after sitting too long. She has trouble sleeping and uses a heating pad on her back at night. She is of the opinion that she needs further medical treatment for her back problems. Her medical bills for the hospital and doctor visits were in the amount of $691.00. Her vehicle was totaled. She

valued her vehicle at $1,075.00. It was taken to an automobile dealer, but she was unaware of receiving any salvage value for the vehicle.

Claimant Virginia L. Ellison Foss was taken to Summers County Hospital after the accident. She was transferred to Princeton Community Hospital where she was treated for her injuries. She remained there for one week. She suffered a concussion, lacerations and bruises, and injury to two vertebrae in her back. She wore a neck brace and back brace for approximately six and one-half months. She continues to experience pain in her back and her neck. She is unable to perform many normal household tasks. She also experiences numbness in her arms. Her medical bills were in the amount of $3,500.00. Her vehicle was totaled. She received $4,200.00 from her insurance carrier for this loss. She also lost $71.00 in wages from a part-time position she had at Concord College.

West Virginia Route 20 at the scene of these accidents was described by the witnesses as being a two-lane road, fairly level and straight in this area. There is a high wall approximately 90 to 100 feet high on one side which is made up of layers of shale, rock, and dirt with trees growing out of the hillside. The lake side of the road has a cliff which varies in height from 200 to 500 feet. The Bluestone Lake is at the bottom of the cliff. There are pull-off areas for tourists along the cliff side of Route 20. There are also wooden posts on this side and areas of concrete posts with wire strung between the posts. The wooden posts were erected by an agency other than respondent. The wooden posts do not serve as guardrails. The concrete posts with wire are guardrail structures. Both respondent and claimants were aware of the propensity of rock falls to occur in this area, especially during freeze and thaw periods of weather. There are falling rock signs posted for the traveling public at intervals along this stretch of road.

However, the presence or lack of these signs on February 28, 1987, is not relevant in these particular claims as the claimants were familiar with the potential hazard of rocks falling from the steep hillside adjacent to Route 20. In fact, a former Sheriff of Summers County, James H. Blume, described this area of Route 20 as "... the most dangerous stretch of road" when he described the rock fall areas in Summer County.

A geologist employed by respondent, John M. O'Neil, described the terrain of the hillside as having "very weak and incompetent shales and sandstones which are highly susceptible to weather and erosion. The most effective cure for preventing rock falls would be benching the hillside, which would be a very costly project for respondent to undertake.

The Court is of the opinion that the evidence substantiates the fact that this is a hazardous area for rock falls. Respondent is well aware of this fact. This Court previously found respondent liable for a rock fall accident which occurred in this area. See *Smith v. Dept. of Highways*, 11 Court of Claims 221 (1977). In that claim the Court held that "... for the respondent to do nothing more than to merely patrol the road, known for many years to be hazardous, is not sufficient to remove a known danger." The Court is still of that same opinion. The Court finds that respondent was negligent in the maintenance of Route 20 and this negligence was the proximate cause of these two accidents.

Claimants Koenig were placed in a position of danger when rocks fell down around them as they were driving on the road. They are entitled to recover for their losses as a result of this incident. Therefore, the Court makes an award to Karl Koenig in the amount of $3,000.00 and an award to Joni Carol Koenig in the amount of $7,000.00 for her injuries.

Claimant Virginia L. Ellison Foss came upon the scene after the rocks had fallen. She was aware of the propensity of falling rocks in the area. It is the opinion of the Court that she was operating her vehicle in an unsafe manner for the conditions then and there existing, i.e., rainy and foggy. The Court finds that she was also negligent, and, in applying the doctrine of comparative negligence, the Court determined her damages for her injuries and work loss in the amount of $17,571.00, but reduces this amount by forty percent for an award of $10,542.60.

Accordingly, the Court is of the opinion to and does make awards to the claimants as indicated hereinabove.

Award to Karl E. Koenig of $3,000.00.

Award to Joni Carol Koenig of $7,000.00.

Award to Virginia L. Ellison Foss of $10,542.60.

OPINION ISSUED DECEMBER 20, 1989

TRI-STATE ASPHALT CORPORATION
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-237)

Henry C. Bias, Jr., and Robert J. Samol, Attorneys at Law, for claimant.
Robert F. Bible, Attorney At Law, for respondent.

HANLON, JUDGE:

Claimant contractor entered into a contract with respondent for paving 5.28 miles of road surface on Interstate 70 in Ohio County. The project was known as a "crack and seat" project in which claimant broke up the existing concrete and used it as the base for the asphalt paving portion of the project. At the conclusion of the project, respondent deducted $114,538.78 from the final payment due claimant as a price adjustment on the cost of liquid asphalt. Claimant alleges that it is entitled to be paid the $114,538.78 and an additional $109,869.06 or $224,407.84 based upon the actual cost of the liquid asphalt and the application of the price adjustment clause.

A separate claim for a deduction made by respondent for asphalt placed in the rain was stipulated by the parties. Respondent agreed that claimant is entitled to $1,559.02 for this portion of the claim.

At the time that this contract was let to bid to contractors, the price of liquid asphalt was fluctuating. Liquid asphalt is just one ingredient of other asphalt products used in paving projects. To assist contractors and owners involved in projects using asphalt products, a publication by McGraw-Hill known as *Platt's Oilgram Price Service* (referred to hereinafter as Platt's Oilgram) published prices for liquid asphalt from various cities in the United States. Contractors were then able to estimate the cost of liquid asphalt when bidding contracts.

Claimant herein based its bid for this paying project by telephoning the Platt's Oilgram headquarters for the posted price of liquid asphalt on September 23, 1986, just prior to placing its bid. Claimant alleges it used the price of $110.83 per ton in calculating its bid. There is no specific item in bids for liquid asphalt. Liquid asphalt is a component of the other asphalt products used in paving roads and is generally considered to constitute six per cent of the other asphalt bid items. Claimant indicated that it was paying $76.00 per ton for liquid asphalt at the time of the bid. It was aware of the fluctuating price for this product.

Respondent used a specific formula to determine the price adjustment to be made after completion of the project. Two elements of the formula involve the price index for liquid asphalt published in Platt's Oilgram at the time of bid and the actual cost of liquid asphalt at the time of placement of the asphalt product. If the parties to the contract are using different price indexes at the time of bid, the price adjustment is then skewed.

A Special Provision for the price adjustment of liquid asphalt was made a part of the contract between claimant and respondent. special Provision 109.9 provided, in part, as follows: "Because of the uncertainly in estimating the costs of petroleum products that will be used during the life of this contract, adjustment in compensation for certain contract items if provided for as follows: ...This index (referring to the price index at the time of bid) will be determined from the average Suppliers' Posted price FOB, per ton of asphalt cement from the following locations as published in *Platt's Oilgram Price Service*." The contract also contained a notice to bidders that the price index at the time of bid for liquid asphalt would $160.17.

Claimant alleged that it used the **posted** price of $110.83 per ton as the price index for liquid asphalt as of September 23, 1986, for its bid on this project submitted to respondent on September 23, 1986. Respondent used the **published** price of $160.17 taken from Platt's Oilgram published on May 27, 1986, which was the date that the contract document was prepared for bid. Although the stated price index was in the contract documents, claimant decided not use this figure as it was aware that this figure was not representative of the actual price for liquid asphalt at that time. The difference in these two figures naturally caused a difference in the dollar amount of the price adjustment calculated by both parties for liquid asphalt used on the project during the months of April, May, June, July and August 1987, when the paving was actually performed by the claimant. The price of liquid asphalt fluctuated from month to month at that time. Claimant's cost for liquid

asphalt at the time of placement ranged from a low of $80.00 per ton to a high of $118.11 per ton.

Respondent and claimant agree that there were problems with Platt's Oilgram and the price adjustment for the liquid asphalt during the time frame of this contract. In fact, respondent offered claimant a change order to show a net change in the contract in the amount of $113,181.88 as the price adjustment for the liquid asphalt. Claimant refused to sign the change order as it contended it represented a loss to it for this project.

The issue for the Court to determine is what is fair to both parties. The price per ton for liquid asphalt used by claimant in its bid is speculative. There is no written figure in the bid proposal for liquid asphalt. However, it is also apparent to the Court that respondent was "hard-nosed" in its attitude toward claimant when its change order was not accepted. Respondent deducted $114,538.78 from the contract based upon the high figure of $160.17 as the price index for liquid asphalt at the time of bid in the price adjustment clause formula. It is the opinion of the Court that this was unnecessarily harsh treatment.

The Court is placed in the position of having to determine the amount due claimant. It is the opinion of the Court that claimant is entitled to receive that amount deducted by respondent at the time of the final estimate. The Court is also of the opinion that claimant is not entitled to any additional amount based upon its price at the time of bid ($76.00) as this amount may or may not have been used in the calculation of the bid. The price at the time of bid used by claimant is speculative. Claimant would not have received any additional monies for other price adjustment if it had signed the change order. Therefore, the Court makes an award for this portion of the claim in the amount of $114,538,78, the amount deducted at the time of the final estimate.

The Court also makes an additional award of 1,559.02 for the stipulated portion of the claim.

Therefore, the Court is of opinion to and does make a total award to claimant in the amount of $116,097.80.

Award of $116,097.80.

OPINION ISSUED DECEMBER 20, 1989

W.J. CLARK SEPTIC TANK SERVICE, INC.
VS.
DEPARTMENT OF HEALTH

(CC-89-240)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $910.00 for sanitary facilities which were destroyed by patients at Huntington State Hospital, a facility of the respondent. The respondent admits the validity and amount of the claim but states that it was unable to pay for the loss of the sanitary facilities as it does not have a fiscal method to do so.

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

Award of $910.00.

OPINION ISSUED DECEMBER 20, 1989

ROSEMARY F. WOODY, ADMINISTRATRIX OF
THE ESTATE OF YALE WARREN WOODY, DECEASED
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-44)

Kathryn K. Allen, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

Claimant Rosemary L. Woody brought this action as the Administratrix of the Estate of Yale Warren Woody, her son, who drowned in a single vehicle accident which occurred on March 14, 1986, on West Virginia Local Service Route 7 near Sardis in Harrison County, West Virginia. Claimant alleges that respondent failed to provide adequate warning signs at the site of a one-lane bridge. Respondent also failed to replace a guardrail at the bridge site which had been knocked down two weeks prior to the incident. Claimant contends that respondent had actual or constructive notice of this guardrail condition and was negligent in failing to make repairs. For these reasons, claimant contends respondent is liable for the death of Yale Warren Woody.

Respondent contends that it did not have notice, either actual or constructive, of the fact that the guardrail was not in place. Respondent also contends that the decedent was the victim of a game being played by other teenagers at the scene.

The facts of this claim as developed in the evidence are as follows: On the evening

of March 14, 1986, Yale Warren Woody, age 17 and a junior at Liberty High School, had been at a basketball game. He returned home to borrow his mother's automobile to go out with some friends. He went to a MacDonald's restaurant in Clarksburg to see if some of his friends were there after the game. Typically, the high school students met there. there he met a friend, Michael R. Johnson, whom he invited to go with him to a party. They proceeded to Kroger's parking lot to get Michael's automobile. Another friend, Mark Clutter, met them at the lot and told them the party was at a house in Sardis and he offered to lead them there as neither Yale nor Michael were familiar with Sardis area. Before leaving for the party, Mark Clutter picked up Darren Oldaker, who was riding with Mark Clutter to the party. As the three vehicles proceeded to Local Service Route 7, Mark Clutter and Darren Oldaker were in the lead in their vehicle. Behind them was Yale Warren Woody in his vehicle, and behind Yale was Michael R. Johnson in his vehicle. It was dark and raining. The Clutter vehicle suddenly disappeared from the view of the driver, Michael R. Johnson. He stated, "And then all of a sudden, that Mark Clutter---and Darren was with him---they took off from us. And so we just kept following the road, because

we thought maybe they'd be up ahead, waiting for us." He then described what he observed at the time of the accident. He stated, "And on the way there, we come---we come down---like coming off of a hill, and there was like a turn in it. And when we come out of the turn, we come to the bridge. There was no markings or nothing, so we didn't know which way to go to meet them. And so he hit his brakes--Yale hit his brakes, and slid over the bank. And I seen him stopping. I was right behind him. So I swerved around him, to keep from hitting him, and hit the bridge."

Michael R. Johnson indicated he was driving at approximately 35 miles per hour. He estimated Yale's vehicular speed at 30 miles per hour. He called the emergency telephone number from a house near the bridge. When he returned to the bridge, he was unable to observe the Woody vehicle. At that time Mark Clutter and Warren Oldaker arrived at the bridge site. Michael Johnson stated that the two boys were laughing; that they had tried "to get us lost." They had apparently hidden back up the road at a school and watched the two vehicles approach the bridge anticipating that one of the boys may have trouble going over the bridge. Michael R. Johnson estimated the time of the accident at approximately 10:55 p.m.

Mr. Johnson described the surrounding area at the bridge. He explained that there were no signs or markings on the road "saying bridge or anything." There were no arrow signs or reflectors on the bridge. He further stated that when the vehicles came down the hill toward the bridge, it is "kind of like a right angle -- not real sharp. But when you come into it, if you never have been there before, you don't know which way you're going. You have to kind of look at it for a minute or so, or a few seconds. And we didn't know where he was going. But it just come up on us real quick, as we come out of the turn and down around the hill."

The Woody vehicle was located in the Tenmile Creek on the following day. Yale Warren Woody had drowned in the creek when his vehicle missed the curve over the Sardis bridge and went off the road into the creek.

Testimony from neighbors who lived near the Sardis Bridge established that the guardrail, on the left side of the Sardis Bridge in the direction from which the Woody vehicle approached the bridge, had been knocked down when Vernon "Bud" Clutter had gone over the guardrail while driving his 1978 Fork Bronco at a speed too great for the curve to the bridge on February 28, 1986. Mr. Clutter did not notify respondent of his accident. However, Joan LaVaughn Kendall testified that she had called respondent's Gore, West Virginia, office to report that the guardrail was down a "couple" days after the Clutter vehicle went over the guardrail and into the creek. She also stated that there were no signs on the bridge.

Testimony also established that respondent inspects bridges on a two-year cycle. The Sardis bridge had been inspected in 1983 and in 1985. The inspector noted in his report in 1983 that this bridge "should have warning paddles." The 1985 report noted that there were sightly faded, one-lane bridge warning signs located near each end of the bridge and that "Installation of hazard warning paddles is considered optional." The only cure for alignment is construction of a new bridge.

After reviewing the record in this claim, the Court is of the opinion that respondent was negligent in failing to maintain the guardrail. The placement of warning paddles on the bridge certainly would have assisted the traveling public on this road. The placement of signs is discretionary with respondent. The maintenance of the guardrail was a duty of the respondent. The respondent failed to protect the traveling public when it failed to replace the missing guardrail at the Sardis bridge in a timely manner.

The Court is also of the opinion that Yale Warren Woody was negligent in the operation of his vehicle for the conditions then and there existing on the evening of March 14, 1986. It was dark and raining. He was unfamiliar with the road. His failure to maintain control of the vehicle which he was driving was a factor which the Court cannot overlook in its consideration of all of the factors which contributed to the cause of this tragic accident. A reasonable prudent person operating a vehicle on a narrow, curvy road is aware of the necessity to drive in accordance with the conditions then and there existing, regardless of the posted speed limit. It is the opinion of the Court that Yale Warren Woody was not operating his vehicle in a prudent and safe manner for the conditions present on this particular night.

In accordance with the above, the Court is of the opinion that under the doctrine of comparative negligence both the respondent and the decedent were equally negligent. Therefore, the Court is of the opinion to and does disallow this claim.

Claim is disallowed.

OPINION ISSUED JANUARY 17, 1990

DAVID M. BUZZARD, ET AL.,
VS.
SUPREME COURT OF APPEALS,

(CC-88-319)

HANLON, JUDGE:

This day came the claimants by their counsel, Warren R. McGraw, Jr., and respondent by its counsel, Frank Venezia, to submit documentation for the amounts to be awarded to the claimants in accordance with the opinion of this Court issued on January 30, 1989, in *Harless, et al. v. Sup. Ct. of Appeals.*

And the Court having reviewed such documentation, the following awards are hereby granted to the claimants.

Helen McCormick	$3,012.10
Sonja L. Johns	$1,028.13
Anita Hager	$2,208.87
David M. Buzzard	$3,012.10
Mark A. Kerwood	$3,012.10
Marjorie L. Baker	$1,028.13
Jeanette Grimes	$1,028.13
Shirley Adkins	$1,028.13
Mary F. Wiedebusch	$2,208.87
Linda L. Bixby	$1,028.13
William D. Anderson	$ 200.00
Robert Lightner	$2,564.60
George J. Narick	Denied
Bill Webb	$3,012.10
John Moses	$3,012.10
Pamela Newsome	$1,028.13
Deloris Sidebottom	$1,028.13
Beverly C. Booth	$1,028.13
Judith P. Goontz	$3,012.10
J.V. DeMarco, Jr.	$3,012.10
Wilma L. Kocher	$1,028.13
Barbara Minor	$1,028.13
Ruth D. Lemon	$2,208.87
Karen B. Lydon	$2,208.87

ENTERED: 1/17/90

_____
Presiding Judge

OPINION ISSUED JANUARY 30, 1989

EDWARD HARLESS, JR., ET AL.
VS.
SUPREME COURT OF APPEALS
(CC-87-60)

LOUIS E. LONGANACRE, ET AL.
VS.
SUPREME COURT OF APPEALS
(CC-88-275)

PHILIP G. CONLEY, ET AL.
VS.
SUPREME COURT OF APPEALS
(CC-88-305)

DAVID M. BUZZARD, ET AL.
VS.
SUPREME COURT OF APPEALS
(CC-88-319)

Warren R. McGraw, Attorney at Law, and Donald K. Bischoff, Attorney at Law, for claimants.
Frank Venezia, Attorney at Law, for respondent.

HANLON, JUDGE:

This matter is before the Court pursuant to claimants' Motion to Reconsider that certain Order heretofore entered in this matter on July 13, 1988, and the Court deeming it proper, said Order is hereby set aside.

The Court is further of the opinion to deny the respondent's Motion for Summary Judgment heretofore made.

The Court has carefully reviewed the memorandum of counsel and oral argument in this case and has come to the following conclusions:

1. That under the holding in *Donaldson v. Gainer*, 294 S.E.2d 103 (1982), the Court of Claims is the proper forum for complainants to seek redress.

2. The holding in *Longanacre v. Crabtree*, 350 S.E.2d 760 (1986), wherein the Supreme Court granted the Legislature time to correct the unconstitutional magistrate pay provision of W.Va. Code Chapter 50, Article 1, Section 3, does not preclude the underpaid complaints from seeking redress in this Court.

3. The two-year statute of limitations contained in W.Va. Code Chapter 21, Article 5C, Section 8, in equity and good conscience, should be applicable to any recovery in this case.

There being no disputed issue of fact to be resolved by this Court, insofar as the question of liability is concerned, the parties are directed to prepare a stipulation of fact showing the amount of unpaid wages to which each complainant would be entitled within two years next preceding the institution of this case and to submit the same to the Court for consideration.

OPINION ISSUED JANUARY 19, 1990

BOARD OF EDUCATION OF THE COUNTY OF GRANT
AND DAVID ADKINS, ET AL. AND THE BOARD OF
EDUCATION OF THE COUNTY OF RITCHIE
VS.
BOARD OF EDUCATION

(CC-89-185)

J. David Cecil, Attorney at Law, for claimants.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

These actions were brought by these two county boards of education against respondent to recover back wages and administrative fees in accordance with the decision of the West Virginia Supreme Court of Appeals in *State ex rel. Board of Education for the County of Grant and Board of Education for the County of Ritchie vs. Honorable A. James Manchin, Treasurer of the State of West Virginia; Glen B. Gainer, Auditor of the State of West Virginia; and Honorable W. Tom McNeel, State Superintendent of Schools,* issued on February 24, 1989.

Claimants brought a mandamus action to have West Virginia Code Chapter 18A, Article 4, Section 5 declared unconstitutional which section the Supreme Court did determine was unconstitutional. The West Virginia Legislature corrected the inequity in the statute to provide prospective relief to these two counties. However, for fiscal years 1986-87 and 1987-88 the employees lost wages due them. When the counties make the salary adjustments for its employees, they will incur administrative expenses. These amounts have been calculated by respondent and agreed to by claimants.

The Court, having reviewed the documentation provided in these claims, is of the opinion that the counties are entitled to recover the amounts for the salary adjustments for the school service personnel and the professional employees and the administrative expenses. Therefore, the Court makes an award to the Grant County board of Education in the amount of $1,295,340.60, and

to the Ritchie County board of Education in the amount of $396,636.00.

Award of $1,295,340.60 to Grant County Board of Education.

Award of $396,636.00 to Ritchie County Board of Education.

OPINION ISSUED JANUARY 19, 1990

CSX TRANSPORTATION, INC.
VS.
RAILROAD MAINTENANCE AUTHORITY

(CC-89-448)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks an award of $100,000.00 for the commuter subsidy for fiscal year 1988-1989 due to it in accordance with a contract with respondent. The invoice for the subsidy was submitted to respondent in August 1989 and was dated August 8, 1989; claimant has not been paid. Respondent, while admitting the validity of the claim, states that there were insufficient funds remaining in its appropriation for the fiscal year in question with which the invoice could be paid.

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

Claim is disallowed.

OPINION ISSUED JANUARY 19, 1990

CITY OF ELKINS
VS.
GOVERNOR'S OFFICE

(CC-89-478)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $31,400.89 which is reimbursement for costs incurred as a result of the 1985 flood. The City of Elkins has received $11,911.11 from the account designated for this flood, but that was a partial payment. The Governor's flood account is now depleted; therefore, the claimant has not been paid. Respondent admits the validity and amount of the claim, but states that it was not paid as the respondent does not have a source of funds to pay it.

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

Claim is disallowed.

OPINION ISSUED JANUARY 19, 1990

THEODORE R. DUES
VS.
HUMAN RIGHTS COMMISSION

(CC-89-423)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks reimbursement for legal services rendered to respondent when he served as a hearing examiner for the respondent State agency. The invoices for the services were not paid in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds in the appropriate fiscal year with which the claim could have been paid.

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

Award of $46,600.00.

OPINION ISSUED FEBRUARY 27, 1990

PAMELA J. DEEM
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-43)

Claimant appeared in person.
Jeff Miller, Attorney at Law, for respondent.

PER CURIAM:

On December 22, 1988, claimant was traveling east on U.S. Route 50 in the direction of Bridgeport when her vehicle struck a pothole on a bridge. She seeks $799.95 for damages to her automobile, a 1973 Plymouth Scamp.

Claimant testified that on the day of the incident, the four-lane highway was dry. Between 8:00 and 8:30 a.m., claimant was going to her place of employment. Her speed was approximately 45-50 miles per hour. She stated that the bridge is in poor condition, and the hole which her vehicle struck was on the surface of the bridge in the right lane. Claimant estimated the hole to be ten inches deep. The road had deteriorated since she had driven that route earlier in the week. Damage was done to the shocks, transmission, and a tire. The automobile also required alignment.

Terry Allen Mellott, who works with the claimant, testified that he drives U.S. Route 50 from Doddridge County to Bridgeport everyday. He stated that the area was not marked in any way to warn drivers of the existence of potholes. In December of 1988, he drove that route to work for the three days prior to claimant's accident and was aware of the hole. He observed another vehicle "... blow a tire..." at this hole about 10:00 a.m. on the day of claimant's accident.

Richard Alan Brown, maintenance crew leader for the respondent on U.S. Route 50, testified that a crew had erected warning signs on the bridge on December 21, 1988, and had patched the bridge with cold mix on December 22, 1988. A "Rough Road" sign and "Speed Advisory" sign with flashing lights were placed. The signs were located approximately 50 feet before the approach on both sides of the bridge. They had been erected the afternoon of December 21, 1988, and were present and functioning on December 22, 1988.

After careful consideration, the Court has determined that the claimant has failed to show the existence of negligence on the part of the respondent. The record reveals that the

respondent followed the required standard in its erection of signs to warn drivers. Respondent was monitoring the holes on the bridge in question, and did not have notice of the increase in size of

the hole involving claimant's accident. For that reason, the Court is of the opinion to, and must, deny the claim.

Claim is disallowed.

OPINION ISSUED FEBRUARY 27, 1990

SUSAN STEVENS
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-300)

Claimant appeared in person.
Jeff Miller, Attorney at Law, for respondent.

PER CURIAM:

On April 14, 1989, claimant was traveling sough on U.S. Route 250 when her vehicle struck a hole. She seeks the sum of $365.00 for automobile damage resulting from the accident.

Claimant testified that on the night of the incident, the weather was dry. At approximately 11:30 p.m., she was operating her 1984 Pontiac Fiero at a speed of 30-35 mph. U.S. Route 250 is a two-lane highway. Claimant described the hole as two to three feet long and seven inches deep. The hole was located on the right-hand side of the road on the shoulder, but part of it extended into the road itself. Claimant testified that she traveled that route twice a week, that she had been over it two to four days before the incident, and the hole was not there. Claimant was aware of the existence of holes on the shoulder, but was unaware of the presence of this particular hole. She stated that one wheel and one tire on her vehicle required repair.

This Court has adopted the principle that notice, actual or constructive, of a defect in the road, and adequate time to repair it must be established in order for a claimant to prevail in a claim of this nature. As notice to the respondent has not been established in this case, the Court is of the opinion to, and must, disallow this claim.

Claim is disallowed.

OPINION ISSUED MARCH 20, 1990

HERSHEL EVANS, JR. AND SANDRA KAY EVANS
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-424)

Claimant Sandra Kay Evans appeared in person.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On September 19, 1989, at approximately 3:40 p.m., claimant Sandra Kay Evans was operating the family vehicle, a 1985 Ford Bronco, southwardly on Route 94 in Boone County, when she struck another vehicle. Claimants allege that the respondent was cleaning out ditches on the day of the accident and had not adequately marked the work location. The Court, on its own motion, amended the style of the claimant to include Hershel Evans, Jr., who has a titled interest in the vehicle. Claimants seek $5,000.00 for personal injury and property damage.

Claimant Sandra Kay Evans testified that she was driving with her sister-in-law and two young children. The weather was sunny and dry. There was mud on the roadway due to respondent's ditch work. Her speed was 45 miles per hour. There was a sign present picturing a flagman, but there were no flagmen, flares, or signs warning of any road work. The sign was located approximately a mile from the work site. Mrs. Evans approached a stopped line of traffic with a flagman at the front of the line. Had she not struck the vehicle in front of her, it would have been necessary to strike a vehicle coming in the opposite direction. Her sister-in-law, Rosetta Harless, confirmed her statements. Claimants' insurance covered the cost of repairing their vehicle. The policy carried a $100.00 deductible. Mr. Evans' health insurance covered his wife's medical costs.

Mancie E. Legg, respondent's Maintenance Supervisor at Chelyan, stated that he was familiar with the accident site. Respondent's crew was pulling ditches on the day of the accident. Three signs, ½ mile apart, were placed in the area for safety purposes. Mr. Legg testified that the three signs read as follows: "Road Construction," "Men Working," and "Flagmen". The placement of the signs was done as specified by traffic manual. He personally observed that these signs were in respondent's place at l:00 p.m. on the day of the accident.

After careful consideration of the evidence, it is the opinion of this Court that claimants have failed to show negligence on the part of the respondent. Placement of the signs was specified by respondent's traffic manual, and this standard was followed on the day of the accident. For that reason, the Court is of the opinion to, and must deny the claim.

Claim is disallowed.

OPINION ISSUED MARCH 20, 1990

SHERI WAGGONER
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-420)

Claimant appeared in person.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks $1,134.66 for property damage she incurred as the result of an accident on September 19, 1989. Claimant alleges negligence on the part of respondent due to respondent's poorly marked construction area in which her 1984 Chevrolet Camaro struck a hole.

Claimant testified that she was traveling on three-lane Garfield Avenue in Parkersburg, West Virginia, at approximately 11:00 p.m. At the time of the incident, claimant observed a police officer and respondent's construction truck. Respondent's crew was patching the road. Claimant was proceeding toward Southside at 30-35 mph in the middle lane of traffic when her vehicle struck a hole. She estimated the hole to be two or three feet long, and six to seven inches deep. She did not notice the hole before her vehicle struck it.

Respondent's truck was located about ½ mile from the hole. There was no flagging or other warning, with the exception of a "Slow" sign. The accident resulted in extensive damage to her vehicle, but claimant continues to drive it. she stated that there are two turns in the road. Respondent's crew was working in the first turn, and the hole was located in the second turn. Claimant stated that she did not travel the route frequently. She admitted that no claim was filed with her insurance company.

Vernon Cowan, a police officer with the City of Parkersburg, was in the vicinity of the accident directing traffic. He indicated that the respondent was repairing several large holes in the road. He did not witness the actual accident. Garfield Avenue is a heavily traveled, main thoroughfare in Parkersburg, according to Officer Cowan. It was his opinion that the hole which caused claimant's accident resulted from work done by the respondent.

Dale Deuley, a foreman with the respondent, was alerted on September 19, 1989, that "... the places that had been worked on that day had got rough." He described the construction work that had been performed that day: "Okay, the road had hooved up and we have to saw them out and replace this, you know in order to get them smooth, okay. The road had been sawed out, the concrete had been taken out, and they had been refilled with a base material which I'm sure you're all aware of that." The original excavation was about ten inches. He observed the site after the accident and stated that there was signing on both sides of Garfield Avenue. There were five or six excavations as described on Garfield Avenue.

The Court has determined that there is ample evidence to sustain a finding that the State had actual knowledge of a hazardous road condition, and failed to respond to that hazard appropriately. Further, the State in its response failed to warn travelers of the hazard in the customary manner. However, claimant's automobile insurance policy statement, submitted for the Court's consideration, indicates that the claimant has comprehensive coverage, and a $500.00 deductible. Claimant has not filed a claim with Dairyland Insurance Company. It is the opinion of the Court to award the claimant $500.00. It is the opinion of the Court to award the claimant $500.00, representing her deductible, and if her claim against her insurance carrier should be judicially denied, she may again pursue the matter here. The Court feels that it is premature to make any further award at this time.

Award of $500.00.

OPINION ISSUED MARCH 26, 1990

BECKLEY VETERINARY HOSPITAL
VS.
FARM MANAGEMENT COMMISSION

(CC-90-76)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $265.50 for veterinary services provided respondent at its location at Pinecrest Hospital. The invoices for these services were not processed for payment in the appropriate fiscal year, therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and further states that sufficient funds were expired in the appropriate fiscal year with which the claim could have been paid.

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

Award of $265.50.

OPINION ISSUED MARCH 26, 1990

RONNIE E. BRITTON

VS.
DEPARTMENT OF HIGHWAYS

(CC-89-299)

Claimant appeared in person.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks $279.85 for property damage he incurred as the result of an accident which occurred at approximately 3:00 p.m. on June 27, 1989 on Corridor G, a four-lane highway, in Kanawha County. Claimant was traveling in his vehicle, a 1986 Bronco, when his vehicle encountered "... concrete sticking out of the road..."

He testified that the concrete consisted of pieces 10-12 inches in diameter. The concrete was broken across the whole lane of traffic. specifically, he stated that the concrete was broken into slabs, and "Well, you couldn't see it until you was right up on it or I couldn't." He was operating his vehicle at the speed limit of 55 miles per hour and he was in a straight stretch of highway. He could not swerve into the other lane because there was another vehicle in that lane proceeding in the same direction. This other vehicle proceeded without incident. Claimant replaced the right rear tire of his vehicle but has not had the wheel or beauty ring replaced. These were also damaged in the accident.

Between 5:00 and 6:00 p.m. that day claimant contacted Chuck Runnion, a highway supervisor for respondent in Boone County, and was informed that Mr. Runnion had been notified of the hazard. A witness for respondent, Hiram Hall, confirmed claimant's statements concerning notification. Hiram Hall, expressway supervisor for respondent, was aware of the road hazard on June 27, 1989. At approximately 4:30 p.m. he received a telephone call. He had already left work for the day, but he received the message at home. He went to the site and stated, upon observation, "The road blowed up. It was both lanes. The expansion joint had bowed up." Mr. Hall explained that heat causes this condition. It is impossible to predict in advance the occurrence of a "blow up". He and three other men cleared the debris from the highway and treated the area with cold mix which remedied the problem.

The State is neither an insurer not a guarantor of the safety of motorists on its highways. *Adkins vs. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be held liable for damages caused by road defects of this type, the claimant must prove that respondent had actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. *Davis vs. Department of Highways,* 11 Ct.Cl. 150 (1976). The evidence in this record indicated that the defect could not be predicted, and that respondent acted quickly after being informed of the hazard. *Sutton vs. Department of Highways,* CC-85-153 (February 19, 1986). *Barnhart vs. Department of Highways,* 12 Ct.Cl. 236 (1979). The Court is of the opinion that negligence on the part of the respondent has not been established, and therefore, the Court denies

the claim.

Claim is disallowed.

OPINION ISSUED MARCH 26, 1990

TRILLA J. DAUBENSPECK
VS.
DEPARTMENT OF EDUCATION

(CC-90-73)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of $295.00 for tuition reimbursement.

In its Answer, the respondent admits the allegations of fact set forth in the Notice of Claim and acknowledges that the claimant is entitled to $295.00. The respondent further alleges that sufficient funds were not available at the end of the fiscal year in question with which the claim could have been paid.

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

Claim is disallowed.

OPINION ISSUED MARCH 26, 1990

LINDA DOTSON
VS.
DEPARTMENT OF NATURAL RESOURCES

(CC-89-346)

Claimant appeared in person.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

On June 13, 1989 claimant was operating her 1981 Mercury Cougar on State Route 10, Lincoln County, when her vehicle struck a deer. She seeks compensation for personal injury and property damage which she incurred as a result of the accident.

Claimant testified that she was traveling south on State Route 10 on the day of the accident. Her speed was approximately 30 miles per hour. It was raining and the roads were slippery. A deer appeared at the hood of her vehicle and her vehicle struck it. she alleges negligence on respondent's part due to the absence of warning signs cautioning drivers about the presence of deer.

The Court has found in the past that respondent is not negligent for accidents concerning wild animals. *Bailey vs. Department of Natural Resources,* (CC-86-438, December 3, 1987). Respondent cannot be held accountable for accidents involving wild animals. Accordingly, the Court denies the claim.

Claim is disallowed.

OPINION ISSUED MARCH 26, 1990

THE DOUGLAS MORTUARY
VS.
DEPARTMENT OF HUMAN SERVICES

(CC-90-65)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $325.00 for funeral services rendered pursuant to respondent's regulations. The invoice for the funeral services was not processed for payment in the proper fiscal year; therefore, claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds in the appropriate fiscal year with which the claim could have been paid.

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

Award of $325.00.

OPINION ISSUED MARCH 26, 1990

SHERRY S. HETZEL
VS.
DEPARTMENT OF EDUCATION

(CC-89-502)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of $212.00 for tuition reimbursement.

In its Answer, the respondent admits the allegations of fact set forth in the Notice of Claim and acknowledges that the claimant is entitled to $212.00. The respondent further alleges that sufficient funds were not available at the close of the fiscal year in question with which the claim could have been paid.

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

Claim is disallowed.

OPINION ISSUED MARCH 26, 1990

JAMES W. LANE, M.D.
VS.
WORKERS' COMPENSATION FUND

(CC-90-69)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks $3,666.66 for medical consulting services provided respondent.

In its Answer, the respondent admits the allegations of fact set forth in the Notice of Claim and acknowledges that the claimant is entitled to $3,666.66. The respondent further alleges that sufficient funds were not available at the close of the fiscal year with which the claim could have been paid.

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

Claim is disallowed.

OPINION ISSUED MARCH 26, 1990

DONALD A. LEWIS
VS.
PUBLIC EMPLOYEES INSURANCE AGENCY

(CC-90-6)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,105.00 for expenses his wife, an insured, incurred as a result of her pregnancy and subsequent child delivery. Claimant submitted the required forms to respondent agency but the claim has not been paid. The paperwork for the medical expenses was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that sufficient funds were expired in the appropriate fiscal year with which the claim could have been paid.

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

Award of 1,105.00.

OPINION ISSUED MARCH 26, 1990

WILLIAM E. MEADOWS, JR.
VS.
DEPARTMENT OF HIGHWAYS
(CC-89-362)

DAVID W. MEADOWS
VS.
DEPARTMENT OF HIGHWAYS
(CC-89-363)

Claimants appeared in person.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimants, William E. Meadows, Jr. and David W. Meadows, father and son, seek $52.98 and $712.81, respectively, for property damage they severally incurred as the result of accidents which occurred about 9:40 a.m. on August 25, 1989, near Exit 96 of Interstate Highways 64 and 77, in Kanawha County, West Virginia. Claimants were traveling in the eastbound lane in separate vehicles; the lead car, a 1987 Ford Tempo, owned by David W. Meadows, was operated by his brother, William R. Meadows; the following car, a 1989 Lincoln Town Car, was owned and operated by William E. Meadows, Jr., who is the father of David w. Meadows and William R. Meadows.

The lead car, operated by William R. Meadows, was behind a tractor trailer in the outside lane reserved for eastbound traffic, when William R. Meadows noticed that the tractor trailer rig "was flipping up something through his tires on the back end of his truck ...," which to William R. Meadows looked like a piece of cardboard, at that instant, but which he a few seconds later found to be a piece of concrete (called by him a rock). He saw a hole in the road in the vicinity and testified that the rock was "kind of at angle from the hole." Because of traffic conditions, William R. Meadows was unable to swerve and avoid contact with the concrete, and the vehicle operated by him, but owned by his brother, David w. Meadows, was damaged.

William E. Meadows, Jr., the father of William R. Meadows and David W. Meadows, was operating his 1989 Lincoln immediately behind the Tempo, and noticed a chunk of concrete described by him as being 12 inches by about 10 inches bouncing down the pavement in front of him; but because of traffic conditions he was unable to avoid the chunk of concrete, and his car was damaged. Neither car struck the hole from which the piece of concrete emanated.

Appropriate measures were promptly taken by the claimants to remove the two cars from the traffic lane, and to report the road defect to authorities, but other cars were damaged almost immediately by the chunk of concrete in the travel portion of the highway, almost immediately after

the accidents sustained by the Meadows. There was no evidence of any report having been lodged with respondent's representatives, or with traffic representatives of the State, prior to the time of the accidents of which the Meadows' vehicles were damaged.

Claimant William E. Meadows, Jr. testified that "we assumed it was the truck just in front of my son that the wheels caused it to kick out. I did not see the first sign of reinforcement in the concrete. I did not look at the hole because there was two lanes of traffic doing anywhere from 55 to 80 or 90 miles an hour and I wasn't about to get out onto the highway." William R. Meadows was asked: "Did it appear to you that the truck ahead of you threw this piece of stone out of the hole, or was it already there and the truck just hit it?", to which he replied: "No. From what I could see it looked like when it ran over where the stone was at it popped out. It popped upside down and came out on the road."

Herbert C. Boggs, Maintenance Assistant, Interstate, employed by respondent, testified that he was, at all relevant times, in charge of the interstate system in Kanawha County, West Virginia, and received a report of the pavement problem at Exit 96 on August 25, 1989, he believed in the morning, and dispatched crews to fix the holes temporarily, with asphalt. He also testified that it was hard to say what would cause the hole, and speculated that it might have been a previously repaired hole or that the base might have gone bad to cause the concrete to crack and come out. He also advised that the respondent had patched holes in that area before.

There was no evidence in the record to support a finding that respondent had notice, actual or constructive, of the concrete pavement defect, prior to the accident causing damage to claimant's vehicle.

In this State, the respondent is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims,* 130 W.Va. 645, S.E.2d 81 (1947). The Court of Claims has, however, recommended payment of a claim in which it is demonstrated that the Department of Highways was negligent. To prove negligence, because of the Department's duty to maintain a highway in a reasonably safe condition, no liability for damages caused by a defect in a road can arise unless it be shown that the Department of Highways had notice of the defect,

actual or constructive, and a reasonable time within which to cure the defect. See *Lohan v. Dept. of Highways,* 11 Ct.Cl. 39 (1975).

In the absence of a showing that the Department of Highways knew or should have known of the defective condition of the pavement near Exit 96, Interstates 64 and 77, on August 25, 1989, there can be no finding of negligence on the part of the respondent and no finding of a moral obligation of the State to make an award to the claimants.

Claim is disallowed.

OPINION ISSUED MARCH 26, 1990

MGM/FARM CITY, INC.
VS.
FARM MANAGEMENT COMMISSION

(CC-90-92)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $330.36 plus $6.38 as finance charges, for a total claim of $336.74 for supplies provided respondent. The invoice for the supplies was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

The Court is of the opinion that the finance charges are interest. This Court will not make an award for interest in accordance with WV Code Chapter 14, Article 2, Section 12. In view of the foregoing, the Court makes an award in the amount of $330.36.

Award of $330.36.

OPINION ISSUED MARCH 26, 1990

ORTHOPAEDIC ASSOCIATES, INC.
VS.
DEPARTMENT OF PUBLIC SAFETY

(CC-90-71)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $74.00 for medical services provided an employee of respondent. The

invoice for the services was not processed for payment in the appropriate fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that sufficient funds were expired in the appropriate fiscal year with which the claim could have been paid.

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

Award of $74.00.

OPINION ISSUED MARCH 26, 1990

RONALD B. RHODES
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-427)

Claimant present in person.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant Ronald B. Rhodes seeks $520.99 for property damage he incurred as the result of an accident which occurred at approximately 10:30 p.m. on August 30, 1989. Claimant was traveling in the right lane of Route 14 south of the Parkersburg city limits in his 1984 Nissan Maxima.

Believing that another vehicle may have been coming too close to him, the claimant moved to the right side of the road. He noticed that his right wheels "dropped off the edge of the road and hit real hard ...two tires were broken and two wheels bent on the car, and there was a sharp drop in the pavement or a cut back in the pavement and also a hole in the berm there."

Claimant reported the road defect to the authorities and contacted his Allstate Insurance representative. He was informed that "...with your deductible, there's a range there of about $300 to $350 if you go over that and they end up paying it, they'll raise your rates...". When queried, claimant stated that he was told his insurance rates would be increased.

Kenneth Welch, crew supervisor for the respondent, testified that he was, at all relevant times, in charge of the section of road on the south side of the river in Wood County, and received a report of the hole on the 18th or 19th of September, 1989. Mr. Welch was unable to locate such a hole in the road, but did observe a hole in the berm, and repaired it temporarily by filling it with dirt.

The Court has determined that claimant's statement that he "met a car that seemed like

it was a little close, so I moved to the side of the road" is not adequate to show that the claimant was forced into the berm. In accordance with prior decisions, [*Sweda v. Dept. of Highways,* 13 Ct.Cl. 249 (1980) and *Hedrick v. Dept. of Highways,* 15 Ct.Cl. 288 (1985)] the claim must be denied.

Claim is disallowed.

OPINION ISSUED MARCH 26, 1990

VIKING WAY LIMITED PARTNERSHIP
VS.
ATTORNEY GENERAL

(CC-90-115)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $74.59 for hotel services provided respondent. The invoice for these services was not processed for payment in the appropriate fiscal year and, therefore, claimant has not been paid. Respondent admits the validity and amount of the claim and further states that sufficient funds were expired in the proper fiscal year with which to pay the claim.

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

Award of $74.59.

OPINION ISSUED MARCH 26, 1990

DWELL D. WHITE
VS.
PUBLIC EMPLOYEES INSURANCE AGENCY

(CC-89-497)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $12,060.00 for the rental of a bed necessary for his wife, Rebel White, an insured, under claimant's P.E.I.A. policy. Claimant's wife suffered a tumor of the brain. Her attending physician, Dr. John H. Schmidt, III, prescribed a Clinitron bed, but when claimant submitted a claim to the Public Employees Insurance Agency, it was denied. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

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

Award of $12,060.00.

OPINION ISSUED MARCH 26, 1990

XEROX CORPORATION
VS.
DEPARTMENT OF FINANCE AND ADMINISTRATION

(CC-90-7)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $444.90 for maintenance services for office equipment provided respondent. Respondent, while admitting the validity of the claim states that there were insufficient funds remaining in its appropriation for the fiscal year in question with which the claim could be paid.

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

Claim is disallowed.

OPINION ISSUED MARCH 26, 1990

XEROX CORPORATION
VS.
WORKERS' COMPENSATION FUND

(CC-89-491)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim submitted for decision upon the pleadings, claimant seeks payment of $2,931.20 for services and office equipment provided respondent.

In its Answer, the respondent admits the allegations of fact set forth in the Notice of Claim and acknowledges that the claimant is entitled to $2,931.20. The respondent further alleges that sufficient funds were not available at the close of the fiscal year in question with which the claim could have been paid.

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

Claim is disallowed.

OPINION ISSUED APRIL 2, 1990

DOUGLAS L. DOUGLAS
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-23)

Claimant appeared in person.
Jeff Miller, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his automobile which struck a rock on West Virginia Route 2 and U.S. Route 250 in an area known as "The Narrows." Cost of repairs to the vehicle was $200.00. The incident occurred on December 20, 1988, at approximately 6:30 p.m. The claimant's wife, Sharon K. Douglas, was driving in a northerly direction from Glen Dale to their

home in McMechen. She had driven this route approximately 15 times since she and her family moved to the area in September 1988.

Claimant's wife testified that the speed limit was 50 miles per hour, and that her speed was 45 mph on the four-lane, concrete roadway. She was traveling uphill around a curve, and it was raining. She observed the rock immediately before she struck it, and described it as being 1 ½ feet in diameter. Mrs. Douglas did not recall whether or not warning signs for the rocks were posted.

Gordon Peake, respondent's Assistant Maintenance Engineer for District 6, testified that he is familiar with the area known as "The Narrows." He stated that there are "Falling Rock" signs at both ends of "The Narrows," and that he had no record that the signs had been knocked down before Sharon Douglas' accident. Earlier that day, an accident caused by falling rocks had occurred. At 7:15 a.m., the respondent was notified to pick up the rocks. Mr. Peake assumed that the respondent sent people to clear the rocks, but he could not confirm that fact.

Although the record establishes that the respondent had notice of the condition of the road prior to the accident, it also establishes that the driver of the vehicle was familiar with the road and its poor condition. Under the doctrine of comparative negligence, the negligence of the driver in traveling a road while aware of a defect, was equal to or greater than the negligence of the respondent in its failure to remove the defect. A traveler on the highways travels at his own risk. The State is not a guarantor of his safety. *Adkins vs. Sims,* [130 W.V. 645, 46 W.E.2d 81 (1947).] The claim is therefore disallowed.

Claim is disallowed.

OPINION ISSUED APRIL 2, 1990

RHONDA LEE
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-216)

Claimant appeared in person.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On June 11, 1989, claimant's vehicle, a 1982 Monte Carlo, struck a hole on County Route 13, in Mingo County, 1/4 mile south of the Braisden Post Office. Damage to the vehicle resulted in the replacement of the inner fender, a wheel, and a tire. The automobile also required alignment. Total estimated cost for repair was $299.72.

Claimant testified that she was traveling in a southerly direction at approximately 10:30 a.m. The weather was good and the pavement was dry. Her speed was estimated to be 30 miles per hour along the two-land highway. Since a large truck was traveling in the opposite direction, the claimant was unable to avoid the hole. Claimant drove this route frequently, and admitted that she was aware of the existence and location of the hole.

The Court believes that the respondent had constructive notice of this hole due to its existence for some length of time. Therefore, the respondent was negligent. However, the Court further believes that the claimant, with her prior knowledge of the road's condition, was equally negligent, and her negligence was equal to or greater than that of the respondent. Under the doctrine of comparative negligence, the Court is of the opinion to, and does, deny the claim.

Claim is disallowed.

OPINION ISSUED APRIL 2, 1990

LONNIE E. PERDEW, JR., AND MARGIE PERDEW
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-214)

Claimant Margie Perdew appeared in person.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimants week $129.05 for expenses they incurred as the result of an accident which occurred on March 31, 1989. The Court, on the motion of Margie Perdew, amended the style of the claim to include Lonnie E. Perdew, Jr., as a proper party claimant. Claimant Margie Perdew was traveling south on W.Va. Route 68 from Parkersburg, West Virginia, toward Ravenswood, in her 1988 Pontiac Grand Am when the vehicle struck a rock.

Claimant Margie Perdew testified that West Virginia Route 68 is a two-lane, blacktop road. The accident occurred at approximately 3:30 p.m. The road surface was damp, and her speed was approximately 45 miles per hour. The vehicle in front of her sent up a spray of dirt and water which obstructed her view of the rock, although she did observe it momentarily before her vehicle struck it. Claimant then proceeded about 150-200 feet to a place where she could stop the vehicle. She had traveled this route earlier that morning, but did not observe rocks present at that time. The rock damaged the tire and rim of the automobile. Additionally, the vehicle required alignment.

Dempsey Skeens, Assistant County Supervisor in Jackson County for the respondent, testified regarding reports of road defects. He produced a copy of a daily report (DOH-12) indicating

that Donald Solock worked for 1 ½ hours on Route 68 the day of the claimant's accident. He explained that the area is a slip area in which rocks would roll into the road. Donald Solock indicated that he had not seen rocks while working in the area on March 31, 1989. There are "Falling Rock" signs present which are visible in both directions approximately 500-600 feet from the area.

For an award to be made in cases such as this, it must be proven that the respondent had actual or constructive notice of the defect in the roadway, and a reasonable amount of time to take corrective action. *Davis vs. Department of Highways*, 11 Ct.Cl. 150 (1976), and *Porterfield vs. Department of Highways*, 14 Ct.Cl. 373 (1983). There is no evidence in the record of such notice; therefore, the Court hereby denies the claim.

Claim is disallowed.

OPINION ISSUED APRIL 2, 1990

WILLIAM L. SMITH AND CONNIE SMITH
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-71)

Claimant Connie Smith appeared in person.
Jeff Miller, Attorney at Law, for respondent.

PER CURIAM:

Claimants seek $775.00 for expenses they incurred as the result of an accident on January 9, 1989. The Court, on its own motion, amended the style of the claim to include Connie Smith as a proper party claimant. claimant's daughter, Angela Sue Smith, was driving their 1979 Volkswagen Scirocco on Alternate Route 10, off Route 60, in Cabell County when the vehicle slid on ice. It left the roadway and struck two parked vehicles and a mobile home. The car was beyond repair. Claimants are seeking the balance of what they owe on the vehicle, which is $775.00.

Angela Smith testified that at the time of the accident, she was alone in the vehicle and was proceeding on Alternate Route 10, from her place of employment, to her home in Salt Rock. It was nearly 10:00 p.m. She estimated her speed to be between 35 and 40 mph. Ms. Smith stated that the posted speed limit in the area was 55 mph. The patch of ice was "...about 500 feet of just a sheet of ice." Angela had driven this route in previous months, but had not encountered ice. She mentioned that the road was already wet. The vehicle slid approximately 500 feet into the driveway of a mobile home about 50 feet from the highway. After striking a truck and another vehicle, it came to rest in the front yard of property owned by Rita Marion.

Ms. Marion testified that her property is lower than the road surface of Alternate Route 10.l She did not witness the accident, but remembered that it wasn't raining at the time. It had, however, rained earlier that day. Ms. Marion explained that the ditches in front of her property were not properly maintained and would fill up with water and freeze. The accident occurred approximately 500 feet from her mobile home. She did not complain about the ice to the respondent prior to the accident, although she had been aware of it for some time.

Harlan Carl Dean, Jr., foreman at Barboursville Headquarters and previously a dispatcher with the respondent, testified that at approximately 10:00 p.m. that evening, respondent's employee contacted him with regard to this stretch of Alternate Route 10. The employee told Mr. Dean that there was a slick spot on the road. Mr. Dean first sent a crew cab, and then dispatched a salt truck (two men) to the area, but warning signals were not set up.

Phillip L. Manley, Equipment Operator III with the respondent, testified that on the evening of January 9, 1989, he had received a call from the dispatcher concerning the accident. Mr. Manley arrived several minutes after 10:00 p.m. as soon as he and the other men noticed that "it was slushing over," they called county headquarters and requested that a salt truck be sent out. Respondent's patrols were not in the area that evening on routine maintenance.

The respondent cannot be held responsible for failure to maintain a highway if it lacks notice of a defect. Here, there is no indication that the respondent was alerted to the ice

problem prior to the 10:00 p.m. call. After careful consideration, the Court finds that it is of the opinion to, and must, deny the claim.

Claim is disallowed.

OPINION ISSUED APRIL 2, 1990

RAYMOND VIOLA
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-278)

Claimant appeared in person.
Jeff Miller, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks $2,209.78 in damages arising out of an automobile accident which occurred on August 12, 1988. The Court, with the approval of the claimant, amended the style of the claim to reflect Raymond Viola, titled owner of the vehicle, as the sole party claimant.

On August 12, 1988, claimant was driving his 1977 Dodge van on Interstate 77 in a southerly direction. He was operating the vehicle at approximately 40-45 mph in a 50 mph zone.

The accident occurred between 11:30 a.m. and noon. It was a sunny day, and the highway was under construction. As claimant's vehicle reached the southerly end of a bridge, "...it just dropped of." Claimant did not see any work being done, but he did observe barrels in the right-hand lane. In addition, he mentioned that an arrow was flashing to move traffic to the left-hand lane. Damage to the van was extensive. Claimant's insurance company reimbursed him for $205.00 for the damage. His policy had a $200.00 deductible.

Claimant testified that he could tell that paving was being done that day. He passed two bridges before the one where his accident occurred. The surfaces of those bridges were not level with the road. However, the third bridge's surface was higher than the surface of the road. Claimant further stated that the contractor on the project was West Virginia Paving, Inc. He was given this information in September 1989 by a representative of respondent, Ben Savilla.

Shelby J. Sharps, Claim Investigator for the respondent, testified that she was made aware of this claim on or after August 10, 1989. She determined, by information supplied her by respondent's District 1 representative, that the paving work was done by West Virginia Paving, Inc. of Dunbar. The paving project began May 5, 1988.

This Court has held in the past that, if the record establishes that an independent contractor was engaged in the construction work, the respondent cannot be held liable for the negligence, if any, of such independent contractor [*Cooper vs. Department of Highway*, CC-84-263, Opinion issued December 8, 1987; *Paul vs. Department of Highways*, 14 Ct.Cl. 479 (1983); *Harper vs. Department of Highways*, 13 Ct.Cl. 274 (1980); *Safeco Insurance Co. vs. Department of Highways*, 9 Ct.Cl. 28 (1972)]. Accordingly, this claim must be denied.

Claim is disallowed.

OPINION ISSUED MAY 2, 1990

TAMERAN, INC.
VS.
WORKERS' COMPENSATION FUND

(CC-90-118)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks $12,087.60 for office equipment rental and maintenance.

In its Answer the respondent admits the allegations of fact set forth in the Notice of Claim and acknowledges that the claimant is entitled to $12,087.60. The respondent further alleges that sufficient funds were not available at the end of the fiscal year in question with which the claim could have been paid.

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

Claim is disallowed.

OPINION ISSUED MAY 2, 1990

LARRY JAMES WILLIAMS
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY OF WEST VIRGINIA

(CC-90-82)

No appearance by claimant.
Paul E. Jordan, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $844.23 in back pay for the period of June 28, 1983 through July 21, 1983. Claimant was reinstated in his position as a carpenter at the Physical Plant of West Virginia University, a facility of the respondent, on June 28, 1983, but he did not receive compensation for the time period mentioned above. The Respondent admits the validity and amount of the claim and states respondent does not have a fiscal method to compensate claimant for back wages.

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

Award of $844.23.

OPINION ISSUED MAY 2, 1990

XEROX CORPORATION
VS.
DIVISION OF CULTURE & HISTORY

(CC-90-93)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $310.00 for office equipment maintenance services provided respondent. The invoice for these services was not processed for payment in the appropriate fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the proper fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $310.00.

Award of $310.00.

OPINION ISSUED JUNE 1, 1990

TERESA BARNETT
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-389)

Claimant appeared in person.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On August 21, 1989, the claimant was traveling on Old Goff Mountain Road, Kanawha County, when her Chevrolet Celebrity struck a hole. The automobile sustained damage to the tire for which the claimant asserts a loss of $53.95.

The claimant testified that at the time of this incident it was evening and the weather

was clear. She was accompanied by three children. She stated that the defect in the road was apparent where the two roads, I-64 and Goff Mountain Road, meet. She explained that the seam of the road was improperly constructed, and this caused the hole. The hole was located on the right-hand side of the road, and was approximately three inches deep. She did not travel this route frequently. She reported the problem to respondent after her accident and respondent rectified the defect in the road.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins vs. Sims,* 130 W.Va. 645, 46 S.E. 2d 81 (1947). For the respondent to be held liable for defects of this type, the claimant must prove that the respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. As there was no evidence of such notice, this claim must be denied.

Claim is disallowed.

OPINION ISSUED JUNE 1, 1990

CRAIG CALLISON
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-174)

Claimant appeared in person.
Jeff Miller, Attorney at Law, for respondent.

PER CURIAM:

On February 28, 1989, claimant was operating his 1975 Chevrolet Camaro on County Route 33/5 (Island Branch Road) when the road collapsed and his vehicle rolled over a hill. The Court, on its own motion, amended the style of the claim to reflect the proper party respondent, the Department of Highways. As a result of the incident, claimant seeks to recover compensation for damages to his vehicle, for inconvenience in being without a vehicle from February 28, 1989 through November 2, 1989, and for mental anguish.

Claimant testified that the incident occurred at approximately 4:30 p.m. The weather was partly cloudy, and the road surface was dry. The road is a single-lane, dirt road. As the claimant approached a hill, he felt the sensation of the road breaking loose beneath his vehicle, his automobile then rolled, and the claimant was thrown from it, ending up beneath his automobile. The claimant testified that there were no signs to warn him of the danger. As a result of the accident, he suffered a mild concussion and a few cuts. The vehicle was beyond repair, and the claimant stated that he sold the parts for salvage for approximately $300.00.

Two witnesses for the claimant, familiar with the road, testified that there are no warning signs, and that it was in poor condition at the time of the accident. Jeffry Clifton Casto, respondent's foreman at North Charleston, testified that Secondary Route 33/5 does not have a high volume of traffic. On March 1, 1989, when Mr. Casto was informed of the absence of warning signs, he quickly had them installed.

After careful review of the evidence, the Court is of the opinion that respondent had constructive notice of the defective condition. Paddles had been formerly placed in the area and the respondent has the responsibility to properly maintain the warning signs. The Court, therefore, makes an award to the claimant in the amount of $500.00.

Award of $500.00.

OPINION ISSUED JUNE 1, 1990

RITA M. GREATHOUSE
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-306)

Claimant appeared in person.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On July 23, 1989, claimant was operating her 1981 Dodge Aries station wagon on Route 16, Clay County, when the automobile struck two holes in the pavement. The automobile sustained damage to its front end, rim, tire an done of its shocks, for which claimant asserts a loss of $521.02.

Claimant testified that she was traveling south on Route 16 with her husband and two other passengers at between 10:00 and 11:00 p.m. Route 16 is a two-lane road which runs from Arnoldsburg to Ivydale. She approached a turn in the road and encountered another automobile traveling left of center. She swerved to miss the other automobile, and her vehicle struck two holes. The two holes were five and six inches deep, respectively. She stated that the holes had taken off the biggest part of the white line marking the highway. She conceded that she had observed the potholes "... just about everyday I go up through there." Kay Croston and Robert L. Blinco, who were passengers in the accident vehicle, confirmed by their testimony the statements of the claimant.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins vs. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held

liable for defects of this type, the claimant must prove that the respondent had actual or constructive notice of the defect and adequate time to repair it. As there was no evidence of such notice, this claim must be denied.

Claim is disallowed.

OPINION ISSUED JUNE 1, 1990

HAMILTON BUSINESS SYSTEMS, INC.
VS.
DEPARTMENT OF HEALTH

(CC-89-169)

Claimant's representative, Paul Hobbs, appeared in person.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant and respondent entered into three "equipment rental agreements." In addition, a fourth equipment rental agreement was signed by both parties for an upgrade of NBI System 64 which is included in the initial agreements. The three agreements cover the period of September 1, 1987 - July 31, 1988. The upgrade agreement covers the period of November 1, 1987 - July 31, 1988. These are rent-to-purchase agreements.

Elaine Fierbaugh, respondent's office manager, testified that the overall amount owed by the respondent is $5,021.48. She stated that the respondent has been notified of this amount in the form of several "past due" statements.

Claimant was asked to provide the equipment prior to the processing of the purchase order by the respondent. The respondent was not authorized to rent the equipment because a requisite form, known as the "Equipment Rental Addendum," was not signed by both parties; therefore, the invoices were not processed for payment.

There is no dispute that respondent used the equipment in question for the ten-month period. All of the equipment rental agreements were signed and the claimant provided the equipment in good faith. It would thus appear that this is a claim which in equity and good conscience should be paid.

However, after the ten-month period, respondent proceeded to purchase the equipment in question. There is no dispute that claimant received the purchase price. The claim is accordingly denied.

Claim is disallowed.

OPINION ISSUED JUNE 1, 1990
RICOH CORPORATION
VS.
STATE TREASURER

(CC-90-140)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $863.62 for the metered usage of office equipment provided respondent. The invoices for these charges were not processed for payment in the appropriate fiscal year; therefore, claimant has not been paid.

The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $863.62.

Award of $863.62.

OPINION ISSUED JUNE 1, 1990

RANDY LANE THORNTON
VS.
DEPARTMENT OF CORRECTIONS

(CC-88-26)

Claimant appeared in person.
Lowell D. Greenwood, Attorney at Law, for respondent.

PER CURIAM:

This claim came on for hearing before the Court on March 21, 1990. The claimant made a motion for the Court to appoint counsel to assist him in the hearing of the claim. Claimant is presently incarcerated in the West Virginia Penitentiary and asserts he is an indigent. The Court took the motion under advisement.

A review of this issue reveals that the appointment of counsel for indigent civil litigants has been considered previously by the West Virginia Supreme Court of Appeals in the cases of *Craigo v. John Hey, Circuit Judge and Hon. A. Andrew McQueen, Chief Judge and James M. Oxier v. Kanawha County Circuit Court,* 245 S.E. 2d 814 (1986). In these cases each petitioner was a prisoner incarcerated in a State penal institution and each desired that an attorney be appointed to represent him in a civil case. The Supreme Court reviewed current law on the issue of appointing counsel in civil cases. Generally, civil litigants do not have a constitutional or statutory right to legal representation in all cases. Trial courts have no duty to appoint counsel to represent indigent civil litigants, imprisoned or not, but trial courts have discretion to do so. The Supreme Court held that in fee generating civil cases the Court should not appoint counsel and "this is overwhelmingly the majority position...". However, the Supreme Court suggested that courts provide a roster of attorneys willing to take fee generating civil suits on behalf of prisoners.

The Court of Claims is a unique body created by the Legislature as a forum for suits against State agencies. The Court accepts many claims filed by law persons and entertains these claims. The Court assists lay persons without prejudicing the State agency which is always represented by counsel. The Court attempts to determine all the essential facts to assure a fair hearing for both parties.

In view of the foregoing, the Court is of the opinion that the claimant herein does not require the appointment of counsel for this civil action. Therefore, the Court is of the opinion to and does overrule claimant's Motion to Appoint Counsel.

Motion overruled.

OPINION ISSUED JULY 18, 1990

ESTATE OF GERARD ANDERSON
VS.
DEPARTMENT OF HIGHWAYS

(CC-83-354)

Joseph D. Talarico, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the pleadings, and upon two stipulations.

The claimant's by their counsel, Joseph D. Talarico, and respondent, by its counsel, Nancy J. Aliff and Jeff Miller, entered into two stipulations. The parties agreed to the following

facts:

On or about August 28, 1983, claimant Paul Anderson was operating his 1980 Datsun 210 Sedan on U.S. Route 22 in Weirton, Brooke County, West Virginia.

On that date, claimant Gerard Anderson was a passenger in said vehicle.

That on August 28, 1983 U.S. Route 22 in Weirton, Brooke County, West Virginia, and the light poles adjacent to U.S. Route 22 were under the control and jurisdiction of the respondent.

On this date, U.S. Route 22 and the light poles adjacent to said highway were owned and maintained by respondent.

That as claimant's vehicle approached the Harmon Creek Exit of U.S. Route 22, respondent's light pole fell from its mounting base and struck the roof and the right side of claimant's vehicle.

That as a result of said fall, claimant's vehicle was damaged and the claimant's sustained personal injuries and pain and suffering.

The $5,000.00 is a fair and equitable settlement of the claim.

Subsequent to the original action filed on December 19, 1983, Claimant Gerard Anderson died intestate in Los Angelos County, California.

No proceeding relating to the administration of Gerard Anderson's estate has been or is currently being conducted in the State of California or the State of West Virginia.

That under the laws of descent and distribution in the State of California (Section 6402 of the California Probate Code), the personal estate of a decedent dying intestate, unmarried, without surviving issue or parent, passes to his/her siblings.

That property of decedent should be paid and delivered to:

Edith R. Bence, 1876 Fowler, #206, Richland, Washington, 99352.

Paul H. Anderson 3106 Bergman St., Pittsburgh, PA 15204, and
Mathilda Mae Miller, 5812 West Gunnison Ave., Chicago, IL 60630.

These are all of the surviving siblings of the decedent and are the only surviving issue of decedent and are the successors to the decedent's estate as defined in Section 6402 of the California Probate Code.

The Court, having determined that Edith R. Bench, Paul H. Anderson and Mathilda Mae Miller affirmed under penalty of perjury that the foregoing is true and correct, finds that no other person has the right to the interest of the decedent in his present estate and that as successors of the decedent, the award herein should be paid, delivered, or transferred to Edith R. Bence, Paul H. Anderson and Mathilda Mae Miller.

In view of the foregoing, the Court makes an award in the amount of $5,000.00 to be divided equally among the successors to the decedent, Edith R. Bench, Paul H. Anderson and Mathilda Mae Miller.

Award of $1,666.67 to Edith R. Bence.

Award of $1,666.67 to Paul H. Anderson.

Award of $1,666.66 to Mathilda Mae Miller.

OPINION ISSUED JULY 18, 1990

DIVISION OF EMPLOYMENT SECURITY
VS.
DIVISION OF CULTURE AND HISTORY

(CC-89-406)

Jack O. Friedman, Attorney at Law, for claimant.
Lowell D. Greenwood, Assistant Attorney General,for respondent.

PER CURIAM:

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

Claimant seeks an award of unemployment compensation tax owed by respondent in the amount of $5,625.00 and $851.63 in accumulated statutory interest of one percent per month. Respondent admits the validity and amount of the claim for unemployment tax, but denies the portion of the claim which is for interest. Respondent states that there were sufficient funds remaining in its appropriation for the fiscal year in question from which the unemployment compensation tax could have been paid.

The factual situation in this claim is identical to that in *Department of Employment Security vs. Department of Corrections,* 14 Ct.Cl. 387 (1983). Following the precedent established in that decision, the Court makes an award to the claimant in the amount of unemployment tax, but denies an award for the accumulated interest based on W.Va. Code .14-2-12.

Award of $5,625.00.

OPINION ISSUED JULY 18, 1990

HCA RIVER PARK HOSPITAL, FORMERLY KNOWN AS
HCA HUNTINGTON HOSPITAL
VS.
DEPARTMENT OF HEALTH - OFFICE OF BEHAVORIAL
HEALTH SERVICES

(CC-90-191)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $2,979.00 plus interest for medical services provided a client of the respondent. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim would have been paid.

The Court has reviewed the claim and has determined that claimant's request for interest must be denied in accordance with West Virginia Code .14-2-12. In view of the foregoing, the Court makes an award in the amount of $2,979.00.

Award of $2,979.00.

OPINION ISSUED JULY 18, 1990

STEVE HOLCOMB AND CYNTHIA JOYCE HOLCOMB
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-386)

Claimants appeared in person.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimants are the owners of property located in Richwood, Nicholas County, West Virginia. Claimants' property sustained flood damage in August 1989. claimants allege that the flooding resulted from respondent's negligent maintenance of certain culverts located on W.Va. Route 76, also known as the "CC Road", which road is above claimants' property. Claimants allege damages in the amount of $3,267.74.

Respondent contends that the culverts were cleaned and maintained in accordance with regular maintenance procedures and that the flooding was the result of an unusual amount of rainfall which occurred the night prior to the flood on claimants' property.

Claimants' testimony described the flood which occurred at approximately 7:00 to 8:00 a.m. on August 21, 1989. claimants observed water flowing onto their property "like a river." The water flooded the basement level of the house and the garage. The basement was finished and carpeted. Claimants telephoned neighbors for assistance. It was determined that the culvert above claimants' property was clogged completely. Claimant Steve Holcomb, with the assistance of neighbors, cleaned it out so that water could flow through it. They also dug a ditch and piled rocks in front of the basement wall to attempt to divert the water. However, water seeped through the blocks and flooded the basement. The carpet was damaged from the mud and water as was a wall mural. The walls were stained by the muddy water and required repainting. The water also washed gravel from claimants' driveway.

During the flood one of the respondent's employees, Raymond R. Tolley, a crew leader for respondent, came to claimants' residence. He observed three culverts blocked with rocks and debris which are located above claimants' property. Mr. Holcomb explained that respondent had cleaned these same culverts two to three months prior to the flooding when excess water had flowed onto claimants' property during a hard rain.

The evidence in this claim established that over two days on August 20 and 21, 1989, the Richwood area received approximately 3.33 inches of rain. Route 76 above claimants' property has three culverts at locations from claimant's property to 726 feet from the property. The farthest culvert carries a small stream. During this rainfall large rocks flowed into the stream culvert blocking it. The next two culverts then became blocked by rocks, debris mud, and soil which flowed from the stream area. When all three culverts became blocked, the water then flowed onto claimant's property causing the flood in their basement and washing the gravel out of the driveway. The water flowed in its natural course from a higher level to a lower level which was below and across claimants' property.

Respondent established that these culverts had been cleaned and maintained prior to this flooding. The stream culvert and the second culvert were replaced after this particular flood as the rocks blocked the culverts. Respondent replaced an 18-inch culvert with a 24-inch culvert at the

stream. The second culvert was an 18-inch culvert also and it was replaced with a new 18-inch culvert. The 18-inch culvert directly above claimant's property was not replaced, but it was cleaned. The ditchline was also cleaned. This maintenance was required as a direct result of the flooding from the stream.

The Court is of the opinion that respondent had performed proper and reasonable maintenance of the culverts prior to this flood. The rainfall was of an unusual mount and could not be reasonably anticipated by respondent. The water flowed in its natural course. The Court is of the opinion that respondent was not negligent in its maintenance of Route 76. although not unmindful of the damages to claimants' property, the Court is of the opinion that the respondent's duty to maintain roads does not extend to require it to take effective measures to prevent damage resulting from weather conditions which it did not and could not reasonably have anticipated. Therefore, the Court is of the opinion to and does disallow this claim.

Claim is disallowed.

OPINION ISSUED JULY 18, 1990

KANAWHA VALLEY RADIOLOGISTS
VS.
DEPARTMENT OF PUBLIC SAFETY

(CC-90-157)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $42.00 for medical services provided an employee of the respondent. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $42.00.

Award of $42.00.

OPINION ISSUED JULY 18, 1990

GARY E. KELLER, SHERIFF OF TYLER COUNTY
VS.
SUPREME COURT OF APPEALS

(CC-90-173)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $11,003.65 for jury and witness fees. The invoice for the fees were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

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

Award of $11,003.65.

OPINION ISSUED JULY 18, 1990

MANPOWER TEMPORARY SERVICES
VS.
DEPARTMENT OF HEALTH

(CC-90-164)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $105.40 for temporary employment services provided respondent. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the

claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $105.40.

Award of $105.40.

OPINION ISSUED JULY 18, 1990

THE POTOMAC EDISON COMPANY
VS.
RAILROAD MAINTENANCE AUTHORITY

(CC-90-137)

Daniel T. Booth, Attorney at Law, for claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover $480.17 in damages to its power lines when the lines were struck by a crane being operated by an employee of the South Branch Valley Railroad, a facility owned and maintained by respondent.

Respondent in its Answer admitted the validity of the facts as stated in the claim and also admits the amount of the claim.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $480.17.

Award of $480.17.

OPINION ISSUED JULY 18, 1990

EARL F. YOUNG
VS.
WEST VIRGINIA PUBLIC DEFENDER SERVICES

(CC-90-155)

No appearance by claimant.

Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,000.00 for conducting an investigation under the authorization of the Preston County Circuit Court. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,000.00.

Award of $1,000.00.

OPINION ISSUED AUGUST 2, 1990

BERNIECE E. FATONY
VS.
DIVISION OF HIGHWAYS

(CC-86-440)

Charles B. Mullins, II, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

BAKER, JUDGE:

Claimant is the owner of real property located in Glover, Wyoming County, West Virginia. The front of the property is adjacent to W.Va. Route 97 and the back of the property is adjacent to Rose Street. Claimant and her husband purchased this property in 1958. In the early 1970's, they added a basement to the house. Respondent performed construction work on W.Va. Route 97 in 1984-85. After this construction, claimant alleges that unusual amounts of water began draining onto the property. This water has caused the ground beneath the house to remain wet all year-round resulting in structural damage to the house and has caused claimant to abandon the use of the basement due to constant water problems in the basement. Claimant also alleges that the bank at the front of the house has not been maintained property by respondent causing an unsightly condition. Claimant seeks damages for the structural problems and the drainage in the amount of $18,000.00.

The evidence revealed that claimant and her husband, who is now deceased, entered into a right-of-way agreement with respondent in 1982. Respondent purchased a portion of the front

yard for widening the shoulder and the surface of Route 97. Prior to the construction, there was an open drainage area from the front to the back of claimant's property which had been placed there by claimant's husband shortly after they had moved onto the property. It was claimant's understanding that there would be no open ditches in her yard after the construction.

During the construction which took place on Route 97, respondent came upon a "swamp" area. It was necessary for respondent to alleviate this condition in order to provide a stable base for the new road. Respondent placed large boulders for the base of the road and provided a drainage structure at the swamp area. A two-foot lift of rock was placed for the roadbed and seven or eight inches of asphalt was laid. Respondent also placed a "filter fabric" on the upper side of the road to catch the water on that side of the road to eliminate the problem of the water flowing through the rock. The placement of the boulders for the base of the road created a "french drain" effect under the road to provide drainage for the road. Charles A. Shaver, Assistant District Engineer in charge of construction for respondent, explained the purpose of placing the rocks under the road. He stated that the fill was "daylighted" which means that there is rock all the way to the outside of the base of the road so that any water would come out through the rock, percolate out and come out into old ground, which is what it was doing.

In the course of the construction, respondent replaced an eighteen inch pipe under the old road with a thirty inch corrugated metal pipe. This metal pipe connects to a thirty-six inch pipe beneath claimant's property, and, eventually, the water drains into the Guyandotte River which is approximately 500 feet from claimant's property.

To provide for drainage from the mountain on the opposite side of Route 97 from claimant's house, respondent provided a drop inlet. The new road also has curbs to contain the water on the road surface and to prevent it from flowing onto claimant's property.

After the construction of the new road, claimant noticed unusual amounts of water on her property. During rainstorms, water would seep into the basement area. Claimant has been unable to use the basement area due to the constant water problem. The ground beneath the house, where there is no basement area, remains wet causing the house to be damp year-round. This condition may also be causing structural problems.

John E. Caffrey, a consulting engineer, testified for claimant as an expert concerning the problems which claimant is experiencing. It is his opinion that the construction of Route 97 modified the subsurface drainage or water table and brought it to a lower level. This has caused water to seep into the soil beneath claimant's home and to migrate into the basement. He was of the opinion that the construction of a ditch for subsurface water to divert the water around the house into an existing drainage structure may resolve the problem. He observed that only a small amount of water was going into the drop inlet on the mountain side of Route 97 which indicates that the water is going beneath the road.

Respondent contends that it has attempted to alleviate the problems being experienced by claimant since the construction of the road. Respondent attempted to prevent water from draining

from the fill bank onto claimant's property by constructing a ditch across the front of claimant's property at the toe of the bank on respondent's right of way. The water should flow from that ditch into the ditch perpendicular to the road which is between claimant's property and the neighbor. The water will then flow into a drop inlet designed to take care of surface water. Respondent has also had the contractor return to the site to place dirt on the bank to cover the large rocks and to sow grass on the bank to alleviate the unsightly condition which claimant complained about.

The evidence as to damages to the property established that the cost to cure the drainage problems on claimant's property will be $6,425.00 based upon the lowest estimate.

Claimant was not compensated by respondent for contemplated water damages in the right-of-way agreement. Respondent's right-of-way agent, Thomas Allen Crutchfield, explained that the reference in the Statement of Just Compensation to "damage to residue" was based upon the diminution to the rest of the property for resale purposes only. An amount of $3,400.00 was included in the compensation to claimant and her husband for damage to the residue, but there was no consideration given to claimant and her husband for damages for water problems which may have occurred after construction.

The problem which confronts the Court as to the issue of the condition of the bank facing the front of claimant's property is one of inability to provide a remedy for the claimant. This Court does not have the authority to compel a State agency to act. Therefore, the Court is unable to afford the claimant a remedy for this portion of the claim.

However, the Court, having reviewed the evidence in this claim as to the issue of the excessive water drainage on claimant's property, is of the opinion that claimant has indeed experienced an increase in the amount of water being drained onto her property as a result of the construction on Route 97. The road was widened and the base of the road was altered in such a way that more than the usual amount of water is flowing from the opposite side of Route 97 through the material beneath the road and then seeping into the ground adjacent to claimant's house. The Court is of the opinion that claimant should be compensated for the cost to cure this water problem. Therefore, the Court makes an award to claimant in the amount of $6,425.00.

Award of $6,425.00.

OPINION ISSUED AUGUST 2, 1990

GREENBRIER COUNTY PUBLIC SERVICE DISTRICT NUMBER 2
VS.
ALCOHOL BEVERAGE CONTROL COMMISSION

(CC-90-75)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $235.17 for sanitation services provided respondent and $85.69 in penalty charges for late payments. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant was not paid for the services when rendered. The respondent admits the validity and amount of the claim including the penalty charges and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

The Court is of the opinion that claimant may not recover the penalty charges assessed respondent. Therefore, the Court makes an award in the amount of $235.17.

Award of $235.17.

OPINION ISSUED AUGUST 2, 1990

ROBERT DALE SHEPARD
VS.
STATE OF WEST VIRGINIA

(CC-88-167)

Claimant appeared in person.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

HANLON, JUDGE:

Claimant brought this action pursuant to the provisions of West Virginia Code .14-12-13a for compensation relating to an unjust conviction. Claimant was sixteen years of age when he was indicated on April 2, 1977, on a felony charge of aiding and abetting another person in the commission of the felony of breaking and entering. Claimant was thereafter transferred from the Juvenile Division to the Adult Division by a Transfer Order dated May 3, 1977. Claimant pleaded not guilty and was then tried and convicted of the felony of aiding and abetting whereupon he was sentenced on July 6, 1979, to confinement in the State Penitentiary for one to ten years. After serving approximately three and one-half years of this sentence, claimant was released. Claimant alleges that he should be compensated for the time served on this conviction as it was voided at a later date by an Order of the Wood County Circuit Court.

The evidence submitted by the parties revealed that in 1983 claimant was charged and convicted of the felony of armed robbery and the felony of voluntary manslaughter. The prosecutor sought to enhance the sentence for voluntary manslaughter based upon the previous conviction of

aiding and abetting for which claimant had served time in the penitentiary. Claimant then challenged the transfer from juvenile to adult status which had occurred in 1977. By Order dated August 31, 1983, the Wood County Circuit Court dismissed the information which sought enhancement of the voluntary manslaughter conviction based upon the prior conviction in 1977. The Court ruled that the 1977 Transfer Order contained no findings of fact, did not set forth any information or reason for the transfer from juvenile to adult jurisdiction, and did not contain any statement of the reason or reasons why juvenile jurisdiction was relinquished.

At the time of the claimant's 1977 transfer from juvenile to adult jurisdiction these requirements were not statutorily mandated. The amendment to West Virginia Code Chapter 49, Article 5, Section 10 requiring finding of fact and conclusions of law became effective July 5, 1977, subsequent to the Transfer Order in question.

Whatever the basis of the 1983 Wood County Circuit Court decision that the 1977 conviction could not be used for enhancement purposes, it is clear that the guilt or innocence of the claimant for the 1977 charges was not addressed.

The Court herein is of the opinion that claimant has failed to bring this claim within the intended provisions of West Virginia Code Chapter 14, Article 2, Section 13a which was passed by the Legislature to compensate individuals unjustly arrested or convicted and thereafter determined to be innocent of any wrongdoing. The Court Order relied upon by claimant to establish this claim fails to establish a wrongful conviction as contemplated by the statute. Therefore, the Court is of the opinion to and does deny this claim.

Claim is disallowed.

OPINION ISSUED AUGUST 10, 1990

W.F. CARMICHAEL
VS.
BOARD OF PROBATION AND PAROLE

(CC-88-377)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action for annual leave which he alleged he accumulated while he served as West Virginia Commissioner of Labor from July 22, 1987, through January 10, 1989. Claimant was appointed to the West Virginia Board of Probation and Parole as of January 11, 1989. Claimant seeks $1,699.99 for accumulated annual leave from the Board of Probation and Parole based upon the allegation that the annual leave transferred with claimant.

Respondent contends that claimant is not entitled to annual leave as department heads of State agencies serve at the will and pleasure of the Governor of the State of West Virginia.

An opinion of the Attorney General's Office issued on December 2, 1977, which relates to annual leave issues states "that department heads of State agencies and elected State officials may not accumulate annual leave."

The Court, having reviewed this claim, is of the opinion that a department head serves at the will and pleasure of the Governor. As the Commissioner of the Department of Labor, claimant was a department head. As claimant did not accumulate annual leave in his position as Commissioner of the Department of Labor, he could not transfer any annual leave to his position as a member of the Board of Probation and Parole. Therefore, the Court is of the opinion to, and does, deny this claim.

Claim is disallowed.

OPINION ISSUED AUGUST 10, 1990

RICHARD WAYNE KOCHER
VS.
DEPARTMENT OF PUBLIC SAFETY
(CC-90-167)

Danny Elmore, Attorney at Law, for claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover the amount agreed to in a Consent Decree entered into by claimant and respondent in an action in the United States District Court for the Southern District of West Virginia.

The respondent admits the validity of the claim and that the amount agreed to by the parties in the Consent Decree was $25,000.00. Respondent has not paid the amount indicated in the Consent Decree to the claimant.

In view of the foregoing, the Court makes an award to the claimant in the amount of $25,000.00.

Award of $25,000.00.

OPINION ISSUED AUGUST 10, 1990

GEORGE LEONARD MEISENHELDER

VS.
DEPARTMENT OF HIGHWAYS

(CC-88-149)

Henry C. Bias, Jr., Attorney at Law, for claimant.
James D. Terry, Attorney at law, for respondent.

BAKER, JUDGE:

Claimant brought this action to recover damages for personal injuries and the loss of a tractor-trailer which occurred in a single vehicle accident on Route 60 near Rainelle, West Virginia. Claimants allege that the proximate cause of the accident was the failure of respondent to properly maintain the berm of Route 60 at the accident site.

Respondent contends that the berm of the road was maintained in proper condition and that the accident occurred when claimant George Meisenhelder drove his tractor-trailer too close to the edge of the berm and the vehicle rolled over the side of the mountain.

The evidence established that the incident occurred on August 28, 1986. claimant George Meisenhelder, owner of a 1978 Freightliner tractor-trailer, was self-employed as an independent connecting carrier. He had picked up a load of Ford engines in Indianapolis, Indiana, under a contract with P.Y. Transport. The engines were bolted on an apparatus which was in turn bolted onto the inside of the trailer. His wife, claimant Nancy Meisenhelder, was traveling with him to Norfolk, Virginia. They left Indianapolis and stopped overnight in Winfield, West Virginia. The next morning (August 28, 1986) they left Winfield and were traveling on Route 60 toward Rainelle, West Virginia. As claimants approached Rainelle, they were traveling down Sewell Mountain. Claimant George Meisenhelder decided to pull his rig to the side of the road to check the brakes. There was no emergency. He noticed a wide area on his right and pulled off the road. As he was stepping out of the tractor, he felt the trailer move. He jumped back into the tractor as the rig began to roll over the side of the mountain. The rig made a full turn and ended up on its side with the passenger side of the tractor toward the ground leaning against some trees. Emergency personnel took the claimants to different hospitals. Claimant George Meisenhelder suffered broken ribs. He has since recovered from his injuries. He was unable to work for approximately six to eight weeks due to his injuries, and his tractor-trailer outfit was a total loss. Claimant Nancy Meisenhelder suffered injuries to her back, neck, and hip. She also sustained cuts on her legs. She has received sporadic treatments for her back injury and still experiences back pain.

The testimony revealed several pertinent facts describing Route 60 at the vicinity of this accident. Route 60 is a paved, curvy two-land highway. It proceeds downhill at the site of this incident. There is a wide berm and a grassy area beyond the berm which is not considered by respondent to be a part of the berm. Beyond the grassy area, there is a drop off over the mountain. The width of the berm over a 100-foot section of the road extends from 11 feet with an additional 4 feet of grassy area to as wide as 16 feet with 4 feet of grassy area or a total of 20 feet wide in some

places. There is also a culvert located approximately 6 to 10 feet below the road surface which protrudes from the bank on the mountain side. The ground surrounding the culvert is eroded. There is an indentation in the bank at the ground level as evidenced by a "half-moon" shape in the bank above the culvert. At the area of the culvert, the berm is approximately 11 feet and the grassy area beyond the berm is approximately 4 to 5 feet for a total area of 15 to 16 feet of ground. The tractor-trailer in which claimants were riding is approximately 8 feet in width.

Claimants contend that the bank at the area of the culvert gave way beneath the weight of the trailer when claimants were parked on the berm of Route 60 causing the rig to go over the mountain.

There is some confusion in the record as to exactly where the tractor-trailer went over the mountain. However, the Court is of the opinion that there was no evidence to support claimants' theory that the bank gave way beneath the weight of the trailer in the area of the berm and grassy area where the culvert is located. There were many photographs in evidence, as well as testimony from a law enforcement officer who was at the scene. No part of the shoulder or gravel area (the actual berm) had eroded, broken down or caved in any manner, but it is evident from the photographic exhibits that the berm sloped away from the paved portion of the road. The edge of the mountain does not appear to have broken away. To the contrary, it appears that the read right tires of the trailer may have been off the stabilized area, too close to the edge of the grassy area, and the rig, which weighed 75,000 or 76,000 pounds, tipped over the edge of the mountain of its own momentum. There was an area beyond the surface of the road at least 15 feet in width, and the rig was 8 feet in width. The berm area was wide enough in and of itself at a width of 11 feet to accommodate the tractor-trailer, and claimant, George Meisenhelder, would not have had to park the tractor-trailer on the grassy area beyond the berm. Therefore, the tractor-trailer would not have been near enough to the bank to tip over unless the rig was parked in the grassy area and at the edge of the bank.

The law of this Court in berm bases has been very consistent. Where a claimant uses the term of the road in an emergency situation, he may be entitled to recover damages if the berm is not maintained property by respondent. See *Blankenship v. Dept. of Highways,* 14 Ct.Cl. 194 (1982) and *Cecil v. Dept. of Highways,* 15 Ct.Cl. 73 (1984). Where a claimant proceeds onto the berm of his own accord, he takes the berm in the condition he finds it. See *Sweda v. Dept. of Highways,* 13 Ct.Cl. 249 (1980) and *Cole v. Dept. of Highways,* (Opinion issued Jan. 17, 1986). In the claim herein, claimants proceeded onto the berm by choice. There was no emergency. The Court is of the opinion that the berm on Route 60 at the location of the accident herein was maintained properly by respondent.

There being no finding of negligence on the part of the respondent, the Court is of the opinion to, and does, deny this claim.

Claim is disallowed.

OPINION ISSUED AUGUST 10, 1990

CHARLES WINKLER, SR.
VS.
DEPARTMENT OF PUBLIC SAFETY

(CC-90-168)

Danny Elmore, Attorney at Law, for claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover the amount agreed to in a Consent Decree entered into by claimant and respondent in an action in the United States District Court for the Southern District of West Virginia.

The respondent admits the validity of the claim and that the amount agreed to by the parties in the Consent Decree was $35,000.00. Respondent has not paid the amount indicated in the Consent Decree to the claimant.

In view of the foregoing, the Court makes an award to the claimant in the amount of $35,000.00.

Award of $35,000.00.

OPINION ISSUED OCTOBER 15, 1990

JOE O. BALDWIN AND ELAINE BALDWIN
VS.
DEPARTMENT OF HIGHWAYS

(CC-89-466)

Claimant appeared in their own behalf.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to their 1985 Lincoln Town Car which occurred when the automobile struck a hole on U.S. 52 near Steptown in Wayne County. This incident occurred on November 3, 199, when claimant Elaine Baldwin was operating the automobile. She had been to a doctor's office in Huntington and she was proceeding home to Matewan, West Virginia, when her automobile struck a razor edge hole in the break of the pavement. The two right tires were damaged, including the wheels and rims for a total amount of $779.20 in damages. Claimant received compensation from her insurance company for these damages less the deductible

of $200.00.

Claimant Mrs. Baldwin described the hole as being approximately three feet in length and "deep". The hole was located on the right side of the southbound lane "within the road limit." After the automobile struck the hole, claimant stopped her automobile and waited for assistance. Her daughter and grandson were passengers. No one was hurt in the incident.

Respondent's assistant maintenance engineer for District 2, Earl David BlevinsVS, testified that U.S. Route 52 is a heavily traveled coal haul road. Respondent's employees constantly repair holes on this road with hot mix, but the patch material comes out almost as fast as it is placed. He explained that the "heavy loads definitely contribute and any flaw in the structural integrity of the roadway base under the hot mix moisture infiltrating that base." Holes in the payment are a regular ongoing problem for this highway.

The Court, having reviewed the evidence in this claim, is of the opinion that respondent had constructive notice of the hazard on the highway. This particular hole was large and was in the traveled portion of the highway. Respondent's employees are aware that the highway has a propensity to develop holes in the pavement. Respondent has a duty to maintain the highways with known traffic problems more carefully. Therefore, the Court has determined that claimants are entitled to an award.

Claimant received compensation for their damages from their insurance, less their deductible of $200.00. Therefore, the Court makes an award in the amount of $200.00.

Award of $200.00.

OPINION ISSUED OCTOBER 15, 1990

BICKLEY, JACOBS & BARKUS,
VS.
HUMAN RIGHTS COMMISSION

(CC-90-79)

Robert D. Jacobs, Attorney at Law, for claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,200.00 for legal services provided respondent. The invoice for the services was not processed for payment in the appropriate fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that sufficient funds were expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,200.00.

Award of $1,200.00.

OPINION ISSUED OCTOBER 15, 1990

TRUDY L. CORR
VS.
DIVISION OF HIGHWAYS
(CC-90-161)

Claimant appeared in here own behalf.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On March 15, 1990, claimant was operating her 1983 Chevrolet Chevette on Route 50 in Parkersburg, West Virginia, when the vehicle struck a hole in the pavement with a couple of bricks sticking up which caused damages to her vehicle. The total amount of her claim is $589.27, which includes repairs to the exhaust system of the vehicle and $80.00 in lost wages for the two days of work claimant lost while the vehicle was being repaired.

Claimant described the scene of the incident as follows. Claimant was at a multi-street intersection. She was watching for traffic from the other streets as she turned right onto Staunton Avenue (Route 50). As there was oncoming traffic approaching from Seventh Avenue, she stayed to the right on Staunton Avenue. Her vehicle struck the hole as soon as she had competed her turn. She did not observe the hole prior to coming upon it.

Respondent alleges that the hole at this location was not in the travel portion, but rather in a parking lane. Paul F. Reese, an employee of respondent, testified that the scene of the incident is in an area where heavy trucks come around a curve and "push the bricks up out of place." He stated that he was personally aware of the hole, but repairs were not made as the area was not in the driving lane. He was of the opinion that vehicles had room in the lane to avoid this hole.

The Court, having reviewed the evidence in this claim, is of the opinion that respondent had actual knowledge of the hazard which caused the damages to claimant's vehicle, and was negligent in failing to make timely repair of the street in question.

The Court is of the opinion to and does make an award to claimant in the amount of

$341.78 for lost wages and the damages to her vehicle attributable to this incident.

Award of $341.78.

OPINION ISSUED OCTOBER 15, 1990

VIRGIL O'NEAL
VS.
DIVISION OF HIGHWAYS

(CC-90-178)

Claimant appeared in his own behalf.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover $98.57 for damage to a tire on his automobile which occurred when the tire struck a jagged edge of pavement on W.Va. Route 60 at Rand, West Virginia. Claimant testified that he was proceeding west on W.Va. Route 60 on March 13, 1990, when an oncoming vehicle crossed the centerline into his lane of travel. Claimant drove to the right to avoid the oncoming vehicle at which point the tire of his automobile struck the jagged edge of pavement.

The Court is of the opinion that respondent had constructive notice of this defect. U.S. Route 60 is a heavily traveled main artery in Kanawha County. Claimant was placed in the position of having to proceed to the right. The edge of the highway was not property maintained. The Court finds respondent was negligent in its maintenance of this portion of the highway. For this reason, the Court makes an award tot he claimant in the amount of $98.57.

Award of $98.57.

OPINION ISSUED OCTOBER 15, 1990

JAMES D. WEINSTEIN
VS.
DIVISION OF CORRECTIONS

(CC-90-236)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $150.00 for medical services provided a resident of the Industrial Home for Youth, a facility of the respondent. The invoice for the services was not processed for payment in the appropriate fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that sufficient funds were expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $150.00.

Award of $150.00.

OPINION ISSUED NOVEMBER 15, 1990

BLANCHE OSBORNE AND ARTHUR OSBORNE
VS.
DIVISION OF HIGHWAYS

(CC-90-185)

Claimants represent selves.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action to recover damages to personal property which was damaged as the result of flooding on their property. The claimants and respondent entered into a stipulation of the facts and circumstances which gave rise to this claim.

Respondent placed a certain pipe contiguous to claimants' property representing that the temporary pipe would be adequate to contain the flow of water from a creek adjacent to claimants' property.

The temporary pipe was inadequate, and a flood occurred on claimants' property on October 17, 1989, causing damage to two lawn mowers.

Respondent admits that it was negligent in placing an inadequate temporary pipe and, further, respondent agrees that full and just compensation for all damages was $818.00.

The Court, having reviewed the facts and circumstances of this claim, makes an

award to the claimants in the amount of $818.00.

Award of $818.00.

OPINION ISSUED NOVEMBER 17, 1990

MARY SWIM
VS.
DIVISION OF HEALTH

(CC-83-136)

John R. Mitchell, Attorney at Law, for claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover for personal injuries which she received when she fell in the corridor of Pinecrest Hospital, a facility maintained by the respondent.

Counsel for the parties submitted an agreed stipulation as to the facts and amount of the claim as follows:

Claimant sustained personal injuries when she was visiting Pinecrest Hospital. She was walking in a corridor when she slipped on a pat of butter for which respondent admits that its employees were responsible. As a result of the fall, claimant sustained injuries to her back, sternum, knees, elbow, chin, teeth, and ankle.

The parties have agreed that the amount of $10,000.00 will be fair and reasonable compensation for the claimant in satisfaction of her claim.

The Court, having reviewed the stipulation, is of the opinion to, and does, make an award to the claimant in the amount of $10,000.00.

Award of $10,000.00.

OPINION ISSUED NOVEMBER 21, 1990

COUNTY COMMISSION OF MINERAL COUNTY
VS.
DIVISION OF CORRECTIONS

(CC-89-340)

Lynn A. Nelson, Attorney at Law, for claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

STEPTOE, JUDGE:

Claimant, County Commission of Mineral County, provides and maintains a facility for the incarceration of prisoners who have committed crimes in Mineral County. Some of the prisoners held in the facility are guilty of crimes which require the sentencing of prisoners to facilities provided and maintained by the respondent, Division of Corrections. Claimant brought this action to recover medical payments and the costs of housing for prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the county prison facility for periods of time beyond the date of sentencing order. Claimant contends respondent is liable for these additional expenses not normally incurred by a county.

Respondent contends that the law of custom and usage applies to this claim; that the respondent should not be required to make retroactive payments where respondent did not have prior notice that changes would be incurred; and, that respondent does not have a moral obligation to pay all or any part of this claim.

The claimant herein brought this action in the West Virginia Court of Claims as this Court has jurisdiction conferred upon it by the Legislature as the body created to hear claims against the State or agencies thereof. See West Virginia Code Chapter 14, Article 2, Sections 1-29. This Court has entertained two previous claims against respondent involving the issue of prisoners whose housing and/or medical expenses were incurred by county or by a regional jail. See *Kanawha County Comm'n. v. Dept. of Corrections*, Claim Nos. CC-87-489 and CC-87-724, Unpublished Opinion issued Nov. 28, 1989, and *Regional Jail and Correctional Facility Authority v. Dept. of Corrections*, CC-89-382, Unpublished Opinion issued Jan. 19, 1990.[1] The Court made awards in those claims and appropriations were forthcoming from the West Virginia Legislature to satisfy the awards. Thus, the Court of Claims is the only forum afforded the claimant for the matters in controversy in this claim.

[1]In the Kanawha County Commission claim the Court held that the Department of Corrections was liable to Kanawha County for the housing expenses of prisoners in the county jail after a reprieve by the Governor. The Court of claims referred to the Supreme Court of Appeals decision in *The County Commission of Mercer County v. A. V. Dodrill, Comm'r, Dept. of Corrections, or his named successor,* April 19, 1989. In the Regional Jail Claim the Court of Claims made an award for expenses incurred by the Eastern Regional Jail Authority for housing inmates who were the responsibility of the Department of Corrections. The Department had admitted the validity of the claim in order.

A review of the back ground for this claim is essential. It has been the custom that prisoners indicated for crimes and tried in circuit courts are housed in county prison facilities until the conclusion of the trial, and further, until the sentencing order is entered. The language for the sentencing order, also known as commitment paper, is provided in W. Va. Code 62-7-10. It states, in part, as follows:

> ....It is adjudged that the defendant is hereby committed to the custody of the Warden of the West Virginia Penitentiary (Superintendent of the West Virginia State Prison for Women) or his (her) authorized representative for imprisonment for a period of....
> Conviction Date:
> Sentence Date:
> Effective Sentence Date:
> It is adjudged that .....
> It is ordered that the clerk forthwith transmit this record, duly certified, of the judgement and commitment to the Warden of the West Virginia Penitentiary (Superintendent of the West Virginia State Prison for Women) and that this record serve as .....County,

Claimant herein had a policy of informing the State penal institutions (normally Huttonsville Correctional Center) that it was bringing a prisoner to the facility and, in fact, transported the prisoner to the facility a short time after the sentencing order was entered.[2] This was the custom until an Order was issued by the Randolph County Circuit Court in *Nobles v. White*, Civil Action No. 83-C-249. That Order, entered on August 17, 1987, provided a specific "ceiling" for the number of inmates assigned to Huttonsville Correctional Center at 500 inmates. An Amended Order entered on October 9, 1987, provided a ceiling of 550 inmates and stated that "any deviation from this ceiling of 550 can only be by specific written order of the Court." A slight deviation was permitted by the Court on April 9, 1988, to 553 inmates, but the limit of 550 inmates is in effect as of this date.

The direct result of this Order was to increase prison populations at the county level as those inmates sentenced to State institutions could not be transported by the counties nor the Division of Corrections to Huttonsville Correctional Center, the facility where inmates are transferred for evaluation prior to being placed in other State facilities.

The Court is very concerned with the situation facing the counties and the respondent. The counties are incurring expenses on a daily basis for housing inmates who are actually wards of the respondent, Division of Corrections. The failure of the Executive and Legislative branches of

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[2]This practice varies from county to county. There are other counties which held prisoners for periods up to two weeks before the respondent sent a van to pick up the prisoners and transport them at one time to a State facility.

government to construct new prison facilities created a situation which has ultimately fallen upon the shoulders of the county commissions. The county commissions have no means or authority for coming up with the additional funds needed to provide for housing these inmates. The taxpayers in the counties have been bearing a burden which was certainly unanticipated. This has undoubtedly affected the financial status of some counties more than others. The Executive and Legislative branches of government ultimately created an agency known as the Regional Jail and Correctional Facility Authority. This agency has the authority to institute a bond program for the construction of new prison facilities. See W.Va. Code Chapter 31, Article 20, Sections 1-26. This new agency is now in the process of constructing new prison facilities to resolve the overcrowded conditions which were addressed by the Nobels v. White Order. However, the county commissions have incurred and will continue to incur expenses for housing these inmates until the new prison facilities are completed.

This Court may make retroactive awards only. It does not have statutory authority to make prospective awards. The Court is of the opinion that county commissions are incurring additional expenses for the housing of inmates who would normally be transported to a State facility after the sentencing orders are entered. Claimant herein has held inmates from five days to 339 days beyond the sentencing order date. The average number of additional inmate days is approximately 146 days. The respondent has had the benefit of using claimant's facility and resources for inmates who are by law its responsibility. The Court is of the opinion that this constitutes an unanticipated and significant expense to claimant. These expenses were not contemplated, and claimant did not have the opportunity to provide for these expenses in this budget. It appears to the Court that there is a moral obligation on the part of the State to ease the burden which claimant and the other counties have incurred in order to afford protection to the citizens of the State of West Virginia. For these reasons, the Court is of the opinion that claimant is entitled to a reasonable award for the additional expenses which it has incurred for housing inmates sentenced to a State penal institution.

A determination of the amount of the award is an issue in and of itself. Respondent contends that the amount expended by claimant for the additional inmate days is negligible while claimant contends the award should be based upon its actual expenses of $25.00 per inmate day. For this Court to review every item of expense for each inmate or attempt to calculate the "actual" expense for each additional inmate day would be a most difficult undertaking. The Court, therefore, has determined that, absent a showing that additional personnel were employed for the jail, or that overtime had to be paid to existing personnel, or that there were other extraordinary expenses incurred as a direct result of the State prisoners, a daily rate of $15.00 for each inmate is fair and reasonable to both claimant and respondent at this time. Further, the Court is of the opinion that a two week holding period in a county jail beyond the date of a sentencing order for inmates is also fair and reasonable to both parties. The Court directs the parties herein to calculate a dollar figure based upon the time frame and daily inmate rate established by the Court hereinabove, excluding, however, all days wherein inmates remained in the county as the result of a stay pending appeal or at the request of county officials, and submit the amount to the Court in a written stipulation. The stipulation shall be filed by the parties on or before December 12, 1990.

As to the issue of medical expenses incurred by claimant, the parties are in agreement

that claimant is entitled to an award of $5,181.46. The Court therefore makes a partial award in the amount of $5,181.46 to the claimant.

Partial award: $5,181.46.

OPINION ISSUED NOVEMBER 27, 1990

BETTY J. ZATOR
VS.
DIVISION OF HIGHWAYS

(CC-89-341)

Thomas H. Newbraugh, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover for permanent personal injuries which she received when a bridge railing gave way causing her to fall approximately six feet into a stream bed below a bridge. The incident occurred on Wade's Run Road in Monongalia County. Claimant and respondent stipulated the facts of the claim and liability on part of the respondent.

On January 13, 1988, claimant stopped her automobile on a bridge on Wade's Run Road. She departed the automobile to deposit a letter in her mailbox. She was returning to her automobile when she heard a noise behind her and turned around. She took hold of the bridge railing for balance as the roadway and bridge were covered with ice. The bridge railing gave way causing claimant to fall. The bridge railing gave way as it was in a rusted condition. claimant fell approximately six feet into the stream bed below the bridge. She suffered severe and permanent injuries to her left hand.

Claimant and respondent stipulated that claimant is entitled to recover $2,250.00 as a result of this incident.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $2,250.00.

Award of $2,250.00.

OPINION ISSUED DECEMBER 19, 1990

ALPINE FESTIVAL, INC.
VS.
DIVISION OF CULTURE AND HISTORY

(CC-90-374)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General,
for respondent.

PER CURIAM:

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

Claimant seeks $4,282.83 for full and final payment of a grant expended to promote tourism. The respondent has not paid the claimant for same. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $4,282.83.

Award of $4,282.83.

OPINION ISSUED DECEMBER 19, 1990

COUNTY COMMISSION OF MINERAL COUNTY
VS.
DIVISION OF CORRECTIONS

(CC-89-340)

Lynn A. Nelson, Attorney at Law, for claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, County Commission of Mineral County, provides and maintains a facility for the incarceration of prisoners who have committed crimes in Mineral County. Some of the prisoners held in the facility are guilty of crimes which require the sentencing of prisoners to facilities provided and maintained by the respondent, Division of Corrections. Claimant brought this action to recover medical payments and the costs of housing for prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the county, these prisoners

have had to remain in the county prison facility for periods of time beyond the date of the sentencing order.

The Court previously determined in an opinion issued November 21, 1990, that a daily rate of $15.00 for each inmate is fair and reasonable to both claimant and respondent at this time, and directed the parties to calculate a dollar amount based upon the time frame and daily inmate rates of $15.00 excluding, however, all days wherein inmates remained in the county as a result of county officials and a two week holding period beyond the date of a commitment order.

Pursuant to the opinion, the parties filed a stipulation based upon 2,638 inmate days of $15.00 per day which equals $39,570.00.

In view of the foregoing, the Court makes an award to claimant in the amount of $39,570.00.

Award of $39,570.00.

OPINION ISSUED DECEMBER 19, 1990

FLORENCE DIMMICK
VS.
DIVISION OF HIGHWAYS

(CC-87-712)

Larry L. Skeen, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

HANLON, JUDGE:

Claimant seeks $500,000.00 in a wrongful death action. Her husband, John R. Dimmick, died as the result of an accident which occurred on December 20, 1985. Claimant alleges that respondent was negligent in that having been notified, prior to the accident, of the existence of a hazardous condition at the accident site, the respondent took inadequate precautionary measures to warn the traveling public of the danger.

The claimant and her late husband were traveling north in their 1981 Ford Ranger truck on Interstate 77 just south of the Ripley/Route 33 Interchange. Mr. Dimmick was driving. After having ascended a hill, the Dimmicks started down a long straight stretch of roadway, which unbeknown to them, was icy. Mr. Dimmick lost control of his pickup and it turned over. Neither party was seriously injured, and they exited their vehicle and joined others on a nearby hill. Mr.

Dimmick decided to return to his vehicle to secure his heart medicine and some other items. Another vehicle, a 1984 Chevrolet S-10 truck driven by Lewis Wayne Davis, slid down the hill and crashed into the claimants' overturned truck striking Mr. Dimmick between the two vehicles. Mr. Dimmick was pronounced dead at Jackson General Hospital.

Several employees of respondent testified concerning respondent's highway operations on December 20, 1985. Mr. James Vernon Kiser, maintenance crew supervisor for respondent, testified that the department's records established that the road was treated with salt three times on the day of the accident. Treatment commenced at 7:00 a.m. and concluded at 8:50 p.m. The records indicated that five tons of salt were placed on the section of highway between the Ripley and Fairplain Interchanges.

Charles Taylor, an Operator II for respondent, operated a truck and spreader on the accident date. He stated that the spreader broke down at milepost 137 which was at the top of the hill, south of the accident. He testified that the road was becoming slick when he went over the hill. It took approximately one hour to repair the spreader. Mr. Taylor then returned to the place on the highway where the spreader had broken down and proceeded to treat the hill. He stated that he had observed no accidents at the time, although he did recall seeing claimant's vehicle. Mr. Taylor stated that he did not notify the police that the road was becoming slick.

Deputy Sheriff Grover Anderson, the investigating officer of the accident, described what he observed. He stated that before coming from Fairplain, the road was wet. Then, as a driver cleared the top of the hill, ice was present which was not visible to the driver. "It still looked like it was a wet road, but it was a glare of ice, ..." The Dimmick truck hit the ice, slid off the highway, and struck the guardrail and turned over. The Davis Chevy S-10 truck likewise struck the ice, slid off the road stroking the Dimmick truck, and came to rest approximately 1/3 on top of the Dimmick truck which was on its top against the guardrail. Mr. Dimmick was pinned between the two trucks, according to Mr. Anderson.

The driver of the other truck, Lewis Wayne Davis, gave his version of the accident. He and his wife and two sons were going to Marion, Ohio, on vacation. They had come from their residence in North Carolina, and were traveling north on Interstate 77. Rain had developed at approximately 4:30 p.m. on the afternoon of December 20, 1985. They noted the presence of a fire truck, and Mr. Davis lowered his speed. His truck started to slide when it reached the crest of the hill. In an attempt to curtail the slide, he tapped his brake. This was unsuccessful and the vehicle slid sideways. He noted a man standing beside a truck, but he did not see Mrs. Dimmick. The left read of his truck hit the Dimmick truck. The Dimmick truck was upside down, and Mr. Davis' truck struck the rear of the driver's side of the Dimmick truck. He noted that his vehicle slid in the same groove in which the Dimmick vehicle had slid. He described the roadway as being "solid ice."

Mrs. Dimmick stated that the Davis truck struck her from her right side and knocked her to the pavement. She testified that she was standing near the front of her truck and that the Davis truck hit the Dimmick truck with enough force to move it. She came to this conclusion because Mr.

Dimmick was underneath his own truck after the accident. Her recollection of the events differs in some respect with Mr. Anderson's account of the accident.

While the Court sympathizes with the claimant's plight in the loss of her husband, it is unable to establish negligence on the part of the respondent. Although there are discrepancies in the accounts of the accident, there is no disagreement that there was an unusually icy condition present on Interstate 77. The record indicates that the road in question had been treated on the day of the accident.

The respondent was treating the condition in its ordinary manner when Mr. Taylor's spreader broke. As a result, this particular section of highway was untreated for approximately one hour. There is no evidence to indicate that this breakdown was the result of negligent equipment maintenance or that the repairs were not accomplished as quickly as possible.

The only possible negligence shown was the failure of Mr. Taylor to advise his supervisor or someone in authority to close the highway until the conditions could be corrected. However, it must be noted that Trooper Bright, who was patrolling the highway and eventually closed it, testified:

> "It was just in a matter of a few minutes when the rain hit, the hill was -- people were traveling coming down the hill without any problem at all, and then just all of a sudden the temperature dropped or the ice started sticking on the road or whatever. It wasn't something that built up. It was just, boom, it was slick, and there wasn't any warning."

Under the extraordinary circumstances which existed, the Court finds no negligence in respondent's conduct, and for that reason, the Court is of the opinion to, and must, deny the claim.

Claim is disallowed.

Judge Baker and Judge Steptoe did not take part in the hearing or decision of this claim.

OPINION ISSUED DECEMBER 19, 1990

RODNEY SHAWN JOHNSON
VS.
DIVISION OF HIGHWAYS

(CC-90-170)

Claimant appeared in his own behalf.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant was involved in a single vehicle accident on February 16, 1990, on Madison Creek Road in Cabell County, West Virginia. He was driving his 1989 B2600 Mazda pick-up truck proceeding north when the vehicle went into a hole on the right side of the road. His vehicle overturned into Madison Creek. Claimant sustained personal injuries and loss of wages. The vehicle, which was totaled, was covered by his insurance company. Claimant's medical expenses were also paid for him by his insurance. The Court has reviewed the record in this claim and has made the following findings of fact and conclusions of law.

Findings of Fact

Madison Creek Road is a narrow, paved, two-lane road which is owned and maintained by respondent.

This road had a significant but unmarked break in the pavement.

Claimant was unfamiliar with this section of Madison Creek Road.

When claimant's vehicle struck the break in the pavement, he lost control of his vehicle and went over the embankment. Claimant sustained personal injuries as a result of the incident.

The accident occurred between 7:30 and 8:00 p.m. at which time it was "pretty much dark", according to the claimant.

There were no warning signs at the break of the pavement.

Although respondent contends that it did not have notice of the defect on Madison Creek Road until four days after claimant's accident, respondent's employees passed the break in the pavement in the course of salting operations during the winter months.

The evidence established that the break in the pavement had existed for an appreciable time prior to this incident.

Conclusions of Law

Respondent had constructive notice of the break in the pavement on Madison Creek Road.

There were no warning signs placed at the break in the pavement to afford the traveling public an opportunity to avoid the hazard.

Respondent, having had constructive notice of the defect on Madison Creek Road,

was negligent in its maintenance of the road and this negligence was the proximate cause of claimant's accident.

Claimant was not negligent in the operation of his vehicle.

Claimant's damages for work loss are in the amount of $1,615.36.

Claimant sustained personal injuries for which he seeks compensation for pain and suffering in the amount of $1,384.64.

In view of the foregoing, the Court makes an award to claimant in the amount of $3,000.00.

Award of $3,000.00.

OPINION ISSUED DECEMBER 19, 1990

J. DON MCCLUNG
VS.
ALCOHOL BEVERAGE CONTROL ADMINISTRATION

(CC-90-381)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $76.80 for reimbursement of travel expenses incurred by him as an employee of respondent. The respondent has not paid the claimant for same. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $76.80.

Award of $76.80.

OPINION ISSUED DECEMBER 19, 1990

LYNE RANSON
VS.
ETHICS COMMISSION

(CC-90-348)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $2,037.50 for legal services provided respondent. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $2,037.50.

Award of $2,037.50.

OPINION ISSUED DECEMBER 19, 1990

RES-CARE, INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

(CC-90-369)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $182,299.45 for managerial services provided the Colin Anderson Center, a facility of the respondent. The respondent has not paid the claimant for the services. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $182,299.45.

Award of $182,299.45.

OPINION ISSUED DECEMBER 19, 1990

SAINT ALBANS PSYCHIATRIC HOSPITAL
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

(CC-90-314)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $18,560.00 for hospital care and medical services provided a client of the respondent. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $18,560.00.

Award of $18,560.00.

OPINION ISSUED DECEMBER 19, 1990

BARBARA A STEINKE
VS.
ATTORNEY GENERAL
(CC-90-376)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of

Claim and the respondent's Answer.

Claimant seeks $381.75 or court reporting services provided respondent. The respondent has not paid the claimant for the services. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $381.75. Claimant's request for interest is disallowed pursuant to W.Va. Code .14-2-12.

Award of $381.75.

OPINION ISSUED DECEMBER 19, 1990

BONNIE H. WOODY
VS.
DIVISION OF HIGHWAYS

(CC-89-140)

David P. Hawkins appeared for claimant.
Jeff Miller, Attorney at Law, for respondent.

PER CURIAM:

Claimant Bonnie H. Woody seeks $151.62 for property damage she incurred as the result of an accident on April 6, 1989. The Court amended the style of the claim to reflect Bonnie H. Woody, titled owner of the vehicle, as the proper party claimant. Claimant alleges negligence on the part of the respondent due to a poorly marked area of highway in which her vehicle struck a hazardous hole.

Claimant's son, David P. Hawkins, was operating claimant's 1981 American Motors Eagle in the south bound lane of U.S. Route 250 on April 6, 1989, at approximately 4:00 p.m. Mr. Hawkins testified that it had rained that day. He was proceeding toward Fairmont at approximately 25 miles per hour when the vehicle struck a water-filled hole. The hole was located on the berm and extended eight to twelve inches into the road. He estimated the hole to be six to eight inches deep. A piece of metal similar in appearance to a cable protruded from the hole. Since three oncoming vehicles were traveling in the opposite direction, Mr. Hawkins was unable to avoid striking the hole. He then removed claimant's car from the traffic lane of the highway and reported the hazard to the respondent. No warning signs were present on U.S. Route 250, according to Mr. Hawkins. Damage was done to the right front and right rear tires of claimant's vehicle, and it was necessary to have the vehicle towed back into Fairmont.

The Court has carefully considered the record, and has determined that a piece of metal or a similar material was present in the hole on U.S. Route 250. The State had constructive knowledge of a hazardous road condition, and failed to respond to that hazard appropriately. In addition, the State failed to warn travelers of the hazardous condition. Therefore, the Court makes an award to the claimant in the amount of $151.62.

Award of $151.62.

Judge Steptoe and Judge Baker did not participate in the hearing or the decision of this claim.

OPINION ISSUED JANUARY 4, 1991

L. G. DEFELICE, INC.
VS.
DIVISION OF HIGHWAYS

(CC-85-388)

Jack M. Quartararo, Michael T. Chaney, William W. Lanigan, Stanley E. Deutsch, Michael J. Delgiudice, and Timbera Carte, Attorneys at Law, for claimant.
Robert F. Bible, Attorney at Law, for respondent.

STEPTOE, JUDGE:

L. G. DeFelice, Inc., claimant contractor, entered into a contract with respondent for the construction of a section of the West Virginia Turnpike also known as Kanawha County Project No.ID-77-2 (37) 71. The contract was awarded to claimant L. G. DeFelice, Inc. (hereinafter to be referred to as DeFelice) on August 13, 1979, for upgrading a section of the West Virginia Turnpike from the existing two lanes to a four-lane highway. The project involved heavy excavation, the construction of two bridges, and concrete payment. The construction area was mountainous on the north end, involving blasting operations for excavation, while the south end of the project consisted of fill areas. The project had a considerable amount of excess excavation which had to be wasted.

The claim has seven causes of action. The first four causes of action are on behalf of the prime contractor, DeFelice. The fifth cause is on behalf of the subcontractor Atlas Machine and Iron Works, Inc. The sixth cause of action is on behalf of the subcontractor Norther Systems, Inc. The seventh cause of action is on behalf of the subcontractor the Vaughn Building Co., which cause of action was withdrawn and dismissed by the Court at the beginning of the hearing of this claim. The total amount of the claim as brought by DeFelice is in the amount of

$539,238.89. The Court has determined that each cause of action shall be considered and decided

separately.

FIRST CAUSE OF ACTION

This claim is for interest on the final payment by respondent. Both parties have agreed that the amount of $976.14 is due and owing to DeFelice pursuant to West Virginia Code Chapter 14, Article 3, Section 1. The Court accordingly makes an award to DeFelice in the amount of $976.14.

SECOND CAUSE OF ACTION

This claim is for delay expense incurred by DeFelice due to the alleged interference with and obstruction of its normal construction operations, by respondent's having ordered a change in claimant's blasting schedules.

Site preparation involved the blasting and removal of large quantities of rock and surface and sub-surface material in the northern part of the project area, and transporting it to the southern part of the project area, where it was to be used as fill material.

It appears from the evidence that DeFelice devised a blasting sequence involving three shots per working day, with intervals of about three hours between shots. Such an interval was required for removing random rock falling on the existing turnpike, setting up and taking down temporary barricades, loading and removal of the blasted material, and, principally, for moving blasting equipment from one site, after use, to the next site, and setting it up for the next blast, all in difficult terrain. The system was efficient, and no criticism of it appears to have been made by the respondent.

It further appears from the evidence that, on or about the 22nd day of April, 1980, the respondent, apparently at the insistence of the West Virginia Turnpike Commission which felt that traffic on the existing two-lane turnpike was not moving as briskly as it should, ordered DeFelice to conduct blasting only on even hours of the working day; that DeFelice could not prepare for a succeeding blast in a two-hour period, and was forced to blast at four-hour intervals, and consequently lost production; that by October of 1980 the contractor was some 13% behind in its projected blasting and site preparation schedule; consequently it elected, in order to get back on schedule, to continue blasting and hauling operations during the winter months of December, 1980, and January, February and March of 1981, a period during which all construction operations were usually suspended.

DeFelice contends that respondent's unilateral change of its blasting procedures on or about April 22, 1980, caused it, DeFelice, to be delayed in its performance, and that the delay resulted in extra expense to DeFelice in the amount of $86,356.05. The respondent, the Division of Highways, correctly points out that the respondent had a contractual right to take measures to protect traffic on the existing Turnpike and that the order revising the timing of explosions was a lawful exercise of such right for the protection of the Turnpike, and its revenues, and for the convenience

of its customers. Be that as it may, the respondent, in exercising its right, made it more expensive for the contractor to perform its duties under the contract.

It is a necessary implication of every contract with promises binding each party that neither will interfere to prevent performance by the other.

17 Am.Jur.2d 899, Contracts §442.

A building contractor may recover damages sustained by him resulting from unreasonable delay on the part of the owner in permitting him to perform his contract.

See *Atlantic Coast Line R. Co. v. A. M. Walkup Co.,*
132 Va. 386, 112 S.E. 663 (1922)

In a contract action where one party has been wronged and has a number of remedies, he may select the most efficient one.

Cochran v. Ollis Creek Coal Company, 157 W.Va. 931,
206 S.E.2d 410 (1974).

The DeFelice claim consists of:

$51,044.20 for labor,
$ 8,750.48 for equipment expenses,
$10,394.73 for materials used, and,
$7,166.64 for a total of $86,356.05.

The Court finds from a preponderance of the evidence that respondent unreasonably delayed DeFelice in the performance of its duties specified in their contract, and that DeFelice is entitled to recover, in the second cause of action, the sum of $51,044.20, for labor delay, and $8,750.48 for equipment expense delay.

The Court further finds that DeFelice has not proved by a preponderance of the evidence a loss of materials due to the delay caused by the respondent.

The Court disallows that portion of the claim designated as an overhead item, upon the ground that the claim is conjectural and speculative.

See *State ex rel. Shatzer v. Freeport Coal Co. et. al.,*
144 W.Va. 178, 107 S.E.2d 503 (1959).

Accordingly, the Court makes an award to DeFelice, on the second cause of action, in the amount of $59,794.68.

THIRD CAUSE OF ACTION

This claim, by DeFelice against the respondent, the Division of Highways, is for delay expense incurred early in the construction period, due to the alleged failure of the respondent to provide a right-of-way for the use of the contractor in hauling, by truck, blasted rock and other surface and subsurface material, from the northern part of the construction area to the southern portion, for use as fill material.

In the contract between DeFelice and the respondent, the latter was required to provide for necessary access to construction areas and necessary rights-of-way for haulage. There were no roads available except the West Virginia Turnpike, which was used by various vehicles, including ten-wheeler trucks of coal haulers and which the contracting parties apparently assumed could be used by the ten-wheel trucks of the contractor in hauling blasted materials and concrete and aggregates for use in the project. At a pre-construction conference on August 20, 1979, however, representatives of the West Virginia Turnpike Commission appeared and announced that DeFelice would not be permitted to haul blasted rock and other materials, by ten-wheelers, over a bridge crossing Paint Creek near Station 1370, between the loading and dumping areas, and opined that such a use would result in traffic deaths. It appears from the evidence, however, that trucks of the same size, carrying coal, and other trucks of the same size operated by DeFelice in transporting cement and aggregates, were permitted to use the bridge.

In order to obtain a haulage-way, DeFelice negotiated with Eastern Associated Coal Corporation for a right-of-way on the latter's abutting land, and with CS Corporation for a right-of-way across its railroad property, and built a new haulage road, with a new temporary bridge across Paint Creek, near Station 1370. The delay was approximately four months.

The Court finds from the evidence that the construction area, including the area for drilling and blasting, was land-locked; that it was a condition of performance by DeFelice that DeFelice have a right-of-way for its use in hauling rock and other blasted materials from one section of the project to the other; that respondent failed to provide such a right-of-way; that performance by DeFelice was impossible without such a haulage; that DeFelice, on its own initiative and at its own expense, obtained rights-of-way and constructed a haulage road considerable longer than that by the Turnpike, for the sole purpose of transporting blasted materials from the northern section of the construction area to the southern end, as required by the contract; and that DeFelice incurred additional expense as a result of the delay.

A building contractor may recover damages sustained by him for loss resulting from unreasonable delay on the part of the owner in permitting him to perform his contract.

Atlantic Coast Line R. Co. v. A. M. Walkup Co., supra
See also *McDonald V. Cole et. al.*, 46 W.Va. 186,
32 S.E. 1033 (1899).
17 Am.Jur.2d 899, *Contracts* §422.

The Court finds from the evidence that DeFelice incurred additional expense for which it was not compensated under the contract between the parties as the result of the respondent's having failed to provide DeFelice with a haulage-way for the transportation of blasted material, and that its damages consist of $24,024.80 for labor, $24,372.33 for equipment, $18,081.33 for materials and rights-of-way, and $15,264.60 for constructing the haul road and temporary bridge across Paint Creek, for a total of $81,743.06.

No award is made for home office overhead of DeFelice as the Court considers such element of the claimed damages to be speculative and conjectural.

The Court makes an award to DeFelice, on the third cause of action, in the amount of $81,743.06.

THE FOURTH CAUSE OF ACTION

Over the Memorial Day weekend one night's heavy rain caused extensive damage to a partially constructed segment of the new highway north of the Paint Creek Bridge near Station 1370. The rainfall, for this period from Saturday morning to Tuesday morning, was something between 3.55 inches and 6.0 inches, according to unsatisfactory evidence on the subject.

Since restoration required extra work, for which the contractor was required to give advance notice to the respondent, DeFelice duly notified the respondent by letter dated June 7, 1982, that extra work would be required for which it would seek extra compensation. The restoration was duly completed according to original plans and specifications, and DeFelice seeks compensation for the extra work in the amount of $84,238.00.

On the question of who should bear the risk of damage to work under construction under a building contract, i.e., whether the contractor (in this case DeFelice) or the owner (in this case, the Division of Highways), the general rule is:

> One who contracts absolutely or unqualifiedly to erect a structure for a stipulated price, in other words, enters into an entire or indivisible occasioned by the accidental destruction or damage of the building before completion...the contractor is not excused from his duty to perform where the partially erected building is injured or destroyed by fire, an act of God, such as lightning, violent or unusual storms, tornadoes or other like disturbances .....
> 13 Am.Jur.2d 67,68, *Building and Construction Contractors* §64.

Whether a contract is entire or severable is a determination to be made by the Court in this State, in accordance with requirements specified in *L.D.A., Inc. v. Cross*, 167 W.Va. 215, 279 S.E.2d 409 (1981). After consideration of the evidence in this case, this Court is of the opinion that the contract between DeFelice and the Division of Highways is an entire or indivisible contract for the construction of highway segment, for a set price.

DeFelice maintains, however, that the general rule is inapplicable because the parties,

in their contract, have otherwise stipulated as to risk of damage to or destruction of work in progress, citing Standard Specifications Roads and Bridges Adopted 1978, Provision 107.16, which reads as follows:

> Until Final written acceptance of the project by the Engineer, the Contractor shall have the charge and care thereof and shall take every precaution against injury or damage to any part thereof by the action of the elements, or from any other cause, whether arising from the execution or from the nonexecution of the work. The Contractor shall rebuild, repair, restore, and make good all injuries or damages to any portion of the work occasioned by any of the above causes before final acceptance and shall bear the expense thereof except damage to the work due to unforeseeable causes beyond control of and without the fault of or negligence of the Contractor, including but not restricted to acts of God, of the public enemy or governmental authorities.

DeFelice relies upon the exception contained in the above Specifications which relate to acts of God, and contends that it was without fault and that the heavy rain was an act of God.

The contractor, it may be seen from Provision 107.16, supra, must bear the expense of damage to or destruction of work in progress by a heavy rainfall, if such a rainfall was foreseeable.

It appears from the evidence that the rainfall which immediately preceded the damage to work in progress was heavy, but probably not of extraordinary duration or otherwise remarkable; that the construction activity in the immediate vicinity of the damage, with steep slopes, and much rock and disturbed surface, probably prevented normal percolation of the rain; that the work was in progress was in a narrow passage, with inadequate surface and subsurface drains; and that in a relatively short period water accumulated above the construction area, and that the surface water, by force of gravity, and having no other place to go, rushed into the choke area and severely damaged the work in progress. We find that there was a potential for a large amount of damage from precipitation which did not approach being a **force majeure** or act of God, and which this Court believes to have been reasonably foreseeable.

Our finding of foreseeability is re-enforced by the circumstance that at some time before this washout (the record not reflecting the exact date) less extensive damage to work in progress on the same job was done by surface water following precipitation of less intensity and volume, and that damage was repaired or replaced by DeFelice at its own expense, without making claim for extra work.

The extra work for which this claim is made having resulted from events which, in the attendant circumstances, were reasonably foreseeable, the fourth cause of action is denied.

FIFTH CAUSE OF ACTION

The fifth cause of action is the claim of the steel fabrication subcontractor, Atlas Machine and Iron Works, Inc., hereinafter referred to as Atlas. The steel for the bridges on this

project were fabricated from the summer of 1980 through the early spring of 1981 by Atlas at its plant in Gainsville, Virginia. Atlas alleges that respondent's inspectors required work to be done which exceeded the standards imposed by the specifications, and that the extra work caused a delay which impacted all of the operations at the plant. The delay was quantified by Atlas as a total of 6.8 days. The girders for the bridges being fabricated for this project were welded plate girders. These girders necessitated welds for the flanges to the web. The girders were then blast-cleaned to remove mill scale (impurities on the steel). Atlas contends that respondent's inspectors required a "near white metal blast" which exceeded the specifications requiring a "near white metal blast." The procedures followed were to run the girders through a wheelabrator which shot the girders with BB type shot. The girder was then inspected for mill scale and the welds were inspected. Atlas contends that to achieve the "white metal blast" required by the inspector it was necessary to run the girder through the wheelabrator for a second time causing delay for the other girders. Respondent's lead inspector testified that it was Atlas' normal procedure to quickly blast each girder, then have the welds inspected and repaired, if necessary, and then run the girder through the wheelabrator a second time more slowly to achieve a complete cleaning of the mill scale. This was the normal procedure selected and determined by Atlas' personnel.

After the cleaning process, the girder was then ready for the edges to be broken. Atlas claims that respondent's inspectors required a radius on all edges of the steel being fabricated. To radius an edge requires work by hand which is labor intensive. Respondent contends that edges were normally not required to be radiused, only broken. The Specifications refer to "break the edges" not "radius the edges."

The next stage in the fabrication process required the girders to be spray painted with an organic zinc system of four mils in thickness. Atlas contends that respondent's inspectors required an over sprayed areas to be hand sanded and resprayed with paint to meet the specifications. Respondent contends that over sprayed areas were required to be sanded but not repainted.

Atlas also put forth a claim in the amount of $969.55 for disruption of cash flow when it was not timely paid for work accomplished. The evidence established that invoices for work not approved by respondent's shop inspector were indeed not processed for payment by respondent when presented, but were subsequently approved after having been approved by respondent's shop inspector and presented for payment. Therefore, this portion of the Atlas claim is denied by the Court.

This Court has previously considered many of the issues of Atlas' present claim in an unpublished opinion issued January 18, 1988, *S. J. Groves and Sons, Company, for the Benefit of Atlas Machine and Iron Works, Inc. v. Dep't of Highways,* Claim Nos. CC-82-295 & CC-83-233. The Court denied the claims based upon over spray and for the radius of edges, but allowed recovery for removal of mill scale from snipes. However, the recovery was limited to work performed prior to May 1, 1980.

In the present claim there was no issue made of the necessity of removal of mill scale from the snipes. The Court is of the opinion to deny the fifth cause of action in its entirety as the

problems confronting Atlas in fabricating steel for West Virginia were resolved by May 1, 1980. The steel girders being fabricated for the bridges on this project were not due for delivery until September 1980. Therefore, the Court is of the opinion to and does deny the claim of Atlas.

SIXTH CAUSE OF ACTION

The sixth cause of action was brought on behalf of the subcontractor Northern Systems, Inc., which company was responsible for drilling and grouting the rock anchors for two retaining walls adjacent to the mountain. During construction of the project Northern experienced financial problems. As a result of these problems Northern's bonding company, Indemnity Insurance Company, to be hereinafter referred to as Indemnity, expended certain funds relating to this project. The first issue confronting the Court is the standing of the indemnitor in this claim, i.e., does the bonding company of a subcontractor have the same rights and interests as the subcontractor? The doctrine of collateral estoppel was also raised by respondent as there had been a related lawsuit in Kanawha County Circuit Court wherein Northern was defendant and Indemnity satisfied certain judgments against Northern. Respondent contends that this lawsuit involved the same issue which is the basis of the sixth cause of action, that the issue was resolved by the circuit court action and that, therefore, Indemnity cannot now have the same issue tried again before this Court. The Court must resolve these two issues prior to a consideration of the merits of the claim.

As to the issue of standing, the Court is of the opinion that the surety, Indemnity, has standing in the Court of Claims to present Northern claim just as a casualty insurance company brings actions through its insureds. The Court has determined that collateral estoppel is not a bar to this cause of action inasmuch as the Kanawha County Circuit Court action was brought by Construction Drilling, Inc., to prove and recover damages only. The issue of liability based upon misrepresentations on the part of the respondent herein was not an issue in that action and was not considered by that Court.

Indemnity contends that Northern was unable to perform its contract for DeFelice because the depth of the rock anchors was misrepresented on the plans provided by respondent. Originally, the plans indicated 96 rock anchors but respondent reduced this to 71 rock anchors during construction. Northern was unable to drill certain of the holes as its drilling equipment was inadequate. Construction Drilling, Inc., was brought onto the project by Northern to complete this work. This company was able to perform the drilling necessary as it had the proper drilling equipment. Respondent contends that the plans indicated the depth of the deepest holes accurately and that, therefore, the problems encountered by Northern were directly related to the equipment being used by Northern. The Court agrees with respondent. The Court is of the opinion to deny the sixth cause of action as Indemnity has failed to establish a breach of contract on the part of respondent.

In accordance with the foregoing findings and conclusions, the Court makes awards in the following amounts: first cause of action - $976.14; second cause of action - $59,794.68; third cause of action - $81,743.06, for a total award in the amount of $142,513.88 to claimant L. F. DeFelice, Inc.

Award of $142,513.88.

Judge Baker did not participate in the hearing or decision of this claim.

OPINIONS ISSUED JANUARY 4, 1991

WANITA SOMMERVILLE/STATE FARM FIRE AND CASUALTY
VS.
DIVISION OF HIGHWAYS

(CC-89-374)

Claimant present in person.
James D. Terry, Attorney at Law, for respondent.

HANLON, JUDGE:

On or about January 15, 1989, claimant, Wanita Sommerville, formally complained to respondent about a recurring problem of tar and gravel splashing against her house from a near-by hole in State Route 19, in Clarksburg. Not only did this claimant call respondent, she also visited their District Office in Clarksburg. Claimant identified to the Court both the name of the individual she complained to, and the date and time of such discussion. Respondent, while not maintaining a log or record of such discussions, testified that such conversations "probably occurred.: Although respondent's work records indicate that the hole was repaired with "cold patch" on the 3rd and 17th of January, 1989, such temporary repairs were not effective, and the section of road surface adjoining claimant's house was eventually repaved to remedy the problem. Prior to the repaving however, claimant's house was damaged by the tar and gravel splash, which produced dents and black scars to the aluminum siding of the house. Repair of the described damage cost $265.00. Claimant filed this invoice for repair with her home owners insurance, State Farm Fire and Casualty. The insurance company paid $165.00 of this claim, while claimant requests the return of her $100.00 expenditure, and the insurance company, a co-claimant in this action requests the return of its $165.00 expenditure. These enumerated amounts have been stipulated to respondent. This Court must decide whether these amounts are recoverable by claimant (s), as a result of negligence on the part of respondent in failing properly to maintain the road adjoining claimant's house.

Respondent avers that it did not commit any act of negligence which proximately caused the damage complained of. Respondent further argues that the damage was the result of intervening and superseding causes, not directly attributable to any act or omission on its part. Essentially, respondent believes the damage was an act of nature, for which it should not be held responsible. This Court believes otherwise.

While these is no evidence that respondent placed the cold patch in a negligent manner, it was certainly foreseeable that it would be a short-lived solution. Respondent had both constructive and actual knowledge of the hole in the road surface that was producing the splash on

claimant's house. The respondent knew or should have known that as the cold patch deteriorated over the course of the winter its components would add to the problem. The Court is of the opinion that respondent breached its duty of reasonable care and diligence in repairing this hole and, therefore, respondent is liable for the damage to claimant's house.

This Court is of the opinion to and does award to claimant Wanita Sommerville, the amount of $100.00. This award represents the reimbursement of her out-of-pocket expense of the deductible assessed by her insurer. Although co-claimant is a subrogee under her home-owners policy, and this Court has previously permitted subrogation claims, we believe that such a practice can no longer be permitted in equity and good conscience.

In *State Farm Mutual Automobile Insurance Company, Assignee to the rights of Sarah G. Romans, its assured, Claimant v. West Virginia Department of Highways,* 8 Ct.Cl. 169 (1970), this Court recognized that a subrogee may have the same right of recovery as the insured, "absent some provision of the Statute conferring jurisdiction upon the Court which would deny the subrogee the remedy afforded to the insured/" It is the position of this Court in reinterpreting West Virginia Code §14-2-13(1), that "claims and demands....which the state as a sovereign commonwealth should in equity and good conscience discharge and pay," mandates that claims which may permit unjust enrichment be disallowed. Subrogation, as defined in Michie's Jurisprudence, Section 2 at page 3, "is purely an equitable right, and being an equity, it is subject to the rules governing equities." Equity does not embrace, nor allow unjust enrichment. Premiums are paid by the insureds for insurance, and, when claims are paid, the accumulated premiums or reserves are used to cover such expenditures. If no claims are made, the premiums are never expended. This is a risk assumed by an insurance company for a valuable consideration, and there is no reason the company should escape the risk. In any event, it is the opinion of the Court that neither equity nor good conscience requires the State to reimburse an insurance carrier for having paid a claim for which it received a premium, a premium which is designed to allow a reasonable profit to the insurer. The claim of the subrogee is accordingly disallowed and an award is made to the insured in the amount of her deductible which is $100.00.

Award of $100.00 to Wanita Sommerville.

OPINIONS ISSUED JANUARY 24, 1991

WESTBROOK CONSTRUCTION, INC.
VS.
DIVISION OF HIGHWAYS

(CC-89-508)

John A. Jenkins and M. Blane Michael, Attorneys at Law, for claimant.
Robert F. Bible, Attorney at Law, for respondent.

BAKER, JUDGE:

Claimant contractor entered into an agreement with respondent, designated as project no. I-6404 (72)123, on November 25, 1985, for the construction of the Glade Creek bridge, identified as bridge no. 3382. Claimant had substantially underbid other competitors for the project, which entailed the construction of a four-lane 2,180 foot long, bridge in Raleigh County. The $28,876,876.00 bridge has two main piers, and two intermediate piers, connecting to abutments. Claimant alleges that it encountered unexpectedly hard rock in building two of the piers, designated as pier 2 and pier 3. The foundations for piers 2 and 3 were drilled caissons, which were constructed by Meredith Drilling Company, Inc., and Permian Rat Hole Drilling, a joint venture which was a subcontractor of claimant. During the drilling of the caissons for both piers 2 and 3, claimant alleges the density of the rock base its subcontractor encountered was two to four times greater than was identified by respondent's core drillings. Claimant contends the hard rock constitutes a changed condition of the contract, entitling claimant to equitable adjustment for the resulting cost and delay occasioned by additional labor, equipment, maintenance, and overhead necessary to complete the drillings. Claimant seeks to recover its own excess costs and those of its subcontractor, Meredith/Permian Rat Hole, in the aggregate amount of $2,054,823.02.

Claimant and respondent agree that the prebid core drillings for pier 2 indicated that the caissons were expected to be drilled in sedimentary rock described as sandstone, shale and siltstone with a range of rock harness varying from soft to hard. No very hard sandstone was indicated. Prebid core drillings for pier 3 did indicate hard to very hard sandstone in one of the five sample drillings. Based upon the representations of respondent's prebid drillings, claimant estimated its construction costs and submitted its bid. However, claimant alleges that when the drilling for pier 3 caissons was performed, claimant encountered vary hard sandstone of higher strength and abrasiveness than indicated by respondent's bid samples. Claimant also alleges that greater quantities of this material were discovered than anticipated. Claimant's witnesses indicated their belief that the lost time and additional costs of pier 3 would be recovered and offset by pier 2 performance. Accordingly, with regard to pier 3 claimant provided no formal notice to respondent of a changed condition, nor were force account records maintained.

However, when pier 2 caissons were drilled, very hard sandstone was again found and again obstructed and impaired claimant's performance on the project. Respondent's witness, Mr. John O'Neil, a geologist with respondent and assigned to the Glade Creek bridge project, testified that the sandstone in the area of pier 2 was "10 to 21 percent" harder then originally indicated in the pre-bid core samples. Mr. O'Neil further testified that, "...some of the sandstone was indeed harder than hard. It logged as very hard, based on compressive strength testing." Mr. O'Neil's testimony was consistent with that of claimant's expert, Dr. James W. Mahar. It is of particular interest to the Court that the prebid core samples of pier 2 indicated soft to hard rock, and no very hard rock. Mr. O'Neil's subsequent findings of very hard rock were the result of claimant's request for retesting and serve as the foundation for this equitable adjustment claim.

The retesting as to pier 2 is described in respondent's exhibit no. 7, Materials Inspection Report No. 1180771. The Report at paragraph 2.4.1 states that "the Department (respondent) has never had any intent to make any representation or description of the abrasive qualities of rock strata in soils information presented in contract documents, nor are there any

standardized tests for abrasiveness of which we are aware."

The Court observes that no retesting of core samples was requested or made as to pier 3.

Although claimant was awarded this contract in November 1985, it did solicit bids from subcontractors for the caisson work until December 1985. Representatives of the subcontractor which was ultimately awarded the bid visited the respondent's office in Princeton, West Virginia, to inspect the core samples available to all prospective bidders. The subcontractor had not performed drilling operations in the State of West Virginia prior to this particular contract. The fact that the subcontractor was unfamiliar with the nature of subsurface strata in southern West Virginia may have been reflected in its bid which was substantially lower than the bids of other, more experienced contractors which have performed drilling projects in all areas of the State.

It appears from the evidence that certain geotechnical data were obtained by respondent during the design stage for this project. The data included unconfined compressive strength tests in some of the strata, but, as was the usual and customary practice during the pre-bid stage, this information was not made available to prospective bidders. While the information may have been of assistance to claimant herein at the pre-bid stage, the Court believes that it was withheld by inadvertence, and not by design. In the future respondent may wish to consider disclosing the availability of such information to prospective bidders.

Whether or not the differing subsurface conditions previously described permit claimant the remedy of equitable adjustment is the issue this court will now address. Provision for equitable adjustment is made in section 104.2 of the West Virginia Department of Highways Standard Specifications of 1982, and reads in part as follows:

> ....Should the Contractor encounter or the Department discover during the progress of the work subsurface or latent physical conditions at the site differing materially from those indicated in the Contract, or unknown physical conditions at the site of an unusual nature, **differing materially** from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract, **the Engineer shall be notified in writing of such condition;** and if the Engineer finds the conditions do materially differ and cause an increase or decrease in the cost of, or the time required for performance of the Contract, an equitable adjustment will be made and the Contract modified in writing accordingly. (Emphasis added.)

Respondent also relies upon §104.2, and this Court finds the section to be operative and controlling in the contract between the parties. Accordingly, the Court will apply the section to the claims asserted for damages relating to the excess costs of constructing pier 3 and pier 2, respectively. Before undertaking this consideration, the Court must emphasize that §104.2 is not operative when a claimant fails to invoke the section and abide by its directives in a timely manner. Although claimant has demonstrated by a preponderance of the evidence that very hard rock was encountered,

and not anticipated, this Court does not believe the circumstances excuse a strict interpretation of and compliance with §109.4 and §109.4.8, providing that:

> Extra work performed in accordance with the requirements and provisions of 104.3 will be paid for at the unit prices or lump sum stipulated in the order authorizing the work, or the Department may require the Contractor to do such work on a force account basis to be compensated in the manner hereinafter prescribed.
>
> The Contractor's representative and the (respondent's) Engineer **shall compare records daily** of the cost of work done as ordered on a force account basis, and **shall indicate agreement by signature on such records. No payment will be made** for work performed on a force account basis until the Contractor has furnished the Engineer with duplicate itemized statements.... (Emphasis added.)

Accordingly, the Court makes the following findings or fact and conclusions of law:

Pier 3

Claimant's subcontractor began drilling caissons for pier 3 on the project to pier 2. The plan was to drill a pilot hole with a 12-inch diameter carbide tricone bit, using sufficient down pressure and air circulation with medium drill bit rotation to produce a straight hole. The hole was then enlarged using an 18-inch hole opener and then a 36-inch auger hole opener. This equipment was contained on a Williams LLDH-80 drilling rig. Using this process and equipment 38 caissons were drilled for pier 3. The progress of the drilling was slowed when very hard rock was encountered almost immediately. Foam and water were then utilized by claimant to increase drilling productivity, but this practice was suspended until adequate pollution safeguards were taken. In the interim a hole was attempted with air only resulting in substantial damage to the hole opener. Testimony suggests the hole opener "burned up" when the cutters became so hot that the bearings disintegrated. Concerned and falling behind the critical path (schedule), claimant resorted to what it described as "a radical change in drilling technique." Using 36-inch air barrels, a 36 inch thin wall core barrel, two additional hole openers, and foam and water, the caissons were completed, but not without additional cost. Despite the difficulties encountered at pier 3, Terry Allen Penn, General Manager for Permian Rat Hole, testified that "as far as our production and expenses on the job at that point, we still felt like we could make up the difference on pier 2." Since there was no intent to put forth a claim based upon a changed condition on pier 3, it appears to the Court that subcontractor consciously made the decision not to provide "notice" to respondent.

Respondent avers that the failure on the part of claimant to "notice" the respondent's engineer that there was a changed condition in pier 3, as required by §§104.2, 109.4, and 109.4.8, *supra*, resulted in the respondent not keeping force account records on the construction of pier 3 to ascertain actual costs in accordance with the Specifications. We cannot now speculate as to same. Respondent received notice that claimant was making a claim for pier 3 through correspondence received in February 1986, well after the completion of the pier.

Since claimant failed to provide timely notice to respondent as to the allegation of a

changed condition, no force account records were maintained by respondent. Therefore the claim relating to pier 3 must be disallowed, consistent with the previously described sections, and the holding of *Vecellio and Grogan, Inc. vs. Dept. of Highways,* 14 Ct.Cl.451 (1983).

Pier 2

The Court now turns its attention to the issue of pier 2. Claimant has provided convincing evidence that unforeseeable subsurface conditions and abrasive rock were encountered, conditions which differed materially from those indicated in respondent's bid proposal. Claimant did provide the requisite notice to respondent concerning pier 2. Accordingly, claimant contends that the difficulties encountered entitle it to an upward equitable adjustment in the contract price under the terms of the "changed condition clause" of the "differing site condition clause" in §104.2, as cited supra.

By reason of the materially indifferent conditions encountered at pier 2, claimant incurred extra expense not contemplated under the contract. The claimant provided notice of the changed conditions to respondent by letter dated October 1, 1986, and same was acknowledged for investigation by respondent in its letter dated November 5, 1986. It is therefore uncontroverted that the requisite notice to invoke §104.2 was timely given and is operative and controlling in this claim for pier 2 expenses. Claimant testified that 44 drilling shifts were estimated to drill the pier 2 shafts, but 298 drilling shifts were ultimately required to drill the very hard rock. The additional labor and equipment expense incurred for the additional shifts are the bases of this equitable adjustment is best set forth by this Court A. J. Baltes v. Dept. of Highways, 13 W. Va. Ct. Cl. 1 (1979), which states in part:

> "The recoverable items of cost must be realistically confined to additional cost incurred by the claimant, wand which were directly and proximately caused by the changed conditions. Expenses which the contractor would have been required to expend in any event had no changed conditions occurred are not compensable as part of an equitable adjustment." *Baltes* at 6-7.

This Court therefore applies an "actual cost" theory as the appropriate measure of damages. Actual cost is defined in Baltes, supra, at 6, as "a daily cost analysis of the additional expenses required by the changed condition." In doing so the recoverable items as enumerated must be realistically confined to the additional costs incurred by the claimant. Expenses which the contractor would have been required to expend had no changed condition occurred are not compensable. See *Dale Ingram, Inc. v. United States,* 475 F.2d 1177 (Ct. Cl. 1973).

The condition of "very hard rock" was not anticipated by claimant. The claimant was required to drill at substantially higher cost to complete pier 2, and the cost for that labor and equipment will be compensated. However, care must be taken to avoid duplications and overlap, with recovery limited to those costs directly and proximately caused by the changed conditions. In particular, the evidence concerning additional equipment for road maintenance, extra grader and operators appears redundant, if not unrelated.

The Court finds that claimant was in part responsible for the increased costs by not exercising greater diligence in preparing and estimating its project bid. It is uncontroverted that claimant's bid was substantially lower than others received. Although the Court does not adopt respondent's argument that, "the four-fold increase in actual versus estimated time of drilling is attributable to lack of knowledge of local conditions combined with inadequate examination and testing of core samples," the Court is of the opinion that claimant must shoulder some responsibility for its bid.

Claimant's request that the Court award the cost of "travel and sustenance" will not be considered. Claimant has failed to prove that local labor was unavailable. Furthermore, these costs were not a part of the stipulated labor rate.

The Court therefore considers only the following in its determination of recoverable costs, pursuant to §§109.4 to 109.4.7, which the evidence indicates to be the direct and proximate result of the changed conditions of pier 2:

Labor -	$ 50,349.00
Mark up on Labor-	20,140.00
Equipment rental- (subcontractor owned)-	213,033.00
Equipment rental- (non-owned)	19,350.00
Mark up on non-owned equipment	3,870.00
Clean out costs for caisson holes-	35,076.00
Welding subcontractors	20,000.00
Expendables -	80,000.00
TOTAL FOR MEREDITH PERMIAN RAT HOLE	$441, 818.00

These costs incurred by claimant Westbroook which were the result of the changed conditions at pier 2 have also been considered by the Court. The Court is of the opinion to and does make an award to Westbrook in the amount of $119,397.46.

The Court has considered interest on the total award of $516,251.46 in accordance with Provision 9 of the contract which provides for the rate of six (6) per centum per annum. As calculated, the interest to the issue date of this opinion is awarded in the amount of $52,030.46. Therefore, the total amount of the award is $613,245.92.

Award of $613,245.92.

BARBOUR COUNTY SHERIFF'S DEPARTMENT
VS.
DIVISION OF CORRECTIONS

(CC-91-51)

Claimant represents self.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, Barbour County Sheriff's Department, provides and maintains a facility for the incarceration of prisoners who have committed crimes in Barbour County. Some of the prisoners held in the facility are guilty of crimes which require the sentencing of prisoners to facilities provided and maintained by the respondent, Division of Corrections. Claimant brought this action to recover the costs of housing for prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the county prison facility for periods of time beyond the date of the sentencing order.

The Court previously determined in the *County Comm'n. of Mineral County v. Div. of Corrections,* an unpublished opinion of the Court of Claims issued November 21, 1990, that a daily rate of $15.00 for each inmate is fair and reasonable to both claimant and respondent at this time, and directed the parties to calculate a dollar amount based upon the time frame and daily inmate rates of $15.00 excluding, however, all days wherein inmates remained in the county as a result of a stay pending appeal or at the request of county officials and a two week holding period beyond the date of a commitment order.

Pursuant to the guidelines provided in the Mineral County opinion, the respondent reviewed this claim to determine the number of inmate days for which respondent may be liable and filed an Answer admitting the validity and amount of the claim.

In view of the foregoing, the Court makes an award to claimant in the amount of $2,850.00.

Award of $2,850.00.

OPINION ISSUED JANUARY 25, 1991

MARY BERKLEY AND CARL BERKLEY
VS.
DIVISION OF HIGHWAYS

(CC-88-78)

Larry Thompson, Attorney at Law, for claimant.
Jeff Miller, Attorney at Law, for respondent.

HANLON, JUDGE:

On February 24, 1987, Mary Berkley was operating claimants' 1984 Ford Bronco II on State Route 14 in Chattaroy, Mingo County, when the vehicle encountered ice. As a result, the Bronco went over an embankment and landed in a creek. Claimants seek $115,945.08 for medical expenses, personal injury to claimant Mary Berkley, damage to their vehicle, and loss of consortium on the part of claimant Carl Berkley.

Claimants allege that respondent had actual and constructive notice of the ice in the month of January 1987. Respondent alleges that the driver of the accident vehicle was familiar with the road. She was award of the propensity of water to collect on the road and she was negligently operating her vehicle for the road conditions then and there existing.

Claimant Mary Berkley was traveling to work at approximately 6:45 a.m. on the day of the accident. She testified that she was operating her vehicle between 20 and 25 miles per hour. She had encountered ice previously in this area. However, on the evening preceding her accident the road was not slick. She indicated that the ditch at the accident location was blocked by debris year round. Additionally, she had observed ice at this particular site three or four times prior to this accident, but she had not reported her concerns to respondent.

As a result of the accident, claimant Mary Berkley sustained personal injuries. She was examined by Dr. Zamora immediately following the accident in the emergency room or Williamson Memorial Hospital. However, contrary to the doctor's directions, she did not return for further treatment nor did she receive physical therapy as instructed by the physician. She returned to work a week after the accident. She testified that due to her injuries, which included back pain, she was unable to work as many hours as she had prior to the accident in her position as parts Manager at Muncy's Automotive in Nolan.

Claimant Carl Berkley testified that he was familiar with the area of the accident because he has resided there for 15 years. There has been a problem with drainage in the area since 1963. He also testified as to his wife's limitations following the accident. She complains of pain daily, which was not the case prior to the accident. She is unable to perform simple household chores, and can not assist him with year work. They now lack a social life, whereas previously they enjoyed dancing and other activities.

Edward Hatfield testified that he witnessed the accident. He was 200 to 300 feet behind claimant in his vehicle. Mr. Hatfield estimated claimant Mrs. Berkley's speed at approximately 30 to 35 miles per hour. The creek was on the left side of the road, and the ditch was on the right side. He stated that the ice was noticeable on the highway on the date of the accident "only when you got up right close to it."

Respondent established that the clerk at the Mingo County headquarters, Patricia Pyrtle, could not remember having received any complaints concerning this section of Route 14 before February 24, 1987. The written records for telephone complaints are not available for complaints made on or before February 24, 1987, as respondent does not retain the records for more than a month.

Earl David Bevins, Maintenance Engineer with respondent in Huntington, testified concerning ditching standards followed by respondent. Ditching is normally performed during the months of March, April, May, June, August, September, October and possibly during November, December, January or February. He is familiar with Route 14 in the area of the accident because he has traveled this route since the early 1970's. He is described the road as a secondary route, 16/17 feet in width, and composed of hot-laid bituminous concrete with shoulders approximately three feet wide. He stated that it's a "relatively high maintenance area" as ditch lines fill rapidly with trash and other debris.

Mr. Bevins further testified that he received a Xeroxed copy of a January 20th, 1987, Williamson newspaper photograph concerning the water and ditch hazards on this particular section of Route 14. However, he is certain that he did not receive and review this Xeroxed copy until late February 1987. He made a notation on the copy of the news article which stated, "Need ditches pulled ASAP. To be pulled while Grade-All is in the county." There is a lag time between requests and the scheduling of the use of Grade-Alls due to a minimum number of Grade-Alls. He could find no evidence of oral or written notice of complaints about this section of Mingo County Route 14 prior to receiving the newspaper clipping. This is a state local service route as opposed to being a feeder route, trunk line, or expressway, and as such, it is a low priority area for maintenance.

The Court, having reviewed the record in this claim, is of the opinion that respondent had constructive, if not actual, notice of the propensity of this area of State Route 14 to accumulate water as a result of the lack of maintenance of the ditch lines. It is reasonable to assume that water allowed to accumulate on the orad would create an ice hazard to the traveling public during the winter months. However, as claimant Mary Berkley was also familiar with this location and the problems of water accumulating on the surface of the road, she also had notice that ice may form in the area. It is the opinion of the Court that both respondent and claimant Mary Berkley were negligent. In accordance with the doctrine of comparative negligence, the Court finds claimant Mary Berkley 40 per cent negligent and respondent 60 per cent negligent.

As a result of this accident, claimant Mary Berkley suffered severe injuries to her back. Testimony from her treating physician, Dr. Donald G. Vaughan, substantiated that claimant experienced pain after the accident from the injuries and that she has been receiving treatment since that time. It will be necessary that she receive further medical treatment through October 1989. He stated that she will need treatment from time to time in the future. Her medical bills from treatment were $1,368.00.

Claimant Mary Berkley also established a loss of income as a result of the injuries during the remainder of 1987 and in 1988 and 1989. The Court was provided documentation that these losses totaled approximately $12,000.00.

She incurred medical bills for emergency room treatment and for physical therapy in the amount of $721.00. She had medical prescription expenses but these expenses were not satisfactorily proven to the Court.

The Court, having reviewed all of the medical expenses, loss of work, and pain and suffering, has determined that claimant Mary Berkley has sustained damages in the amount of $18,589.00, which will be reduced by 40 per cent. The Court therefore makes an award to claimant Mary Berkley in the amount of $11,153.40. The Court makes no award to claimant Carl Berkley for loss of consortium.

Award of $11,153.40 to Mary Berkley

Judge Baker did not participate in the hearing or decision of this claim.

OPINION ISSUED JANUARY 25, 1991

ROBERT C. BIANCHINOTTI
VS.
COMMISSION ON AGING

(CC-90-364)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer. Claimant seeks $576.00 to correct the amount of the annual incremental salary increase which he received for fiscal years 1985 through 1989 pursuant to West Virginia Code Chapter 5, Article 5, Sections 1 and 2. The increment increase was based upon an inaccurate number of years as respondent did not calculate the increment increase was based upon an inaccurate number of years as respondent did not calculate the increment increase upon the actual number of eligible years accrued by claimant during his employment with the West Virginia Housing and Development Fund. Respondent has not paid the claimant for same. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal years with which these payments could have been paid.

In view of the foregoing, the Court makes an award in the amount of $576.00.

Award of $576.00.

OPINIONS ISSUED JANUARY 25, 1991

CAROLYN SUE COPEN
VS.
DIVISION OF CORRECTIONS

(CC-89-368)

Claimant present in person.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant was involved in what appears to be an unprovoked altercation with another inmate at the Pruntytown Correctional Facility, a facility of the respondent. Claimant's eyeglasses were damaged in the altercation, and subsequently replaced at State expense. Claimant now brings this action alleging the replacement glasses were of lesser quality. This Court has previously held that for lost or otherwise damaged personal articles, the State is liable for only the "fair value of the items." *Umberger vs. Department of Corrections,* CC-86-411, unpublished Opinion (1988). The burden on establishing fair value falls upon claimant. Claimant has failed in that regard to establish that her State-provided glasses that are too dissimilar from those damaged, to be less than a fair value replacement. Respondent having replaced the glasses is accordingly discharged from any further responsibility to claimant in this matter.

The Court is of the opinion that the State is not an insurer of personal articles which inmates choose to bring in State facilities. *Fields vs. Department of Corrections,* CC-87-215, unpublished Opinion (1989). Therefore, the Court is of the opinion to and does disallow this claim.

Claim disallowed.

OPINIONS ISSUED JANUARY 25, 1991

GLENN E. CURKENDALL
VS.
DIVISION OF HIGHWAYS

(CC-89-456)

Thomas C. Cady, Attorney at Law, for claimant.
Robert F. Bible, Attorney at Law, for respondent.

BAKER, JUDGE:

Claimant was operating his 1981 Honda motorcycle on U.S. Route 19 north, near Clarksburg, West Virginia, August 25, 1986, when his motorcycle crossed two drain holes in the

road, forty-nine feet apart. Claimant lost control of the motorcycle and sustained damages of $2,600 to the motorcycle, and $6,900 in medical expenses and lost wages. Claimant contends that the accident was the result of negligent design and maintenance of the drain(s). Evidence established that the respondent is responsible for the described section of road, and this road had at the time of the accident, a square drain inlet with a depression of three to seven inches below the surface, followed by a similar drain inlet. Respndent avers that the drains were not a hazard, and that claimant had notice of the condition, having driven the road daily during the last five years. Respondent aers that the drains were not a hazard, and that claimant had notice of the condition, having drien the road daily during the last five years. Respondent accordingly denies negligence, having no knowledge or complaints of the dangerousness of the described section of road. Respondent challenges both the eligibility of the claimant for damages, and the value of the damages asserted. Claimant argues that the collateral source rule bars consideration of prior payments.

This accident occurred on a "very clear morning" in August, according to claimant. He was so pleased with the favorable weather that he decided to ride his motorcycle to work. Leaving earlier than usual, claimant nevertheless followed the same route to work that he had used during the last five years. On the day of the accident, claimant was on the outside lane area when he crossed the first of two drain inlets. Testifying that the inlets were both too low below road surface, claimant said that the first inlet caused him to lose control of the motorcycle, and the second inlet less than twenty yards from the first, prevented him from regaining control, thereby causing the crash. The motorcycle was a total loss. Claimant suffered fractures, and alleged damage to a nerve that controls male sexual responsiveness. Claimant believes he is impotent as a result of the accident. The Court is asked to decide whether the drains were the proximate and actual cause of the accident. We determine this issue of fact and conclusion of law as follows:

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins vs. Sims*, 130 W. Va. 645, 46 S.E. 2d 81 (1947). For the respondent to be held liable for defects in road conditions, the claimant must prove that the respondnet had actual or constructive notice of the condition, and a reasonable amount of time to take corrective action was given. It appears from the testimony of respondent's witness that respondent was or should have been aware that the described section of road could present an unreasonable risk of danger to motorcycle traffic. This witness, a road supervisor, testified that drains, four to six inches below (road) surface level, "should have been corrected." This witness further testified that the drains "should be about an inch below road surface." The drains involved were raised after the accident. It is therefore the finding of this Court that the drains were too low, and thereby caused an unreasonable danger to motorcycle traffic.

This Court also recognizes that the accident site has a posted 20 miles per hour speed advisory, and the claimant has testified to exceeding that limit when he said, "my sped was 25 miles per hour." An expert witness for the respondent counters that claimant was more likely traveling at twice that speed, as indicated by skid marks left at the accident scene. In either event, it appears to this Court that speed in excess of posted limits, a violation of statute, is involved. The West Virginia Supreme Court of Appeals has consistently held that "violation of statute is prima facie evidence of negligence." *Price vs. Halstead*, 355 S. E. 2d 380, 64 A.L.R. 4th 255 (1987).

Since negligence is imputed from the conduct of both claimant and respondent, this claim is governed by the rule of comparative negligence. The rule in this State is that a party is not barred from recovering damages in a tort action so long as the negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the action. *Michie's Jurisprudence,* Negligence 27 at p. 339. *Bradley vs. Appalachian Power Co.,* 163 W.Va. 332, 256 S.E.2d 879 (1979). It is the position of this Court that claimant was 50% negligent, and respondent was 50% negligent.

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

Claim disallowed.

OPINION ISSUED JANUARY 25, 1991

MINGO COUNTY SHERIFF'S DEPARTMENT
VS.
DIVISION OF CORRECTIONS

(CC-90-142)

Glen Rutledge, Prosecuting Attorney, for claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, Mingo County Sheriff's Department, provides and maintains a facility for the incarceration of prisoners who have committed crimes in Mingo County. Some of the prisoners held in the facility are guilty of crimes which require the sentencing of prisoners to facilities provided and maintained by the respondent, Division of Corrections. Claimant brought this action to recover the costs of housing for prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the county prison facility for periods of time beyond the date of the sentencing order.

The Court previously determined in the *County Comm'n of Mineral County v. Div. of Corrections*, an unpublished opinion of the Court of Claims issued November 21, 1990, that a daily rate of $15,00 for each inmate is fair and reasonable to both claimant and respondent at this time, and directed the parties to calculate a dollar amount based upon the time frame and daily inmate rates of $15.00 excluding, however, all days wherein inmates remained in the county as a result of a stay pending appeal or at the request of county officials and a two week holding period beyond the date of a commitment order.

Pursuant to the guidelines provided in the Mineral County opinion, the respondent

reviewed this claim to determine the number of inmate days for which respondent may be liable and filed an Answer admitting the validity and amount of the claim.

In view of the foregoing, the Court makes an award to claimant in the amount of $15,290.00.

Award of $15,290.00

OPINION ISSUED JANUARY 25, 1991

WILLIAM F. MOORE
VS.
DEPARTMENT OF ADMINISTRATION

(CC-90-403)

Claimant represents self.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant sought reimbursement for motel expenses incurred when he was traveling on behalf of the Division of Purchasing, an agency within the Department of Administration. Claimant was not paid in the proper fiscal year. Respondent admitted the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $32.78.

Award of $32.78.

OPINION ISSUED JANUARY 25, 1991

JUNIOR J. ORSBURN AND MARGARET ORSBURN, HIS WIFE
VS.
DIVISION OF HIGHWAYS

(CC-88-247)

William C. Garrett, Attorney at Law, for claimants.
James D. Terry, Attorney at Law, for respondent.

STEPTOE, JUDGE:

On September 27, 1986, at approximately 7:55 a.m., claimant Junior J. Orsburn experienced transmission slippage and so he immediately parked his 1976 Ford pick-up truck on the North side berm of U. S. Route 33, near intersection of State Secondary Route 5/10 in Upshur County, West Virginia. He was off the road standing in front of his truck. He had the hood up and was checking the transmission fluid. A short distance away on Route 33, Thomas Binns was driving his 1983 Ford Mustang in the direction of claimant. When Mr. Binns drove into a large pool of surface water, some four to six inches deep, he lost control of his vehicle which struck claimant's truck. As a result of Mr. Binn's vehicle striking the claimant's parked truck, claimant was knocked backwards and sustained personal injury and total destruction of his truck. Claimant Junior J. Orsburn has been diagnosed as having suffered bilateral inguinal hernias and shoulder injury. Surgery was performed to correct the hernias, however, additional surgery is recommended to correct a reoccurrence of the hernia to his right side. As of this date, he has not had additional surgery and he has returned to work. Additional surgery unperformed as of this date is estimated to cost $2,000.00 more. Lost income during the pendency of his recovery was testified by the claimant as minimal, as he is earning more per hour performing carpentry than he did before the accident. No estimate was provided for the replacement value of his pick-up truck. Total medical expenses to date have been stipulated to in the amount of $4,274.11.

Claimants contend the large pool of surface water extant in the area of the accident was the proximate cause of the accident, and that respondent was aware that water could and would collect in the area due to a culvert that was obstructed and admittedly inadequate to handle drainage from the road surface.

Respondent, while acknowledging the inadequacy of drainage , avers the result of excessive and unusual rainfall. Respondent concluded that if negligence is found for having failed to provide adequate drainage in the area, such negligence is negated by a superseding act of nature, namely excessive rainfall. The Court is unconvinced. The very need for adequate drainage is heightened and not reduced by the excessive rainfall argument. Uncontroverted testimony of meteorological records indicates heavy rainfall of over three inches fell in the area of the accident within a two-day period. Respondent contends the unusual weather is an unforeseeable factor relieving the respondent of negligence in failing to have adequate drainage.

This Court believes that inadequate drainage does produce foreseeable results under unforeseeable conditions, and thus does not excuse respondent from liability. Testimony is replete with examples of both constructive and actual notification to respondent of the inadequacy of drainage in the area of the accident. The failure of respondent to secure an easement for improved drainage from a recalcitrant property owner does not relieve respondent of its statutory duty of providing a roadway free of hazards. Efforts at condemnation were never instituted, nor were signs posted to warn motorists of the dangerousness of standing water. Respondent's witnesses testified

to having knowledge of inadequate drainage, an obstructed culvert, and related deficiencies in this area, but no definitive corrective action was taken to arrest or remedy same. It is well established by case precedent that the State is neither an insurer nor a guarantor of the safety of motorists on its highway. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be liable for the damages caused by the inadequate drainage, claimant must prove that respondent had actual and constructive notice of the existence of the defect and a reasonable amount of time to correct it. *Davis v. Dept. of Highways,* 11 Ct.Cl. 150 (1976). Respondent witnesses have testified to having such knowledge of the inadequate drainage some four years before the accident in 1982 and thereafter. The Court likewise recognizes the habitual nature of inadequate drainage in the accident area, as initially found in *Currence v. Dept. of Highways,* (CC-84-116), Unpublished Opinion of the Court of Claims (1985).

This Court is of the opinion that claimants have established by a preponderance of the evidence that respondent was aware of the hazardous condition in the area of U.S. Route 33 at State Route 5/10, and that respondent failure to take appropriate action to eliminate the water hazard or warn motorists of the presence of the same constituted a failure to keep the road in a reasonably safe condition. Therefore, the respondent was guilty of negligence proximately causing the injuries to claimant Junior J. Orsburn. The Court further finds that the record fails to disclose negligence on the part of claimant Junior J. Orsburn. Therefore, the Court is of the opinion to make wards to claimant, Junior J. Orsburn, and to his wife, claimant Margaret Orsburn.

While the Court is aware that claimant Junior J. Orsburn received a settlement from the other driver, we recognize the amount was expended for injury related costs leaving him with outstanding unpaid expenses. Claimant J. Orsburn incurred medical expenses in the amount of $4,274.11, loss of earnings in the amount of $6,538.00, future medical expenses in the amount of $2,000.00, and pain and suffering in the amount of $5,000.00 as determined by the Court. He received a settlement in the amount of $7,500.00 from the joint tortfeasor; therefore, the Court makes a total award of $10,312.11 to claimant Junior J. Orsburn. The Court is also of the opinion to, and does, make an award to claimant Margaret Orsburn in the amount of $1,000.00 for her loss of consortium.

Award of $10,312.11 to Junior J. Orsburn.
Award of $1,000.00 to Margaret Orsburn.

Judge Baker did not participate in the hearing or decision of this claim.

OPINION ISSUED JANUARY 25, 1991

THOMAS GLENN ROBERTS
VS.

DIVISION OF HEALTH

(CC-90-270)

RONNIE R. BOLEN
VS.
DIVISION OF MOTOR VEHICLES

(CC-90-275)

WILFORD N. BIRD
VS.
DIVISION OF MOTOR VEHICLES

(CC-90-324)

Claimants appeared in their own behalf.
Lowell D. Greenwood, Assistant Attorney General, for respondents.

PER CURIAM:

These three claimants brought actions against two State agencies to recover the pro rata annual increment increases which they allege each of them earned during the fiscal year 1988-89. Each of the claimants retired during this fiscal year although not in the same month. Claimants allege that the respondent State agencies failed to follow the statutory provisions for the payment of their annual incremental salary increases. The claimants and respondents have agreed and stipulated to the amount of the pro rata increment increase which may be due and owning to each of the claimants.

Respondents contend that claimants are not entitled to any annual salary incremental increase on a pro rata basis as each of the claimants retired during the fiscal year 1988-89 and was not employed for the full fiscal year.

The West Virginia Legislature provided employees of State agencies with annual salary incremental increases beginning with the 1985-86 fiscal year. See W.Va. Code §5-5-2 (1984). This section of the Code has been interpreted in two decisions of the Supreme Court of Appeals.

The first decision relating to the increment increase was *State ex. rel. Erwin v. Gainer,* unpublished Order dated August 2, 1985. In this decision the Court held that the State Auditor "should pay the salary supplement as set out in W.Va. Code, §5-5-2 (1984), in a lump sum amount,...." In other words, the annual salary increment was not to be paid as a part of an employee's regular salary, but rather as a separate payment in a lump sum. Generally speaking, the practice of the State Auditor has been to make this lump sum payment to State employees in July of each fiscal

year.

Erwin also held that the lump sum payment "is designed to supplement the regular pay of eligible State Employees on the basis of past and present services" and is therefore not barred by Article VI, Section 38 of the West Virginia Constitution.

In the second opinion, Courtney et al. v. State Dep't of Health, 388 S.E.2d 491 (1989), the Court held that an employee need not be employed on the first day of the ensuing fiscal year in order to be entitled to receive an annual incremental salary increase as provided by W.Va. Code, §5-5-2 (1984). The first day of the fiscal year establishes the date upon which the incremental salary increase is to be received.

An Attorney General's opinion dated June 27, 1990, followed the Courtney decision, supra, wherein the Department of Public Safety was advised that, "Considering that the W.Va. Code §5-5-2 incremental salary increase constitutes part of an eligible State employee's regular pay for services previously rendered, **any such employee has a statutory right to any accrued pro rata share of that increment** owing but not due on his final day of employment. By entitlement to a pro rata share, it is meant that an employee who does not work an entire fiscal year is entitled to a fractional portion of the total increment to which the employee would have been entitled had he been employed during the entire fiscal year." (Emphasis supplied).

The Annual increment increase is an annual salary adjustment provided by law to State employees and not a bonus. The increment is based upon each month of service rendered by State employees as it is rendered; therefore, employees of State agencies earn this increment increase for each month of employment during a particular fiscal year of service to the State.

It is, therefore, the opinion of this Court that each of the three claimants herein earned his pro rata share of the annual incremental increase during this final fiscal year of service to the State i.e., the 1988-89 fiscal year. Accordingly, the Court is of the opinion to and does make awards to each of the claimants for his pro rata share of the annual incremental salary increase earned during the 1988-89 fiscal year.

Award of $306.00 to Thomas Gleen Roberts.
Award of $660.00 to Ronnie R. Bolen.
Award of $360.00 to Wilford N. Bird.

OPINIONS ISSUED JANUARY 25, 1991

H. JOHN ROGERS
VS.
TREASURER

(CC-90-272)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,194.00 for 19.9 hours of legal services provided to and authorized by respondent. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,194.00.

Award of $1,194.00.

OPINION ISSUED JANUARY 25, 1991

ROBERT JAMES SATTERWHITE
VS.
DIVISION OF HIGHWAYS

(CC-90-294)

Frank C. Mascara, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

BAKER, JUDGE:

Between 1:00 a.m. and 2:00 a.m. on August 23, 1989, as rain and fog surrounded the Fairmont area, claimant was returning from work on State Route 73/73 (Bridgeport Road), Harrison County, when his 1984 Chevrolet El Camino hydroplaned on standing water and struck a bridge abutment. Fortunately claimant was not injured. However, his vehicle was a total loss. Its value has been stipulated as $5,000.00 for which this claim is made.

Claimant contends that a culvert in the area was inadequately maintained, thereby permitting water to accumulate on the road surface. Claimant had driven through the accident site on his way to work, some ten hours earlier, and had not observed or encountered standing water. He did however testify that it was raining all day. He further testified that at the time of the incident his headlight vision was no more than 35 to 40 feet and his speed was 38 miles per hour. No accident report was filed or corroboration of these events provided.

Respondent did send claimant a bill for damage to a traffic counter, allegedly destroyed when claimant struck the bridge abutment.

Claimant had been traveling the road almost twice a day one year prior to his accident, but he had never before seen water on the road at the site of the accident.

A witness for claimant testified that he had hydroplaned on standing water within the area of claimant's accident, on the same morning. He noticed a vehicle near the bridge abutment but did not stop. He later learned that claimant owned the vehicle and was informed of claimant's accident.

A second witness for claimant also encountered the water. He testified that he observed that water would accumulate on the road surface in the winter months after a rainfall. He further testified that he had not informed respondent of his concerns with this road condition. However this accident occurred in late summer.

Respondent avers neither knowledge of the water hazard nor notice of same. Respondent witness, an area maintenance manager, testified that water was not known to accumulate or pool within the accident site, and that routine maintenance including inspection and culvert cleaning had been performed in November of 1988, and again in July of 1989.

The law in such matters is consistent and well settled. The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be liable for the damages caused by the standing water, claimant must prove that respondent had actual or constructive notice of the existence of the defect and a reasonable amount of time to correct it. *Davis v. Department of Highways*, 11 Ct. Cl. 150, 1976). The evidence indicated that there was no advance warning of any problems with standing water in the area and that respondent acted promptly upon notification of the condition. Testimony by claimant relating his speed under inclement weather conditions further suggests to this Court that the accident may have been prevented had he observed a lower speed. Accordingly, the Court is of the opinion to and does disallow this claim.

Claim disallowed.

OPINION ISSUED JANUARY 25, 1991

ROBERT E. SMITH
JUERGEN WILDMAN
JOHN L. ANDERSON
PHILLIP t. CARNELL
JAMES P. OWENS
JOSEPH S. JELICH
MICHAEL McWHORTER
JAMES P. SCHAFFNER
ARTHUR J. YAGEL, III

CHARLES E. BOWLING
GEORGE P. CLARKSON
LAWRENCE E. COOK
ROBERT S. DAMERON
WALTER L. LESTER
KEVIN I. ARNOLD
HOWARD M. DEMPSEY
JAMES L. DICKERSON
TEX FIELDS
ROBERT L. HANNAH
JOHN F. LOONEY
CRAIG M. MINTON
ALAN G. SOWARDS
RICHARD H. STRICKLAND
THOMAS E. WITHROW
EDWARD D. WALKER
BERNARD R. BOGGS
MARLA CLIFTON
THOMAS HALKI
DAVID WARNER
SCOTT EGGERUD
STEPHEN FORRY
JANE OHI
EARL REAVES, JR.
JOSEPH TAYLOR
BILLY SIRK
JOHN M. GIBSON
EARL BIBB
JOSEPH LILLY
AVARY MCMILLIAN
WOODROW SMITH
VS.
WEST VIRGINIA DIVISION OF FORESTRY
(CC-90-144)

No appearance by claimants.
William H. Gillespie, Administrative Forester, for respondent.

PER CURIAM:

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

The above titled claimant's seek unpaid overtime, as determined by the United States

Department of Labor, Wage and Hour Division, Charleston, by audits dated October 24,1 990, October 26, 1990, October 30, 1990, November 5, 1990, and November 19, 1990, respectively. The audits resulted in a determination that the above titled employees have not been compensated for overtime as the law requires. Specifically, the audits established that neither Rangers or Service Rangers or Service Foresters are in exempt positions, since they have more than 20% of their time in "routine activities." The respondent has not paid the requisite overtime, although now admitting the validity and the amount of same. Respondent states that it does not have a fiscal method to pay the aggregate claims.

In view of the foregoing, the Court makes an aggregate award in the amount of $32,877.63, inclusive of $1,939.68 for matching FICA, as enumerated for each claimant in the following manner:

CLAIMANT	AMOUNT
Robert E. Smith	$ 483.04
Juergen Wildman	$ 718.00
John L. Anderson	$ 102.52
Phillip T. Carnell	$ 481.85
James P. Owens	$ 33.62
Joseph S. Jelich	$ 354.91
Michael McWhorther	$ 586.33
James P. Schaffner	$ 3,192.37
Arthur J. Yagel, III	$ 1,334.99
Charles E. Bowling	$ 397.19
George P. Clarkson	$ 400.98
Lawrence E. Cook	$ 1,352.16
Robert S. Dameron	$ 1,865.53
Walter L. Lester	$ 596.27
Kevin I. Arnold	$ 1,053.65
Howard M. Dempsey	$ 361.44
James L. Dickerson	$ 713.39
Tex Fields	$ 950.59
Robert L. Hannah	$ 522.27
John F. Looney	$ 345.15
Craigo M. Minton	$ 649.43
Alan G. Sowards	$ 662.15
Richard H. Strickland	$ 1,246.34
Thomas E. Withrow	$ 237.99
Edward D. Walker	$ 1,307.24
Bernard R. Boggs	$ 468.04
Marla Clifton	$ 139.79
Thomas Halki	$ 52.02
David Warner	$ 652.72
Scott Eggerud	$ 1,669.52

Stephen Forry	$	433.22
Jane Ohi		$ 1,280.82
Earl Reaves, Jr.		$ 1,358.81
Joseph Taylor		$ 996.24
Bily Sirk		$ 42.36
Ear Bibb		$ 214.04
Joseph Lilly		$ 157.27
Avary McMillian		$ 414.46
Woodrow Smith		$ 449.59
Total		$ 28,804.36

Award to the Division of Forestry for matching funds in the amount of $4,073.27.

OPINIONS ISSUED FEBRUARY 22, 1991

VIRGINIA S. ASHBURY
VS.
DIVISION OF HIGHWAYS

(CC-90-1)

Claimant represents itself.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover for damage sustained by her vehicle, a 1988 Mercury Topaz, when it struck a hole in a road in Berwind, West Virginia in October 1989. It was approximately 4:00 p.m., and it was wet and raining. She was operating her vehicle at about 25 miles per hour. The hole was approximately one foot deep. Claimant was familiar with the hole. It was located on the right side of the lane in which claimant was traveling. A vehicle was approaching claimant in the opposite lane. Claimant alleged that she was unable to avid driving through the hole. Her vehicle sustained damage in the amount of $200.00 and her deductible for her insurance of $150.00.

The Court, having reviewed the evidence in this claim, is of the opinion that claimant has established constructive notice on the part of the respondent for the existence of the hole. Claimant testified that the hole appeared to be about one foot deep. A hole of this size in the travel portion of a State road constitutes a hazardous condition. However, the Court is also of the opinion that claimant, having knowledge of this hazardous condition, was also negligent in failing to operate her vehicle so as to avoid proceeding through the hole. Under the doctrine of comparative negligence the Court has determined that both parties were equally at fault for this incident.

Therefore, the Court must disallow this claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 22, 1991

DALE D. BROWN, SR.
VS.
DIVISION OF HIGHWAYS

(CC-89-498)

Claimant appeared in his own behalf.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On November 7, 1989, claimant was driving his 1986 Chevrolet Cavalier on State Secondary Route 19/7 also known as bethel Road near Morgantown, Monongalia County. As he travelled the gravel road at approximately 25 miles per hour in a late afternoon rain, the passenger side of the car struck a hole with such severity that his windshield cracked and the front suspension sustained damage. Claimant testified that the hole was eighteen inches deep. Estimates provided by claimant evidence repair costs of $504.44 resulting from the accident. Claimant seeks an additional $100.00 for what he describes as "aggravation." The total amount sought by claimant is $604.44.

Claimant testified that respondent was notified on several occasions prior to the accident that Bethel Road was in poor condition with dangerous holes. Claimant travelled the road

daily to and from work and testified to being very familiar with its condition. Although claimant did not see the hole that caused the damage to his car, the Court reiterates that he testified to being aware of holes in the road.

Respondent avers that the road was continually repaired and maintained prior to and after the accident. Respondent's records and testimony indicated that the road was "graded at least once and it was patched on three or four different occasions and in the past it's been stone stabilized... and was surface treated two different times in 1989.

James M. Beer II, an area maintenance engineer further testified that "tar and chip" cannot be placed on the road as it "hasn't proven to be solid enough to hold the surface treatment in the past, so we don't feel like we need to waste anymore money on it right now." Mr. Beer concluded his testimony by indicating that upgrading is determined "by the amount of traffic and whether it will hold." He stated "that coal traffic on the road is off and will stay off." Accordingly, respondent suggests that upgrading is not appropriate nor mandated at this time.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins vs. Sims,* 130 W.Va. 645, 46 SE.2d 81 (1947). In order for the respondent to be found liable for the damages, it must have had actual or constructive knowledge of the defect in question. While there was no evidence of actual notice, a hole of the dimensions described by claimant could not have developed overnight, and respondent is therefore charged with constructive knowledge of the condition of the road. However, claimant also had acknowledge of the hole and he was likewise negligent, and the Court finds that his negligence was equal to or greater than respondent's. The Court must, therefore, deny the claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 22, 1991

GERALD B. DUNCAN
VS.
DIVISION OF HIGHWAYS

(CC-90-154)

Claimant appeared in person.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant was driving his 1980 Toyota pick-up truck south on West Virginia Route 61 at 10:00 p.m., February 24, 1990, when he collided with a fallen tree. Fortunately, claimant was not injured, but his vehicle was a total loss. It was sold for $400.00 salvage. The weather conditions

were described as "very cold and windy" the night of the accident. Claimant testified that he saw a "downed tree some 30 feet ahead," but could not stop in time to avoid it. Claimant estimated his speed of travel as "40 to 45" miles per hour.

Respondent believes the claimant's accident was the result of an act of nature. This Court is inclined to agree. The tree found at the scene of the accident was a "live tree." Testimony further indicated that the "40 foot green pine tree had rolled out of the ground and slid down the hill, roots and all" shortly before the accident.

No notice was given to respondent that the tree had fallen across the road until after the accident. No evidence was introduced to show that trees fall routinely in the area of the accident. It is therefore impossible to predict such an occurrence, nor to provide warning of this peril. The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins vs. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by a defect of this sort, it must have had either actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. *Davis vs. Dept. of Highways,* 21 Ct. Cl. 150 (1977). As the claimant did not meet this burden of proof, the claim must be denied.

Claim disallowed.

OPINION ISSUED FEBRUARY 22, 1991

REGINALD CUNNINGHAM AND IRENE BARKLEY
VS.
DIVISION OF HIGHWAYS

(CC-89-475)

Claimant appeared in his own behalf and for Irene Barkley, co-owner of the damaged vehicle.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On a clear and dry October 27, 1989, evening, claimant Reginald Cunningham was driving his 1988 Nissan Sentra on State Route 9 near the turn-off for the Berwind Country Store in McDowell County. As he approached the turn-off for the store, his vehicle struck a hole in the road. claimant could not estimate the size or depth of the hole. The impact punctured a left front tire and produced a slow leak in the left rear tire. Both hubcaps and rims for the left side of the car were bent. An estimate obtained from a Nissan dealership two weeks after the accident indicates that replacement of the described items will cost $344.57. The claim submitted is for the amount of $350.51. Claimant testified that he did not notify respondent of this accident, nor did he contact law enforcement authorities.

Respondent avers no knowledge of the defect complained of. Respondent further argues that this claim submitted December 1, 1990, was the first and only notice it has received concerning a hole in Route 9 in the area of Berwind Country Store. Accordingly, respondent asserts a lack of notice of this alleged hazard.

The law governing such a claim is well settled. For the respondent to be held liable for damage caused by a hole in the road surface, it must have had either actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Davis vs. Department of Highways*, 11 Ct. Cl. 150 (1977). As the claimant has failed to prove that respondent knew or should have known that a dangerous hole was present in the road, the claim must be denied.

Claim disallowed.

OPINION ISSUED FEBRUARY 22, 1991

E. SHAWN LINGER
VS.
DIVISION OF HIGHWAYS

(CC-90-187)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On April 3, 1990, claimant was operating his 1987 Dodge Shadow on West Virginia State Route 19/24. This route connects the exit ramp on I-79 and West Virginia State Route 119. Claimant's vehicle struck a hole as he was driving from Route 19/24 onto Route 119 proceeding toward Star City in Monongalia County, West Virginia. His vehicle sustained damage to both of the left tires for which claimant alleges a loss of $198.24.

Claimant testified that he had not driven in this area for a number of months. There were several holes on the right side of the connecting area from Route 19/24 to Route 119. The holes were approximately seven inches wide and four to five inches deep. He was traveling at approximately forty miles per hour. There was a steady rain at the time of this incident which occurred at approximately 3:00 to 3:30 p.m. He was proceeding through a "yield sign" at the intersection.

Gary Leary, assistant superintendent for respondent in Monongalia County testified that he travels this area every day. The holes occur were the concrete surface of Route 19/24 and the black-top surface of Route 119 intersect. Respondent's records reflect that cold mix was placed in the holes on March 23, 1990.

The Court is of the opinion that claimant has failed to establish constructive or actual notice on the part of the respondent. The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947). The respondent maintained the road by placing cold mix in the holes. This method of repair is temporary in nature, but it is the only remedy available to respondent during the winter months. Therefore, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINIONS ISSUED FEBRUARY 22, 1991

DARRELL G. LINKSWEILER
VS.
DIVISION OF MOTOR VEHICLES

(CC-90-295)

Claimant appeared in his own behalf.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

On December 12, 1987, claimant purchased a new Buick from Scott Runyon Pontiac - Buick of Nitro, West Virginia. As a result of an admitted structural defect the manufacturer repurchased the vehicle on June 5, 1989. Claimant was refunded the original purchase price, exclusive of taxes. Claimant testified that pursuant to an arbitration agreement by and between the manufacturer and purchaser, claimant may only recover the purchase price. An arbitration award to claimant in the amount of $19,489.00 was made by General Motors Corporation. This amount did not include the $974.45 paid by claimant as sales tax on purchase. Claimant informally sought the refund of the sales tax from respondent, but was advised that a "six month rule" barred the refund request. Claimant now petitions for the sales tax refund to this Court.

Respondent avers that the Court lacks jurisdiction to allow a refund of sales tax. Respondent, however, does stipulate that the sales tax was paid and collected by the State in the stated amount of $974.45.

It is the opinion of the Court that the claimant lacks standing to recover the refund through the Court of Claims under W.Va. Code §14-2-1 and §14-2-14(5). Furthermore, W.Va. Code §46A-6A-4(a) et. seq. provide that in a civil action by a consumer:

> (a) If the nonconformity results in substantial impairment to the use or market value of the new motor vehicle and the manufacturer has not replaced the new motor vehicle pursuant to the provisions of section three [§46-A-6A-

> 3] of this article, or if the nonconformity exists after a reasonable number of attempts to conform the new motor vehicle to the applicable express warranties, **the consumer shall have a cause of action against the manufacturer in the circuit court** of any county having venue.
> (b) In any action under this section, the consumer may be awarded all or any portion of the following:
> (1) Revocation of acceptance and refund of purchase price, **including, but not limited to, sales tax,...**. (Emphasis added.)

As the Court lacks jurisdiction over the subject matter of this claim, the Court must deny the claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 22, 1991

JOSEPH J. NEKORANEC
VS.
DIVISION OF HIGHWAYS

(CC-90-148)

Claimant appeared in his own behalf.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On December 29, 1989, around 3:00 p.m., claimant drove his Ford 150 pick-up truck into the parking lot of Economy Tank Company beside the Pt. Pleasant road in St. Albans, Kanawha County. To enter the lot, claimant's truck crossed a drain grate. The grate struck the under-structure of claimant's truck damaging the front fender. Claimant immediately notified a representative of Economy Tank Company, who advised that the grate "belonged to the State Road." Claimant then notified respondent of the damage before leaving the scene of the accident. A representative of respondent's St. Albans office came to the accident site and disavowed responsibility for the grate.

The uncontroverted testimony in this matter is that a worn grate with a concave shape caused the damage. Claimant testified that the grate "kicked up" as his truck crossed it. The resulting damage is estimated at $178.08, the amount upon which this claim is brought.

Respondent avers that the grate is not its responsibility, since the driveway upon which it is situate is the property of Economy Tank Company. Respondent further argues that property owners are responsible for maintaining the approach to their lot, inclusive of drainage. An encroachment permit is required for private driveway access to state roads. This permit obligates

and assigns maintenance responsibility and liability to the property owner. The pertinent law is WV Code §17-16-9 and reads in part:

> The owner or tenant of land fronting on any state road shall construct and keep in repair all approaches or driveways to and from the same, under the direction of the state....

Respondent's witness testified that the grate in question was not of the type approved by and installed by respondent. Testimony also indicates that Economy Tank Company has routinely altered the grating and by such actions has manifested dominion and control over same. Accordingly, the Court can find no negligence upon the part of respondent and must deny the claim. The Court further holds that respondent is not the proper party defendant.

Claim disallowed.

OPINION ISSUED FEBRUARY 22, 1991

MILDRED J. POTTER
VS.
DIVISION OF HIGHWAYS

(CC-89-76)

On February 3, 1989, claimant and her daughter were travelling on State Route 52, near Welch, in McDowell County. As claimant entered an area of the road known as "Premier Cut", rocks began falling from the overhanging cliff and struck claimant's 1976 Chevrolet Monte Carlo. Claimant momentarily lost control of her vehicle, but testified that she "got the car braked without running into anything." The rock fall, however, dented and scratched the vehicle. A Chevrolet dealership estimates repairs to cost $661.23, the amount for which this claim is brought. Claimant testified that she 'drives this area very often," and has "driven it all her life." She further testified that "rocks in the road" in the area of her accident were frequently seen. However, claimant did not notify respondent of prior rock slides, only the present one.

Respondent avers that claimant's accident was caused by an act of nature over which it has no control. Respondent's witness, an assistant McDowell County road supervisor, testified that 'nobody had complained about falling road in the (accident) area." However, he said that "rock does fall quite often (there)" and no signs warning of this danger have been installed.

The case law governing liability for rock falls permits a finding of negligence against respondent, when "it has ben demonstrated that respondent knew or should have known that a particular area of highway was dangerous because of frequent rock slides, and adequate precautions to remove the hazard or warn motorists were not taken. Hammond v. Dept. of Highways, 11 Ct. Cl. 234 (1977). This Court has additionally held that "the lack of falling rock signs does not make the

State liable, without convincing evidence of such a hazard. *Dallas Howard Jude v. Dept. of Highways,* 13 Ct. Cl. 28, (1979).

Conversely, claimant testified that she was aware that rock falls occurred in the described area, and had seen rocks in and along the road-side prior to her accident. As the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, the Court must deny this claim. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by the rock fall, it must have had either actual or constructive notice of the condition and a reasonable amount of time to take corrective action. *Davis v. Dept. of Highways,* 11 Ct. Cl. 150 (1977). It appears to this Court that the requisite notice was not provided to respondent. Therefore, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 22, 1991

ELIGAH W. PROFFIT AND JUDY PROFFIT
VS.
DIVISION OF HIGHWAYS

(CC-89-494)

Claimants appeared in person.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimants, husband and wife, brought this action to recover for damages to their vehicle in the amount of $1,581.75. Claimants' daughter, Dedra Yvonne Proffit, was operating their 1984 Mazda 626 on Route 10 in McDowell County, West Virginia. On October 20,1 989, at 6:15 p.m., claimant's daughter entered a tunnel on Route 10. It was raining and water was collecting in the tunnel. Mrs. Proffit was a passenger and testified that her daughter's speed was

"about five-to-ten miles per hour." Mrs. Proffit and her daughter testified that the water was about one foot deep in the tunnel when the car struck a hole and collided with the tunnel wall. Both indicated that they are very familiar with the tunnel and travel it daily. The daughter stated, "I go through there every day of my life and there's always, if there's not big holes, there's big humps on the road."

The evidence in this claim indicates that claimants knew of the hazard of the roadway and that standing water collected in the tunnel, potentially creating and obscuring holes in the road surface. The evidence does not establish that respondent had this knowledge. No witnesses were provided by claimants to prove otherwise, nor did claimants notify respondent of the hazardous conditions of the road until after the accident.

Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947), holds that the State is neither an insurer nor a guarantor of the safety of the motorists on its highways. For the respondent to be held liable for the damage caused by a defect of this nature, it must have had either actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways,* 11 Ct. Cl. 150 (1977). The evidence presented by claimants did not establish notice. Since claimants did not meet this burden of proof, the claim must be denied.

Claim disallowed.

*OPINION ISSUED FEBRUARY 22, 199*1

JENNY M. YOST
VS.
DIVISION OF HIGHWAYS

(CC-90-334)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant was operating her 1982 Ford Escort on January 1, 1990, on U.S. Route 50 in Clarksburg, West Virginia, when her vehicle stuck a large hole. Claimant testified that as she was proceeding from the Second Street ramp on U.S. Route 50, her vehicle struck a hole which was approximately twenty-six inches in diameter. As a result of this incident, claimant's vehicle sustained damage to a tire and a rim for a total claim of $67.84.

Claimant testified that there were other holes in the area. There were no signs indicating "Rough Road." She had driven in this area about a week prior to this accident but had not noticed the particular hole which her vehicle struck.

Richard Alan Brown, a maintenance crew leader for respondent, testified that the are of U.S. Route 50 described by the claimant did not have any "bad holes in that section." He further testified that a bridge near this section of road did have many holes and "Rough Road" signs were placed to provide notice to travelers crossing the bridge.

The Court, having reviewed the facts and allegations in this claim, is of the opinion that claimant has failed to establish actual or constructive notice on the part of the respondent for the defect which her vehicle struck. The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order

for respondent to be found liable for a defect in the road, it must have had actual or constructive knowledge of the defect in question.

Therefore, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED MARCH 14, 1991

CAROL LEWIS BOSLEY
VS.
DIVISION OF HIGHWAYS

(CC-90-108)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to her vehicle , a 1987 Ford EXP, which occurred on February 6, 1990, when the vehicle struck a hole and/or a metal expansion joint on a bridge. Claimant's vehicle sustained damage to a tire which had to be replaced. The new tire cost $96.99 for which claimant now requests reimbursement.

Claimant testified that she was familiar with U.S. Route 250 in this area and knew that there was a hole in the surface of the road just before the Watson Bridge and a second hole on the bridge which is also a part of U.S. Route 250 in Fairmont, West Virginia. The hole struck was approximately two feet in diameter, and about four to five inches deep, and was just prior to an expansion joint between the road surface and the bridge surface. Claimant was not sure whether the tire was damaged as a result of striking the hole or striking the expansion joint. She was operating her vehicle at approximately thirty-five to forty miles per hour. The holes were filled with water at the time of her accident.

Dwayne Allen Miller, county assistant supervisor for Marion County, testified that records of the respondent reflect that cold mix was placed in the holes in the area of the Watson Street bridge on February 5, 1990. The condition of the expansion joint had been reported to the bridge engineer. He stated that "cold mix is usually just a temporary patch and it doesn't hold up."

The Court is of the opinion that respondent failed to properly maintain this area of U.S. Route 250. Claimant, however, was familiar with the area and failed to take reasonable care to avoid the hazard. The Court finds that under the doctrine of comparative negligence the claimant is 25% negligent for this incident. Therefore, the Court makes an award in the amount of $72.74.

Award of $72.74.

OPINION ISSUED MARCH 14, 1991

DOMONICK DELGRANDE
VS.
DIVISION OF HIGHWAYS

(CC-90-325)

Claimant present in person.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On or about August 30, 1990, claimant was attempting to cross a bridge located on Nemours Road designated as 52/6 located in Mercer County. As he was proceeding across the wooden deck that was missing a plank, he damaged a tire. Claimant immediately notified the respondent of the incident.

Claimant and respondent have stipulated the facts of the claim and have reached an agreed amount of $102.82 for damage sustained by claimant's vehicle.

Testimony indicates that respondent had actual and constructive notice of the faulty board, but did not repair it in a timely manner. Accordingly, the claimant has met his burden of proof. The Court makes an award in the stipulated amount of $102.82.

Award of $102.82.

OPINION ISSUED MARCH 14, 1991

WALLACE D. DEMPSEY AND MICHAEL C. DEMPSEY
VS.
DIVISION OF HIGHWAYS

(CC-90-312)

Claimant appeared in person.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On or about July 27, 1990, at approximately 4:00 p.m., claimant Michael C. Dempsey, was operating a 1982 Honda 500 motorcycle along U.S. Route 199 and encountered a hole in the road. The hole is alleged to have been "eight inches wide, five to six inches deep, about five feet long." Claimant lost control of the motorcycle and slid for a few feet. Claimant was injured, but is not seeking medical damages as they were paid by a collateral source. The motorcycle was titled in the name of Wallace D. Dempsey, co-claimant, the father of the 18-year-old claimant.

Claimant Michael C. Dempsey stated that he had acquired the 500 series motorcycle a short time before the accident. He testified that this was the first time he had driven a "street motorcycle" on a highway. His prior experience was limited to a lesser powered "trail bike." The weather was clear and dry as claimant was traveling at 45 miles per hour in an area of Route 119 that he testified "was being repaired." Claimant believed the repairs to the road, included resurfacing, had been completed two days earlier. Unfortunately, the repairs were not completed or were inadequate, as cracks and holes remained in the road surface. Claimant seeks damages in the amount of $1,988.98 as the motorcycle was declared a total loss. Claimants allege that they had no prior knowledge that the defect was present, since the road had recently been repaired. No warning signs were posted in the accident area to indicate otherwise.

Respondent contends that claimant Michael C. Dempsey simply failed to exercise caution when he encountered the area. *Adkins v. Sims,* 130 W.Va. 645, S.E.2d 81 (1947) holds that the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. For the respondent to be hold liable for damage caused by a defect of this sort, it must have had actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways,* 11 Ct.Cl. 150 (1977). Testimony suggests that respondent did have notice of the dangerous condition of the described road, but had inadequately completed repairs two days before the accident. Accordingly, but for respondent negligent repair of the road surface, this accident may not have occurred. Claimants have met their burden of proof and are entitled to recover damages.

However, this Court is of the further opinion that claimants must shoulder some responsibility for this accident. It appears to this Court that the speed of travel may have been too great for an area of road known to be undergoing repair. Furthermore, the speed appears excessive for an unsupervised 18-year-old first time operator of an unfamiliar, large and powerful motorcycle on a highway. It is therefore the finding of the Court that claimants were 20% at fault and respondent was 80% at fault for this accident. The Court also finds that claimant has not established with requisite specificity what a fair value for the loss of the motorcycle is. The Court may not speculate as to this value. Accordingly, claimant's testimony of "$600.00" as the amount he paid when he purchased the 9 -year-old motorcycle, is the value of the loss. Applying comparative negligence to the amount of $600.00, a 25% finding of fault reduces the intended award to the amount of $450.00.

Award of $450.00

OPINION ISSUED MARCH 14, 1996

ROBERT W. FISHER
VS.
DIVISION OF HIGHWAYS

(CC-90-135)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant was operating his 1988 Chevrolet Celebrity on U.S. Route 250 proceeding toward Grafton, West Virginia. It was approximately 8:30 p.m. on February 27, 1990. Claimant was familiar with the area and knew that the hole which his vehicle struck had been there for a long time. Claimant incurred the expense for a new tire in the amount of $131.82 and a tow bill in the amount of $31.50 for a total claim of $163.32.

Claimant testified that he was operating his vehicle at approximately thirty miles per hour. A vehicle was approaching in the opposite lane and claimant was unable to avoid striking the hole. Claimant described the hole as being seventeen inches wide, thirty-seven inches long and six inches deep. It was on the right side of the lane and it was located in a turn.

Dwayne A. Miller, county assistant supervisor for the respondent for Marion County, testified that respondent's crew had placed cold mix in the area described by claimant on February 26, 1990, the day prior to claimant's incident.

The Court is of the opinion that claimant has established constructive notice, if not actual, on the part of respondent as to the existence of the defect in the road. In fact, respondent was aware of the hole and attempted to maintain the hole with cold mix which was evidently insufficient for this particular hole.

The Court is cognizant of the fact that claimant also was familiar with the hole and, therefore, he must bear a portion of the negligence for this incident. Under the doctrine of comparative negligence the Court finds claimant forty per cent negligent and reduces his damages in the amount of $163.32 by that amount.

Accordingly, the Court makes an award to claimant in the amount of $97.99.

Award of $97.99.

OPINION ISSUED MARCH 14, 1991

NICHOLAS RAMIREZ
VS.
DIVISION OF HIGHWAYS

(CC-90-341)

Claimant appeared in his own behalf.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On September 7, 1990, claimant was traveling north on State Route 52 around 11:00 p.m. when the front wheel of his 1988 Chevrolet Astro Van struck a hole on a bridge near Justice, Logan County. This accident resulted in damage to the van's front fender, running board, front wheels, and rims. Claimant provided an estimate of $757.37 for the described damage. Claimant denies any prior knowledge of this peril. He testified that he had not traveled the road in "over a year." Claimant further testified that no warning signs or other protective devices were present when the accident occurred.

Respondent's witness, an area maintenance supervisor, testified that he was aware of this particular hole and he had inspected it the afternoon before the accident. He further testified that no repair was attempted since bridge work is not performed by his office. Although this witness believed that cones were placed around the hole, the Court is more concerned that no effort was made temporarily to cover the hole. Subsequent testimony indicated that a steel plate was placed over the hole three days after claimant's accident.

Accordingly, the Court finds that respondent had both actual and constructive notice of the hazard and that respondent failed to exercise reasonable care to remedy the hazard. Therefore, the Court finds that the respondent is liable to claimant for its negligence.

Claimant testified that he did not submit the damage estimates to his insurer since he has a $500.00 deductible. The Court is of the opinion to and does award claimant the amount of $500.00. Any expenses above and beyond this award amount must be borne by the insurer.

Award of $500.00.

OPINION ISSUED APRIL 11, 1991

TERRY ASHWORTH
VS.
DEPARTMENT OF EDUCATION

(CC-91-63)

Claimant represents self.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks reimbursement of $165.00 for a course taken to renew his teaching certificate. The invoice for the course was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $165.00.

Award of $165.00.

OPINION ISSUED APRIL 11, 1991

ELDEN GENE DAVIDSON
VS.
DIVISION OF HIGHWAYS

(CC-90-104)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant was operating his 1986 Chevrolet Celebrity on West Virginia Route 4 in Marion County at approximately 3:00 p.m. on February 13, 1990, when his vehicle struck a hole in the road. The vehicle sustained damage to a tire which claimant replaced at a cost of $48.76.

Claimant testified that the road is "full of potholes." He had reported the condition of the road to the respondent on tow occasions prior to the date of this incident. He was unable to avoid the hole as a coal truck was approaching him in the opposite lane and he was driving "at the edge of the road" to avoid being crowded. The hole, located on the right edge of the road, was approximately eighteen inches in diameter and six inches in depth. Claimant was aware that the hole was in the road.

The Court is of the opinion that claimant has established that respondent had actual notice of the condition of the road. This particular hole was deep and constituted a hazard to travelers on the State road. As the claimant has established negligence on the part of the respondent, the Court is of the opinion to make an award to claimant for the damaged tire.

The Court therefore makes an award to claimant in the amount of $48.76.

Award of $48.76.

OPINION ISSUED APRIL 11, 1991

DAVIS-WEAVER FUNERAL HOME, INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

(CC-91-48)

No appearance by claimant.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $400.00 for funeral services rendered pursuant to respondent's regulations. The invoice for the funeral services was not processed for payment in the proper fiscal year; therefore, claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

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

Award of $400.00.

OPINION ISSUED APRIL 11, 1991

HAMILTON BUSINESS SYSTEMS
VS.
DEPARTMENT OF ADMINISTRATION

(CC-91-62)

Claimant represents self.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $44.33 for an exposure lamp provided respondent. The invoice for the lamp was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $44.33.

Award of $44.33.

OPINION ISSUED APRIL 11, 1991

VIRGIL HARPER
VS.
DIVISION OF CORRECTIONS

(CC-90-287)

Claimant represents self.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to personal property which occurred when an escapee from the Huttonsville Correctional Center, a facility of the respondent, broke into claimant's retirement home. Claimant and his wife discovered that an escapee had broken into their home approximately one week after the incident occurred. The damages included the theft of various canned food, stolen clothing, the cost to repair a broken window, and stolen money for a total claim of $272.38.

Respondent, although admitting that the escape occurred, denies the claim.

Claimant's testimony established that he and his wife maintained a retirement home at Valley Head, West Virginia, near the Huttonsville Correctional Center. He and his wife went to their home for a weekend in the spring of 1990. Upon entering the home, they discovered that it had

been broken into and that damages had occurred as described hereinabove. Claimant contacted William C. Duncil, Warden at the Huttonsville Correctional Center, who informed claimant that there had been an escape. Employees from the Center came to claimant's home to retrieve the escapee's clothing and shoes which he had left in the home. Warden Duncil confirmed in a letter to claimant that an escapee from Huttonsville Correctional Center had broken into the home and that the escapee had later confessed to the crime.

This Court has 12 Ct. Cl. 263 entertained various claims involving escapees from State institutions. The Court's position as enunciated in the claim of *Tyre v. Dept. of Corrections,* 1 Ct.Cl. 263 (1979) establishes that each claim of this nature must be decided upon its own particular facts. The claimant must fully establish negligence on the part of the State agency and that the negligence contributed to and made possible the escape of the individual. This burden of proof was established in *Lambert v. Board of Control,* 2 Ct.Cl. 198, 202 (1943), wherein the Court stated:

> ...that the lack of reasonable care must be shown in each instance (of an escape) and that the negligence must be so extreme as to be directly the cause for the commission of the tort and thus place the responsibility squarely on the authorities involved.

See also *Farmers & Mechanics Mutual Fire Insurance Company of W.Va. And Mutual Protective Association of W.Va. v. Dept. of Human Services and Dept. of Corrections,* Unpublished Opinion dated October 24, 1986.

In the instant claim, claimant has failed to establish by a preponderance of the evidence the requisite negligence on the part of the respondent. Therefore, the Court, although sympathic with the claimant and the fact that he has suffered a loss without fault on his own part, is constrained to apply the applicable law and must deny this claim.

Claim disallowed.

OPINION ISSUED APRIL 11, 1991

HIGHLAWN PHARMACY, INC.
VS.
DIVISION OF CORRECTIONS

(CC-91-60)

Claimant represents self.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $4,073.79 for medication provided inmates housed in the Cabell County Jail for whom respondent is responsible for medical expenses. The invoices for the medication were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $4,073.39.

Award of $4,073.79.

OPINION ISSUED APRIL 11, 1991

WANDA KELLER
VS.
DIVISION OF HIGHWAYS

(CC-90-349)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On October 1, 1990, claimant was operating her 1983 Oldsmobile Delta 88 on Route 14 in Parkersburg, Wood County. While crossing the Fifth Street Bridge, claimant's vehicle struck a hole on the right side of the lane causing damage to both tires on the right side of her vehicle. Claimant brought this claim in the amount of $558.09 to recover for the damages to the tires, a wheel, and a trim ring.

Claimant testified that her vehicle struck a hole located about six inches from the curb on the Fifth Street Bridge. There was other traffic on the bridge. She observed a crew performing maintenance on the ramp to the bridge which she assumed were respondent's employees. She was driving at approximately thirty-five miles per hour when her vehicle struck the hole and both tires on the right side of her vehicle went flat. The incident occurred at around 11:00 a.m. she saw the hole just prior to driving into it. After her accident, she obtained Notice of Claim Forms and took the same to her insurance agent's office where an individual completed the forms, she signed the forms, and then took them to the "State Road Commission" whereupon the forms were mailed to the Court of Claims for filing. Although claimant's testimony revealed that the incident occurred on Route 14, her Notice of Claim forms indicated that the incident occurred on Route 95.

Respondent's investigation of the claim was based upon the statement in claimant's Notice of Claim forms which indicated that the accident had occurred on Route 35. Respondent was therefore not prepared to defend this claim for alleged defects on Route 14. However, Paul F. Reese,

respondent's maintenance superintendent for Wood County, testified that the maintenance garage is not far from the area where claimant had her accident. It was an area with heavy traffic, and he keeps a close watch on the area for problems. He indicated that the curb may have been broken in several places, but the road surface was properly maintained. The travel lanes in the area of claimant's accident are the average width.

The Court, having reviewed the record in this claim is constrained to find that negligence on the part of the respondent was not established by the claimant. It is incumbent upon the knowledge of the hazard upon which the claim is based. As claimant failed to established such notice, the Court is unable to find that respondent was negligent.

Therefore, the Court is of the opinion to and must deny this claim.

Claim disallowed.

OPINION ISSUED APRIL 11, 1991

SHIRLEY A. RINKER
VS.
DIVISION OF HIGHWAYS

(CC-90-245)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to her vehicle which occurred on June 12, 1990. Claimant was operating her 1978 Chevrolet Nova on Baird Street in Grafton, West Virginia. The vehicle went in to a drop inlet located on the right side of the road next to a curb. Claimant had to replace a tire and had to have her vehicle aligned for a total claim of $56.13.

Claimant testified that she was familiar with Baird Street. She was aware that there were three deep inlets in a row. The road had been paved in 1989 and the edge of pavement was built up around the inlets. She stated that there was a six inch difference in the top of the pavement and the location of the grate over the culvert. She was traveling at a rate of approximately twenty miles per hour when the incident occurred.

The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for respondent to be

found liable for the damages, it must have had actual or constructive knowledge of the defect in question. The depth of the drop inlet which claimant's vehicle struck was six inches. It is reasonable to conclude that the tire of the vehicle may be damaged when it strikes a hazard such as this along a State maintained road. The Court is of the opinion that the condition of the drop inlets constituted a hazard on Baird Street. Therefore, the Court is of the opinion to and does make an award to claimant in the amount of $56.13 for the damages to her vehicle.

Award of $56.13.

OPINION ISSUED APRIL 11, 1991

RAYMOND T. SUTTON
VS.
DIVISION OF HIGHWAYS

(CC-90-189)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant is the owner of property in Waverly, Wood County. On April 16, 1990, respondent had a crew ditching the State maintained road, known as Corker Run, in front of claimant's property. Claimant alleges that the crew placed a ditch across his driveway which caused damage to his 1982 Cadillac when he was backing the vehicle out of his driveway the next day, April 17, 1990. The vehicle sustained damage to the bumper for which claimant now alleges a loss in the amount of $156.50.

Claimant testified that he had obtained a permit from the respondent in 1980 to place a drainage structure under the driveway. A metal corrugated pipe was placed under the driveway. Claimant alleged that on several occasions respondent's trucks used his driveway and damaged the metal pipe. After opening the pipe on more than one occasion, claimant had not attempted to open or repair the pipe since 1988, over a year prior to this incident.

On the evening of April 16, 1990, claimant was returning to his home in his pick-up truck. He proceeded through the ditch and into his driveway without any problems. The ditch was approximately one foot in width and eight-to-ten inches in depth. On the following morning, he backed his automobile down the driveway and into the ditch. The automobile sustained damage when it went into the ditch.

D. Dale Deuley, a crew leader for the respondent, testified that his crew performed

the ditching operation which involved claimant's driveway. The crew "cut a swale to drain water" as the water was running across the road. Mr. Deuley did not observe any metal pipe for drainage under the driveway. On April 18, 1990, after having received a call from the claimant, the crew returned and added gravel to the ditch to alleviate the problem for claimant entering and exiting his driveway.

The Court, having reviewed the evidence in this claim, is of the opinion that respondent acted in an appropriate manner. The impoundment of water was caused by the faulty pipe beneath claimant's driveway. The Court notes that W.Va. Code §17-16-9 provides:

> The owner or tenant of land fronting on any state road shall construct and keep in repair all approaches or driveways to and from the same, under the direction of the state road commission, and, likewise, **the owner or tenant of land fronting on any county-district road shall construct and keep in repair all approaches or driveways to and from the same,** under the direction of the county road engineer, and it shall be unlawful for such owner or tenant to fill up any ditch, or place any material of any kind or character in any ditch, so as in any manner to obstruct or interfere with the purposes for which it was made. (Emphasis added).

According to the provision of this section of the Code, claimant failed to maintain the metal pipe beneath his driveway. Respondent contends that it was performing proper maintenance opening the ditch for a State maintained road. The Court is of the opinion that the action on the part of the respondent was proper maintenance to alleviate a potential hazard for the travelers of this road, i.e., allowing water backed up at claimant's driveway to flow onto the road surface. As claimant has failed to establish any negligence on the part of the respondent, the Court is of the opinion to and does disallow this claim.

Claim disallowed.

OPINION ISSUED APRIL 11, 1991

ERNIE WILLIAMS
VS.
DIVISION OF HIGHWAYS

(CC-90-268)

Claimant represents self.
James D. Terry and Glen A. Murphy, Attorneys at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damage to his 1988 Ford Escort GT when the vehicle's tire went into a drop inlet on Route 14 in Parkersburg, Wood County, on June 7, 1990. Claimant alleges that the drop inlet was six to six and one-half inches below the road surface. It was located in the middle of his lane of travel. The incident occurred between 3:00 p.m. and 4:00 p.m. on a sunny day. Claimant replaced the damaged tire at a cost of $98.57.

Paul F. Reese, respondent's maintenance superintendent for Wood County, testified that the drop inlet is maintained by respondent. He stated that the depth of the drop inlet is "maybe a little bit less than three inches" and that this depth is accepted as being safe.

The Court is of the opinion that the drop inlet which is the subject matter of this claim did not pose a hazard to the travelers on the road. As claimant failed to establish negligence on the part of the respondent, the Court must deny this claim.

Claim disallowed.

OPINION ISSUED APRIL 29, 1991

ALTMEYER FUNERAL HOMES, INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

(CC-91-88)

Claimant represents self.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $400.00 for funeral services rendered pursuant to respondent's regulations. The invoice for the funeral services was not processed for payment in the proper fiscal year; therefore, claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

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

Award of $400.00.

OPINION ISSUED APRIL 29, 1991

THE MICHIE COMPANY
VS.

GOVERNOR'S OFFICE OF COMMUNITY AND
INDUSTRIAL DEVELOPMENT

(CC-91-99)

Claimant represents self.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $713.44 for books provided respondent. The invoices for the books were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claimant states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $713.44.
Award of $713.44.

REVISED OPINION ISSUED APRIL 29, 1991
JAMES MICHAEL MCKINNEY, AND MRS. JAMES
MICHAEL MCKINNEY, HIS WIFE
VS.
DIVISION OF HIGHWAYS
(CC-87-165)

Larry E. Losch, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

STEPTOE, JUDGE:

Claimant was driving his 1971 Ford Pinto east on State route 41 in Nicholas County, West Virginia, when the right front wheel crossed a hole within the paved portion of the right lane, causing momentary loss of handling, during which time claimant was thrown against the steering wheel and sustained personal injury. Claimant further alleges property damage to his vehicle, however the Court will only consider the issue of liability at this time.

Claimant's single vehicle accident occurred on or about June 16, 1985. Claimant was traveling on Route 41 at approximately 11:30 a.m., when he was forced to the side of his lane (but not off the road) by an approaching tractor trailer. Claimant testified that the tractor trailer was over the yellow line. Claimant further testified that when he moved to the edge of the road to "give the tractor trailer room," he hit a hole in the road surface that was one foot wide and several inches deep. When asked specifically how deep, claimant stated, "deep enough that my car frame hit the road." Claimant resides in the area of the accident, and travels this particular section of road, "once or twice a month." Claimant testified that "the road is pretty bad through there." No accident report was filed, nor did claimant contact the respondent prior to or after the accident to report the alleged hazard.

Respondent does not deny that Route 41 was in need of repaving, but takes the position that it was not on notice of the defect in the pavement which allegedly caused this accident. The former maintenance crew leader in Nicholas County for Route 41, Ernest Eugene Stewart, testified, however, that "we had all kinds of complaints from Route 41 all the way from Summersville to Craigsville," an area that included the accident location. This witness for claimant further testified that "we fixed only the larger holes," in the months prior to claimant's accident. It was several weeks after claimant's accident that the road was repaved in its entirely. Although respondent appears to have had both constructive and actual notice of the holes in Route 41, there is no indication, nor was testimony provided, that respondent placed "rough road" or similar warning signs in the area.

Respondent, on cross examination of claimant's wife, Debbie Lucille McKinney, elicited testimony that claimant was not wearing a seat belt at the time of the accident, but that his wife and children were wearing seat belts and were not injured. This Court recognizes that failure to wear a seat belt is not at the present time in any way a basis for contributory negligence. The West Virginia Supreme Court of Appeals has held, "In the absence of mandatory seat belt legislation, no violation of a common law duty of reasonable care may be construed from failure to wear a seat belt. In the absence of a mandatory statutory duty to wear a seat belt, evidence of one's failure to wear a seat belt is not admissible in a negligence action to assess percentage of fault..." *Wright vs. Hanley*, 387 S.E.2d 801 (1989).

From the evidence presented, it is the opinion of this Court that respondent had both constructive and actual knowledge of the road conditions, including the defect which caused the damage to claimant and his vehicle, and having failed to warn the traveling public of and to take affirmative action to remedy such conditions in a timely manner, respondent did thereby cause an unreasonable risk to the safety of those using the described road.

As the Court is of the opinion that respondent was negligent in the maintenance of Route 41 and that such negligence was the proximate cause of the injuries received by the claimant in this claim, the Court directs the Clerk to set the claim for hearing on the issue of damages.

Judge Hanlon did not participate in the hearing or decision of this claim.

OPINION ISSUED APRIL 29, 1991

JEFFERY LEE MILLER
VS.
DIVISION OF HIGHWAYS

(CC-89-447)

Matthew J. Hayes, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

STEPTOE, JUDGE:

On November 17, 1987, at approximately 10:00 a.m., the 19-year-old claimant and a passenger in his 1977 Chevrolet C-10 350 V-8 pickup truck collided with a tractor trailer on Route 21, hereafter referred to as Sissonville Drive, in Kanawha County. The collision caused the death of the passenger and claimant sustained serious and permanent injury. Claimant's vehicle allegedly hydroplaned while traveling north on Sissonville Drive, a two-lane highway, and crossed the center line into the path of the southbound tractor trailer. The accident occurred in the southbound lane, approximately 500 feet north of the intersection of Route 21 and the Tuppers Creek exit of Interstate 79, 100 feet north of Floyd Young's Body Shop. Claimant alleges that the accident site had a problem with standing water which an adjoining property owner had previously called to the attention of the respondent. The road surface in the area of the accident is lower than the berms and this condition causes water to stand and pool on the highway. Claimant further alleges that drainage along the described highway was not adequately maintained.

Respondent contends that extremely heavy rainfall caused the water to accumulate on the road surface, and that there was a general accumulation of water throughout the area caused by heavy rain. Respondent also contends that claimant failed to exercise reasonable caution in this weather, and operated his vehicle in a negligent manner. Specifically, respondent's position is that claimant's vehicle when he lost control of the vehicle, and, therefore, claimant's own negligence was the proximate cause of this accident.

David A. Young, a witness for claimant, testified that he and his wife reside at 5532 Sissonville Drive which is near the scene of the accident. Mr. Young did not witness the accident as it occurred, but was present at the scene shortly thereafter. Mr. Young explained that this residence is owned by his mother-in-law. Mr. Young testified that he called respondent "two or three times" prior to claimant's accident, about water collecting on the road surface and creating a dangerous condition, such as ice. Mr. Young said his calls were directed to the North Charleston

maintenance office of the respondent. He further stated that the specific problem area was from his residence to Floyd Young's Body Shop, some 500 feet away. When asked specifically what created the standing and pooling of water in the described road section, the witness said "because gravel and the berm are higher than the blacktop."

Respondent introduced a federal government rainfall report indicating that heavy rain had fallen at the airport on the date of the accident. The Court observes that all witnesses when asked about the weather on the date of the accident likewise answered that rain had fallen.

The investigating police officer, Sgt. Robert Long, of the Kanawha County Sheriff's Department, testified that in his opinion "standing water did contribute to Mr. Miller hydroplaning." He observed that there was approximately one-half to one inch of standing water which crossed both lanes. However, when asked by claimant's counsel how far from the accident was the standing or pooling water, Sgt. Long answered, "the pooling of water was just approximately in front of the body shop itself, located at 5932 Sissonville Drive. The accident occurred, as I stated, approximately a hundred feet or so north, and Sgt. Long testified that claimant would have passed through the pooling water shortly before the accident. Sgt. Long explained to the Court that no skid marks or any physical evidence to identify or approximate speed were found. However, other witnesses who gave statements to Sgt. Long estimated claimant's speed between 30 to 35 miles per hour. The posted speed limit for this area is 40 miles per hour.

The first issue to be considered by the Court is whether respondent was negligent in its maintenance of Sissonville Drive, and whether such negligence was the proximate cause of claimant's injury. The totality of the evidence does not demonstrate negligence upon the part of the respondent. For respondent to be held liable, claimant must establish that respondent had actual or constructive notice of a particular road defect and that respondent had a reasonable amount of time for corrective action to be taken. *Davis v. Dept. of Highways*, 11 Ct. Cl. 150 91977). The evidence in this case only suggests a possible defect, namely inadequate drainage, resulting from a road surface that was allegedly lower than the berm. The existence of the pooling of water does not in and of itself demonstrate inadequate drainage. The pooling of water is a common occurrence on asphalt paved roads due to the uneven nature of this type of road surface. Such pooling occurs especially during and after heavy rainstorms. The record in this claim is replete with testimony concerning the slop of the road surface with no nexus of said defect to negligence by respondent. It is the opinion of the Court that respondent was not negligent in the maintenance of Sissonville Drive at the scene of claimant's accident.

The second issue considered by the Court is the negligence of the claimant. Although claimant drove through an area of standing water, the driver immediately behind him, Tony Burdette, testified that he did not see any brake lights from claimant's truck. The witness further testified that claimant "spun out a lot when he did take out..." This testimony and the testimony of Sgt. Long suggests that claimant may not have been exercising reasonable care under inclement weather conditions. A traveler on the State's highways is responsible for operating his vehicle in accordance with the conditions then and there existing. This requires the reasonable and prudent driver to drive with a higher degree of care when traveling on wet pavement in order to slow the vehicle when

approaching pools of water on the pavement. The Court is of the opinion that the speed of the claimant's vehicle was greater than a reasonable speed under the circumstances and conditions then and there existing.

In accordance with the findings stated hereinabove, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED APRIL 29, 1991

NATIONAL BUSINESS INSTITUTE, INC.
VS.
ATTORNEY GENERAL

(CC-91-94)

Claimant represents self.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $196.00 for registration fees for the West Virginia Labor and Employment Law seminar attended by two employees of the respondent. The invoice for the registration fees was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $196.00.

Award of $196.00.

OPINION ISSUED MAY 28, 1991

CURTIS E. ASBURY
VS.
DIVISION OF HIGHWAYS

(CC-90-221)

Claimant appeared in his own behalf.

James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On or about March 23, 1990, claimant was driving his 1987 Isuzu on County Road 43, more commonly known as Clover Hollow Road, Kanawha County. Claimant alleges that his vehicle struck a hole in the road, resulting in $1,122.70 in damage to the rear axle, rocker panel, and wheels. Claimant said his speed of travel was approximately thirty to thirty-five miles per hour when the accident occurred. He was unaware of the hole, and testified to being unfamiliar with the area. He was unable to stop his vehicle in time to avoid the hole as it was dark and he could not see the defect. Claimant further testified that no signs were present warning of the hazard. Claimant's insurance reimbursed him $1,000.81 for the described damages.

Respondent avers no knowledge of the peril. Mancie Legg, a maintenance supervisor for respondent, testified, "there are no potholes whatsoever" in the area of the accident. However, this witness did observe a "recessed area" in the road, further described as a "wave with a depth of one to two inches." The witness did not believe the recessed area in the road surface presented a danger. He testified the depression in the road was the result of a sanitary sewer that had settled. Subsequent investigation by the witness of the accident area indicates the depression in the road surface is "a normal gradual slope, with no sharp edge." The witness concluded his testimony indicating that no complaints had been received of the defect in the road.

The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by a defect of this nature, it must have had either actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Davis v. Dept. of Highways*, 11 Ct. Cl. 150 (1977). As the claimant did not meet his burden of proof, the claim must be denied.

Claim disallowed.

OPINION ISSUED MAY 29, 1991

RUTH P. BLEVINS
VS.
DIVISION OF HIGHWAYS

(CC-89-22)

Michael A. Esposito, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

HANLON, JUDGE:

Claimant alleges that on January 25, 1987, she was traveling on snow covered State Route 85 between Madison and Van in Boone County when her Fiat struck holes in the road, left the highway, and landed in the waters of Pond Fork. Claimant testified that she was traveling approximately 27 miles per hour on Route 85, when she encountered the holes near the Quinlon-Robinson boundary line. She explained that she had driven Route 85 daily for the past three years. Although she testified that the road was full of holes that she had previously seen, the record does not indicate that she notified respondent of the condition. On the morning before her 2:00 p.m. accident, claimant testified hat she had seen many potholes. Although in route to work at the Boone County Jail, with close proximity to law enforcement officers and other government workers, the record does not indicate that claimant had previously informed any responsible party of the conditions existing on State Route 85.

Claimant further alleges that the respondent failed to post guard rails in the accident area which could have stopped claimant's vehicle from going over the bank and landing in the river.

A witness for the claimant, Loretta Petry, whose residence overlooks Route 85, testified that on the date of the accident traffic on the road appeared to be "creeping" along in the snow. When asked by the Court to define creeping, the witness, Mrs. Petry, explained, "going very, very slowly." In terms of miles per hour, Mrs. Petry said, "probably about 10 miles per hour." A second witness for the claimant, Mr. Petry, testified that there was six inches of snow on the road in the area of the accident and twelve inches on the road edge. When asked what caused claimant to lose control of her vehicle, the snow, or the hole(s) in the road, claimant alleged the potholes in the road. Neither claimant nor her witnesses could describe the holes with particularity. Mrs. Petry was asked whether she had contacted respondent to complain about holes in the road, whereupon she answered, "Well, I guess it's like the weather. You complain but you really don't do anything about it. You complain to someone, you know, a friend or neighbor, **but you really don't, you know, contact the Department of Highways."** (Emphasis added).

Respondent denies liability contending that it had no notice of the particular hazard complained i.e., the holes in the road. Respondent additionally avers that it was not reasonable and customary to have guard rails in an area of road that was level and low. Both respondent and claimant agree that there had been a snowfall in the area and that State Route 85 was covered with snow.

The State is neither an insurer nor a guarantor of safety of persons traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by the hole, it must have had either actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways,* 11 Ct. Cl. 150 (1977). As the claimant did not establish notice, and the accident may have resulted from causes other than the road condition, the Court cannot hold respondent liable. It appears to the Court that the admitted speed of travel of claimant was excessive for the road conditions then and there existing. It is further the opinion of the Court that the absence of a guard rail does not in and of itself establish negligence. The West Virginia Supreme Court of Appeals established this rule in *Adkins* when it stated, "We do not think the failure of the state road commission to provide guard

rails...constitutes negligence of any character, and particularly no such negligence as would create a moral obligation of the State to pay damages for injury or death assumed to have occurred through such failure, and as the proximate cause thereof." The Supreme Court reasoned that the financial limitations placed upon the highway commissioner made it impossible to take care of all defects or inadequacies of the road system, at one time, or even in one year. The Court concluded, "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 points guard rails, danger signals and center lines should be provided, and the honest **exercise of that discretion cannot be negligence."** (Emphasis added). For the reasons stated hereinabove, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED MAY 28, 1991

RONALD D. CUMMINGS
VS.
DIVISION OF HIGHWAYS

(CC-90-206)

Claimant appeared in his own behalf.
Jerry D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant alleges that on April 22, 1990, he was traveling on Route 28 in Calhoun County, when his 1975 American Motors Hornet station wagon struck an eight to ten inch rock in the middle of this gravel road. Claimant was a passenger, and his wife was driving when this accident accurred. He believes the accident damaged the tail pipe and transmission of his vehicle. Claimant seeks $350.00 for transmission repairs and $53.19 for a tail pipe replacement. His total claim is for $403.19.

Respondent denies liability, having no notice of the particular hazard complained of. Respondent's witness, Keith Lynch, the Calhoun County highway maintenance supervisor, testified that no complaints were received from claimant prior to the accident, although claimant states otherwise.

Claimant testified that no one was injured in this accident, and that his wife was driving about 5 to 10 m.p.h. on what he described as a normal sunny day. He further testified that the rock may have been left after a neighbor voluntarily graded the road with a farm tractor. Claimant concluded his testimony by explaining that the transmission repair estimate presented to the Court appeared high, so he personally repaired the transmission for $50.00 with used parts. The

tail pipe was replaced at the stated amount of $53.19 by a repair shop.

The State is neither an insurer nor a guarantor of the safety of persons traveling on its highway. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by the rock, it must have had either actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1977). As the claimant did not establish notice, and the defect complained of may have resulted from unauthorized repair of the road surface by claimant's neighbor, the Court cannot hold respondent liable.

Claim disallowed.

OPINION ISSUED MAY 28, 1991

FERRELLGAS, INC.
VS.
ALCOHOL BEVERAGE CONTROL ADMINISTRATION

(CC-91-118)

Claimant represents self.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer. Claimant seeks $162.52 for gas services provided respondent. The invoices for the services were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $162.52.

Award of $162.52.

OPINION ISSUED MAY 28, 1996

ANDREW A. JONES, JEREMY L. JONES & CLEDITH JONES
VS.
DIVISION OF HIGHWAYS

(CC-89-499)

Sidney H. Bell, Attorney at Law, for claimants.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On December 5, 1989, claimants Andrew Jones, his wife Cledith, and their seven year old son, Jeremy, were traveling on State Route 80 approaching the town of Bradshaw in McDowell County. Route 80 is paralleled by a high rock cliff that is neither terraced nor stepped. The cliff which is located close to Bradshaw has been the subject of public controversy. Parents have complained that school buses were in danger of rock slides. Mr. Jones testified that as he drove his 1971 Pontiac Catalina into Bradshaw on the day of the incident, his car was struck by approximately five rocks from the cliff. The rocks hit and damaged the roof, passenger side window, and windshield of the vehicle. Although the car was driven from the accident scene, it was subsequently determines a total loss, and taken to a salvage yard. Claimant estimates the vehicle loss at $500.00, however no testimony was provided as to whether he received a salvage payment for the value of the vehicle. The claimants were treated at Welch Emergency Hospital for trauma and minor bruises after the accident. Their medical expenses were in the amount of $848.00. The claim was brought in the amount of $4000.00, for combined vehicle loss and bodily injury. Mr. Jones complaints of impaired hearing as a result of the accident, and testified that his wife and son suffer from repeated nightmares of the rock fall. Neither Mr. Jones and nor Mrs. Jones sustained work loss.

Claimant's two witnesses, Harmon Stinson and Jack Miller, were traveling together behind the claimant's car when the accident occurred. Both testified that claimant's car was struck by falling rock. Mr. Stinson testified that the accident occurred around 10:00 a.m. and the weather was clear. He further testified that the accident area was known to have rock slides, although respondent had undertaken repairs. He believes the repairs completed in 1987, two years prior to this accident, were "not a success, and rock fell right after they got done, and it's still falling up there." Mr. Miller testified that the repairs were not effective, stating "it hasn't helped any, they didn't take anything off the top to keep the rocks from falling down." He further testified, "there's no screen or net, ledge, or anything there to protect motorists from rocks falling off of there." Neither witness, however, testified to notifying respondent of subsequent rock falls, or of perceived fears of same.

Respondent avers that the repairs to the cliff were effective, and that no notice was provided of further rock falls, or dangerous conditions, until claimant's accident. William Bennett, a registered civil engineer and maintenance employee of respondent responsible for the Bradshaw area, testified that complaints were received concerning the cliff in the early 1980's, however the complaints ceased after respondent completed a $737,000.00 scaling of this cliff. Mr. Bennett testified, "since the completion of the project, there have not been any complaints received at the district level."

An additional witness for respondent, Charles Lane, an assistant county road supervisor, testified that the overhanging cliff was repaired in 1987, and no complaints have been received about the cliff after 1987. Mr. Lane testified that what discussion he had with claimant

concerned only coal trucks damaging Route 80, with no discussion ever made of the cliff.

Vincent Cantrell, a current school teacher and former patrolman for the town of Bradshaw testified that he had investigated the claimants' accident in 1989, and was called as a witness for respondent. Mr. Cantrell testified objectively that after the 1987 repairs to the cliff, "there had been no appreciable amount of rock (falling) at all." He further testified that after these repairs, no reports of rock slide accidents were received until claimant's. Mr. Cantrell also indicated to the Court that he had eight years of experience as a coal miner, and was knowledgeable about the nature of sandstone rock layers. He observed that the cliff was "sagging" prior to its repair in 1987. He even would estimate when the rock slides would occur. However after 1987, he believed the repairs to be adequate and no longer saw or predicted rock falls.

The case law governing liability for rock falls permits a finding of negligence against respondent, when "it has been demonstrated that respondent knew or should have known that a particular area of highway was dangerous because of frequent rock slides, and adequate precautions to remove the hazard to warn motorists were not taken." *Hammond v. Dept. of Highways,* 11 Ct.Cl. 234 (1977).

The Court, having reviewed the evidence in this claim, is the opinion that respondent's repairs to the cliff appeared to ameliorate the rock fall hazard, signs were present warning of the hazard, and the community was on notice that this is an area with a propensity for falling rocks. Claimant has not demonstrated to this Court that respondent failed to take adequate precautions to remove the hazard or warn of same. The evidence is uncontroverted that substantial and extensive repairs were made to prevent the hazard complained of, and such repairs did significantly reduce the rock fall hazard. Although the Court is sympathic with claimants and recognizes that this accident occurred through no fault of their own, the Court is constrained to adhere to the applicable law which provides that the State is neither an insurer nor guarantor of the safety of persons traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). Accordingly, this claim is denied.

Claim disallowed.

OPINION ISSUED MAY 28, 1991

JAMES C. LANHAM
VS.
DIVISION OF HIGHWAYS

(CC-90-248)

Claimant appeared in his own behalf.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On May 28, 1990, claimant was traveling south on Interstate 79, when his 1988 Honda struck a hole in the pavement in the area of exit 99. The left front tire appeared to have a "bulge" as a result of the accident. Claimant continued to drive his vehicle that afternoon, but later rechecked the tire when he observed that it was not holding air. Upon removing the wheel, he realized that the wheel was bent where the bulge had developed. Claimant however submitted and seeks to recover costs associated with the purchase of two wheels, two tires, one hubcap, an alignment, labor and tax, amounting to $636.27. Claimant testified that only one wheel and one tire were damaged by the accident, and the amount of damages claimed should be amended accordingly. Testimony further revealed that claimant's insurance had already paid $586.04 for the alleged damages.

Respondent denies knowledge of the alleged road hazard, and avers that claimant's insurance "has paid all of the damages." The Court agrees that damages not related to the alleged road hazard should not be considered. The Court further agrees with respondent that claimant's insurance has reimbursed claimant for this accident. As this claim was not brought in behalf of the insurance company for subrogation, and as the Court has adopted a position of not making awards in subrogation claims, this claim is denied. See *Sommerville v. Div. of Hwy.*, CC-89-347, an unpublished Opinion, January 4, 1991.

Claim disallowed.

OPINION ISSUED MAY 28, 1991

BARBARA J. AND JAMES F. MUSOLIN
VS.
DIVISION OF HIGHWAYS

(CC-89-228)

Claimant appeared in their own behalf.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On or about January 12, 1989, claimant was driving her 1980 Chevrolet Citation east on State Route 123 in Mercer County when she alleges that a boulder the size of her car suddenly appeared in her path. Claimant testified that she was able to avoid the boulder, but her vehicle ran over smaller rocks that caused an estimated $1200.00 of structural damage to the front of her vehicle.

The accident occurred at approximately 7:30 p.m. and was reported to the Mercer County Sheriff's Department. It appears from the evidence and testimony that a rock slide had occurred one mile west of the intersection of U.S. Route 52 and State Route 123, on the night in question. The record further reveals that the accident occurred in an area that has no rock fall warning signs. Claimant further testified that the accident site is about one mile from her residence, and that she had never seen falling rocks in this area before.

Respondent denies negligence and avers that it was without notice of the falling rocks on Route 123. Frank Costello, the assistant superintendent of Mercer County for respondent, testified that in his ten to twelve years in Mercer County, this was the first time that a slide had occurred in this area of Route 123.

It appears to the Court that testimony from both claimant and respondent is consistent and uncontroverted regarding the occurrence of rock falls in the area; in fact, this may have been the first. For respondent to be held liable for the damage caused by the rock fall, it must have had either actual or constructive notice of the condition and a reasonable amount of time to take corrective action. Davis v. Dept. of Highways, 11 Ct. Cl. 150 (1977). It appears to the court that the requisite notice is absent as this rock fall was a first time occurrence for the area. As the State is neither an insurer nor a guarantor of the safety of persons on its highways, the Court must deny this claim. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947).

Claim disallowed.

OPINION ISSUED MAY 28, 1991

LORA G. PORTER
VS.
DIVISION OF HIGHWAYS

(CC-90-194)

Claimant appeared in her own behalf.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

This action was brought by claimant to recover for damages to her 1981 Dodge Omni sustained when she was forced to use an allegedly eroded berm on County Route 43, near Branchland, in Cabell County. Claimant testified that on or about April 10, 1990, as she was traveling on Route 43, a truck approaching in the opposite lane crossed the center line and headed directly in the path of claimant's vehicle. In order to evade the on-coming truck, claimant attempted to use what she believed was the berm of the road. With the right side of her vehicle on the berm, she evaded the approach of the other driver. However, claimant alleges that the berm was broken

off, and her vehicle struck a hole, where the berm should have been. The claimant's husband testified that the drop off was four to five inches. The right front wheel was bent upon impact, the right front tire burst, and a strut was damaged. Claimant has since replaced the tire, but not the wheel, or the strut. Mrs. Porter testified that her husband went over several times and told respondent about places in the road requiring repair before and after the accident.

Respondent avers no knowledge of Mr. Porter's complaints. However, an employee of the respondent, who testified as a witness for the claimant, stated that a formal complaint was made of the particular road condition four months prior to claimant's accident. This witness, Thomas L. Thornburg, stated "I went to the district office and we had one complaint from a Mrs. Elkins. That was in January." Although this complaint was received in January, 1990, as cited, Mr. Thornburg when asked by claimant's counsel if repairs were made, answered, "No, sir."

Based upon the foregoing testimony the Court must conclude that respondent was on notice of the particular defect, and having failed to remedy same, is liable in negligence for the damages suffered by the claimants. The law provides that "the safe condition for use when the occasion requires, and liability may ensue when a motorist is forced onto the berm in an emergency..." 39 Am. Jur. 2d "Highways, Streets, and Bridges" §488, *Taylor v. Huntington*, 126 W.Va. 732, 30 S.E. 2d 14 (1944). Accordingly, the Court makes an award to claimant in the amount of $123.83.

Award of $123.83.

OPINION ISSUED MAY 28, 1991

RICHARD THOMPSON
VS.
WORKERS' COMPENSATION APPEAL BOARD

(CC-91-136)

Claimant represents self.
Lowell D. Greenwood, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $877.57 for travel expenses as he is a member of the respondent's Appeal Board. The invoices for the travel expenses were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount

of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $877.57.

Award of $877.57.

OPINION ISSUED MAY 28, 1991

CHARLES R. WEBB, ADMINISTRATOR
OF THE ESTATE OF RUSSELL G. WEBB
VS.
DIVISION OF HIGHWAYS

(CC-89-461)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

This claim was brought for rehearing upon the issue of responsibility for maintenance of an undefined roadway situate in Boone County. The original action was brought to recover the amount of $525.00 expended by claimant for gravel applied to Harold Road on or about July 17, 1989. The prior decision of the Court issued October 15, 1990, held that Harold Road was not within the State Highway System, and no requisite duty was owed by the State to maintain this road. Upon rehearing, the prior decision is affirmed.

It appears from the documents submitted to the Court that an Order was entered by the Boone County Circuit Court on April 26, 1972, wherein the respondent obtained a construction easement for the construction of Corridor G. Claimant contends this Order brought Harold Road into the State system and obligated respondent to maintain the road. A second Order entered May 15,1 990, by the Commissioner of the Division of Highways specifically provides for the addition of the road in question into the "State Local Service System."

The respondent is not responsible for maintaining a road unless it is a part of the State road system as defined by §17-4-2 of the W.Va. Code as follows:

The following meanings shall be ascribed to roads comprising the state road system:

(a) "Expressway"-Services major intrastate travel, including federal interstate routes.
(b) "Truckline"-Serves major city to city travel.
(c) "Feeder"-Serves community to community travel or collects and feeds traffic to

the higher systems or both.
(d) "State local service"-Localized arterial and spur roads which provide land access and socioeconomic benefits to abutting properties.
(e) "Parks and forest"-Serves travel within state parks, state forests and public hunting and fishing areas. (1967, c. 175; 1972, c. 101)

The 1972 Order that was referenced by claimant was a construction easement only. This Order did not bring Harold Road into the state system for maintenance purposes. Harold Road, although within the State's right of way, was similar to many private access roads in West Virginia which traverse right of way areas in order to access public roads.

In accordance with above, the Court is of the opinion to and does reaffirm its previous Opinion.

Claim disallowed.

REFERENCES

- Berm
- Bridges
- Building Contracts
- Contracts - See also Building Contracts
- Damages
- Drains and Sewers
- Falling Rocks -See also Landslides
- Independent Contractors
- Interest
- Landslides - See also Falling Rocks
- Motor Vehicles, Department of
- Negligence - See also Streets and Highways
- Notice
- Prisons and Prisoners
- Public Employees
- State Agencies
- Streets and Highways - See also Falling Rocks; Landslides; Negligence
- Trees and Timber
- Vendors

BERM

MEISENHELDER VS. DEPARTMENT OF HIGHWAYS (CC-88-149)

The Court disallowed a claim alleging defective berm on the basis the truck driver had voluntarily pulled off the road to check his brakes. The Court reiterated its rule that where a claimant proceeds onto the berm by choice he takes the berm in the condition he finds it. . . . . p. 80

MILLER VS. DIVISION OF HIGHWAYS (CC-89-447)

The claimant suffered serious injury and the passenger was killed when claimant's car hydroplaned on standing water on Sissonville Drive in Kanawha County. Claimant alleged berm areas were higher than the road surface, causing the water problem. The Court found no negligence by respondent and said claimant's speed was contributing factor.
Claim disallowed. . . . . p. 161

PORTER VS. DIVISION OF HIGHWAYS (CC-90-194)

Where claimant was forced onto the berm area because of approaching traffic, and where respondent had received a prior complaint of eroding berm area, the Court awarded $123.83 for vehicle damage. . . . . p. 171

RHODES VS. DEPARTMENT OF HIGHWAYS (CC-89-427)

The Court disallowed a claim alleging unsafe berm conditions, saying there was insufficient evidence that claimant was forced onto the berm in such a way as to trigger liability on the part of respondent. . . . . p. 50

USF&G, SUBROGREE OF MARGOLIS VS. DEPT. OF HIGHWAYS
(CC-87-20)

The Court reiterated its position that respondent is liable for failure to maintain berm areas when a driver is placed in a position of having to use them. When a driver proceeds onto the berm without justification, there is no liability for damages. The court disallowed damages for the driver, but held that respondent was negligent in maintaining the berm and made an award to his wife, an innocent passenger. . . . . p. 17

BRIDGES

BURGESS VS. DEPARTMENT OF HIGHWAYS (CC-89-37)

Claimant's son sustained injuries when he fell through a wooden bridge maintained by respondent. The Court found the respondent had constructive notice of the deteriorating condition of the bridge deck and awarded a total of $1,295.71. . . . . p. 2

RAMIREZ VS. DIVISION OF HIGHWAYS (CC-90-341)

The Court awarded the $500 insurance deductible where claimant's car was damaged after hitting a hole on a bridge and the evidence was that respondent's maintenance supervisor knew

about the hole but made no effort to temporarily cover it because bridge work was performed by

another office. . . . . p. 148

WOODY, ROSEMARY, ADMINISTRATRIX VS. DEPARTMENT OF HIGHWAYS (CC-87-44)

Where claimant's son drowned in a single-vehicle accident when his vehicle went off a one-lane bridge, the Court said the respondent was negligent in failing to replace a guard-rail and that the claimant's son was equally negligent in failing to maintain control.
Claim disallowed. . . . . p. 29

ZATOR VS. DIVISION OF HIGHWAYS (CC-89-341)

Where claimant fell from a bridge after a rusting handrail gave way, the Court awarded stipulated damages in the amount of $2,250. . . . . p. 91

CONTRACTS

L.G. DEFELICE, INC. VS. DIVISION OF HIGHWAYS (CC-85-388)

The Court awarded $142,513 in damages for delay and increased expense on a road construction project on WV Turnpike, including for unilateral changes in claimant's blasting schedule, and failure to provide a right of way for hauling blasted rock debris. The court denied a claim for cost overrun from damage due to foreseeable heavy rain. . . . . p. 102

TRI-STATE ASPHALT CORP. VS. DEPARTMENT OF HIGHWAYS (CC-88-237)

Where the claimant paving contractor sought $224,407 based upon the actual costs of liquid asphalt, the court noted that asphalt prices can vary during the life of a paving contract and awarded $114,538 based upon the published high price

. . . . . p. 26

WESTBROOK CONSTRUCTION, INC. VS. DIVISION OF HIGHWAYS (CC-89-508)

The Court awarded $613,245 for cost overrun and interest on a bridge construction project where the contractor encountered unexpected hard subsurface stone in preparing two piers. The court disallowed a claim for one of the piers where the contractor failed to give adequate notice of force account work. . . . . p. 112

DAMAGES

L.G. DEFELICE, INC. VS. DIVISION OF HIGHWAYS (CC-85-388)

The Court awarded $142,513 in damages for delay and increased expense on a road construction project on WV Turnpike, including for unilateral changes in claimant's blasting schedule, and failure to provide a right of way for hauling blasted rock debris. The court denied a claim for cost overrun from damage due to foreseeable heavy rain. . . . . p. 102

DEMPSEY VS. DIVISION OF HIGHWAYS (CC-90-312)

Where claimant's motorcycle was totaled after encountering a hole in the road, the Court said respondent had inadequately completed repairs to the road and would be liable. The Court found claimant 20 percent at fault due to excessive speed, but said the damages claimed was speculative and reduced the award to $600. . . . . p. 146

WALKER VS. DEPARTMENT OF HIGHWAYS (CC-88-139)

Claimants, owners of a general store at Deepwater in Fayette County, filed a claim for lost revenues when respondent undertook bridge construction that allegedly impeded traffic to claimant's store. The Court found that the respondent attempted to maintain traffic and access during the construction project and that an award of lost profits would be speculative. . . . . p. 11

WANITA SOMMERVILLE, ET AL. VS. DIVISION OF HIGHWAYS (CC-89-372)

The Court awarded $100 to claimant for property damage caused by tar and gravel splashing against her home from WV Route 19 in Clarksburg. The Court said respondent knew, or had reason to know, that the cold patch repairs would deteriorate and therefore breached its duty to properly repair the hole in question. The Court disallowed a $165 co-claim by claimant's home insurer-subrogree on the basis the insurer would be unjustly enriched by the award and claimant's premium. p. 110

WESTBROOK CONSTRUCTION, INC. VS. DIVISION OF HIGHWAYS (CC-89-508)

The Court awarded $613,245 for cost overrun and interest on a bridge construction project where the contractor encountered unexpected hard subsurface stone in preparing two piers. The court disallowed a claim for one of the piers where the contractor failed to give adequate notice of force account work. . . . . p. 112

<u>DRAINS and SEWERS</u>

CURKENDALL VS. DIVISION OF CORRECTIONS (CC-89-456)

The Court said two drains were placed too far below the road surface, causing unreasonable danger to motorcycle traffic. However claimant was also speeding and comparatively negligent. Claim disallowed. . . . . p. 122

FATONY VS. DIVISION OF HIGHWAYS (CC-86-440)

The Court awarded $6,425 as compensation for water damage to claimant's home, caused when road construction on WV Route 97 in Wyoming County shifted the water table and drainage patterns, resulting in constant water seepage in claimant's basement. . . . . p. 74

HOLCOMB VS. DEPARTMENT OF HIGHWAYS (CC-89-386)

Property owners in Richwood alleged that flood damage to their land was caused by negligent maintenance of respondent's culvert pipes on WV Route 76. The Court said respondent had performed reasonable and proper maintenance and could not be held responsible for unusually heavy rainfall. . . . . p. 69

NEKORANEC VS. DIVISION OF HIGHWAYS (CC-90-148)

Where claimant's vehicle was damaged when it struck a grate that kicked up under the vehicle, the Court denied the claim as the grate was on a driveway owned by another party. The owner of land fronting on a state road shall maintain and keep in repair all approaches or driveways to and from same. WV Code §17-16-9. . . . . p. 140

ORSBURN VS. DIVISION OF HIGHWAYS (CC-88-247)

Where respondent knew of inadequate drainage problems and had been seeking an easement for several years to correct same, the Court found that respondent was liable for damage caused when claimant was injured due to an accident caused by standing water on the road. . . . . p. 125

SUTTON VS. DIVISION OF HIGHWAYS (CC-90-189)

Claimant alleged property damage to his vehicle caused by ditching operations on respondent's road fronting his property. The Court disallowed the claim on grounds that property owner had not repaired the culvert across his drive and respondent's ditching activity was required to prevent water hazards on the road. WV Code § 17-16-9. . . . . p. 156

FALLING ROCKS -- See also Landslides

CUMMINGS VS. DEPARTMENT OF HIGHWAYS (CC-88-346)

The Court declined to award damages to claimant for property damage to her vehicle caused by rockfall on Route 60. The Court said the rockfall was caused by weathering that was not detectable during routine inspection, and that there was no actual or constructive notice of hazard. p. 6

DOUGLAS VS. DEPT. OF HIGHWAYS (CC-89-23)

Where the claimant was aware of risk of rock fall, and respondent was similarly aware of rock fall hazard the day of the accident, the Court found that claimant's comparative negligence was equal to or greater than respondent's. Claim disallowed. . . . . p. 54

JONES VS. DIVISION OF HIGHWAYS (CC-89-499)

Where respondent had posted signs and had undertaken major scaling of the rock cliff to ameliorate risk of rock fall, the Court found that claimant had taken adequate precautions and was not liable for rock fall. . . . . p. 168

KOENIG VS. DEPARTMENT OF HIGHWAYS (CC-87-220)

Claimants alleged personal injuries and vehicular loss as a result of rock fall on Route 20 near the Bluestone Bridge. The Court said that respondent DOH was aware that this particular area of road is prone to rock fall and that respondent was liable for failing to properly maintain the road. Award of $20,542.60 to three claimants. . . . . p. 22

PERDEW VS. DEPARTMENT OF HIGHWAYS (CC-89-214)

The Court disallowed a claim for damage to claimant's tire and rim caused by a rock that had fallen on the road. Respondent's employee had been working on the road earlier the same day and did not notice any rock hazards, therefore there was no notice to respondent. . . . . p. 55

POTTER VS. DIVISION OF HIGHWAYS (CC-89-76)

Where both claimant and respondent were familiar with rock hazard on the road and road cut but no warning signs were present, the Court disallowed a claim for vehicle damage caused by falling rock. . . . . p. 141

DOUGLAS VS. DEPT. OF HIGHWAYS (CC-89-23)

Where the claimant was aware of risk of rock fall, and respondent was similarly aware of rock fall hazard the day of the accident, the Court found that claimant's comparative negligence was equal to or greater than respondent's. Claim disallowed. . . . . p. 54

INDEPENDENT CONTRACTORS

VIOLA VS. DEPARTMENT OF HIGHWAYS (CC-89-278)

In a case involving vehicle damage from uneven paving work, the Court restated its rule that when an independent contractor was engaged in construction work, the respondent cannot be held liable for the negligenec, if any, of such independent contractor. . . . . p. 58

INTEREST

DIVISION OF EMPLOYMENT SECURITY VS. DIVISION OF CULTURE AND HISTORY (CC-89-406)

Consistent with a prior decision, the Court issued an award of $5,625 in unpaid unemployment compensation tax, but denied any award for accumulated statutory interest. . . . . p. 68

LANDSLIDES -- See also Falling Rocks

CUMMINGS VS. DEPARTMENT OF HIGHWAYS (CC-88-346)

The Court declined to award damages to claimant for property damage to her vehicle caused by rockfall on Route 60. The Court said respondent was not engaged in any construction activity that would have caused the rockfall, and there was no actual or constructive notice of hazard. . . . p. 6

KOENIG VS. DEPARTMENT OF HIGHWAYS (CC-87-220)

Claimants alleged personal injuries and vehicular loss as a result of rock fall on Route 20 near the Bluestone Bridge. The Court said that respondent DOH was aware that this particular area of road is especially prone to rock fall and that respondent was liable for failing to properly maintain the road. Merely patrolling is not sufficient to remove a known danger. Award of $20,542.60 to three claimants. . . . . p. 22

MOTOR VEHICLES, DIVISION OF

DENT VS. DEPARTMENT OF MOTOR VEHICLES (CC-89-34)

The Court awarded claimant $45, the cost of a towing fee, when claimant's car was towed after police received erroneous information that claimant's driver's license had been suspended. p. 1

LINKSWEILER VS. DIVISION OF MOTOR VEHICLES (CC-90-295)

Where claimant successfully arbitrated a refund of the purchase price of his new car with the car dealership, the Court lacked jurisdiction to grant an additional refund of sales tax paid. Claim disallowed. . . . . p. 139

T.H. COMPTON, INC. VS DEPARTMENT OF MOTOR VEHICLES (CC-88-293)

Claimant sought recovery for excessive sales tax paid on vehicles from 1984 through March 1986, alleging that the tax was improperly computed based on total price, plus federal excise and in some instances state gross tax as well. The Court awarded $12,377.24. . . . . p. 1

NEGLIGENCE

BLEVINS VS. DIVISION OF HIGHWAYS (CC-89-22)

The Court restated its position and that of the Supreme Court that respondent's failure to place guardrails does not alone establish negligence
on the part of respondent. Guardrails are discretionary. . . . . p. 164

BOSLEY VS. DIVISION OF HIGHWAYS (CC-90-108)

Where claimant testified she was familiar with two large holes on US Route 250 near Fairmont, the Court found respondent liable for damage to her tire but reduced the award by claimant's 25 percent comparative negligence. . . . . p. 144

DOTSON VS. DEPARTMENT OF HIGHWAYS (CC-89-346)

The claimant struck a deer in Lincoln County alleged negligent failure to post warning signs about the presence of deer. The Court said respondent cannot be held liable for accidents concerning wild animals. . . . . p. 44

MCKINNEY VS. DIVISION OF HIGHWAYS (CC-87-165)

Consistent with the state Supreme Court, the Court of Claims held that failure to wear a seatbelt will not be used for purposes of assessing comparative fault.
. . . . . p. 159

MILLER VS. DIVISION OF HIGHWAYS (CC-89-447)

The claimant suffered serious injury and the passenger was killed when claimant's car hydroplaned on standing water on Sissonville Drive in Kanawha County. Claimant alleged berm areas were higher than the road surface, causing the water problem. The Court found no negligence by respondent and said claimant's speed was contributing factor.

Claim disallowed. . . . . p. 161

O'NEAL VS. DIVISION OF HIGHWAYS (CC-90-178)

The Court awarded $98.57 for tire damage on US Route 60 when claimant was forced to the right due to an oncoming car in his lane. The Court said Route 60 is a heavily traveled artery and claimant was placed in a position of having to move to edge of the road. . . . . p. 85

SWIM VS. DIVISION OF HEALTH (CC-83-136)

The Court awarded $10,000 in stipulated damages, where claimant slipped on some butter left on the floor at Pinecrest Hospital, a facility of respondent. . . . . p. 87

VIOLA VS. DEPARTMENT OF HIGHWAYS (CC-89-278)

In a case involving vehicle damage from uneven paving work, the Court restated its rule that when an independent contractor was engaged in construction work, the respondent cannot be held liable for the negligence, if any, of such independent contractor. . . . . p. 58

WANITA SOMMERVILLE, ET AL. VS. DIVISION OF HIGHWAYS (CC-89-374)

The Court awarded $100 to claimant for property damage caused by tar and gravel splashing against her home from WV Route 19 in Clarksburg. The Court said respondent knew, or had reason to know, that the cold patch repairs would deteriorate and therefore breached its duty to properly repair the hole in question. The Court disallowed a $165 co-claim by claimant's home insurer-subrogree on the basis the insurer would be unjustly enriched by the award and claimant's premium. p. 110

WEBB VS. DIVISION OF HIGHWAYS (CC-89-461)

The Court ruled that a construction easement granted respondent for construction of Corridor G does not bring the property within the state road system. Claim disallowed. . . . . p. 173

WOODY, ROSEMARY, ADMINISTRATRIX VS. DEPARTMENT OF HIGHWAYS (CC-87-44)

Where claimant's son drowned in a single-vehicle accident when his vehicle went off a one-lane bridge, the Court said the respondent was negligent in failing to replace a guard-rail and that the claimant's son was equally negligent in failing to maintain control.
Claim disallowed. . . . . p. 29

NOTICE

BROWN VS. DIVISION OF HIGHWAYS (CC-89-498)

Claimant's car was damaged when it hit a large hole on a gravel road. The Court charged respondent with constructive notice of a hole of this size, but disallowed the claim because of claimant's comparative fault. . . . . p. 135

DUNCAN VS. DIVISION OF HIGHWAYS (CC-90-154)

Where the claimant collided with a fallen tree on WV Route 61, the Court found that the accident was the result of an act of nature and that respondent had no notice of any hazard. p. 136

KELLER VS. DIVISION OF HIGHWAYS (CC-90-349)

The Court disallowed a pothole claim where claimant's Notice of Claim stated the incident occurred on Route 95 but testimony revealed the road was Route 14 and no additional evidence of negligence was offered. . . . . p. 153

PROFFIT VS. DIVISION OF HIGHWAYS (CC-89-494)

Where claimants were familiar with the tunnel and knew that standing water tended to obscure holes in the road surface, the Court found that respondent had no notice of the hazard and disallowed the claim. . . . . p. 142

WESTBROOK CONSTRUCTION, INC. VS. DIVISION OF HIGHWAYS (CC-9-508)

The Court awarded $613,245 for cost overrun and interest on a bridge construction project where the contractor encountered unexpected hard subsurface stone in preparing two piers. The court disallowed a claim for one of the piers where the contractor failed to give adequate notice of force account work. . . . . p. 112

WOODY, BONNIE H. VS. DIVISION OF HIGHWAYS (CC-89-140)

The statge had constructive notice of a hole six to eight inches deep and extending eight to twelve inches into the road and failed to place warning signs. Award of $151.62. . . . . p. 101

PRISONS AND PRISONERS

CLAYTON VS. STATE OF WEST VIRGINIA (CC-89-235)

The Court awarded claimant $35,000 after he served 32 months for an armed robbery committed by another man. WV Code §14-2-13a. . . . . p. 5

COPEN VS. DIVISION OF CORRECTIONS (CC-89-368)

Claimant's glasses were damaged in an unprovoked altercation at Pruntytown, a facility of the respondent. The Court held that respondent is liable only for fair value of replacement costs and that claimant failed to establish that her replacement glasses are less than fair value replacement. Claim disallowed. . . . . p. 121

HARPER VS. DIVISION OF CORRECTIONS (CC-90-287)

Claimant brought an action for property damage when an Huttonsville escapee broke into her home. The Court restated its position that escapee cases must be decided upon facts particular to each case and that claimant must establish causal negligence by the state agency. Claim disallowed. p. 152

KANAWHA COUNTY COMMISSION VS. DEPARTMENT OF CORRECTIONS (CC-87-489 & CC-87-724)

The Dept. of Corrections is not liable for payment for housing a prisoner in a county jail as a result of a circuit court order to permit the prisoner to participate in or assist in preparing for trial. The respondent Dept. of Corrections is liable for costs for holding prisoners in a county jail pursuant to reprieve orders by the Governor granted prior to April 19, 1989. . . . . p. 15

MINERAL COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-89-340)

The Court held that the county commission is entitled to reasonable costs for holding state prisoners confined in the county jail due to lack of space at respondent's prison institutions. The Court said $15 per day per inmate is a reasonable rate, and, based on stipulation of 2,638 inmate days, awarded claimant $39,570. The Court also held that claimant is entitled to $5,181 for medical services provided these inmates. . . . . pp. 88, 93

(See also, Barbour County Sheriff's Dept. vs. DOC, CC-91-51, p. 117; Mingo County Sheriff's Dept. vs. DOC, CC-90-142, p. 124)

SHEPARD VS. STATE OF WEST VIRGINIA (CC-88-167)

Claimant filed this claim for unjust imprisonment, alleging that he was unlawfully transferred from juvenile to adult status on a prior 1977 conviction used for sentence enhancement. The Court rejected the claim because at the time of the 1977 transfer order, statutory findings of fact and conclusions of law were not required. . . . . p. 77

THORNTON VS. DEPARTMENT OF CORRECTIONS (CC-88-26)

The Court overruled a motion to appoint counsel for an incarcerated inmate for purposes of pursuing the inmate's claim in the Court of Claims. The Court said the nature of the claim is civil and that civil litigants generally do not have a constitutional or statutory right to counsel. . . . . p. 65

PUBLIC EMPLOYEES

CARMICHAEL VS. BOARD OF PROBATION AND PAROLE (CC-88-377)

The Court denied a claim for $1,699.99, representing annual leave time accumulated while claimant served as Commissioner of Labor. The Court said department heads of state agencies serve at the governor's will and pleasure and do not accumulate leave.
Claim disallowed. . . . . p. 78

DIVISION OF EMPLOYMENT SECURITY VS. DIVISION OF CULTURE AND HISTORY (CC-89-406)

Consistent with a prior decision, the Court issued an award of $5,625 in unpaid unemployment compensation tax, but denied any award for accumulated statutory interest. . . . . p. 68

SMITH, ET AL. VS. WV DIVISION OF FORESTRY (CC-90-144)

The Court awarded $32,877 in unpaid overtime to various employees of

respondent. . . . . p. 132

ROBERTS VS. DIVISION OF HEALTH (CC-90-270)
BOLEN VS. DIVISION OF MOTOR VEHICLES (CC-90-275)
BIRD VS. DIVISION OF MOTOR VEHICLES (CC-90-324)
The Court awarded annual pay increases as per statute WV Code § 5-5-2, on a pro rata share. . . . . p. 128

SPRINGSTON VS. DEPARTMENT OF EDUCATION (CC-89-147)
The Court awarded $666.87 in salary adjustment because the paperwork for claimant's pay increase had not been processed in the proper fiscal year. Respondent admitted the validity of the claim and stated that there were sufficient funds in the appropriate fiscal year with which claimant could have been paid. . . . . p. 9

STATE AGENCIES

CARMICHAEL VS. BOARD OF PROBATION AND PAROLE (CC-88-377)
The Court denied a claim for $1,699.99, representing annual leave time accumulated while claimant served as Commissioner of Labor. The Court said department heads of state agencies serve at the governor's will and pleasure and do not accumulate leave. Claim disallowed. . . . . p. 78

STREETS & HIGHWAYS -- See also Falling Rocks; Landslide; Motor Vehicles; Negligence

ANDERSON, ESTATE OF, VS. DEPARTMENT OF HIGHWAYS (CC-83-354)
The Court distributed $5,000 stipulated damages to heirs of decedent-claimant, whose car was struck by a falling light pole maintained by respondent causing non-fatal injuries and property damage. . . . . p. 66

BALDWIN VS. DEPARTMENT OF HIGHWAYS (CC-89-466)
The Court awarded $200 for tire damage where the evidence was that the road was heavily travelled by coal trucks and that holes are a regular and ongoing problem. . . . . p. 82

BERKLEY VS. DIVISION OF HIGHWAYS (CC-88-78)
Where claimant was familiar with the icing conditions on WV Route 14, the Court found claimant 40 percent at fault and granted a percentage-reduced award of $11,153.40. . . . . p. 118

BRITTON VS. DEPARTMENT OF HIGHWAYS (CC-89-229)
The claimant filed for property damage to his 1986 Bronco caused by concrete pieces laying on the road surface. The Court held this road condition was unforeseeable because it was caused by heat building up and warping a joint in the road. Claim disallowed. . . . . p. 42

BROWN VS. DIVISION OF HIGHWAYS (CC-89-498)

Claimant's car was damaged when it hit a large hole on a gravel road. The Court charged respondent with constructive notice of a hole of this size, but disallowed the claim because of claimant's comparative fault. . . . . p. 135

BURGESS VS. DEPARTMENT OF HIGHWAYS (CC-89-37)

Claimant's son sustained injuries when he fell through a wooden bridge maintained by respondent. The Court found the respondent had constructive notice of deteriorating condition of the bridge deck and awarded a total of $1,295.71.

. . . . . p. 2

CHILDERS VS. DEPARTMENT OF HIGHWAYS (CC-87-202)

Claimant brought an action to recover for multiple serious injuries suffered in an automobile accident in Charleston, when her vehicle was struck by another driver, Melinda Good, who had slid on ice and lost control. The Court found combined negligence on the part of respondent and the second driver and awarded $165,000. . . . . p. 13

CLANSY VS. DEPARTMENT OF HIGHWAYS (CC-89-172)

Respondent's employees had placed cold mix in a hole on a road in front of claimants' home. The court awarded $1,256.10 in compensation for damage to claimant's home when passing vehicles splashed the mix onto their home. . . . . p. 4

DIMMICK VS. DIVISION OF HIGHWAYS (CC-87-712)

The Court disallowed a wrongful death claim for icy road conditions where the respondent had treated the road surface three times on the day of the accident and the salt spreader had broken down for an hour, and the evidence was that icy conditions had occurred suddenly. . . . . p. 94

DOTSON VS. DEPARTMENT OF NATURAL RESOURCES (CC-89-346)

The claimant struck a deer in Lincoln County alleged negligent failure to post warning signs about the presence of deer. The Court said respondent cannot be held liable for accidents concerning wild animals. . . . . p. 44

EDWARDS VS. DEPARTMENT OF HIGHWAYS (CC-87-333)

The Court disallowed an award to claimant's decedent killed in a two-vehicle car wreck in Boone County allegedly triggered by a dip in the road. The Court found that the driver was familiar with the road and that his negligence was equal to or greater than that of respondent. . . . . p. 7

EVANS VS. DEPARTMENT OF HIGHWAYS (CC-89-424)

Claimant alleged that respondent had not adequately marked the work location where respondent's employees were cleaning out ditches. The Court disallowed the claim, since placement of three signs was done as specified in the respondent's traffic manual. . . . . p. 39

FATONY VS. DIVISION OF HIGHWAYS (CC-86-440)

The Court awarded $6,425 as compensation for water damage to claimant's home, caused when road construction on WV Route 97 in Wyoming County shifted the water table and drainage patterns, resulting in constant water seepage in claimant's basement. . . . . p. 74

HOLCOMB VS. DEPARMTENT OF HIGHWAYS (CC-89-386)

Property owners in Richwood alleged that flood damage to their land was caused by negligent maintenance of respondent's culvert pipes on WV Route 76. The Court said respondent had performed reasonable and proper maintenance and could not be held responsible for unusually heavy rainfall. . . . . p. 69

JOHNSON VS. DIVISION OF HIGHWAYS (CC-09-170)

The Court awarded $3,000 for work loss and pain and suffering, where claimant's car was totaled and the evidence was that respondent's employees had constructive notice of the break in the pavement during maintenance that winter. . . . . p. 96

MEADOWS VS. DEPARTMENT OF HIGHWAYS (CC-89-362, CC-89-363)

Claimants were travelling eastbound in two separate cars on I-64 and 77 when a truck in front of them kicked up broken concrete, damaging both cars. The Court said there was no actual or constructive notice of the defect and disallowed the claim. . . . . p. 47

MEISENHELDER VS. DEPARTMENT OF HIGHWAYS (CC-88-149)

The Court disallowed a claim alleging defective berm on the basis the truck driver had voluntarily pulled off the road to check his brakes. The Court reiterated its rule that where a claimant proceeds onto the berm by choice he takes the berm in the condition he finds it. . . . . p. 80

RHODES VS. DEPARTMENT OF HIGHWAYS (CC-89-427)

The Court disallowed a claim alleging unsafe berm conditions, saying there was insufficient evidence that claimant was forced onto the berm in such a way as to trigger liability on the part of respondent. . . . . p. 50

SMITH VS. DEPARTMENT OF HIGHWAYS (CC-89-71)

Where respondent had no notice of an ice sheet forming on the road surface, the Court will not find respondent liable for vehicle damage. . . . . p. 56

SUTTON VS. DIVISION OF HIGHWAYS (CC-90-189)

Claimant alleged property damage to his vehicle caused by ditching operations on respondent's road fronting his property. The Court disallowed the claim on grounds that property owner had not repaired the culvert across his drive and respondent's ditching activity was required to prevent water hazards on the road. WV Code § 17-16-9. . . . . p. 156

USF&G, SUBROGREE OF MARGOLIS VS. DEPT. OF HIGHWAYS (CC-87-20)

The Court reiterated its position that respondent is liable for failure to maintain berm areas when a driver is placed in a position of having to use them. When a driver proceeds onto the berm without justification, there is no liability for damages. The court disallowed damages for the driver, but held that respondent was negligent in maintaining the berm and made an award to his wife, an innocent passenger. . . . . p. 17

VIOLA VS. DEPARTMENT OF HIGHWAYS (CC-89-278)

In a case involving vehicle damage from uneven paving work, the Court restated its rule that when an independent contractor was engaged in construction work, the respondent cannot be held liable for the negligenec, if any, of such independent contractor. . . . . p. 58

WAGGONER VS. DEPARTMENT OF HIGHWAYS (CC-89-420)

The Court awarded $500 for damage to claimant's car, holding that the respondent failed to adequately post warning signs of ongoing roadwork. . . . . p. 40

WINCHESTER VS. DEPARTMENT OF HIGHWAYS (CC-87-200)

The Court awarded $650 to claimant for personal injuries received when she fell on broken concrete near a vending machine at rest stop on Interstate 79. The Court found that respondent, through its attendants and supervisor, had constructive and actual notice of deteriorated and broken concrete. . . . . p. 10

TREES and TIMBER

DUNCAN VS. DIVISION OF HIGHWAYS (CC-90-154)

Where the claimant collided with a fallen tree on WV Route 61, the Court found that the accident was the result of an act of nature and that respondent had no notice of any hazard. . . . . p. 136

VENDORS

The following cases represent a sampling of vendor claims decided by the Court.

Admit Claims: Submitted upon the pleadings.

- ALPINE FESTIVAL, INC. VS. DIVISION OF CULTURE AND HISTORY (CC-90-374) . . . . . p. 92

- BECKLEY VETERINARY HOSPITAL VS. FARM MANAGEMENT COMMISSION (CC-90-76) . . . . . p. 41

- BICKLEY, JACOBS AND BARKUS VS. HUMAN RIGHTS COMMISSION (CC-90-79) . . . . . p. 84

- CAPITOL BUSINESS INTERIORS VS. TAX DEPARTMENT

(CC-89-234a) . . . . . p. 3

- COLE BUSINESS FURNITURE VS. DEPARTMENT OF ENERGY (CC-89-244) . . . . . P. 21
- DUES VS. HUMAN RIGHTS COMMISSION (CC-89-423) . . . . . p. 36
- EASTERN PANHANDLE TRANSIT AUTHORITY VS. PUBLIC EMPLOYEES AGENCY (CC-89-88) . . . . . p. 22
- FERRELLGAS, INC. VS. ALCOHOL BEVERAGE CONTROL ADMINISTRATION (CC-91-118) . . . . . p. 167
- GREENBRIER COUNTY PUBLIC SERVICE DISTRICT VS. ALCOHOL BEVERAGE CONTROL COMMISSION (CC-90-75) . . . . . p. 76
- HAMILTON BUSINESS SYSTEMS VS. DEPT. OF ADMINISTRATION (CC-91-62) . . . . . p. 151
- HCA RIVER PARK HOSPITAL VS. DEPARTMENT OF HEALTH (CC-90-191) . . . . . p. 69
- HIGHLAWN PHARMACY, INC. VS. DIVISION OF CORRECTIONS (CC-91-60) . . . . . p. 153
- KANAWHA VALLEY RADIOLOGISTS VS. DEPT. OF PUBLIC SAFETY (CC-90-157) . . . . . p. 71
- KELLER VS. SUPREME COURT OF APPEALS (CC-90-173) . . . . . p. 72
- MANPOWER TEMPORARY SERVICES VS. DEPT. OF HEALTH (CC-90-164) . . . . . p. 72
- MICHIE COMPANY VS. GOVERNOR'S OFFICE OF COMMUNITY AND INDUSTRIAL DEVELOPMENT (CC-91-99) . . . . . p. 158
- NATIONAL BUSINESS INSTITUTE, INC. VS. ATTORNEY GENERAL (CC-91-94) . . . . . p. 163
- ORTHOPAEDIC ASSOCIATES, INC. VS. DEPT. OF PUBLIC SAFETY (CC-90-71) . . . . . p. 49
- RANSON VS. ETHICS COMMISSION (CC-90-348) . . . . . p. 98

- RES-CARE, INC. VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-90-369) . . . . . p. 99
- RICOH CORPORATION VS. STATE TREASURER (CC-90-140) . . . . . p. 64
- SAINT ALBANS PSYCHIATRIC HOSPITAL VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-90-314) . . . . . p. 100
- ROGERS, H. JOHN VS. TREASURER (CC90-272) . . . . . p. 130
- STEINKE VS. ATTORNEY GENERAL (CC-90-376) . . . . . p. 100
- VIKING WAY PARTNERSHIP VS. ATTORNEY GENERAL (CC-90-115) . . . . . p. 51
- WEINSTEIN VS. DIVISION OF CORRECTIONS (CC-90-236) . . . . . p. 86
- XEROX CORPORATION VS. DIVISION OF CULTURE AND HISTORY (CC-90-93) . . . . . p. 60
- YOUNG VS. WEST VIRGINIA PUBLIC DEFENDER SERVICES (CC-90-155) . . . . . p. 73

Funeral Home Services provided in accordance with the Indigent Funeral and Burial Service Account. The following claims were awarded for these services:

- ALTMEYER FUNERAL HOMES, INC. VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-91-88) . . . . . p. 158
- DAVIS-WEAVER FUNERAL HOME, INC. VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-91-48) . . . . . p. 150
- DOUGLAS MORTUARY VS. DEPT. OF HUMAN SERVICES (CC-90-65) . . . . . p. 44
- STEVENS & GRASS FUNERAL HOME VS. DEPT. OF HUMAN SERVICES (CC-89-267) . . . . . p. 11

Overexpenditures: The Court will deny over-expenditure claims on the basis of its decision in *Airkem Sales & Service, et al. vs. Dept. of Mental Health,* 8 Ct. Cl. 180 (1971).

- CITY OF ELKINS VS. GOVERNOR'S OFFICE (CC-89-478) . . . . . p. 35

- CSX TRANSPORTATION VS. RAILROAD MAINTENANCE AUTHORITY (CC-89-448) . . . . . p. 35
- DAUBENSPECK VS. DEPT. OF EDUCATION (CC-90-73) . . . . . p. 43
- HETZEL VS. DEPT. OF EDUCATION (CC-89-502) . . . . . p. 45
- LANE VS. WORKERS' COMPENSATION FUND (CC-90-69) . . . . . p. 46
- TAMERAN, INC. VS. WORKERS' COMPENSATION FUND (CC-90-118) . . . . . p. 59
- XEROX CORPORATION VS. DEPARTMENT OF FINANCE AND ADMINISTRATION (CC-90-7) . . . . . p. 52
- XEROX CORPORATION VS. WORKERS' COMPENSATION FUND (CC-89-491) . . . . . p. 53