STATE OF WEST VIRGINIA

Report

of the

Court of Claims

1971-1973

Volume

9

STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the Period from July 1, 1971
to June 30, 1973

By
CHERYLE M. HALL
Clerk

VOLUME IX

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

BJW PRINTERS, BECKLEY, W. VA.
C 641

TABLE OF CONTENTS

PERSONNEL

OF THE

STATE COURT OF CLAIMS

HONORABLE HENRY LAKIN DUCKER ..... Presiding Judge

HONORABLE W. LYLE JONES ..... Judge

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

CHERYLE M. HALL ..... Court Clerk

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

Letter of Transmittal

To His Excellency

The Honorable Arch Alfred Moore, Jr.

Governor of West Virginia

Sir:

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

Respectfully submitted,

CHERYLE M. HALL,

Clerk

TERMS OF COURT

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

STATE COURT OF CLAIMS LAW

CHAPTER 14 CODE

Article 2. Claims Against the State.

§14-2-1. Purpose.

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

§14-2-2. Venue for certain suits limited to Kanawha county.

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

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

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

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

§14-2-3. Definitions.

For the purpose of this article:

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

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

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

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

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

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

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

The "court of claims" is hereby created. It shall consist of three judges, to be appointed by the president of the senate and the speaker

of the house of delegates, by and with the advice and consent of the senate, one of whom shall be appointed presiding judge. Each appointment to the court shall be made from a list of three qualified nominees furnished by the board of governors of the West Virginia State bar.

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

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

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

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

§14-2-6. Terms of court.

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

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

§14-2-7. Meeting place of the court.

The regular meeting place of the court shall be at the state capitol, and the joint committee on government and finance shall provide

adequate quarters therefor. When deemed advisable, in order to facilitate the full hearing of claims arising elsewhere in the State, the court may convene at any county seat.

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

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

§14-2-9. Oath of office.

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

§14-2-10. Qualifications of judges.

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

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

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

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

The court shall, in accordance with this article, consider claims which, but for the constitutional immunity of the State from suit, or

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

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

§14-2-13. Jurisdiction of the court.

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

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

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

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

§14-2-14. Claims excluded.

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

1. For loss, damage, or destruction of property or for injury or

death incurred by a member of the militia or national guard when in the service of the State.

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

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

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

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

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

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

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

§14-2-16. Regular procedure.

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

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

2. The clerk shall transmit a copy of the notice to the state agency concerned. The state agency may deny the claim, or may request a postponement of proceedings to permit negotiations with the claimant. If the court finds that a claim is prima facie within its juris-

diction, it shall order the claim to be placed upon its regular docket for hearing.

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

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

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

§14-2-17. Shortened procedure.

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

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

2. The state agency concerned concurs in the claim.

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

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

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

The rejection of a claim under this section shall not bar its resubmission under the regular procedure.

§14-2-18. Advisory determination procedure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The court shall not take jurisdiction of any claim, whether accruing before or after the effective date of this article [July 1, 1967], unless notice of such claim be filed with the clerk within such period of limitation as would be applicable under the pertinent provisions of the Code of West Virginia, one thousand nine hundred thirty-one, as amended, if the claim were against a private person, firm or corpora-

tion and the constitutional immunity of the State from suit were not involved and such period of limitation may not be waived or extended. The foregoing provision shall not be held to limit or restrict the right of any person, firm or corporation who or which had a claim against the State or any state agency, pending before the attorney general on the effective date of this article [July 1, 1967], from presenting such claim to the court of claims, nor shall it limit or restrict the right to file such a claim which was, on the effective date of this article [July 1, 1967], pending in any court of record as a legal claim and which, after such date was or may be adjudicated in such court to be invalid as a claim against the State because of the constitutional immunity of the State from suit.

§14-2-22. Compulsory process.

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

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

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

§14-2-24. Records to be preserved.

The record of each claim considered by the court, including all documents, papers, briefs, transcripts of testimony and other mater-

ials, shall be preserved by the clerk and shall be made available to the legislature or any committee thereof for the reexamination of the claim.

§14-2-25. Reports of the court.

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

Claims and awards shall be separately classified as follows:

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

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

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

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

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

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

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

§14-2-26. Fraudulent claims.

A person who knowingly and wilfully presents or attempts to present a false or fraudulent claim, or a state officer or employee who knowingly and wilfully participates or assists in the preparation or presentation of a false or fraudulent claim, shall be guilty of a misdemeanor. A person convicted, in a court of competent jurisdiction, of

violation of this section shall be fined not more than one thousand dollars or imprisoned for not more than one year, or both, in the discretion of such court. If the convicted person is a state officer or employee, he shall, in addition, forfeit his office or position of employment, as the case may be.

§14-2-27. Conclusiveness of determination.

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

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

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

§14-2-29. Severability.

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

Rules of Practice and Procedure

OF THE

STATE COURT OF CLAIMS

(Adopted by the Court

September 11, 1967.

Amended February 18, 1970

Amended February 23, 1972.)

TABLE OF RULES

Rules of Practice and Procedure

RULES OF PRACTICE AND PROCEDURE

OF THE

COURT OF CLAIMS

STATE OF WEST VIRGINIA

RULE 1. CLERK, CUSTODIAN OF PAPERS, ETC.

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

RULE 2. FILING PAPERS.

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

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

(c) No paper, exclusive of exhibits, shall be filed in any action or proceeding or be accepted by the Clerk for filing nor any brief, deposition, pleading, order, decree, reporter's transcript or other paper to be made a part of the record in any claim be received except that the same be upon paper measuring 8 1/2 inches in width and 11 inches in length.

RULE 3. RECORDS.

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

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

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

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

RULE 4. FORM OF CLAIMS.

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

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

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

RULE 6. PREPARATION OF HEARING DOCKET.

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

RULE 7. PROOF AND RULES GOVERNING PROCEDURE.

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

the claimant with satisfactory proof, or proper stipulation as hereinafter provided before an award can be made.

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

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

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

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

RULE 8. APPEARANCES.

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

RULE 9. BRIEFS.

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

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

RULE 10. CONTINUANCES: DISMISSAL FOR FAILURE TO PROSECUTE.

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

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

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

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

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

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

No original paper in any case shall be withdrawn from the Court files except upon special order of the Court or one of the Judges thereof in vacation. When an official of a State Department is testi-

fying from an original record of his department, a certified copy of the original record of such department may be filed in the place and stead of the original.

RULE 12. WITHDRAWAL OF CLAIM.

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

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

RULE 13. WITNESSES.

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

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

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

RULE 14. DEPOSITIONS.

(a) Depositions may be taken when a party desires the testimony of any person, including a claimant. The deposition shall be upon oral examination or upon written interrogatory. Depositions may be taken

without leave of the Court. The attendance of witnesses may be compelled by the use of subpoenas as provided in Rule 13.

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

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

RULE 15. RE-HEARINGS.

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

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

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

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

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

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

RULE 17. APPLICATION OF RULES OF CIVIL PROCEDURE.

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

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

Amended February 18, 1970.

Amended February 23, 1972.

CHERYLE M. HALL,
Clerk

REPORT OF THE COURT OF CLAIMS

For the Period January 1, 1973, to June 30, 1973

(1) Approved claims and awards not satisfied but to be referred to the Legislature, 1974, for final consideration and appropriation, for the period January 1, 1973, to June 30, 1973:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-565	Emma Gas Company	Office of Federal-State Relations	$ 2,500.00	$ 550.62	June 11, 1973
D-588	Enochs, W. Dale	Department of Highways	350.00	175.27	June 26, 1973
D-576	Haines, John S.	Department of Highways	3,939.16	750.00	June 11, 1973
D-538	Jones, Orpha E.	State Building Commission	7,560.00	6,480.00	June 26, 1973
D-480	Moore, Meade J.	Department of Highways	1,292.14	1,292.14	June 11, 1973
D-558	Pauley, Joel V.	Department of Highways	469.80	469.80	May 15, 1973
D-604	State Farm Fire & Casualty Co., as subrogee of Billy Keffer, its insured	Department of Highways	82.94	82.94	June 26, 1973
	TOTALS		$16,194.04	$ 9,800.77	

REPORT OF THE COURT OF CLAIMS (Continued)

For the Period July 1, 1971, to June 30, 1973

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1971, to June 30, 1973:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-229 C	Aetna Insurance Company, subrogee of John Fragale, d/b/a Top Hat Billiards	Department of Highways	$ 110.22	$ 55.11	February 11, 1972
D-229 L	Aetna Insurance Company, subrogee of Montgomery Motors, Inc.	Department of Highways	4,723.55	4,723.55	February 11, 1972
D-416	Appraisal & Realty Service, Inc.	Board of Regents	750.00	750.00	September 13, 1971
D-228 A	Atkins, Murl E.	Department of Highways	1,400.00	945.57	February 11, 1972
D-230 B	B. H. Child & Co., Inc. d/b/a Fort Pitt Shoe Store	Department of Highways	4,194.63	3,700.00	September 12, 1972
D-589	Bailey, Darrell	Department of Highways	437.13	437.13	March 21, 1973
D-478	Barker, Lawrence	Department of Labor	400.00	300.00	February 7, 1972
D-378	Barton, Bertha G.	Department of Highways	3,256.00	2,531.00	July 6, 1971
D-559	Betonte, Larry L. and Judith A.	Department of Highways	1,077.25	700.00	January 3, 1973
D-442	Blair, Fred E.	Department of Natural Resources	8,600.00	1,464.00	February 9, 1972
D-471	Blair, Willard	Department of Natural Resources	3,400.00	1,236.00	February 9, 1972
D-438	Bondy, Harold E., M.D.	Department of Public Institutions	2,000.00	2,000.00	June 13, 1972
D-409 A	Brown, Carl A.	Department of Highways	1,087.00	750.00	February 6, 1973
D-409 B	Brown, Clarence E.	Department of Highways	1,094.77	600.00	February 6, 1973
D-439	Bryant, William	Department of Highways	450.00	400.00	July 6, 1971

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1971, to June 30, 1973:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-468	Buckner, Lurleen (Mrs. John, Jr.)	Department of Highways	225.83	171.96	December 14, 1971
D-474	Budget Rent A Car of Cleveland, Inc.	Department of Natural Resources	44.59	44.59	December 10, 1971
D-472	Bukovinsky, Steve and Mary	Department of Highways	1,000.00	725.00	December 14, 1971
D-228 B	Caldwell, Sam	Department of Highways	2,100.00	1,082.95	February 11, 1972
D-228 C	Carelli, Thomas Eugene and Frank Carelli, d/b/a The Smoke House	Department of Highways	2,300.00	1,300.00	September 12, 1972
D-573	Carpenter Addition Water Company	Department of Highways	124.74	124.74	January 3, 1973
D-228 M	Chiles, Algie	Department of Highways	1,500.00	751.57	February 11, 1972
D-574	City of Charleston	Department of Finance & Administration	91,329.00	91,329.00	March 21, 1973
D-448	Columbia Ribbon & Carbon Manufacturing Company	Department of Finance & Administration	3,204.80	3,186.80	August 2, 1971
D-230 A	Cory Auto Parts Company	Department of Highways	20,000.00	10,000.00	December 4, 1972
D-295	Dixon, Paul W.	Department of Highways	126,419.56	6,500.00	February 9, 1972
D-400	Dixon, Paul W.	Department of Highways	2,910.00	1,210.00	February 9, 1972
D-409 C	Downey, Marlene J.	Department of Highways	200.00	100.00	February 6, 1973
D-229 A	Drasnin, Joseph W., trading and doing business as Drasnin's Men's Shop	Department of Highways	2,400.00	2,400.00	February 11, 1972
D-230 C	Duncan, Elsie McCall d/b/a Mac's Jewelry Store	Department of Highways	10,000.00	2,621.30	September 12, 1972
D-229 B	Ellis, Mary	Department of Highways	500.00	437.00	February 11, 1972

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1971, to June 30, 1973:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-409 D	Ellison, Harry	Department of Highways	2,304.65	1,500.00	February 6, 1973
D-608	Fairmont Times and West Virginian (The)	Office of the Governor	210.00	210.00	March 21, 1973
D-229 C	Fidelity-Phenix Insurance Company, subrogee of John Fragale, d/b/a Top Hat Billiards	Department of Highways	55.10	27.55	February 11, 1972
D-229 L	Fidelity-Phenix Insurance Company, subrogee of Montgomery Motors, Inc.	Department of Highways	7,834.13	7,834.13	February 11, 1972
D-227	Firestone Tire & Rubber Company (The)	Department of Highways	6,824.17	6,000.00	December 4, 1972
D-228 D	Foley, A. M.	Department of Highways	4,300.00	3,530.54	February 11, 1972
D-545	Foremost Insurance Co.	Department of Highways	550.00	550.00	September 12, 1972
D-229 C	Fragale, John, d/b/a Top Hat Billiards	Department of Highways	213.04	159.78	February 11, 1972
D-502 A	Frazier, James B.	Department of Highways	100,000.00	10,000.00	October 24, 1972
D-502 D	Frazier, James B., Admin. of Estate of Michael Scott Frazier, deceased	Department of Highways	10,000.00	10,541.95	October 24, 1972
D-502 C	Frazier, Jamy Lou & James B. Frazier	Department of Highways	10,000.00	500.00	October 24, 1972
D-502 B	Frazier, Lou Irene & James B. Frazier	Department of Highways	10,000.00	1,000.00	October 24, 1972
D-482	Friddle, Blanton M.	Alcohol Beverage Control Commission	946.95	946.95	January 24, 1972
D-399	Gal, Maciej	Denzil L. Gainer, Auditor	3,100.46	3,100.46	August 24, 1971

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1971, to June 30, 1973:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-540	General Foods Corporation	State Tax Department	28,590.95	28,590.95	December 4, 1972
D-229 D	Gonano, Eddie, trading and doing business as Ed's Place	Department of Highways	9,600.00	3,032.53	February 11, 1972
D-580	Gravely, Charles	Department of Highways	106.61	106.61	January 23, 1973
D-229 E	Halsey, Belva, d/b/a Belva's Beauty Shop	Department of Highways	1,222.00	1,000.00	February 11, 1972
D-233	Hardy, J. R.	Department of Highways	415.56	160.68	October 23, 1972
D-229 F	Hark, L. J., trading and doing business as Drasnin's Tailor Shop	Department of Highways	2,300.00	2,280.88	February 11, 1972
D-484	Harleysville Mutual Insurance Co., subrogee of Lena Nancy Shaver	Department of Highways	226.88	226.88	November 16, 1971
D-486	Harmon, Arden	Department of Highways	27.86	27.86	November 16, 1971
D-454	Harrah, Leo R.	Department of Highways	20,000.00	6,000.00	February 6, 1973
D-229 C	Home Insurance Co., subrogee of John Fragale, d/b/a Top Hat Billiards	Department of Highways	110.22	55.11	February 11, 1972
D-229 L	Home Insurance Co., subrogee of Montgomery Motors, Inc.	Department of Highways	11,336.52	11,336.52	February 11, 1972
D-229 G	Jackson, Robert W., trading and doing business as Henderson's Drug Store	Department of Highways	3,995.00	2,368.27	February 11, 1972
D-228 E	Jacobs, Wilson & Eugene	Department of Highways	6,357.60	4,225.00	October 23, 1972
D-581	Joe L. Smith, Jr., Inc. d/b/a Biggs-Johnston-Withrow	Board of Regents	448.48	372.98	February 6, 1973

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1971, to June 30, 1973:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-509	Jones, Joseph C. and Emma Lou	Department of Highways	265.54	265.54	April 26, 1972
*D-357	Jones, Orpha E.	State Building Commission	8,058.00	5,425.00	December 14, 1971
D-228 F	Kanawha Aerie No. 1040, Fraternal Order of Eagles (The Trustees)	Department of Highways	4,400.00	2,776.09	February 11, 1972
D-228 G	Kayton Theatre, Inc.	Department of Highways	1,000.00	701.81	February 11, 1972
D-229 H	Kelly, E. W., trading and doing business as E. W. Kelly Store	Department of Highways	1,553.70	1,450.00	February 11, 1972
D-228 I	McClellan, David	Department of Highways	3,500.00	1,700.00	September 12, 1972
D-518	McClure, William B. and Helen	Department of Highways	137.55	137.55	July 10, 1972
D-551	MacDorman, C. P.	Department of Highways	300.00	50.00	December 4, 1972
D-550	Matheny, Delbert J.	Department of Highways	200.00	200.00	January 3, 1973
D-229 J	Mearns, Inc., a corporation, trading and doing business as The Fashion Shop	Department of Highways	13,000.00	11,000.00	February 11, 1972
D-477	Monongahela Power Company	Department of Highways	198.45	148.84	July 10, 1972
D-563	Monongahela Power Company	Office of the Adjutant General	298.43	298.43	January 23, 1973
D-229 K	Montgomery Hardware Company, Inc.	Department of Highways	9,900.00	5,125.01	February 11, 1972
D-229 L	Montgomery Motors, Inc.	Department of Highways	17,521.90	1,055.37	February 11, 1972
D-533	Morris, Wilma Lee	Department of Public Safety	25,000.00	1,500.00	October 24, 1972
D-492	Mucklow, Thomas Oliver	Board of Regents	1,595.00	1,595.00	February 7, 1972

*The Respondent has failed to pay this claim even though the funds were appropriated by the Legislature.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1971, to June 30, 1973:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-228 J	Murad, Anna Cater, widow and sole devisee of Louis F. Murad, deceased, and Ida Cater, widow	Department of Highways	1,400.00	1,296.95	February 11, 1972
D-445	Murphy, Alvin E.	Adjutant General	50.00	50.00	July 16, 1971
D-582	Myers, Gertrude A. and Lena M. Brown	Department of Highways	3,823.24	1,000.00	March 21, 1973
D-470	Nationwide Insurance Co., subrogee for Fred or Carolyn Runyon	Department of Highways	553.65	553.65	December 14, 1971
D-229 C	New Hampshire Insurance Co., subrogee of John Fragale, d/b/a Top Hat Billiards	Department of Highways	110.22	55.11	February 11, 1972
D-459	Oscar Vecellio, Inc.	Department of Highways	12,901.00	4,970.48	January 23, 1973
D-229 N	Palmer, O. E., Administrator, c t a d b n the Estate of A. A. Mitchell, deceased, and Mary Rose	Department of Highways	5,200.00	269.00	February 11, 1972
D-412	Peraldo, George N., d/b/a Pauley Drilling Company	Office of the Governor	11,119.33	11,119.33	July 16, 1971
D-229 C	Phoenix Assurance Co., subrogee of John Fragale, d/b/a Top Hat Billiards	Department of Highways	137.77	68.88	February 11, 1972
D-229 M	Phoenix Insurance Company (The)	Department of Highways	37,536.47	37,536.42	February 11, 1972
D-229 C	Phoenix Insurance Company, subrogee of John Fragale, d/b/a Top Hat Billiards	Department of Highways	137.77	68.88	February 11, 1972

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1971, to June 30, 1973:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-229 L	Phoenix Insurance Company, subrogee of Montgomery Motors, Inc.	Department of Highways	10,000.00	10,000.00	February 11, 1972
D-513	Powers, Roy W.	Department of Highways	298.40	131.32	February 9, 1972
D-577	Preece, Amos	Department of Highways	1,200.00	1,200.00	January 23, 1973
D-228 K	Progressive Investments, Inc.	Department of Highways	2,800.00	1,249.04	February 11, 1972
D-521	Prozzillo, Frank	Department of Public Safety	209.11	155.61	July 11, 1972
D-485	Pudder, Flossie Grace	Department of Natural Resources	50,000.00	8,000.00	October 23, 1972
D-487	Pudder, Robert J.	Department of Natural Resources	50,000.00	3,000.00	October 23, 1972
D-560	Radiological Consultants Association	Department of Public Institutions	2,815.00	2,815.00	December 4, 1972
D-306	Randolph, Gloria L.	Department of Highways	336.00	235.00	February 7, 1972
D-444	Reinhart, Clyde W.	Department of Highways	14,781.99	3,381.99	February 7, 1972
D-436	Rivers, Collins and Ruth	Department of Highways	4,873.68	3,246.00	December 14, 1971
D-524	Robey, Jerry A.	Department of Highways	42.23	42.23	February 9, 1972
D-203	S. J. Groves & Sons and Turman Construction Co.	Department of Highways	1,327,721.71	38,404.45	June 13, 1972
D-305	Sands, Joseph and Kathleen	Department of Highways	2,040.49	1,450.00	February 7, 1972
D-541	Seebaugh, Virgil Donald and Ava Marie	Department of Highways	4,191.00	750.00	December 5, 1972
D-546	Shaffron, Peter Jr.	Department of Highways	120.00	114.33	October 24, 1972
D-232	Sheppard, Thomas C. Sr. and Nellie	Department of Highways	5,512.62	2,444.03	July 11, 1972
D-408	Singer Sheet Metal Company, Inc.	Department of Mental Health	5,928.00	5,928.00	August 20, 1971

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1971, to June 30, 1973:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-526	Smith, Robert D.	Department of Highways	220.42	220.42	February 10, 1972
D-503	Starvaggi, Mary Jane	Department of Public Safety	150,000.00	25,000.00	October 24, 1972
D-230 D	State Farm Insurance Co., Assignee of Margaret Roeser and Harriet Davidson	Department of Highways	650.00	464.00	September 12, 1972
D-600	State Farm Mutual Automobile Insurance Company, as subrogee of Ralph Henne	Department of Highways	36.05	36.05	March 21, 1973
D-601	State Farm Mutual Automobile Insurance Co., as subrogee of Robert L. Hulett	Department of Highways	46.35	46.35	March 21, 1973
D-605	State Farm Mutual Automobile Insurance Co., as subrogee of Corliss P. MacDorman	Department of Highways	277.81	277.81	March 21, 1973
D-606	State Farm Mutual Automobile Insurance Co., as subrogee of Diana K. Smith	Department of Highways	78.80	78.80	March 21, 1973
D-350	Strader, A. D. and Eulah M.	Department of Highways	1,500.00	896.00	August 1, 1972
D-228 L	Tabit, Freda, widow and devisee of Andrew Tabit, deceased.	Department of Highways	2,100.00	1,874.38	February 11, 1972
D-304	Thomas, Herbert and Lovie	Department of Highways	1,252.50	900.00	February 7, 1972
D-434	Trebag Enterprises, Inc.	Department of Natural Resources	4,550.00	3,000.00	February 9, 1972
D-219	Tri-State Stone Corp.	Department of Highways	222,880.76	112,910.24	February 3, 1972
*D-433	Tutlis, Mary Louise	Board of Regents	9,801.00	6,172.00	March 17, 1972

*The claim was not included by the Legislature in the Claims Bill of 1973; therefore, the claim has not been satisfied.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1971, to June 30, 1973:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-405	United Air Lines, Inc.	Office of the Governor	1,130.65	1,040.20	September 13, 1971
D-505	Vecellio & Grogan, Inc.	Department of Highways	6,540.00	5,895.68	February 9, 1972
D-457	Vecellio & Grogan, Inc., and Foster & Creighton Co.	Department of Highways	5,331.25	5,331.25	December 14, 1971
D-276	Walker, Harry d/b/a Gauley Esso Service Center	Department of Highways	20,000.00	900.00	May 15, 1972
D-287	Warner, Vergie	Department of Highways	1,975.00	100.00	December 4, 1972
D-598	Waugh, Ralph W.	Department of Highways	700.00	700.00	February 20, 1973
D-568	W. Va. Welding Supply Co.	Department of Highways	1,660.00	1,660.00	December 4, 1972
D-495	Wotring, Bliss R.	Department of Highways	900.00	750.00	July 10, 1972
D-498	Wright, Earl L.	Department of Highways	106.75	106.75	February 7, 1972
	TOTALS		$2,612,820.84	$ 589,587.17	

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

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-564	Ashcraft, Robert H. and Juanita M.	Department of Highways	$ 75,000.00	Disallowed	January 23, 1973
D-302	Bandy, Rev. Charles Q.	Department of Highways	54.95	Disallowed	December 21, 1971
D-500	Beckett, John L. & Betty A.	Department of Highways	704.35	Disallowed	March 15, 1972
D-390	Bryan, Fonda	Department of Highways	148.01	Disallowed	November 16, 1971

REPORT OF THE COURT OF CLAIMS (Continued)

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-481	Capitol Paper Supply, Inc.	Department of Finance & Administration	4,700.00	Disallowed	February 23, 1972
C-30	Central Asphalt Paving Co. and V. N. Green & Co., Inc.	Department of Highways	159,915.50	Disallowed	January 16, 1973
D-543	Combs, Vernon & Daisy	Board of Regents	1,486.78	Disallowed	February 20, 1973
D-244	Davis, Ora V.	Department of Highways	150,000.00	Disallowed	January 24, 1972
D-365	Griffith, Baxter Curtis, Admin. of the Estate of Bernard William Griffith, deceased	Department of Public Institutions	113,000.00	Disallowed	May 21, 1973
D-278	Hall, C. Vernon and Louise	Department of Highways	564.48	Disallowed	August 30, 1972
D-332	Henderson, Harry C.	Department of Highways	72,300.00	Disallowed	September 16, 1972
D-469	Hodges, Amie, Administratrix of the Estate of Margaret Nancy Hodges	Department of Mental Health	110,000.00	Disallowed	February 18, 1972
D-323	Hogue, William O.	Department of Public Institutions	7,003.30	Disallowed	July 10, 1972
D-349	Hurst, Lelia	Department of Public Institutions	10,000.00	Disallowed	September 12, 1972
D-554	Jeffries, G. B.	Department of Highways	910.00	Disallowed	February 20, 1973
D-569	Kirk, Joe aka Cary Joe Kirk	Department of Public Institutions	949.63	Disallowed	May 2, 1973
D-395	Lomas, Irene	Department of Highways	14,000.00	Disallowed	March 15, 1972
D-527	Long, Wm. Manuel	Department of Highways	5,300.00	Disallowed	January 3, 1973
D-398	Lynn, Norma Lee	Department of Highways	250,000.00	Disallowed	June 13, 1972
D-508	McCargo, Mrs. Pauline M.	W.Va. Racing Commission	12,000,000.00	Disallowed	April 26, 1972
D-437	McMellon, Rev. Don	Department of Highways	322.51	Disallowed	February 15, 1972
D-534	Melbourne Brothers Construction Company	Department of Highways	55,817.82	Disallowed	June 26, 1973

REPORT OF THE COURT OF CLAIMS (Continued)

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-566	Monongahela Power Co.	Department of Public Institutions	3,391.62	Disallowed	November 16, 1972
D-522	Moore, John C. and Margaret	Department of Highways	20,000.00	Disallowed	August 30, 1972
D-494	Morgan, Rev. F. Douglas	Department of Highways	179.00	Disallowed	February 18, 1972
D-491	Mullins, Paul J.	Department of Highways	235.48	Disallowed	January 8, 1973
D-363	Nichols Engineering & Research Corp.	State Tax Department	22,288.12	Disallowed	July 13, 1971
D-567	Pace, Barbara	Department of Natural Resources	50,000.00	Disallowed	June 26, 1973
D-525	Rinear, Millard, as parent and guardian of Linda Sue Rinear, and Millard Rinear, individually	Board of Regents	30,000.00	Disallowed	June 29, 1973
D-407	Safeco Insurance Co.	Department of Highways	112.24	Disallowed	September 13, 1971
D-537	Shaffer, Violet M.	Board of Regents	12,000.00	Disallowed	January 3, 1973
D-511	Shered, Mrs. James E., Sr. and James E., Jr.	Department of Highways	1,000.00	Disallowed	July 10, 1972
D-431	Shiflet, Stanley, d/b/a Shiflet's Transfer	Department of Mental Health	321.31	Disallowed	February 7, 1972
D-222	Southern Realty Co., Inc.	Department of Finance & Administration and Dept. of Welfare	1,125.00	Disallowed	July 16, 1971
D-259	Stepp, Crintes	Department of Highways	7,000.00	Disallowed	February 7, 1972
D-519	Varner, Ola Marie and Okla Olin	Department of Highways	15,000.00	Disallowed	January 3, 1973
D-217	Walton, Hubert Jr.	Department of Mental Health	5,000.00	Disallowed	December 4, 1972
D-557	Williams, B. L.	Department of Highways	332.45	Disallowed	January 3, 1973
D-530	Wolverton, Scott	Department of Highways	20,000.00	Disallowed	January 10, 1973
	TOTAL		$13,220,162.55		

REPORT OF THE COURT OF CLAIMS (Continued)

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
*D-587	Board of Regents	Board of Vocational Education, Division of Vocational Rehabilitation	$ 317.57	$ 317.57	February 6, 1973

*The claim was not included by the Legislature in the Claims Bill of 1973; therefore, the claim has not been satisfied.

*(6) Claims rejected by the Court but payments made by special appropriation by the Legislature in the 1972 and 1973 Legislative sessions:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-547	Amstan Supply Division, American Standard, Inc.	Department of Mental Health	456.00	456.00	September 25, 1972
D-532	Bristol Laboratories, Div. of Bristol Myers Co.	Department of Mental Health	462.50	462.50	February 22, 1972
D-593	J. S. Latta, Inc.	Department of Mental Health	65.00	65.00	March 21, 1973
D-497	Karoll's, Inc.	Department of Mental Health	1,308.94	1,308.94	November 29, 1971
D-461	P. B. & S. Chemical Company	Department of Mental Health	56.25	56.25	July 26, 1971
D-464	Rinard, Ralph E., d/b/a Rinard Coal Company	Department of Mental Health	633.60	633.60	July 26, 1971
D-466	3M Business Products Center Company	Department of Mental Health	61.40	61.40	July 26, 1971
D-460	Upjohn Company (The)	Department of Mental Health	136.70	136.70	July 26, 1971
D-515	Will Ross, Inc.	Department of Mental Health	190.05	190.05	November 29, 1971
D-465	Wilson, Denver G., O.D.	Department of Mental Health	80.00	80.00	July 26, 1971
	TOTALS		$ 3,450.44	$ 3,450.44	

*The Opinion issued in the Claim of Airkem Sales and Service, et al vs. Department of Mental Health, Claim No. D-333, 8 Ct. of Cls. Rep. 180, was applied through per curiae to all the claims listed in Section (6).

REPORT OF THE COURT OF CLAIMS (Continued)

(7) Approved claims and awards satisfied by payment by the State agency through an opinion decided by the Court under the Shortened Procedure:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-483	Klein, DeWayne R.	Board of Regents	74.35	$ 74.35	July 26, 1971
D-488	Moore, Wanda H.	Board of Regents	65.75	65.75	September 20, 1971
	TOTALS		$ 140.10	$ 140.10	

OPINIONS

TABLE OF CASES REPORTED

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

Opinion issued July 6, 1971

BERTHA G. BARTON, Claimant

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-378)

No one appeared for the Claimant.

Donald L. Hall, Esq., for the Respondent.

PETROPLUS, JUDGE:

This is a claim for damages to real estate owned by Bertha G. Barton in Charleston, West Virginia, caused by an earthslide on December 30, 1969, adjacent to and under West Virginia Route 14, South Hills Area, Kanawha County. By an agreed Stipulation of Facts, the parties informed the Court that a drain and drainage line in the area was permitted by the Respondent, The West Virginia Department of Highways, to become clogged with refuse causing water to overflow over the roadway Route 14 and into a large crack in the road surface, thereby saturating the earth below the road and undermining the paved portion of the road and thereby precipitating a landslide down a hill towards and on to the property of the Claimant. Damage was considerable and was stipulated in the amount of $2,531.00, with a detailed estimate attached.

It appearing that employees of the Respondent had previously worked on the road and patched the road surface, they must have had knowledge of the drainage problem or in the exercise of ordinary care should have detected the hazard to which Claimant's property was exposed. The blocked drain constituted actionable negligence and the slide which occurred was a reasonably foreseeable consequence of said negligence.

On similar facts, this Court made an award to Dale E. Olive, in Claim No. D-290, on September 23, 1970, against the Respondent, the property involved being in the same area of the landslide.

The Court accordingly makes an award in the amount of $2,531.00 to the Claimant.

The Respondent's Motion to Dismiss on the ground that the Claimant may maintain a proceeding against the State by mandamus to compel the State to institute eminent domain proceedings has been considered. The Court is cognizant of the limitation on its jurisdiction under Chapter 14, Article 2, Section 14, Code of West Virginia, 1931, as amended, which states:

> "The jurisdiction of the court shall not extend to any claim: 5. With respect to which a proceeding may be maintained against the State, by or on behalf of the claimant in the courts of the State".

The above exclusion is not applicable where the Claimant has proceeded against the State on a theory of nonfeasance or neglect of duty which proximately results in damages to real estate. If damages were caused by a taking of the property or as a result of highway construction or improvement properly performed, or even by the affirmative act of the State, then and in that event, this Court could reasonably hold that the Claimant had an adequate legal remedy by invoking through a Writ of Mandamus the statutory duty of the State to institute eminent domain proceedings. That is our interpretation of the cases of *State* ex rel *Teter* v. *State Road Commission,* 152 W. Va. 805, and *State* ex rel *Griggs* v. *Graney,* 143 W. Va. 610, 103 S.E.2d 878. The Respondent's Motion to Dismiss is overruled.

Claim allowed in the amount of $2,531.00.

Opinion issued July 6, 1971

WILLIAM BRYANT, Claimant

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS,
a Corporation, Respondent

(No. D-439)

Paul R. Goode, Jr., Esq., for the Claimant.

Donald L. Hall, Esq., for the Respondent.

PETROPLUS, JUDGE:

The Claimant. William Bryant, sustained damages on March 23, 1970, to his mobile home, automobile, and lawn as a result of the propulsion of debris and rocks through the blasting activities of the Respondent, West Virginia Department of Highways, in Wyoming County, West Virginia. The Respondent's employees were cleaning out a ditch line in front of the Claimant's property on West Virginia Trunk Line 16, Indian Creek, and failed to take reasonable precautions to protect the Claimant's mobile home and automobile which were in the vicinity of the blasting. The resulting damage in the amount of $400.00, itemized in the stipulation of counsel and declared to be fair and equitable, was a foreseeable consequence of this negligent conduct and a violation of Claimant's property rights. All the material facts having been stipulated by counsel for the respective parties, the Court is of the opinion to award the Claimant the sum of $400.00.

Claim allowed in the sum of $400.00.

Opinion issued July 13, 1971

NICHOLS ENGINEERING AND RESEARCH CORPORATION,

Claimant,

vs.

CHARLES H. HADEN, II, STATE TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA, Respondent.

(No. D-363)

Henry C. Bias, Jr., Esq., for the Claimant.

George E. Lantz, Deputy Attorney General, and *James C. Coleman,* Assistant Attorney General for the Respondent.

PETROPLUS, JUDGE:

The Petitioner is Nichols Engineering and Research Corporation, a Delaware corporation, with its principal business office in New York City, and has duly qualified as a foreign corporation to do business in the State of West Virginia. The Petitioner has never maintained an office or other place of business in West Virginia, and except as hereinafter set forth, has never had any agents or employees in the State of West Virginia.

The claimant-taxpayer, Petitioner, is a professional engineering firm of specialty engineers and as such is engaged in planning, designing and in the purchase, sale and installation of specified types of technical equipment for the special needs of its customers. It maintains no manufacturing facilities or inventory in the State of West Virginia but does maintain on a small scale warehouse inventories of replacement parts and some types of equipment, all of which are purchased from other persons, firms and corporations.

The Petitioner entered into engineering and sales contracts involving installations in the State of West Virginia, the first contract covering a sanitary sewage disposal plant in the City of Huntington, in which project R. E. Daily & Company of Detroit, Michigan, was the prime and integrating contractor, and the second contract involving the construction of a bark carbonizing plant in Beryl, Mineral County, West Virginia, wherein the Cumberland Corporation of Louisville, Kentucky, was the prime contractor.

The Petitioner made a proposal to supply various units of the sewage disposal plant in Huntington and engineering services necessary to adapt the equipment to a master plan. Superintendents of the Petitioner inspected and supervised the installation of the equipment and instructed the personnel of the City of Huntington in the manner of its operation. Highly skilled employees of the Petitioner performed certain essential services in the State of West Virginia to install and adapt the equipment to the master plan. On the second contract, the Mineral County Carbonizing Plant, the Petitioner designed, selected all equipment for, constructed and assisted in placing the plant in operation, also using skilled engineers and technicians to coordinate and supervise the work of local independent contractors.

The claimant filed Business and Occupation Tax Returns with the State Tax Commissioner, under the classification of a contractor, for a period commencing in July, 1963, and ending in March, 1965. Approximately $15,000.00 in such taxes was voluntarily paid.

Pursuant to an audit made by the State Tax Commissioner's office, additional taxes were assessed against the Petitioner for said period in the amount of $6,963.42, plus statutory penalties, which were later waived in a conference with the State Tax Commissioner. Petitioner's claim was filed on September 28, 1970, in the amount of $22,288.12, which includes both taxes voluntarily paid and the amount additionally assessed.

Within the thirty-day period and in the manner required by Chapter 11, Article 13, Section 7b of the official Code of West Virginia of 1931, as amended, the Petitioner filed a Petition with the State Tax Commissioner for reassessment of its taxes. A Petition was also filed for refund of taxes erroneously, illegally and improperly paid under the provisions of Chapter 11, Article 1, Section 2a of the aforementioned Code. Thereafter, an informal hearing was held in the office of the Tax Commissioner, respondent, upon both Petitions, at which time, the Petitioner was given an opportunity to present its views in opposition to the assessment and in support of its request for a refund. By letter dated January 20, 1966, the respondent notified the Petitioner of his written decision affirming the above described assessment. In its Petitions for Reassessment and Refund, the Petitioner took the position that only a percentage of the contract amounts were allocable to and taxable by the State of West Virginia and no issue was raised concerning the classification and rates under which

the taxes were paid or the imposition of State privilege taxes in violation of the Constitution of the United States as a burden on Interstate Commerce. Those issues are apparently raised for the first time in this Court.

The claimant-Petitioner thereafter paid the additional assessment and failed to appeal to the Circuit Court of Kanawha County, West Virginia, within the thirty-day period prescribed by Chapter 11, Article 13, Section 8 of the West Virginia Code. It likewise failed to appeal to the Circuit Court within the thirty-day period prescribed by Chapter 11, Article 1, Section 2a of the West Virginia Code by giving the necessary written notice requiring the Tax Commissioner to institute a declaratory judgment proceeding in the Circuit Court. The result of all this was to cause the decisions of the State Tax Commissioner to become final, both upon the claimant's Petition for Reassessment and upon the Petition for Refund. The time having expired for filing statutory appellate proceedings, and no other remedy being available to the claimant, a claim was filed in this Court to secure a refund not only of the additional taxes assessed but also the privilege taxes voluntarily paid on the ground that all taxes were improperly and illegally collected, the collection thereof amounting to an illegal burden upon Interstate Commerce. The Petitioner also contends that it should have been taxed not as a contractor but as a company engaged in performing a service which carries a lower rate of taxation.

All of the above facts were submitted to the Court by an agreed Stipulation signed by both parties. The Answer of the respondent, while admitting the facts, denies the legal conclusions and poses the question whether the Petitioner, who has failed, refused or neglected to utilize the statutory provisions with reference to a judicial review of the adverse decisions of the respondent, can properly invoke the jurisdiction of this Court to hear the Petition under the exclusionary provisions of Chapter 14, Article 2, Section 14(5) and Section 21 of the Code. Chapter 14 of the Code established the Court of Claims in 1967 and defined its general jurisdiction with limitations. It is further agreed in the Stipulation that no claim was presented by the Petitioner to the Attorney General of the State of West Virginia or any other Court in this State for a refund of said taxes prior to the creation of the Court of Claims.

The parties have defined the legal issues to be decided by this Court as follows:

(a) Does the Court of Claims have jurisdiction to determine the issues presented by the Petition, the Answer and the Stipulation of Facts.

(b) If the Court of Claims has jurisdiction to determine the issues here presented, then have the taxes paid by the Petitioner been illegally and improperly collected and paid, thereby imposing upon the State of West Virginia a moral obligation to refund to the Petitioner the tax monies so collected.

At the hearing on December 8, 1970, oral arguments were ably presented by counsel on both sides on the jurisdictional issue. Counsel for the claimant relies heavily on Chapter 14, Article 2, Section 12 of the Code which defines the general powers of the Court. Said Section reads:

> "The Court shall, in accordance with this Article, consider claims which, but for the constitutional immunity of the State from suit, *or for some statutory restrictions, inhibitions or limitations,* could be maintained in the regular Courts of the State". (emphasis supplied)

The argument of the Petitioner seems to be that in addition to cases where constitutional immunity is involved, if there are statutory restrictions, inhibitions or limitations other than constitutional immunity, this Court has jurisdiction to hear a claim even though it may be barred in the regular Courts of the State because of such statutory restrictions, inhibitions or limitations. We consider this to be a novel argument and if the Petitioner is right, this Court has the right to disregard all statutory impediments except the Statute of Limitations which is specifically made applicable to this Court under Chapter 14, Article 2, Section 21. Under the Petitioner's contention, this Court would have jurisdiction of any and all claims for tax refunds in cases where the claimant has not exhausted his administrative remedies and statutory rights to a judicial review. We do not believe that the Legislature intended to give this Court such broad powers, particularly jurisdiction of claims which are barred from the regular Courts of the State because of "statutory restrictions, inhibitions or limitations" other than the limitation of sovereign immunity. Such a contention if sustained, would extend the jurisdiction of this Court to

consider all claims of every kind and nature as a matter of conscience and moral obligation.

After further defining the jurisdiction of this Court in 14-2-13 Code of West Virginia, the Legislature stated that the jurisdiction of this Court is extended to claims and demands, liquidated and unliquidated, ex contractu and ex delicto against the State or any of its agencies which the State as a sovereign commonwealth should in equity and in good conscience discharge and pay except for claims excluded by Section 14 of said Chapter and Article. Chapter 14, Article 2, Section 14, entitled "Claims Excluded" reads:

> "The jurisdiction of the Court shall not extend to any claim ..... 5. With respect to which a proceeding may be maintained against the State, by or on behalf of the claimant in the Courts of the State".

It is the opinion of the Court that the latter Section excludes from the jurisdiction of the Court any and all claims where administrative and statutory remedies are provided in the regular Courts of the State and particularly where a judicial remedy is also provided in the regular Courts of this State to review administrative decisions of State agencies. The Statutes relating to jurisdiction of this Court must be read together and if there is an ambiguity in the Statutes conferring general jurisdiction and defining the powers of this Court, there certainly is no ambiguity in 14-2-14 Code, which specifies and excludes from the jurisdiction of this Court any claim for which there is an adequate legal remedy. To adopt Petitioner's contention, we must hold that the Legislature intended to impose upon the Court of Claims the impossible task of reviewing the legality and propriety of all taxes collected by the State.

This Court in previously decided cases has consistently held to a position that a taxpayer who has not exhausted his administrative and judicial remedies cannot avail himself of the jurisdiction of this Court.

Chapter 11, Article 13, Section 8 and Chapter 11, Article 1, Section 2a of the West Virginia Code provide for a judicial review of the Tax Commissioner's decisions which may be erroneous, unconstitutional or capricious. The Petitioner who failed, refused or neglected to avail itself of the judicial reviews afforded by the Statutes cannot later, after the assessment of taxes has become final, come into this

Court and raise questions concerning the constitutionality of the tax or the illegal action of the State Tax Commissioner.

For the reasons stated in this Opinion, the Court holds that it is without authority to entertain this claim for a tax refund and that it has no jurisdiction to pass upon the validity of the tax. The issue of jurisdiction being decided adversely to the Petitioner, there is no necessity in making any findings on the illegality or improper collection of the tax.

Claim disallowed.

Opinion issued July 16, 1971

ALVIN E. MURPHY, Claimant

vs.

ADJUTANT GENERAL, Respondent

(No. D-445)

No one appeared for the Claimant.

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

PETROPLUS, JUDGE:

On July 22, 1970, personnel of the 19th Special Forces Group, while engaged in parachute dropping exercises at Camp Dawson in Preston County, West Virginia, landed in a field of growing crops belonging to the Claimant, Alvin E. Murphy. The parachutists were National Guardsmen. Respondent had leased from the Claimant the use of the uncultivated part of his property as a drop-zone at a nominal rent of $1.00, which Lease granted unto the State of West Virginia the right to conduct military parachute jumps on the Claimant's property.

It appears from the Stipulation of Facts that Respondent conducted an investigation of the damage to the crops and that claims for torts committed by the personnel of the National Guard are not recognized until State remedies have been exhausted. The Respondent recommends that the claim be paid and no hearing is demanded.

This claim is submitted under Chapter 14, Article 2, Section 17 of the Code, the shortened procedure, and has been approved by the Attorney General as one that should be paid.

Whereupon, upon consideration of the claim informally upon the record submitted, the Court determines that the claim should be entered as an approved claim and an award is made to the Claimant in the amount of $50.00.

Claim allowed in the amount of $50.00.

Opinion issued July 16, 1971

GEORGE N. PERALDO d/b/a
PAULEY DRILLING COMPANY, Claimant

vs.

ARCH A. MOORE, JR., GOVERNOR OF THE
STATE OF WEST VIRGINIA, Respondent.

(No. D-412)

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

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

PETROPLUS, JUDGE:

This claim came on for hearing on the following facts admitted in the Answer of the Respondent:

During the month of October, 1969, a critical shortage of water existed at Concord College, a State Institution, and the College was about to close because of an inadequate water supply. The Governor of the State of West Virginia, acting by his Administrative Assistant, requested the petitioner-claimant to transport his well drilling equipment to Athens, West Virginia, and drill such water wells as might be necessary to furnish Concord College with an adequate supply of water. The petitioner was advised that his services would be paid from the Governor's contingent fund. Pursuant to said request and at the direction of the Governor of the State of West Virginia, the petitioner worked under extremely adverse weather conditions during the

months of October, November and December drilling two water wells and installing a pump under the direction of a Geologist from West Virginia University and a Supervisor from the West Virginia Department of Highways.

Upon the completion of the work and pursuant to the request of the Governor, the petitioner submitted a statement to the Governor for his services amounting to the sum of $11,119.33. The statement was approved and forwarded to the Auditor of the State of West Virginia for payment. The Auditor refused to pay the petitioner and yet refuses to pay said sum, although the petitioner acted in good faith under emergency orders to furnish the labor and materials which were critical for the continued operation of the College. The Governor and his assistants testified personally at the hearing, and their testimony indicates that the claim is reasonable, liquidated and undisputed and should be paid by the State of West Virginia as a moral obligation of the State.

The Auditor's refusal to pay the claim, as revealed by the Answer, is based on the ground that the payment would be in violation of Article X, Section 6 of the State Constitution and the provision of Chapter 5A, Article 3, Section 1, et seq. of the Code of West Virginia.

It is the opinion of this Court that Article X, Section 6, which states:

> "The credit of the State shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the State ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person; nor shall the State ever hereafter become a joint owner, or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever."

has no application and does not constitute a tenable defense to the claim. We do not consider this to be a case where the State's credit is granted in aid of a city, nor one where the State has assumed or become responsible for the liabilities of a city. The constitutional provision has been interpreted as prohibiting the granting of State aid to counties and municipalities by direct appropriation or by granting a credit. Although the City of Athens, West Virginia, had a primary contractual duty to keep the College supplied with water, it appears that the City neglected or was unable to meet its obligation to the

College. The services were directly requested by the Governor who had funds available in his contingency appropriation to make payment for said services. The appropriation is for public purposes and we find that the Governor's action created a moral obligation on the part of the State to pay for said services. A further fact developed at the hearing was that the water made available by the digging of the two wells was not used by the College but we feel this to be irrelevant and immaterial to the State's contractual obligation to pay for services rendered under an emergency situation which was called to the attention of the Governor and which he felt required immediate and prompt attention to safeguard the health, safety and well-being of a student body of approximately 1800 at the College.

Chapter 5A, Article 3, Section 1 of the Code, also cited as a reason for the Auditor's refusal to issue a Warrant for the payment of the claim, deals with the purchase of commodities by the Departments of the State Government and outlines the procedures to be followed. However, Section 17 of said Chapter and Article makes an exception for bona fide emergencies arising from unforeseen causes. We also hold that said Section of the Code has no application to the instant case.

The Legislature has seen fit to appropriate annually for the use of the Governor what is designated as a Civil Contingent Fund and the Governor is authorized by Statute (5-1-18) to pay sums from the fund which the Governor may deem necessary or proper. The Governor's requisition in every case does not authorize the Auditor to issue a Warrant for payment of funds particularly where the Governor has no authority to make a requisition. It is our opinion that as the Chief Executive Officer of this State, the Governor does have authority to incur obligations to meet an acute emergency which involves sanitation, health or safety of a community. This Court should not assume by judicial review the prerogative of the Governor to determine what constitutes an emergency. It is true that subsequent developments, not foreseeable when the Governor acted, disclosed that no real emergency existed. The parties involved acted in good faith under circumstances then existing which strongly indicated that the College would have to shut down because of a water shortage.

The Chief Executive is vested with discretion by the Constitution and laws of the State respecting his official duties, and this discretion should not be subject to review or control by the Court of Claims.

When funds are appropriated for the use of the Governor in the discharge of his official duties, his judgment in disbursing those funds under what appeared to be emergency conditions should not be questioned, unless it appears that he acted improperly, in violation of law, or in bad faith. One of the Governor's duties is to see that our educational institutions function, and no College can function without an adequate supply of water to meet the needs of the students, the personnel, and the various public buildings.

For the foregoing reasons, an award will be made to the petitioner in the amount of $11,119.33, for the drilling of wells to make an emergency water supply available to Concord College.

Claim allowed in the amount of $11,119.33.

Opinion issued July 16, 1971

SOUTHERN REALTY COMPANY, INC., Claimant,

vs.

DEPARTMENT OF WELFARE, Respondent.

(No. D-222)

Claimant appeared by *O. L. Givens,* President of Southern Realty Company, Inc., without counsel.

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

PETROPLUS, JUDGE:

The Claimant is Southern Realty Company, Inc., a West Virginia corporation, which on June 20, 1966, acquired a parcel of real estate in Sutton, Braxton County, West Virginia, which had formerly been leased to the State of West Virginia for the use of the West Virginia Department of Welfare. The property was conveyed to the Claimant subject to the terms and conditions of said Lease and the rental of $125.00 per month, payable on the 1st day of each month, was to be paid to Southern Realty Company, Inc., Claimant, at its address, Box 666, Sutton, West Virginia, from and after the date of purchase, all

of which appears in Respondent's Exhibit No. 1, designated Certification of Approval, signed by the Southern Realty Company and Truman E. Gore, Commissioner of the Department of Finance & Administration.

The Lease in question is dated February 9, 1966, by and between C. A. Duffield, Jr. (the former owner) as Lessor, and the State of West Virginia, by the Commissioner of Finance & Administration, as Lessee. The relevant provisions of the Lease are as follows:

The term was for a period of 4½ months beginning February 15, 1966, and ending on June 30, 1966. The Lessee was granted an option to renew the Lease for a period of three additional one-year periods upon giving written Notice to the Lessor, at least, 30 days prior to the end of the leased period of its intention to so renew said Lease. The rental was stipulated at $125.00 per month, and it was agreed by and between the parties that the Lessee may, at any time, upon giving 30 days' written Notice, terminate the Lease, and upon pre-delivery of possession of the premises to the Lessor, the Lessee was to be relieved from any and all liability thereunder. It was further agreed by the parties that Notices in the Lease were to be given by personal service upon the parties entitled to such Notice, or by certified mail, duly stamped and directed to the last known address of the party to be notified and deposited in the postoffice so as to allow 5 days for delivery.

The Claimant contends that the Lessee, Respondent, refused to pay rent after November 15, 1968, while holding as a tenant under the third optioned period which would have expired on June 30, 1969. It is further contended that the Department of Welfare continued to occupy the premises after November 15, 1968, and prevented the Claimant from leasing said premises to another tenant. The rental claim is in the amount of $1125.00, covering a period of 9 months beginning on December 1, 1968.

It was clearly established by testimony at the hearing that by letter dated October 8, 1968, signed by Joseph C. Peters, Commissioner and addressed to Southern Realty Company, Inc., Post Office Box 666, Sutton, West Virginia, 26601, the Lessor was notified that in accordance with the terms of the Lease dated February 9, 1966, that the premises will be vacated and the Lease terminated as of midnight November 15, 1968. The Respondent placed in evidence (Exhibit

No. 3) the envelope in which said Notice of termination was mailed addressed to Southern Realty Company, Inc., Post Office Box 666, Sutton, West Virginia, 26601, postmarked "Charleston, West Virginia, October 10, 1968" and stamped "Certified Mail . . . Return Receipt Requested". The letter was returned to the Respondent with a rubber stamp imprinted thereon by the postoffice reading: "Return to writer . . . reason checked . . . unclaimed".

The only issue before the Court is whether said Lease was properly terminated by written Notice, and if so, no liability would be incurred by the Respondent for any rentals after November 15, 1968. Mr. O. L. Given, President of Southern Realty Company, Inc., testified that the letter was never received by the Company, although it was correctly addressed and that he visited the postoffice practically daily on or about the time of the postmark of the letter. Mr. Given further testified that possession of the premises was not surrendered to the Lessor because the Lessee permitted an old safe to remain on the premises and the failure of the Lessee to surrender the keys. He was, however, notified in December, 1968, that the tenant had moved from the property when he received a telephone call about terminating the utility services. However, Mr. Given was aware that the Department of Welfare was no longer using the premises in the conduct of its business and had removed its furniture and other personal property therefrom.

The witnesses for the Respondent testified rather clearly and persuasively that proper procedures were followed in terminating the Lease by written Notice and that a large safe on the premises was not the property of the State and had been furnished by the former owner for the use and convenience of the tenant. The State witnesses were unable to testify from personal knowledge whether the keys to the premises were delivered to the Lessor.

According to the testimony presented at the hearing, it is the finding of this Court that the Lease was properly terminated in accordance with its terms and provisions and that the Lessor was aware that the premises had been vacated. Retention of the keys or some of the keys to the property, in our opinion, does not constitute an unlawful withholding of the premises especially when the Lessor had access to the property through other available keys at the time of the tenant's removal. The Lessee, having complied with the terms of the Lease by

sending the requisite written Notice, we cannot justify a finding of a moral obligation on the part of the State to pay rent after the date of termination because of a failure to remove a safe from the premises that was not owned by the State and the symbolic surrender of the premises by delivering all of the outstanding keys thereto.

The return of the termination Notice by the postoffice as "unclaimed" was not explained by the evidence and, in our opinion, the Respondent was under no duty to guarantee the delivery of the Notice if it complied with the provision of the Lease requiring it to send said Notice by certified mail. If the Notice was not delivered because of the negligence of the postoffice, the Claimant's damages, if any, might be recovered as a postal claim.

On the foregoing findings of fact, the claim is denied.

Claim disallowed.

Opinion issued July 26, 1971

IN THE WEST VIRGINIA COURT OF CLAIMS
THE UPJOHN COMPANY, Claimant

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-460)

P. B. & S. CHEMICAL COMPANY, Claimant

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-461)

RALPH E. RINARD, d/b/a RINARD COAL COMPANY, Claimant

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-464)

DENVER G. WILSON, O.D., Claimant

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-465)

3M BUSINESS PRODUCTS CENTER CO., Claimant

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-466)

No one appeared for the Claimants.

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

PER CURIAM

All of the foregoing claims are disallowed for the reasons set forth in the opinion of this Court heretofore filed in deciding the claims of

*Airkem Sales and Service, Claimant, et al, vs. Department of Mental Health, Respondent, covering Claims No. D-333 to D-347, inclusive, the factual situation and the law applicable thereto being the same as that involved in the foregoing decision of this Court.

Claims disallowed.

*Please see 8 Ct. of Cls. Rep. 180.

Opinion issued July 26, 1971

DEWAYNE R. KLEIN, Claimant

vs.

BOARD OF REGENTS, Respondent

(No. D-483)

No appearance for the claimant.

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

JONES, JUDGE:

The claimant, DeWayne R. Klein, a member of the faculty of West Virginia Institute of Technology, was living in a "faculty house" rented by him from the respondent when, on December 7, 1970, an employee of the respondent negligently caused a ceiling to collapse, resulting in damages to the claimant's household furnishings and other personal property in the amount of $74.35.

The Court has considered this claim informally upon the record submitted and is of opinion that the shortened procedure authorized by Section 17, Article 2, Chapter 14 of the Code of West Virginia applies, and that the claim should be approved.

Therefore, it is ORDERED that the claim be approved and an award is hereby made to the claimant in the amount of $74.35.

Award: $74.35.

Opinion issued August 2, 1971

COLUMBIA RIBBON & CARBON MANUFACTURING CO., INC., Claimant

vs.

THE DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF WEST VIRGINIA, Respondent.

(No. D-448)

Dennis W. Vaughan, Esq., Homer W. Hanna, Jr., Esq., Alexander J. Ross, Esq., and *Andrew A. Raptis, Jr., Esq.* for the Claimant.

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

PETROPLUS, JUDGE:

Columbia Ribbon & Carbon Manufacturing Co., Inc., Claimant, seeks to collect the sum of $3,186.80 from the Department of Finance and Administration, Respondent, a State Agency, for goods which were ordered by the Respondent, delivered and invoiced, but for which payment was never made. The claim arises from three separate invoices dated respectively October 28, 1969, in the amount of $946.80, October 28, 1969, in the amount of $540.00, and November 6, 1969, in the amount of $1,700.00. All of the invoices were for carbon paper and other supplies sold to the Respondent on orders taken by T. R. Spradling, a salaried employee of the Claimant for over sixteen years, who also acted as a manufacturer's representative for his Company's products which were sold throughout the State of West Virginia. His customers were classified generally in three categories. Products were sold by Mr. Spradling directly to the customer at a list or retail price. He sold to Government Agencies at a wholesale or less than retail price, and also sold to dealers as independent contractors, who in turn made sales directly to the consumer. Previously to the orders in question which were received personally by Mr. Spradling, the State had been buying the Claimant's products from Elk Service Supply, Incorporated, an independent dealer, which was purchasing the products directly from the Claimant and re-selling them to the State, presumably at a profit. When the Elk Service Supply Company became delinquent in the payment of its accounts with

the Claimant, by letter dated September 30, 1969, the Claimant notified Mr. Spradling that no future orders were to be taken from Elk Service Supply until payment had been made for the past due accounts. Mr. Spradling notified the Department of Finance and Administration of the problem with Elk Service Supply and was advised by June S. Church, the department head of the Revolving Fund, to take the orders in question personally and ship the merchandise directly to and bill the Department of Finance and Administration, Division of Purchases, Revolving Fund, Room B-59, Main Capitol Building, Charleston. Documentary evidence was submitted by the Claimant showing orders taken, shipment of goods, bills of lading, receipt of the goods by State, invoices and other documents verifying direct sale of merchandise to the State without an intermediary.

The State pleaded as a defense that payment of this indebtedness was made to the Elk Service Supply Company, Inc., a local agent of the Claimant, which solicited the orders, invoiced the same, and received payment through proper channels of procedure, and that Respondent had no liability to the Claimant.

At the hearing the State's witnesses testified that they could find no invoices from Columbia Ribbon & Carbon Manufacturing Co., Inc., in their files, and no memoranda showing receipt of shipments from Columbia, and no documentary evidence that the orders had been given to Mr. Spradling. On the contrary, documents were produced as Exhibits by the State showing the orders were taken by Elk Service Supply, Inc., were invoiced by Elk Service Supply, and stock room Receiving Reports designating Elk Service as the party from whom the goods were received, were presented to the Court, as well as cancelled checks showing payment of all invoices to Elk Service Supply at a post office address in Charleston. Payment was refused to the Claimant by the Commissioner of the Department of Finance and Administration as all records and information in the files of the State indicated the goods were received from another Company and that Company was paid. Furthermore, Elk Service Supply had been an agent or dealer for Columbia Ribbon & Carbon Manufacturing Co., Inc., on other purchases previously made.

It is on this record that the claims are submitted to this Court for decision. The flagrantly inconsistent documentary evidence gives rise to a suspicion that either the Claimant is attempting to perpetrate a fraud on the State by producing spurious documentary evidence to

this Court, or that the State's files have been tampered with by removing the genuine copies of the documents and substituting fictitious documentary evidence that the sale had been made by and the goods were received from Elk Service Supply. The State's witnesses were limited in their personal knowledge and observation of this transaction, and with no reflection on the witnesses, their unsatisfactory testimony can be explained by the rapid and unusual personnel changeovers in the department, vacations, unfamiliarity with purchasing procedures by special authorization, and lack of communication with the many persons involved in ordering, shipping, receiving and paying for the goods sold to the State. On the contrary we find the evidence of the Claimant to be direct and persuasive, properly documented and corroborated by personal knowledge of its salesman.

We, therefore, come to the conclusion that either the State's purchasing procedures at that time were negligently handled, or irresponsibly documented by badly informed personnel, or that the State's files have been ransacked and spurious invoices and supporting documents substituted for the genuine papers in such a manner as to divert payment to the so-called agent of the Claimant. Unexplained invoices from Elk Service Supply appear in the State's files for the same items invoiced by the Claimant. This conclusion is supplemented by the refusal of Richard Pine, President of Elk Service Supply Company, who cashed the checks from the State, to respond to a subpoena of this Court and who on advice of counsel sought an immunity that this Court could not grant, thereby seeking refuge under his right to avoid self-incrimination under the Fifth Amendment. Mr. Church, the head of the Revolving Fund, at the time in question, a material witness, was unable to attend as a witness because of a personal involvement in Kentucky, and the Director of the Fund who did testify took office on February 1, 1970, long after the fact.

Elk Service Supply Company was an independent contractor and not an agent of the Claimant, and even if we assume an agency relation did exist at one time as the State contends, it had been terminated before these transactions took place. The State employees had been so informed and dealt with the Claimant directly on these purchases. Payment to a former agent after his authority had terminated certainly cannot be considered payment to the principal. The improper diversion of funds to Elk Service Supply which should have gone to the Claimant does not constitute payment of an obligation to the Claimant

through an agent having actual or apparent authority to receive payment. As a matter of equity and good conscience, the State has a moral obligation to the Claimant, and an award in the amount claimed is hereby made.

Claim allowed in the amount of $3,186.80.

Opinion issued August 20, 1971

SINGER SHEET METAL COMPANY, INC., Complainant,

vs.

WEST VIRGINIA DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-408)

Claimant not represented by counsel and not appearing in person.

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

PETROPLUS, JUDGE:

The Court on its own motion rescinded and set aside its former Opinion, issued in the above captioned case on July 6, 1971, after a reconsideration and review of the Court File, because of an erroneous finding of fact.

The Singer Sheet Metal Company, Inc. furnished labor and materials for the erection of two fire escapes on one of the main buildings at Weston State Hospital by a requisition issued on June 9, 1969, under an Emergency Authorization by John S. Bell, Director of the Division of Purchases, Department of Finance and Administration, dated June 25, 1969. The fire escapes were constructed in accordance with the specifications of the State Fire Marshal's Office. A letter was also given to Mildred Bateman, M.D. of Weston State Hospital, authorizing the purchase of the two fire escapes in the open market. The fire escapes were constructed and the materials were furnished by the Claimant and the work was completed in a good and workmanlike manner. The State accepted the fire escapes as being in compliance with the specifications.

At the time the order was issued for the construction and erection of the fire escapes, funds had been duly appropriated and were available to pay for the work. The only reason that the Claimant did not receive payment for its work was because the fiscal year 1968-1969 had expired before the Claimant was able to complete the work. The Claimant was unable to proceed with the work or bill for the same, as originally intended, because of an intervening strike of the Sheet Metal and Iron Workers Union which lasted from June 1, 1970 to July 15, 1970. An invoice for the work was not presented until December 9, 1969, and by this time all funds for the fiscal year ending on June 30, 1969 had expired by operation of law, although the funds had been encumbered for this particular purpose.

The case was submitted on the Notice of Claim filed on December 11, 1970, and the two Answers of the Attorney General admitting the goods and services were furnished at the Respondents request, and that the invoice was reasonable in amount and should be paid as a moral obligation of the State.

The Court originally made a finding that the claim could not be paid because the Respondent did not have sufficient funds remaining in its budgeted account for the fiscal year 1969-1970 to pay the claim because of overcommitment of budgeted funds by the State Agency. The first answer of the Respondent filed on December 29, 1970 so stated and inasmuch as the case was submitted on the pleadings, the Court was misled into making a finding of overcommitment of budgeted funds, and held the Contract void and unenforcible under Chapter 12, Article 3, Sections 14, 15, 16 and 17 and Chapter 5-A, Article 3, Section 19 of the Code of West Virginia.

The doctrine of the case of *Airkem Sales and Service vs. Department of Mental Health,* Claim No. D-333 is not applicable to this case. On the contrary this case is controlled by the Opinion in *Biggs-Johnston-Withrow* vs. *Department of Mental Health,* Claim No. B-393.

For the foregoing reasons, the Court finds said claim in the amount of $5,928.00 to be a valid and subsisting claim against the State of West Virginia, and a claim which the State is morally bound to pay.

Claim allowed in the amount of $5,928.00.

Opinion issued August 24, 1971

MACIEJ GAL, Claimant

vs.

DENZIL L. GAINER, STATE AUDITOR, Respondent.

(No. D-399)

Herman D. Rollins, Esq., for the Claimant.

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

PETROPLUS, JUDGE:

This case involves a claim brought by Maciej Gal, a brother of Stanley S. Gal, who died intestate in Bluefield, West Virginia, on June 15, 1968, supported by official documentation that he is the deceased man's brother and sole heir at law. The Claimant is a citizen and resident of Poland.

Stanley S. Gal's Estate was valued at $11,984.53, and after payment of administrative expenses, funeral expenses and claims and demands against the Estate, a balance remained in the amount of $3,100.46, which was paid to the State Auditor, Respondent, on the theory that there being no living heirs, the Estate escheated to the State of West Virginia.

There appears to be no question that the Claimant, a Polish National, has properly identified himself as the sole heir at law of the decedent, although his identification as such was not officially established until a few months after the Estate had been settled and distribution of the residue made to the State of West Virginia under Chapter 37, Article 2, Section 1, stating that whenever any person shall die intestate and without any heir or next of kin owning real estate or personal property within this State, the title of such deceased person therein shall escheat to the State.

Counsel for the State of West Virginia filed a Motion to Dismiss on the ground that this Court is without jurisdiction and that the Claimant's remedy was under the Declaratory Judgment Act of the State, which is found in Code 55-13-1. The Act reads as follows:

> "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. (1941, c.26, Sec. 1.)"

The Respondent assigns as a second ground for its Motion that a Civil Action is pending in the Circuit Court of Mercer County against the Administrator of the Estate, the surety on the Administrator's bond, the Commissioner of Accounts and the Attorney for the Administrator. The present status of that case is not clear although it is admitted that the Auditor was dismissed from the case under the provisions of Article VI, Section 35 of the Constitution, which reads:

> "The State of West Virginia shall never be made defendant in any Court of law or equity . . .".

In the argument, counsel for the Respondent further cited the Sections in Chapter 14 of the Code relating to the jurisdiction of this Court and particularly Chapter 14, Article 2, Section 14, which provides that:

> "The jurisdiction of the Court shall not extend to any claim:
>
> * * *
>
> 5. With respect to which a proceeding may be maintained against the State, by or on behalf of the claimant in the courts of the State."

The Claimant having established that he is lawful heir of the decedent and that the residue of the Estate was wrongfully escheated to the State of West Virginia, and documents having been produced establishing his identity and relationship to the deceased, the Court is of the opinion that it is the proper forum for the filing of this claim. The State of West Virginia has been unjustly enriched by receiving money to which it was not entitled under the laws of escheat. Said funds under equity and good conscience cannot be retained by the State when they lawfully belong to the Claimant, and should have been distributed to the Claimant at the time the Estate was settled.

Although it is apparent that the Claimant may have a remedy that can be pursued in the regular Courts of the State against other parties, such a remedy is not available in pursuing a claim against the State of West Virginia. It is difficult for us to dismiss this claim on the ground that the Claimant had a remedy under the declaratory judgment proceedings. A declaration by a regular Court that the Claimant was entitled to the residuary distribution would not be binding on the State of West Virginia as disclosed by this Record, as the Auditor could not be properly made a party to said proceeding. It is further apparent that the Auditor was dismissed as a party in the Circuit Court proceeding.

It is our opinion that the Claimant may maintain his action in the Court of Claims and that this Court has jurisdiction to make an award allowing his claim. The Motion to Dismiss the claim is overruled, and an award is made to the Claimant in the amount of $3,100.46.

Claim allowed in the amount of $3,100.46.

Opinion issued September 13, 1971

APPRAISAL & REALTY SERVICE, INC.

vs.

WEST VIRGINIA BOARD OF REGENTS

(No. D-416)

George W. Stokes, for Claimant.

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

DUCKER, JUDGE:

The Claimant, Appraisal and Realty Service, Inc., was employed by the West Virginia Board of Education to appraise sixteen lots in Blocks 9 and 11 of Institute City, Kanawha County, West Virginia, in connection with and for the use of West Virginia State College at Institute, and an agreed fee of $950.00 for such services was paid. During the process of such work done by the Claimant, negotiations

were conducted for the Claimant to make an additional appraisement of Lots 1-7, L. N. Brown Tract, in Institute, for the same purpose for a fee of $750.00. The work of the additional appraisement was completed before formal approval by the Board of Education was obtained, although the President of West Virginia State College had recommended such additional employment of Claimant. The recommendation of the work and the approval of the fee were in process at the time of the death of Marjorie C. Pace, the Claimant's agent who performed the appraisement work and who was admittedly an expert in her field. The claim now before us is for the additional fee of $750.00.

It appears from the evidence that the services rendered by the Claimant were entirely satisfactory, and were useful to the College, and that the amount of the fee is reasonable. The sole reason for its nonpayment was that the agreement was not formally authorized before the service was rendered. That formal approval would have been obtained after the completion of the work is admitted by the President of the College both in his recommendation to the Board of Education and his evidence in this matter, in which he expressly requests approval and payment of this claim.

As the State has had the benefit of the services rendered by Claimant and it is shown that the amount claimed is fair and reasonable, we are of opinion to, and do hereby allow the claim as a moral obligation and hereby make an award to the Claimant in the amount of $750.00.

Award of $750.00.

Opinion issued September 13, 1971

SAFECO INSURANCE COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-407)

John R. Charnock, Jr., for the claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Donald L. Hall* for the respondent.

JONES, JUDGE:

This is a subrogation claim for damages to the automobile of the petitioner's insured, Atlee Thaxton, and the amount of damages is stipulated to be $112.24.

On or about August 11, 1969, the Thaxton vehicle was lawfully parked on property of the respondent at its North Charleston garage. The substance of the petitioner's case is alleged in the petition as follows: "Department of Highways employees, while transferring tar from a tank to a tar spreader did create a hazard, throwing fire from the tank, causing spreader to pull out suddenly, breaking the hose, tar was strown over the area and the Petitioner's vehicle was covered by the tar."

Facts developed at the hearing of this case disclose that the tar spreader was owned by Burdette Asphalt Paving Company; that the operator of the spreader and his helper were employed by that company; that Burdette Asphalt was employed by the respondent to spread tar furnished by the respondent upon a portion of an unidentified State road, subject to inspection by an employee of the respondent; that the operator of the spreader, upon instructions of his employer, drove the spreader from the parking lot of Burdette Asphalt to the respondent's North Charleston garage and was in the process of transferring tar from the respondent's storage tank to the spreader when the mishap occurred; and that no other person was involved in any act resulting in damage to the claimant.

From our study of the petition and answer, and the testimony taken in this case, the Court has concluded that Burdette Asphalt

Paving Company was an independent contractor, and that the respondent may not be held accountable for the contractor's negligent acts.

Accordingly, this claim is disallowed.

Opinion issued September 13, 1971

UNITED AIR LINES, INC.

vs.

OFFICE OF THE GOVERNOR

(No. D-405)

George W. Jackson, Jr., Resident Station Agent, appearing for the claimant.

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

JONES, JUDGE:

Some twenty years ago the State of West Virginia entered into a contract with the claimant, United Air Lines, Inc., for the establishment of a Universal Air Travel Plan providing worldwide credit for passage on any commercial carrier or scheduled airline. During the period involved in this claim, approximately 45 split billing accounts were in use by various departments and divisions of the State government, one being the Office of the Governor. Approximately 200 air travel credit cards were outstanding and at least 12 of these were held by the Governor and members of his staff. Under the contract with the State, the claimant exercised no control over the distribution of the credit cards which were supplied upon proper request by the Department of Finance and Administration; but the claimant did submit monthly or bi-monthly bills to the several departments, including the Governor's office, showing charges incurred by the credit card holders for services rendered during the billing period by the claimant and all other participating air lines. The procedure for the payment of these charges imposed a duty upon each credit card holder to submit a travel voucher to the proper accounting personnel in his office

or department, whereupon a requisition was forwarded to the State Auditor for the issuance of a State warrant to the claimant.

At the expiration of the Governor's term on December 31, 1968, the claimant's account for the Governor's office showed a balance owing in the amount of $4,674.11 (including an item of $110.25 hereinafter disposed of). The indicated balance could not be reconciled with the bookkeeping records in the Governor's office, so it was determined that a thorough examination of all available records should be made to ascertain, if possible, the correct amount owing to the claimant. A voluminous statement of account, item by item, was furnished by the claimant and the reconcilation was undertaken by Ruby Oliver, Comptroller in the Governor's office during the entire period and continuing in that position. The findings and analyses set forth in the Final Reconcilation, filed as an exhibit in the record of this proceeding, clearly show a comprehensive and painstaking effort on the part of the Comptroller, and the Court accepts this document as accurate and true. A brief summary of the reconcilation follows:

United Air Lines Account Balance		$4,674.11
Less Credits For:		
1. 1965 Unidentified Charges		360.85
		$4,313.26
2. Tickets Returned to American Airlines		1,224.10
		$3,089.16
3. Blanket Tax Exemption Certificate		130.69
		$2,958.47
Less Payments:		
1. Gov. Hulett C. Smith's personal check	$1,649.52	
2. Dr. Daniel Hamety's personal check	115.00	
3. State Warrant-Reissued	18.30	1,782.82
		$1,175.65
Adjustment for Overcharge		2.15
	Amount of Claim	$1,173.50

After this claim was filed, a former employee voluntarily paid to the claimant the sum of $42.85 to cover a charge which both she and this Court believe was incurred in the performance of her official duties, but, having failed to file a travel voucher at the time of the trip, some three years before, she preferred to avoid any question of personal responsibility by paying the invoice item. This payment reduced the claim to $1,130.65.

The respondent categorically denies an item of this claim in the amount of $110.25 for a ticket purchased on January 22, 1969, by a former employee whose employment was terminated prior to the credit card charge. While there is no doubt that the service was performed and the claimant is entitled to be paid by someone, there is absolutely nothing in the record of this case to justify the payment of this part of the claim and the same is disallowed.

After deducting the sum of $110.25, the net claim left for consideration by the Court is the sum of $1,020.40. The respondent admits in its answer that its employees did, in fact, purchase tickets for travel on various airlines which were duly and fairly invoiced in the aggregate sum of $1,020.40. The respondent further answers that while it cannot say that all of the tickets were purchased for official state business, because travel vouchers for same have not been filed, "* * * it is presumed that they were."

The Court is concerned that some of these charges may be for travel not related to official State business, even though the holders of the credit cards were bona fide employees of the State and presumably engaged in the exercise of their official duties. However, the State bought credit from the claimant, made a deposit of $425.00 to bind the deal, and for many years has maintained the contract and has been supplied travel credit cards for the use of certain of its employees pursuant to requisition by the Department of Finance and Administration. The claimant had no control over the actions of the credit card holders, but, under the contract, it was required to supply passage to anyone holding a legally authorized card. Conversely, the State did have the power to control its employees and to require them to account for the expenditure of State funds. It appears to the Court that the power and authority of the Governor's office was not exercised at the level of efficiency and trust that the public deserves, but giving careful and deliberate consideration to all of the facts and circumstances pertaining to

this case, the Court is of opinion that the State did receive the services claimed to have been rendered and was benefited thereby in the amount of the award hereinafter made.

Accordingly, the Court is of opinion that the claimant has established a moral obligation on the part of the State to compensate it for services duly rendered, and the claimant, United Air Lines, Inc., is hereby awarded the sum of One Thousand Twenty Dollars and Forty Cents ($1,040.20).

Award of $1,040.20.

Opinion issued September 20, 1971

WANDA H. MOORE

vs.

BOARD OF REGENTS

(No. D-488)

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

JONES, JUDGE:

The petition in this case sets out, and the answer of the respondent admits that on April 29, 1971, a power mower under the control of the respondent's employees at Bluefield State College negligently was permitted to roll down a steep slope and into the claimant's automobile, which was properly parked, causing damages in the amount of $65.75.

The Court has considered this claim informally upon the record submitted and is of opinion that the shortened procedure authorized by Section 17, Article 2, Chapter 14 of the Code of West Virginia applies, and that the claim should be approved.

Therefore, it is ordered that the claim be approved, and an award is hereby made to the claimant, Wanda H. Moore, in the amount of $65.75.

Award of $65.75.

Opinion issued November 16, 1971

FONDA BRYAN

vs.

DEPARTMENT OF HIGHWAYS

(No. D-390)

Claimant appeared in person.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Donald L. Hall* of Department of Highways for the Respondent.

DUCKER, JUDGE:

Claimant, Fonda Bryan, alleges damages to her automobile, a 1961 Plymouth, in the amount of $148.01 resulting from a collision on September 7, 1970, of her car with a rock adjacent to the side of Dry Ridge Road, St. Albans, West Virginia, which road is a secondary road designated as Route No. 6/1 out of St. Albans.

From the evidence it appears that the employees of the Department of Highways had been operating a road grader on said secondary road and had scraped dirt from under a rock abutting the side of the road, and in doing so had left the rock, which had previously been covered with vegetation or other growth, bare and uncovered, but not extended over the paved or hard surface of the road. The grader had not changed the location of the rock in any way, although when the brush and other covering were removed the rock became more visible, a fact which also should have made the edge of the road more visible to a driver on the road. The road was well known to the Claimant who lived in the vicinity of the work done and who testified she had traveled such road since 1946 three or four times a week, except in winter.

From the facts disclosed by the evidence we cannot conclude that there was any negligence on the part of the employees of the Department of Highways, and it does not appear that the work in exposing the rock on the side of the road resulted in any additional projecting of the rock along the side of the road even though it rendered the rock more visible, and that could not be said to be the proximate cause of the damage done to Claimant's car in striking it,

and that the damage done was the result of the negligence of the Claimant; consequently we deny her claim and make no award herein.

Claim disallowed.

Opinion issued November 16, 1971

HARLEYSVILLE MUTUAL INSURANCE CO.

vs.

DEPARTMENT OF HIGHWAYS

(No. D-484)

No appearance in behalf of the Claimant.

Donald L. Hall, of Department of Highways for the Respondent, *Thomas P. O'Brien, Jr.,* Assistant Attorney General, for the Respondent.

DUCKER, JUDGE:

Harleysville Mutual Insurance Company, a corporation, of Baltimore, Maryland, as subrogee of Lena Nancy Shaver, claims $226.88 for damages done to the automobile of the Claimant's insured, Lena Nancy Shaver, who was driving her automobile on U. S. Route 220 about six miles east of Franklin, Pendleton County, West Virginia, resulting from debris falling upon her automobile when the Highway Department was blasting rock without proper warning signals having been given to motorists there upon the highway.

The facts, including the reasonableness of the costs of repairs, were admitted by the pleadings, and as the loss was undoubtedly occasioned by the negligence of the Highway Department's employees, we are of the opinion to and do award the Claimant the sum of $226.88.

Award of $226.88.

Opinion issued November 16, 1971

ARDEN HARMON

vs.

DEPARTMENT OF HIGHWAYS

(No. D-486)

No appearance in behalf of the Claimant.

Donald L. Hall, of Department of Highways for the Respondent, *Thomas P. O'Brien, Jr.,* Assistant Attorney General, for the Respondent.

DUCKER, JUDGE:

Claimant, Arden Harmon, alleges that on April 10, 1971, his wife was driving his automobile on the Patrick Street Bridge which crosses the Kanawha River in Charleston, West Virginia, while the employees of the West Virginia Department of Highways were engaged in the painting of said bridge, and that some red lead paint which was being used by the highway personnel on such work fell on his automobile. The Highway Department's employees' attention was called to the incident and the paint was removed by them, but the car needed further paint removal, cleaning and waxing, the cost of which was $27.86.

All of these facts, including the reasonableness of the charges, were stipulated by the Claimant and counsel for the State, and as this damage undoubtedly resulted from the negligence of the state employees, we are of the opinion to and do hereby award the Claimant the sum of $27.86.

Award of $27.86.

Opinion issued November 29, 1971

IN THE WEST VIRGINIA COURT OF CLAIMS
KAROLL'S, INC., Claimant

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-497)

WILL ROSS, INC., Claimant

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-515)

No one appeared for the Claimants.

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

PER CURIAM

All of the foregoing claims are disallowed for the reasons set forth in the Opinion of this Court heretofore filed in deciding the claims of **Airkem Sales and Service,* Claimant, et al, vs. *Department of Mental Health,* Respondent, covering Claims No. D-333 to D-347, inclusive, the factual situation and the law applicable thereto being the same as that involved in the foregoing decision of this Court.

Claims disallowed.

*Please see 8 Ct. of Cls. Rep. 180.

Opinion issued December 10, 1971

BUDGET RENT-A-CAR OF CLEVELAND, INC., Claimant,

vs.

DEPARTMENT OF NATURAL RESOURCES, Respondent.

(No. D-474)

No appearance on behalf of the Claimant.

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

PETROPLUS, JUDGE:

The above captioned claim was submitted on the Complaint and Answer filed thereto.

The Respondent admits that on August 20, 1970, a Ford Station Wagon owned by the Claimant and driven by Sam Luca, while crossing a cattle guard entrance to a campground at Respondent's Watoga State Park, was struck and damaged by a rail of the cattle guard which was loose, resulting in repairs to an exhaust pipe in front of the muffler in the amount of $44.59. No question of contributory negligence is raised by the Answer and it is admitted that the cattle guard was under the care and control of Respondent's employees at Watoga State Park.

The Answer further states that the Respondent believes the claim to be valid and no hearing is requested.

The Court is of the opinion that the claim should be approved and an award is accordingly made to the Claimant in the amount of $44.59.

Claim allowed in the amount of $44.59.

Opinion issued December 14, 1971

LURLEEN BUCKNER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-468)

The claimant appeared in person.

Donald L. Hall for the respondent.

JONES, JUDGE:

The claimant, Lurleen Buckner, claims damages to her 1970 Chevrolet truck in the amount of $225.83, which occurred while her husband, John Buckner, Jr., was driving the vehicle across a bridge on United States Route No. 119 at Low Gap, across Little Coal River. The respondent had placed pieces of sheet metal on the bridge to cover up holes in the floor. On or about the 4th day of February, 1971, one of these metal plates, approximately one-fourth inch thick and three feet square had broken loose from its fixed position and in some manner had been moved to the opposite lane of traffic. From long wear, the plate had become bent and bowed in the middle and when the claimant's vehicle passed over the metal plate, it was thrown up against the underneath portion of the vehicle causing damage to the exhaust, tire, rim and quarter panel.

Mr. Buckner regularly traveled this road to his work and was accustomed to driving over these metal plates. However, he testified that he had never known one of the plates to be loose. The bolts on this particular plate had deteriorated and broken and there was nothing to keep it from flying up into the underside of claimant's vehicle. There is no evidence that the claimant's driver was guilty of any act or omission that contributed to the damages sustained.

It appears to the Court that the respondent knew or should have known that this metal sheet and the bolts holding it in place had deteriorated, bowed up on the sides and become loose, and that as a result the plate might be displaced and become a hazard to

the traveling public. The testimony for the claimant stands undisputed as no witnesses were called by the respondent and based on the record before us we are of opinion that this bridge was not maintained in a safe condition and as a proximate result thereof the claimant was damaged.

Two estimates of repair were presented in evidence by the claimant, one for $175.83 and the other $171.96, and as the low estimate appears to be the proper measure of damages in this case, we award the claimant, Lurleen Buckner, the sum of One Hundred Seventy-one Dollars and Ninety-six Cents ($171.96).

Award of $171.96.

Opinion issued December 14, 1971

STEVE BUKOVINSKY and MARY BUKOVINSKY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-472)

Robert W. Lawson, III, for the claimants.

Donald L. Hall, for the respondent.

JONES, JUDGE:

This claim was submitted upon the notice of claim, the respondent's answer and a written stipulation of the parties itemizing the claimants' damages in the total amount of $725.00.

The claimants, Steve Bukovinsky and Mary Bukovinsky, allege and the respondent admits in its answer that on or about January 13, 1971, the Maintenance Division of the State Department of Highways, in the normal course of its business, was chopping down a tree alongside West Virginia State Route 14 (also known as Oakwood Road) in Charleston, West Virginia, and the respondent's employees allowed the tree to fall across a high-voltage electric power line of the Appalachian Power Company causing a surge of electricity to be conducted into the electrical system in the claimants' home and resulting in substantial damage to personal property owned by the claimants.

The Court is of opinion that the claimants have stated and proved a cause of action against the respondent entitling them to damages proximately resulting from the negligent acts of the respondent's employees, and that in equity and good conscience the claimants should recover.

Therefore, the Court hereby awards the claimants, Steve Bukovinsky and Mary Bukovinsky, the agreed sum of Seven Hundred Twenty-five Dollars ($725.00).

Award of $725.00.

Opinion issued December 14, 1971

VECELLIO and GROGAN, INC.
and FOSTER and CREIGHTON CO.

vs.

DEPARTMENT OF HIGHWAYS

(No. D-457)

Robert B. Sayre for the claimants.

Thomas P. O'Brien, Jr., Assistant Attorney General, *Dewey B. Jones* and *Wayne King* for the respondent.

JONES, JUDGE:

This claim is for $5,331.25, which the claimants, Vecellio and Grogan, Inc. and Foster and Creighton Co., allege is owing to them under a contract entered into with the State Road Commission, now Department of Highways, on May 25, 1966, for the construction of a public highway known as I-77 in Wood County. One of the provisions of the contract was for concrete guttering at the agreed unit price of $12.00 per square yard, and upon the completion of the contract claimants contended that they had constructed 2,748.17 square yards of concrete gutter while the respondent measured the construction as 2,303.9 square yards. There is no question as to the quality of the work or that this item of construction in any way failed to comply with the requirements of the

contract. The method of measurement accounts for the difference in the quantity to be paid for, and the respondent either owes all of the amount claimed or none of it, depending on which method of measurement is determined to be correct.

The controversy arises from a change in design of concrete gutters, which came about contemporaneously with the bidding on this project, and measurement of the finished work under either design, is governed by Section 2.111.4 of the Standard Specifications Roads and Bridges adopted in 1960, providing in part as follows:

> "The square yards of 'Concrete Gutter' or 'Stone Gutter', as the case may be, shall be determined by the length, measured along the center line thereof, times the width, as measured on the surface of the gutter."

The old design provided by the respondent and conformed to by the claimants under numerous previous contracts with the respondent over a period of several years, was a simple concrete ditch, finished from apex to apex, with unfinished sides, and payment therefor was made for the finished surface from apex to apex. There is some question as to whether that design and the new design were both included in the plans and specifications for the job in question, but in any event, the respondent required the gutter to be built according to the new design and the claimants did not object and did construct the gutter according to the new design. The modified design provided for a concrete ditch as previously constructed, with a concrete extension or shoulder on either side which was to be a flat, finished surface. The extensions required additional concrete and steel wire reinforcement, and the top flat surface was finished by hand.

When the work was completed, the gutter work was measured in the field by respondent's employees, the width being measured from the edge of one of the finished extensions or shoulders across said flat surface, down and across the concrete ditch and thence to the other edge of the finished shoulder. The method and result of this measurement conformed to that here contended for by the claimants.

Later, however, during negotiations for the final settlement, respondent's engineers in the Charleston office reversed this method

of measurement and agreed to pay only for the surface of the gutter from apex to apex, as previously measured under the old design, and not including the finished extensions or shoulders.

The respondent contends that this controversy should be concluded in its favor by the application of Section 1.4.1 of the Standard Specifications which in part is as follows:

> "Should any misunderstanding arise as to the intent or meaning of said Plans, Specifications, or Special Provisions, or any discrepancy appear in any, the decision of the Commissioner in such cases shall be final and conclusive."

We do not think this case is as simple as that. This section may be clear and unambiguous as contended by the respondent in so far as the completion, quality, quantity or method of work and performance of a construction contract are concerned, but here we must deal with a legal definition of the word "surface" as set out in Section 2.111.4 of the Standard Specifications. In our opinion the Specifications do not contemplate that the Commissioner shall make legal decisions pertaining to the language used in a contract, and the legal interpretation necessary to a correct decision in this case is not such a decision as may be final and conclusive when made by the Commissioner. It is further the opinion of the Court that the word "surface" as used in the prescribed method of measurement in this case means *finished* surface as constructed and before the finished extensions or shoulders were covered with dirt. From our study of the record in this case, it appears that custom and usage in the construction trade would confirm our judgment in this matter. These shoulders were additions to the former design, and they were finished in the same manner as the water-carrying portion of the gutter.

We are constrained to accept the measurement of the width of the gutter contended for by the claimants and, accordingly, we award Vecellio and Grogan, Inc. and Foster and Creighton Co. the sum of $5,331.25.

Award of $5,331.25.

Opinion issued December 21, 1971

REV. CHARLES Q. BANDY, Claimant,

vs.

WEST VIRGINIA DEPARMENT OF HIGHWAYS,
a Corporation, Respondent.

(No. D-302)

No appearance for the Claimant.

Donald L. Hall, Esq., for the Respondent.

PETROPLUS, JUDGE:

Notice of Claim was filed in the amount of $54.95, for damage to an automobile tire, caused by striking a road sign approximately 36″ x 36″ in size on a tripod about 4½′ high, which had been placed by the Respondent in the left lane of a highway on which the Claimant was travelling. Although the sign was visible for approximately 250 yards, the Claimant ran into it and burst his tire. Employees of the Respondent, who were working within the area, placed the sign on the highway to warn travellers that men were working in the area.

Although the sign constituted an obstruction in the travelled portion of the highway, it probably should have been placed on the berm in such a position that it would be visible to motorists, the negligence, if any, of the Respondent's employees does not appear to be the proximate cause of the accident. Inasmuch as the sign was plainly visible for a distance of 250 yards, if the Claimant had been exercising reasonable care, he should have been able to see a sign of this size in sufficient time to avoid striking it. Although no facts are presented from which the Court may infer negligence on the part of the employees of the Respondent, this case must be decided on the failure of the Claimant to exercise ordinary care for his own safety under the circumstances. The Court is of the opinion to deny the claim.

Claim disallowed.

Opinion issued December 21, 1971

FRED OR CAROLYN RUNYON by
NATIONWIDE INSURANCE COMPANY, as Subrogee,
Claimant,

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS,
a corporation, Respondent.

(No. D-470)

No appearance for the Claimant.

Donald L. Hall, Esq., for the Respondent.

PETROPLUS, JUDGE:

The above claim in the amount of $553.65, was submitted on a Stipulation of Facts, which are as follows:

The Claimants, Fred and Carolyn Runyon, on May 15, 1970, were travelling on Route 3, between Whitesville and Naoma, West Virginia, in a 1969 Oldsmobile owned by them and insured by Nationwide Insurance Company, subrogee Claimant, when rocks and debris rolled off a hill and down a cliff striking their automobile, causing damages thereto in the amount of $553.65. On said date, employees of the West Virginia Department of Highways had been engaged in drilling and blasting adjacent to Route 3, and had stopped their work for lunch, when they heard the loose rocks and debris roll down the hill.

The accident was investigated by the Respondent and the damaged automobile was examined. There is no doubt that the drilling and blasting, which had ceased before the aforesaid occurrence, was the cause of the precipitation of the rocks and debris off and down the cliff. Although there were signs indicating that the area was under construction, the State had no flagmen in the vicinity to direct and protect traffic on the road.

The claimed damages are admitted to be fair.

It appearing to the Court that the damages were caused by the negligence of employees of the Respondent, who failed to take

proper precautions to protect travellers on the roadway from injury caused by their blasting operation, the Court is of opinion to approve the claim and make an award.

Claim allowed in the amount of $553.65.

Opinion issued December 27, 1971

COLLINS RIVERS and RUTH RIVERS, Claimants,

vs.

DEPARTMENT OF HIGHWAYS, STATE OF WEST VIRGINIA, Respondent.

(No. D-436)

Thomas O. Mucklow, Esq., and *Larry Starcher, Esq.,* for the Claimants.

Donald L. Hall, Esq., for the Respondent.

PETROPLUS, JUDGE:

This claim was instituted by Collins Rivers and Ruth Rivers, his wife, against the Department of Highways to recover damages in the amount of $4873.68 sustained by the claimants as the result of the alleged negligent conduct of the Respondent in installing a septic tank on their property which later developments disclosed to be a health hazard and public nuisance because of the failure of the Respondent to make a proper evaluation of soil conditions and site location as well as other factors required for the adequate sewage disposal on their property.

The property in question was purchased by the claimants for the sum of $3500.00 to replace their dwelling house in Osage, West Virginia, which had been taken by the State for the sum of $2300.00 in connection with the acquisition of land for the construction of Interstate 79, a Federal-aid highway project which entitled claimants to relocation payments and benefits through the facilities of the State Department of Highways. Needy persons displaced by the Federal road building program were entitled to

relocation assistance and replacement housing which was "decent, safe, and sanitary", and funds were furnished by the Federal government as supplementary payments to displaced persons to enable them to secure a comparable dwelling when the funds realized from the sale of their property to the State for road purposes were insufficient to replace their homes with dwellings that met the minimum criteria of safe, decent and sanitary housing. Adequate sewage disposal was an essential requirement to establish eligibility for the housing-allowance. Procedures were outlined in complex and voluminous regulations issued by the Federal Highway Administration, Bureau of Public Roads, Instructional Memorandum 80-1-68, and a Brochure issued by the State pursuant thereto and distributed to persons displaced by highway programs, all of which were incomprehensible to claimants, whose educational background was limited to the second and third grades of public school respectively. The Respondent undertook to process the application for benefits on behalf of the claimants and establish their eligibility for the supplementary payments from the Federal agency and make the necessary improvements to the purchased dwelling to meet the requirements of decent housing. The State was undoubtedly a volunteer, but once it assumed the responsibility, it had a duty to exercise its conduct in a prudent manner, and not cause the claimants any unnecessary loss or dissipation of their funds.

The Relocation Agent of the West Virginia Department of Highways in Clarksburg delivered a brochure to the claimants summarizing and explaining the relocation program and its benefits. Mr. Rivers, 76 years of age and in bad health, was unable to appear at the hearing. His wife, who did appear, testified that all decisions were made by the Respondent's employees, who investigated the house chosen for their new home, and undertook to order the repairs in order to make it decent, safe, and sanitary. The standards set forth in the regulations required the structure to be in conformity with building, plumbing, electrical and housing codes, with a bathroom and flush water closet properly connected to adequate sewage disposal facilities. The claimants purchased the home in July, 1969, and it was decidely substandard with no toilet or sewage disposal system. On December 3, 1969, they paid for the home purchased and received their deed, and on the 9th day of December, 1969, the Relocation Advisory Assistant of the State certified that after an inspection of the property, it met all the requirements of decent,

safe, and sanitary housing as defined in the regulations, when in fact it did not. The certification, however, made the claimants eligible for a replacement subsidy of $4200.00, which it was contemplated by the Respondent would be used in whole or in part to improve the property with siding, a kitchen sink, bathroom, and the installation of a septic tank for sewage disposal. The claimants expended from their subsidy funds $995.50 for plumbing, and $418.80 for the installation of the septic tank, and other smaller amounts for improvements.

Mr. Lee Beckman, general manager of the Company which installed the septic tank, testified that he ordered the installation of the tank at the direction of the Respondent without making percolation tests, a soil analysis, or even an inspection of the proposed location, assuming that the Department of Highways had done so before placing the order, as it had done in other instances similar to this one. Shortly thereafter according to developments water and solid wastes seeped up through the soil overrunning both the claimants' property and that of a neighbor next door. The tank had been installed in clay soil where it could not function properly and the site chosen for it was too narrow for sanitary drainage, as well as too low with reference to the remainder of the property.

Complaints to the Department of Health resulted in investigations, and an order that its use be immediately stopped. It was declared to be a health hazard and the claimants were threatened with prosecution by the Prosecuting Attorney's office of the County. Corrective measures were discussed but were found not to be feasible. There appeared to be no solution to the problem except to install another tank of different design on another location at more expense to the claimants. When the house became untenantable the Respondent disclaimed all responsibility for the ecological disaster and the claimants find themselves to be owners of a piece of property they cannot use.

The Respondent's defense is that the installation of a septic tank was the responsibility of the claimants, that the State only furnishes advice and assistance in these matters, and that the claimants should have made a soil evaluation and supervised the installation of the tank. This defense is not tenable, and is not supported by the evidence, but on the contrary, the evidence adduced clearly

and persuasively established that the Respondent undertook to provide a sewage disposal system without the intervention of the claimants.

The document produced in evidence dated December 11, 1969, signed by the claimants, wherein it is stated that they "believed and were satisfied that their property met the sanitary requirements" cannot be helpful to the State because the inadequacy of the tank was not apparent on that date. Respondent further contends that the claimants' remedy, if any, is against the party doing the work, and that claimants have been adequately compensated by the subsidy allowance of $4200.00 over and above from what they received from the sale of their old home to the State.

The Court, however, is of the opinion that in equity and good conscience some award should be made to the claimants to compensate them for their loss and inability to use their property. As displaced persons they now find themselves without a home that they can enjoy and which qualifies for the allowance given them to provide a decent dwelling to replace the one taken under threat of eminent domain proceedings. The claimants should be reimbused for their expenditure of $1373.00 for plumbing and the tank, which are now useless, and be given additional damages in the amount of $1873.00 to rehabilitate their new home and provide it with adequate sewage facilities.

Claim allowed in the amount of $3246.00.

Opinion issued January 24, 1972

ORA V. DAVIS

vs.

DEPARTMENT OF HIGHWAYS

(No. D-244)

Robert R. Harpold, Jr. and *E. Garth Atkins* for the claimant.

Donald L. Hall for the respondent.

JONES, JUDGE:

The claimant, Ora V. Davis, 48 years of age, and a resident of Verner, in Mingo County, sustained severe and permanent injuries when he fell from a bridge maintained by the respondent, Department of Highways, on Sunday, September 29, 1968, between 3:30 and 4:00 a.m. The claimant was employed as a buggy operator for the Princess Coal Company and he had worked as usual on the preceding day. The bridge in question spans the Guyandotte River, connecting Mingo and Logan Counties, and the claimant's home was located approximately 1500 to 2000 feet from the south end of the bridge in Mingo County. The walkway along the eastern side of the bridge had been equipped with a protective wire mesh about 18 inches in height, this wire mesh having been attached to the steel girders supporting the main bridge and serving as a guard to separate pedestrian and vehicular traffic. However, the record shows that this wire mesh had fallen down along the entire length of the bridge, leaving an unobstructed portion of the walkway approximately two feet wide. There was a similar strip of wire mesh in place along the outside of the walkway with a pipe railing along the top of the wire mesh and another pipe railing about 18 inches above the first rail, except for several lengths of the top rail which were missing at the north end of the bridge. The wire mesh and the missing portion of the top guardrail both had been down for at least two or three months.

We have only the claimant's version of what transpired immediately before and at the time he fell over the side of the bridge, no one else being astir at the early morning hour. The claimant's description of the events leading up to his injuries are found in his testimony sub-

stantially as follows: For several years he had been in the habit of rising during the night to read, or upon many occasions to dress and go for walks in the neighborhood. On the night in question, he awakened at about 3:00 to 3:30 a.m. and, after reading the newspaper, he started out for a walk. He walked slowly across the bridge and, after a few minutes on the other side, he started back across along the walkway. There was a pole light approximately 50 to 100 feet from that end of the bridge, and it was not a particularly dark night. The claimant was carrying a flashlight but he was not sure whether he was using it at the time. In any event, there seems no question that he could see the walkway and the wire mesh which he had observed on many previous occasions. Approximately 20 to 30 feet from the north end of the bridge, the claimant's right foot caught in the strip of wire mesh which was lying flat on the walkway and in his words "When I started to make a step, it caught my toe in the wire and it had me fouled * * * *. When I started to fall, I reached to grab it (the top guardrail) and there was nothing there for me to grab." He fell about 25 feet to the riverbank below and being unable to move himself, remained there until he was found about four hours later.

We are satisfied that the respondent knew or should have known that the detached wire mesh and missing guardrail created an unsafe and hazardous condition which might result in injury to persons using this walkway. However, no one had more knowledge of the danger presented by this failure of the respondent to keep the walkway in a safe condition than the claimant himself. He testified that in the interest of the safety of his own and other children using the walkway, he had nailed up portions of the wire mesh two or three times. He had walked along the walkway on many occasions when exactly the same hazards existed as did on the night of his injury. He had passed over the same area just minutes before. He could see where he was going, he knew that the wire mesh was lying along his path, and he had an unobstructed way about two feet in width. Even the wire may have been walked on without danger to the claimant if he had exercised proper precaution, as by the claimant's admission the wire mesh was flat on the walkway at the place he fell. The claimant also had known for months that the top guardrail was down.

This man was badly hurt and his injuries are permanent. The Court cannot help being sympathetic concerning the claimant's condition,

but it may only apply the law to the facts as it understands them. There can be no doubt that the claimant knew and recognized the hazards before him. Neither can there be any doubt in the Court's opinion that the claimant did not exercise due diligence to avoid and save himself from injury, and that, in fact, his careless conduct was the proximate cause of his injuries.

After careful study of the record in this case and serious deliberation of the issues involved, which were ably briefed by counsel for both parties, the Court is of opinion that the claimant does not have a valid, legal claim against the respondent, and, therefore, this claim is disallowed.

Claim disallowed.

Opinion issued January 24, 1972

BLANTON M. FIDDLE

vs.

ALCOHOLIC BEVERAGE CONTROL COMMISSIONER

(No. D-482)

Clyde M. See, Jr., for the claimant.

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

JONES, JUDGE:

The claimant is employed by the respondent as a utility clerk performing his services at stores located in Moorefield, Keyser, Parsons, Charles Town, Martinsburg, Ridgeley, Piedmont, Harper's Ferry, Berkeley Springs and Shepherdstown. His work requires considerable travel and he is authorized by the respondent to use his personal car in and about his duties. Under the terms of his employment his expenses are paid upon the rendition of proper expense accounts. This claim is for expenses incurred by the claimant during the period from March 7, 1970 to June 30, 1970, and the items of claimant's expenses have been stipulated by the parties to be correct, in the total amount of $946.95.

Through lack of communication with his supervisor and a general misunderstanding of budget requirements, complicated by the claimant's procrastination, completed expense accounts for the period of employment involved were not filed in time for payment out of funds budgeted for the fiscal year ending June 30, 1970, and therefore were not approved for payment by the State Auditor.

There is no contention by the respondent that the sums claimed were not owing to the claimant nor that there were not funds available for payment of the claimed expenses; and in keeping with prior decisions in similar cases, the Court holds this claim to be a moral obligation which in good conscience should be paid by the State. Accordingly, an award is made to the claimant, Blanton M. Friddle, in the sum of $946.95.

Award of $946.95.

Opinion issued February 7, 1972

LAWRENCE BARKER

vs.

COMMISSIONER OF LABOR

(No. D-478)

Robert R. Harpold, Jr., for the claimant.

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

JONES, JUDGE:

The claimant, Lawrence Barker was Commissioner of Labor for the State of West Virginia for approximately eight years, and when a new administration took office on January 1, 1969, he held over at the will and pleasure of the Governor until February 25, 1969, when a new Commissioner was appointed and took office. As Commissioner the claimant was paid his regular salary up to and including February 24, 1969. On the theory that he owed a duty to meet with the new Commissioner and divest himself of his trust in connection with the inventory and records of his office, he reported to work on February

25 and February 26, and on the afternoon of February 26 he saw the new Commissioner for the first time at a State Building and Construction Trades Meeting at the Heart-O-Town Motel in Charleston, and the new Commissioner requested that he stay on as a supplemental employee until the end of the month at a stipend of $50.00 per day. Under that arrangement the claimant reported for work and spent some time about the affairs of the office on February 27 and 28.

During the month of March, 1969, the claimant was regularly employed by West Virginia Laborers Trust Fund at the rate of $75.00 per day with his office near the State Capitol at 1624 Kanawha Boulevard East. During this time the new Commissioner again requested the services of the claimant in preparing for and conducting a wage rate hearing in Charles Town on the evening of March 13, 1969. The claimant worked in the office of the Wage and Hour Director on March 7, 10 and 11, gathering statistics relative to the hearing, and pursuant to a written authorization by the Commissioner of Labor he drove to Charles Town on March 13, 1969. Shortly after his arrival, he was informed that the hearing had been canceled and he returned to Charleston. The claimant was reimbursed for his expenses to and from Charles Town but he has never received compensation for any services rendered for the days February 25, 26, 27 and 28, or the days March 7, 10, 11 and 13.

It appears to the Court that the new Commissioner qualified and assumed the duties of his office on February 25, 1969, and that thereupon the claimant was divested of his duties and was no longer an official or employee of the State. It further appears that after the agreement to employ the claimant as a supplemental employee at the rate of $50.00 per day, he reported for work on February 27 and 28, and the Court is disposed to allow payment for the latter two days or the sum of $100.00.

With reference to the four days in March for which the claimant requests payment, it appears in retrospect that there was little reason for employing the claimant to prepare for and present himself for a hearing that was never held, and we do not look with favor on the daytime "moonlighting" aspect of the employment. Nevertheless, there is nothing in the record to contradict the fact that the claimant was employed and performed services for which he is entitled to be paid.

Accordingly, the Court is of opinion to allow the claimant payment for six days at the rate of $50.00 per day, and an award hereby is made to the claimant, Lawrence Barker, in the amount of $300.00.

Award of $300.00.

Opinion issued February 7, 1972

CLYDE W. REINHART

vs.

DEPARTMENT OF HIGHWAYS

(No. D-444)

Thomas E. Myles for the claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Donald L. Hall,* for the respondent.

JONES, JUDGE:

By agreement dated March 10, 1969, made pursuant to an option dated November 20, 1968, the claimant, Clyde W. Reinhart, conveyed to the respondent, Department of Highways, then known as State Road Commission, a temporary construction easement for road construction purposes over and upon a strip or parcel of land owned by the claimant and being a portion of a service station lot situate in the Town of Gauley Bridge. The following extracts are pertinent parts of the agreement:

> "Said strip or parcel of land herein conveyed is shown as belonging to the parties of the first part upon map or blueprint marked, identified and described as plans of State Road Commission Project 3358-A, Parcel No. 1, as is referenced on plans on file in the office of the Clerk of the County Court of Fayette County, West Virginia."
>
> * * * * * *
>
> "And for the consideration hereinabove set forth the said parties of the first part do hereby release the party of the second part from any and all claims for damages that may be occasioned

to the residue of the lands of the parties of the first part by reason of the construction of a state road over, upon and under the tract or parcel of land herein conveyed."

The sum of $8,000.00 was paid to the claimant by the respondent as the consideration for said easement. At that time the subject property had been used for filling station purposes for more than twenty-one years and was then under lease to Humble Oil and Refining Company. The existing lease was for five years ending April 30, 1971, but to continue in effect for an additional period of five years unless notice to terminate was given by either party. The rental provided for was a minimum of $200.00 per month, with additional payments based on gallonage but in no event more than $300.00 per month.

The claimant and the right of way agent for the respondent both testified that it was clearly understood between them that the road in front of the service station would be lowered approximately two and one-half feet, that the construction work would take approximately six months to complete, and that upon completion the service station and approaches thereto would be "as good or better than before". Apparently the claimant paid little attention to the map or blueprint mentioned in the agreement and the Court is inclined to the opinion that the map or blueprint which was filed as a joint exhibit in this proceeding would be a complete mystery to any layman. It is further interesting to note that the map or blueprint is mentioned only in the easement agreement as showing and describing the property involved, and the agreement makes no further reference to the map or plans or construction in accordance therewith. It appears that the original plans called for a slope back to the pump island, and when the claimant discovered this fact during the course of the construction he requested a change in the plans which would leave a flat surface eight feet wide in front of the pumps, as otherwise vehicles could only be serviced on the inside of the pumps thereby severely lessening the capacity of the station. The respondent agreed to the change in plans, still with the understanding that the service station would be "as good or better than before". However, when the construction was completed, the approaches to the station were so steep that ordinary motor vehicles could not safely enter or leave the station and for practical purposes the property was unfit for use as a service station. Under the terms of its lease, the claimant's les-

see, Humble Oil and Refining Company, declared the property to be unfit for use and, having given the prescribed notice, terminated the lease on January 15, 1970.

The claimant looked about for other uses for the property but concluded that his best and most profitable course was to restore his property for use as a service station by lowering its level to accommodate the level of the new road. Having reached that decision he exercised rights arising from the termination of his lease, demanding that Humble Oil and Refining Company remove their three gasoline tanks, and that company paid him $4,000.00 for damages caused to the property by such removal.

The total cost of restoring the service station property to a condition as good and usable as it was before the road construction was proved by the claimant to be $11,981.99. In addition, the claimant has proved loss of rent in the amount of $2,800.00, and during the construction period beginning April 9, 1969, and ending October 3, 1969, the claimant lost the difference between the minimum rent of $200.00 per month and the maximum of $300.00 or a total of $600.00. This constitutes a total outlay and loss to the claimant in the amount of $15,381.99. The claimant claims damages in the amount of $11,981.99 for restoring the property and $2,800.00 for loss of rentals, a total of $14,781.99.

At this point, the claimant has a service station in at least as good condition as before the construction, and a new and apparently satisfactory lease with Texaco. The evidence is clear that the plaintiff received $8,000.00 from the respondent and $4,000.00 damages from Humble Oil and Refining Company, a total of $12,000.00, leaving him out-of-pocket the sum of $3,381.99.

We are of opinion that the claimant is entitled to his out-of-pocket loss but no more. Therefore, an award is hereby made to the claimant, Clyde W. Reinhart, in the amount of $3,381.99.

Award of $3,381.99.

Opinion issued February 7, 1972

STANLEY L. SHIFLET, d/b/a SHIFLET'S TRANSFER

vs.

DEPARTMENT OF MENTAL HEALTH

(No. D-431)

George M. Cooper for the claimant.

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

JONES, JUDGE:

The claimant, Stanley L. Shiflet, doing business as Shiflet's Transfer of Sutton, West Virginia, contracted to move the household goods of Dr. J. E. Lazaro from Weston to Huntington, West Virginia. Dr. Lazaro was Superintendent of the Weston State Hospital and was being transferred by the respondent, Department of Mental Health, to a similar position at the Huntington State Hospital. The shipping order was signed by Dr. Lazaro and the bill submitted to him by the claimant was in the amount of $321.21. The claimant asks payment of that amount, apparently on the theory that Dr. Lazaro was authorized by the respondent to contract for the moving services on behalf of the respondent, although there is nothing in the notice of claim to support such theory and no evidence was adduced by the claimant.

The respondent presented one witness, the Supervisor of the Division of Administration of the Department of Mental Health. He testified as follows: "The Department did authorize Dr. Lazaro to secure the services of a moving company to move his household goods to Huntington, West Virginia, and that the Department would try to pay this bill."

On its face this contract is between the claimant and respondent's employee, Dr. Lazaro. There is no showing by the claimant of any statutory authority providing for the payment of moving expenses of an employee of the respondent, either by reimbursement or by permitting the employee to extend the State's credit directly to the claimant. We are not aware of any such statutory authority.

Accordingly, this claim is disallowed.

Opinion issued February 7, 1972

CRINTES STEPP

vs.

DEPARTMENT OF HIGHWAYS

(No. D-259)

The claimant, appearing in person, was not represented by counsel.

Thomas P. O'Brien, Jr., Assistant Attorney General and *Donald L. Hall,* for the respondent.

JONES, JUDGE:

In the year 1965, three parcels of land situate in Mingo County were owned respectively by Tilford and Mae Adams, Kernie and Marie Slone and Phillis Jean Thornsbury, and said parcels were assessed in said names on the Land Books of said County. In March 1965, the State Road Commission of West Virginia, now Department of Highways, purchased and obtained general warranty deeds for the Adams property, for the consideration of $4,000.00 and the Slone property for $3,900.00, and in May 1965, paid $3,000.00 and took a general warranty deed for the Thornsbury property. The 1965 taxes thereafter became delinquent for nonpayment and in due course the several properties were advertised and sold by the Sheriff of Mingo County to the State of West Virginia. Again, in regular course, the three parcels were certified by the Auditor to the Deputy Commissioner of Forfeited and Delinquent Lands for Mingo County. In 1968 suit was brought by the Deputy Commissioner in the Circuit Court of Mingo County for the purpose of obtaining an order of sale of the subject properties and others for the benefit of the School Fund. The three properties here involved were sold to the claimant for the aggregate sum of $357.00, and a deed was made by the Deputy Commissioner conveying the properties to the claimant without warranty of any kind. In the interim, the respondent had constructed a road known as State Route No. 49 over the subject lands and the claimant contends that his property was wrongfully taken, prior to his purchase, and he claims damages in the amount of $7,000.00, based on his estimate of the value of the land when taken.

An official opinion of the Attorney General of the State of West Virginia dated March 20, 1950, adopts the holding of State v. Locke, 29 N.M. 148, 219 Pac. 790, 30 A.L.R. 410, as follows: "Syl. 1. Property which is acquired by the state in its sovereign capacity is thereupon absolved and freed of a further liability for the taxes previously assessed against it, and a subsequent sale thereof for such taxes is void." The opinion also notes that in Armstrong Products v. Martin, 119 W.Va. 50, 192 S.E. 125, 11 A.L.R. 1220, the Court held that at a tax sale, when land is purchased by the State, its tax lien is merged in its purchase title. A later opinion of the Attorney General dated June 15, 1962, contains a statement pertinent to this case as follows: "We do not find any statute that imposes a legal duty upon the agents of a governmental body, in the course of acquiring title to land for public use, to provide for payment of the taxes assessed against the land so acquired." This Court approves the logic and conclusions of said opinions of our Attorneys General.

The deeds from the fee owners of the subject land to the respondent were matters of public record before the Sheriff's sale and long before the Deputy Commissioner's sale, and were constructive notice of the fee simple ownership of said land by the State. There also was actual notice to the claimant as the road already had been built and was there for everyone to see. In this case the State's liens for taxes merged with the fee simple titles acquired by the respondent by purchase and the subsequent tax sales were void. The Sheriff had nothing to sell and the State purchased nothing. The Deputy Land Commissioner had nothing to sell and the claimant purchased nothing.

An examination of the records in the office of the County Clerk of Mingo County would have disclosed to any prospective purchaser at the Deputy Land Commissioner's sale that title to these properties was hopelessly unmarketable. Unmindful of the duty to exercise care in such matters, the claimant disregarded the maxim *Caveat Emptor,* and spent $357.00 for which he got nothing, and which he may not recover.

Accordingly, the claim of Crintes Stepp is disallowed.

Opinion issued February 10, 1972

THOMAS OLIVER MUCKLOW, Claimant,

vs.

WEST VIRGINIA BOARD OF REGENTS
(WEST VIRGINIA UNIVERSITY) Respondent.

(No. D-492)

Claimant appeared in person.

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

PETROPLUS, JUDGE:

Thomas Oliver Mucklow, claimant, a student in the College of Law of West Virginia University, brought this claim to be reimbursed for excessive tuition charges, in the amount of $1595.00, made by the University by improperly changing his status from a resident student to a nonresident student beginning with the second semester of the 1967-68 school year. The University administration later recognizing its error restored claimant's residency status and made a partial restitution to him of the excess charge, paying him the sum of $650.00 in January, 1971, leaving a balance owing to him in the amount of $1595.00. The amount is not in controversy. The only issue is whether change of status was justified.

The only reason we can find in the transcript of evidence taken at the hearing for changing his status from a resident student to a nonresident student was the remarriage of his mother in 1966 and her moving to Michigan and later to South Dakota, when the claimant was eighteen years of age. All other circumstances confirm his West Virginia residency. He was born in Morgantown, West Virginia, on January 24, 1948, and has lived in West Virginia all his life, never changing his residence to any other city or state. After his mother moved from West Virginia, he did not follow her but continued to live in Morgantown and visited her in Michigan occasionally during the summers or on holidays, never remaining with her for more than two weeks at the time. He graduated from West Virginia University in May, 1969, and entered Law School the following semester in

1969. He has always maintained a West Virginia Operator's License, driven cars purchased, titled, and licensed in West Virginia. In 1969, he registered as a voter in Monongalia County, West Virginia, and paid property taxes in said county since 1968. Because of the death of his father in an airplance crash in 1958, he received benefits from the Department of Health, Education and Welfare, Social Security Administration, which he used to maintain himself and pay for his education. He registered with the Local Board of the Selective Service System in Morgantown, was married on August 14, 1971, and lived in a trailer after his mother moved from the State, later moving to an apartment in Morgantown. He was never adopted by his stepfather and his mother had been appointed a legal guardian for him in Monongalia County during his minority. In the summers he worked in Morgantown, received little financial support from his mother, and occupied his brother's bedroom whenever he visited his mother.

In view of this overwhelming evidence of residence and complete emancipation of a minor, self-supporting and with an independent source of income, we must conclude that the University's change of status because of the remarriage of his mother and her subsequent removal from the State was unreasonable and arbitrary, and totally unsupported by any facts indicating residency out of the State.

For the foregoing reasons, an award to the claimant in the amount of $1595.00 for excessive tuition paid is approved as a moral obligation of the State. The respondent introduced no evidence at the hearing in contradiction of any of the above mentioned facts.

Claim allowed in the amount of $1595.00.

Opinion issued February 10, 1972

HERBERT THOMAS and LOVIE THOMAS, Claimants,

vs.

DEPARTMENT OF HIGHWAYS
of the STATE OF WEST VIRGINIA, Respondent.

(No. D-304)

JOSEPH H. SANDS, and KATHLEEN SANDS, Claimants,

vs.

DEPARTMENT OF HIGHWAYS
of the STATE OF WEST VIRGINIA, Respondent.

(No. D-305)

GLORIA L. RANDOLPH, Claimant,

vs.

DEPARTMENT OF HIGHWAYS
of the STATE OF WEST VIRGINIA, Respondent.

(No. D-306)

Carmine J. Cann, Esq., for the Claimants.

Donald L. Hall, Esq., for the Respondent.

PETROPLUS, JUDGE:

The above captioned Claims, after a thorough investigation of the facts and damages by Counsel for the Respondent, arise from the same factual situation, and are submitted to the Court on an agreed statement of facts. Liability has been admitted by the State and the amount of damages to the personal property of the Claimants has been agreed in the sums of $900.00 for Claim No. D-304, $1,450.00 for Claim No. D-305, and $235.00 for Claim No. D-306, respectively.

The agreed facts are as follows:

As part of Project I-79-3(5)118, construction of an Interstate Highway in Harrison County, West Virginia, a culvert was construct-

ed under I-79 to take the flow of T-Gee Run, a tributary of Lost Creek in the Town of Lost Creek. On May 23 and 24, 1968, a heavy storm occurred in the Lost Creek area, resulting in the flooding of dwellings along T-Gee Run. An investigation of the topography, ground elevations, drainage structures, creek elevations, and building elevations in the area, together with a review of the design characteristics of the culvert, made it evident that the proximate cause of the flooding of the dwellings of the Claimants was the backwater from the culvert. The Department of Highways neglected to design and construct a culvert with sufficient clearance or opening to permit proper drainage of the area in question in times of heavy rain and to keep the water level of T-Gee Run below that which would cause flood damage.

These Claims were filed on May 22, 1970, one day before the Statute of Limitations would have barred the Claims.

From the above facts it is clear that the damage to the household furnishings was the proximate result of a flooding caused by an improperly designed and inadequate culvert. We approve the admission of negligence by the State and the stipulation of the amount of damages. The Claims have been thoroughly investigated and it is a moral obligation of the State to compensate the Claimants for their damages.

For the reasons stated, awards are made to the Claimants as follows:

Herbert Thomas and Lovie Thomas	$ 900.00
Joseph H. Sands and Kathleen Sands	1,450.00
Gloria L. Randolph	235.00

Claims allowed in the amounts of $900.00, $1,450.00, and $235.00 or a total of $2,585.00.

Opinion issued February 10, 1972

EARL L. WRIGHT, Claimant,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-498)

Claimant appeared in person.

Thomas P. O'Brien, Assistant Attorney General and *Claude H. Vencil, Esq.* for Respondent.

PETROPLUS, JUDGE:

This claim was filed for damage to the muffler and emergency brake cable of claimant's automobile caused by a large piece of steel grading protruding from the bridge floor of the Market Street Bridge that spans the Ohio River between Steubenville, Ohio, and what is known as East Steubenville, West Virginia (or Steubenville Junction). Claimant was crossing the bridge at night and was unable to see the protruding object that tore a large hole in the muffler of his car and pulled loose the emergency brake cable. The cost of making repairs was in the amount of $106.75.

A proper inspection of this heavily traveled bridge should have disclosed this defect to the Respondent, and the Court is of the opinion that the Respondent did not exercise the requisite care to keep the steel flooring of this bridge in proper repair. The evidence further disclosed that maintenance crews of the State were engaged in making welding repairs to the bridge just before the accident occurred.

An award is accordingly made to the claimant in the amount of $106.75.

Claim allowed in amount of $106.75.

Opinion issued February 11, 1972

ORPHA E. JONES, Claimant,

vs.

STATE BUILDING COMMISSION, Respondent.

(No. D-357)

Sam B. Kyle, Jr., Esq. for the Claimant.

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

PETROPLUS, JUDGE:

Pursuant to a plan, all of the property surrounding the State Capitol was to be acquired by the State Building Commission of West Virginia to develop and provide a cohesive group of office buildings to be used and occupied by state agencies. The property owned by the Claimant was in the area encompassed by what was known as the "State Capitol Master Plan". The Claimant was the owner of a 12-unit apartment building at 1715 Quarrier Street in the City of Charleston, which building was fully occupied by tenants. On April 21, 1970, the State Road Commission of West Virginia, acting in cooperation with the West Virginia State Building Commission, sent the following letter to all of the tenants in the apartment building:

"Re: Project Capitol Complex
Parcel 130

The West Virginia State Building Commission has authorized the Right of Way Division of the West Virginia Department of Highways to acquire and relocate the occupants of those properties bounded by Quarrier Street on the North, Duffy Street on the East, Virginia Street and Kanawha Boulevard on the South, and Greenbrier Street on the West.

Appraisals of the real estate are being made and fair market values will be offered to property owners. Relocation assistance in finding replacement housing and reimbursement of moving costs are available to owners and tenants who must relocate because of this project. Right of Way Agents and Relocation Assistants are making personal contacts with those persons affected.

The acquisition and vacating of properties is expected to be completed between July 15 and July 30, 1970, so that the structures may be removed at the earliest possible date.

If we have been unable to contact you, or if you wish further information, please call 344-1831.

/s/ David L. Jack, Administrator
Capitol Complex Project
Department of Highways."

It is to be noted that the tenants were told that the State would acquire the property between July 15 and July 30, 1970, so that the structures could be removed at the earliest possible date.

As a natural consequence of this letter, the tenants who were on terminable leases, began to look for other living quarters, the first tenant moving from the apartment on May 8, 1970, and the last tenant vacating on July 19, 1970.

Other property owners in the area, among which the Claimant was not included, applied to the Supreme Court of Appeals of the State of West Virginia on July 21, 1970, for a Writ of Prohibition. The Supreme Court issued a temporary restraining order and on December 15, 1970, a permanent Writ of Prohibition in the case styled *State ex rel. Hall, et al. v. Taylor, et al.* 178 *S.E.2d* 48. While the Claimant's property was not directly involved in that case, the Writ of Prohibition affected all property in the proposed complex. The 1971 Legislature thought up another way to finance the complex and legislation was passed which subsequently had to be tested for its constitutionality in the Supreme Court. In the meantime, the Claimant was losing $1,080.00 a month in rentals from the unoccupied apartment building. The West Virginia Department of Natural Resources, however, did rent the building from month to month for a period beginning October, 1970, and ending April, 1971, for a rental of $1,000.00 per month, and prior to that period and subsequent thereto the building has remained vacant. Up to the time the claim was filed, September 27, 1971, no condemnation proceedings had been filed by the Respondent.

Article 3, Section 9, of the West Virginia Constitution provides:

"Private property shall not be taken or damaged for public use, without just compensation . . . . . ."

The issue in this case is whether action on the part of the State prior to actual taking will give rise to damages. The problem is of first impression in this State, and as far as this Court can determine

there has been no reported decision on the matter. When eminent domain proceedings are instituted, the Claimant receives the fair market value of his property as damages, without any allowance for loss of rentals therefrom which result from the anticipation of a public improvement which does not constitute an actual taking. Technically, the taking occurs when the State secures a court order for right of entry upon the property. Many reported decisions hold that the serving or giving of a notice of intention to condemn does not constitute a taking of or damaging of the property in the constitutional sense, since there is no physical taking or invasion of the owner's right to use his property. In those cases it has been held that notice to the owner does not interfere with the owner's right to use his property as he sees fit, and the actual bringing of court proceedings constitutes the taking of the property.

The facts of this case, however, go beyond a notice to the owner. The notices were sent to the tenants of the owner which we deem to be an invasion of the contractual rights between the owner and his tenant. The Respondent has defended this claim on the theory that the notices to the tenants were void and of no legal effect and should have been ignored by the tenants. Even though this may be true, this Court cannot assume that the tenants did seek legal advice on the validity of notices issued by the State which in effect advised them to move by a certain date. It is reasonable to assume that a notice from an official agency of the state government would be acted upon by the tenants, and the facts of this case disclose that all of the tenants moved out of the building in accordance with the State's notice.

It is the opinion of the Court that it would be a manifest injustice to the property owner, who finds himself with an unoccupied building for a long period of time, to deny relief. The inaction of the State in instituting eminent domain proceedings tended to depreciate the market value of an unrentable building. Although it is true in this case that the State was without fault in the long delay because of the litigation in the Supreme Court of Appeals which restrained the State from taking action until the constitutionality of the legislature was tested. Although the State is not culpable for the delay, damage did ensue to the property owner, who was also without fault.

It is our opinion that the State has a moral obligation to compensate the property owner for the loss of rentals under the unusual facts of this case for the prolonged delay in taking legal action to

acquire the property after notices were sent to the tenants to vacate the property. Inasmuch as the lost rentals cannot be recovered in a condemnation proceeding, the property owner incurs a substantial loss by the delay of the State in acquiring the property. The mere planning of the public improvement or the fact that the tenants learn of contemplated condemnation or elect to vacate the property would not afford the owner the right to recover damages from the State because there has been no physical invasion of the property. It is always possible that the condemnation may be completely abandoned and the property never taken. In this case the State took affirmative action to cause loss of tenants and resulting loss of rentals. We are constrained to hold that the notices to vacate sent to the tenants constitute a "de facto" taking, and if an unreasonable time elapses before the property is actually acquired, there is a moral and compelling obligation to compensate the owner for his loss of rentals, at least during the time of unreasonable delay.

We are of the opinion to award the Claimant loss of rentals beginning with the month of April, 1971, and ending with the month of August, 1971, a period of five months, in the amount of $5,425.00, that sum being the aggregate rental from the twelve apartments for said period. In accordance with the modern construction of the term, a "taking" of property does not require an actual physical taking, but may consist of an interference with the rights of ownership, use, and enjoyment of the property. Two annotations on what constitutes a "taking" appear in 37 A.L.R. 3d 127 and 29A C.J.S. Sec. 110, and authorities are cited both ways on the issue of "taking". The case of *State v. Vaughan,* 319 S.E.2d 349, wherein the facts were quite similar to the case before us, did not involve notices to the tenants, but only a notice to the property owner. We are not disposed to apply that precedent denying relief to the facts of this case.

Although we are cognizant that there is a split of authority on reported decisions, we believe that the usefulness of this property was effectually destroyed in July, 1970, by affirmative action of the Respondent and that compensation should be made to the owner for any unreasonable delay in acquiring the property, aside from any question of negligence on the part of the Respondent.

Claim allowed in the amount of $5,425.00.

Opinion issued February 15, 1972

FRED E. BLAIR

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. D-442)

WILLARD BLAIR

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. D-471)

John Troelstrup for the claimants.

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

JONES, JUDGE:

These claims are based on substantially the same facts and circumstances and by agreement of the parties the cases were consolidated for the purposes of the hearing and this opinion.

In the months of July and August, 1969, the claimants, Fred E. Blair and Williard Blair, who are brothers, were the owners of adjoining tracts of land, containing 27 acres and 20 acres, respectively, situate on the left fork of Laurel Creek in Harvey District of Mingo County. The two tracts were parts of a large acreage of land which had been in the Blair family for many years, and in the course of dividing the land the center line of an old sled road or trail was used as the dividing line between the Fred and Willard Blair tracts. The sled road or trail began at a common corner of the two properties on the left fork of Laurel Creek and on what is known as State Secondary Route No. 3, and extended up the mountain in a southerly direction to the top of the ridge and the line of property owned by Cotiga Development Company. The trail continued through the Cotiga Development Company property to State Secondary Route 3/4; and the General Highway Map of Mingo County, prepared by the West Virginia Department of Highways, designates the road or trail as State

Secondary Route No. 3/6. The deeds of conveyance to Willard Blair and Fred E. Blair, dated in 1925 and 1959, respectively, both refer to "the county road" as the division line between their properties. However, while the trail had been used for many years as a short cut, mainly by hunters or other persons on foot, there is no evidence in the record that the State ever acquired a right-of-way over or through the subject lands either by dedication or prescription.

Without any right to do so, but with some reason to believe and apparently believing that it had a right-of-way over the subject lands, the respondent did go on the property and it constructed an all-weather road for purposes of a fire break and fire access road. Brush was cleared and a number of trees were cut and a relatively small amount of rock was blasted along a strip extending 15 feet on either side of the center line, plus additional areas on both sides of the road which were cleared for slopes resulting from cuts and fills. Willard Blair saw the respondent's employees at work on the road and inquired as to what they were doing. He was informed that they were building a fire road "to protect your property, your fires when they get out, is the way I understood it. I never said anything." He did not talk to anyone further about the road, except to report the activity to his brother, Fred, who arrived on the scene after the road work was completed.

The items of damages claimed by Fred E. Blair are as follows:

Trees destroyed (569 oaks, 342 hemlocks, 336 yellow poplar, 204 beech, 120 birch and 28 red maple)	$6,180.00
Rock blasted out	100.00
Widening and relocating road at entrance to property	750.00
Grading trail, approximately 2,132 feet	1,570.00
Total	$8,600.00

The foregoing figures are taken from the appraisement and testimony of Rufus M. Reed, a registered engineer, naturalist, teacher and writer. In explaining his appraisement, Mr. Reed testified that in considering the value of trees on this steep mountain land, he took into consideration the market value, the protection that trees give the soil, preventing erosion and conserving moisture, and the

esthetic value of the trees. Mr. Reed's summary shows the size of the trees to be from 2 inches to 19 inches in diameter, stating that both the number and size of trees were estimates, although he did "measure a few". Much of the testimony of this witness as to the value of the trees which were cut appeared to the Court to be speculative, with undue emphasis on the "potential" and "esthetic" values. Mr. Reed gave his opinion of the market value of the land, including the timber, as being $300 to $400 per acre.

Willard Blair claims damages as follows:

411 trees (white oak, beech, poplar and pine) 2 inches to 16 inches in diameter, and 10 to 40 feet high at $5.00 each	$2,055.00
Damage by blasting rock on trees	395.00
Grading trail, 2,312 feet	950.00
Total	$3,400.00

Willard Blair made his own estimates of damages, with the assistance of a man who had worked in timber for a number of years, but who was unable to appear to testify. This claimant testified that he included trees as small as 1 to 1-1/2 inches in diameter to 12 inches in diameter, smaller overall than alleged in the above itemization taken from his notice of claim. While he declined to give an opinion as to the market value of his land, Willard Blair did testify that he had sold a 4-acre parcel for $1,500.00.

Gerald Wimer, District Forester for District 5, which includes Mingo County, testified for the respondent. He qualified himself as a graduate forester, with a background of two years' research at West Virginia University and four years' service with the Department of Natural Resources. He testified that he, along with his assistant district forester, worked two and one-half days along the subject road searching all of the area cut over and disturbed in any way. He personally counted and measured all of the stumps in this area and determined the species of the trees. The witness counted 417 trees cut on the Fred Blair land and of these one 12-inch oak was the only tree more than five inches in diameter, two poplars exceeded seven inches, all 75 beech trees were between three and five inches in diameter, only two birch trees were more than eight inches, three maples more than six inches and one of 67 hickories more than six inches in

diameter. The witness further testified that the nearest pulpwood market was in Wayne, fifteen miles distant, where the market stumpage value of the kind of timber involved was $1.00 per cord. Upon this basis he calculated the value of the Fred Blair trees as $1.50.

On the Willard Blair land the witness counted 247 trees cut, 40 of which were 6 inches or more in diameter and 125 were 3 inches or less in diameter. Damages as determined by Wimer amounted to $1.40 for trees cut, and $9.98 for rock damaged trees below the road, a total of $11.38.

With reference to the fire hazard in the area, Wimer stated that Mingo is one of the ten "hot" counties in the State, and that this particular area of northern Mingo and southern Wayne Counties probably has the highest occurrence of forest fires in the State.

A registered engineer employed by the respondent was given permission by the claimants to go on this land for the purpose of making a survey. The results showed that the total land cut over, graded or disturbed in any way was 1.16 acres on Fred Blair and 1.59 acres on the Willard Blair land. Fred Blair showed the engineer where rock had been blasted and by cross-sections it was determined that 71 cubic yards of sandstone rock were removed.

For a number of reasons these claims are difficult to fairly assess and determine. While the respondent was guilty of trespassing, it was not a deliberate or willful trespass. The State Department of Highways apparently believed it had a right of way over this land as its official County Map shows the road as State Secondary Route No. 3/6. Both of the claimants' deeds refer to a County Road as dividing the two properties. Despite the fact that the respondent interfered with the claimants' rights *not* to have their property improved, it is apparent to the Court that both tracts benefited by a good farm road, also serving as a fire break and fire access road. At such extreme variance as to be almost incredible are the claimants' estimates of damages in the amounts of $6,180.00 for Fred E. Blair and $3,400.00 for Willard Blair and damages determined by the respondent to be $1.50 for Fred E. Blair and $11.38 for Willard Blair. The Court has concluded that none of these figures is realistic, so taking into account that the respondent went upon the claimants' land without right or permission (except such permission as may be implied from Willard Blair's silence), as well as the mitigating cir-

cumstances alluded to herein, the Court is of opinion that in equity and good conscience the claimants are entitled to recover in the following amounts:

Fred E. Blair—Damages to 1.16 acres of land at $400.00 per acre or $464.00; damages to approximately 1/4 acre of land due to relocation of road, $500.00; and additional compensatory damages for trespass, $500.00; a total of $1,464.00.

Willard Blair—Damages to 1.59 acres of land at $400.00 per acre or $636.00; damage to trees by falling rocks, $100.00; and additional compensatory damages for trespass, $500.00; a total of $1,236.00.

Accordingly, an award is hereby made to the claimant, Fred E. Blair, in the amount of $1,464.00; and an award is hereby made to the claimant, Willard Blair, in the amount of $1,236.00.

Opinion issued February 15, 1972

REVEREND DON McMELLON

vs.

DEPARTMENT OF HIGHWAYS

(No. D-437)

The claimant appeared in person.

Donald L. Hall for the respondent.

JONES, JUDGE:

The claimant's notice of claim alleges that the "State did place excessive amounts of slag on both sides of blacktop road in the midst of a dangerous, down-hill curve, and at the time of the accident much slag was in the middle of the road; ****", and that as a result the 1964 Pontiac automobile of the claimant, Reverend Don McMellon, driven by his son, David McMellon, seventeen years of age, skidded off the road and was damaged. The respondent, Department of Highways, by its answer denies the claimant's allegations, but says

that it did place slag on both berms of the blacktop road, and that one of its crews with a sweeper removed any excess slag.

The wreck occurred at about 7:00 p.m. on Saturday, September 24, 1970, on Green Valley Road, in the outskirts of Huntington. It had been raining most of the day, it was dark and drizzling at the time and the driver had his bright lights on. David McMellon estimates his speed upon approaching the curve to the left at 30 miles per hour and the distance from the scattered slag at 25 to 30 feet when he first saw it. He testified that as he entered the curve he applied his brakes, began to slide and crashed the right rear side of his car into a tree growing three or four feet from the edge of the berm, and then continued back onto and across the road, winding up in the ditch on the left side. David McMellon's companion and passenger, Steve Wagoner, testified that he did not notice any gravel on the road before the wreck, but that he did examine the road surface immediately after the wreck and "there was gravel all over it". Pictures taken the following day by the claimant were received in evidence but did not show anything unusual. The claimant obtained an estimate of repairs in the amount of $322.51, but the car was later traded and not repaired.

The Court does not question that some loose slag or gravel had worked its way from the berms onto the hard surface of this road, but the rain, the darkness, the sharp curve and the generally slick propensities of blacktop all called for a degree of care which we believe was not exercised by the claimant's son. Inexperience may have contributed to the lack of care and failure to keep claimant's car under control, but in any event, the Court is of opinion that there was sufficient negligence on the part of the claimant's driver to bar any recovery in this case.

This Court has many times held that the State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of its highways under all the circumstances. These well-settled legal principles apply in this case.

Claim disallowed.

Opinion issued February 15, 1972

JERRY A. ROBEY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-524)

The claimant appeared in person.

Donald L. Hall for the respondent.

JONES, JUDGE:

The claimant, Jerry A. Robey, in his own behalf, and the respondent, Department of Highways, by its counsel, have stipulated the facts giving rise to this claim as follows: On May 19, 1971, while the claimant was traveling on United States Route No. 33, approximately three and one-half miles east of Elkins, in Randolph County, he passed one of the respondent's trucks, driven by an employee of respondent, at which time another employee of respondent was shoveling stone chips upon the road; the respondent's truck stopped abruptly causing the employee on the truck bed to lose his balance and to spill stone chips upon the claimant's automobile; the claimant sustained damages to the left front fender and the chrome around the windshield of his automobile; and $42.23, as supported by repair estimates, is a fair assessment of the damages.

Accepting the stipulations as true, the Court finds in favor of the claimant, Jerry A. Robey, and awards him the sum of $42.23.

Award of $42.23.

Opinion issued February 18, 1972

AMIE HODGES, ADMINISTRATRIX OF THE ESTATE OF MARGARET NANCY HODGES

vs.

DEPARTMENT OF MENTAL HEALTH

(No. D-469)

Clarence L. Watt and *James E. Kessinger* for the claimant.

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

JONES, JUDGE:

On May 12, 1969, Margaret Nancy Hodges was employed by the respondent, Department of Mental Health, as a nurse's aide at Lakin State Hospital. While acting within the scope of her employment, walking a blind patient in a hall of the hospital, another patient pushed a wheelchair into claimant's decedent causing injuries, which allegedly resulted in the death of claimant's decedent on July 9, 1969. On May 12, 1969, and thereafter the respondent was a subscriber in good standing to the Workmen's Compensation Fund, as provided by Code 23-2-1; and subsequently a claim was filed with the Workmen's Compensation Commissioner by the husband of claimant's decedent, which claim was rejected on the ground that the husband was not a dependent widower. The foregoing facts are not in dispute.

This claim was filed on May 6, 1971. The respondent's answer was filed on June 18, 1971, and on October 6, 1971, the respondent filed its motion for summary judgment for the respondent in accordance with the provisions of Rule 56 R.C.P. as made applicable by Rule 17 of this Court, on the ground that the pleadings and exhibits attached thereto show that this action is barred by Chapter 23, Article 2, Section 6 of the Code of West Virginia, and that there is no genuine issue of material fact and the respondent is entitled to judgment as a matter of law.

This claim came on for hearing upon said motion for summary judgment on November 15, 1971, at which time the respondent filed

its memorandum of authorities in support of the motion and it was agreed between counsel for both parties and the Court that claimant's reply brief would be filed within twenty days, and the case was submitted for decision upon that condition. No reply brief has ever been filed by the claimant.

In 1941 the Court of Claims of West Virginia construed Code 23-2-6 in a case very similar to this one. In *Timms v. Board of Control,* 1 Court of Claims 41, the claimant's decedent was an employee at Weston State Hospital and was fatally injured by a patient. The hospital was a subscriber to the Workmen's Compensation Fund and the decedent's two sons, both adults, were denied compensation on the ground that they were not dependents within the classification of the statute. The syllabus of that case is as follows:

> "Where the evidence shows that one is fatally injured while in the course of his employment as an employee of a department of the state and such state department at the time of the injury is a subscriber to the state workmen's compensation fund, has paid the premiums and complied with all the provisions of chapter 23 of the code, the court of claims is without jurisdiction to make an award for the death of such employee although there were no dependents of the employee within the classification of dependents contained in the general law under said chapter 23 of the code which denies death benefits to all who are not dependents of the employee within the class therein specified."

In the *Timms* case, the Court dismissed the claim under the applicable provisions of Code 14-2-14, which has not since been amended or altered in any respect. In the case before this Court the claimant's decedent was an employee of an agency of the State which paid premiums into the Workmen's Compensation Fund and was in good standing, and the remedies provided by Workmen's Compensation are exclusive and final.

A summary judgment will be granted where there is no factual dispute and the moving party is entitled to judgment as a matter of law. Therefore, the motion of the respondent for summary judgment in this case is sustained, and the claim of Amie Hodges, Administratrix of the Estate of Margaret Nancy Hodges, is disallowed.

Claim disallowed.

Opinion issued February 18, 1972

REVEREND F. DOUGLAS MORGAN

vs.

DEPARTMENT OF HIGHWAYS

(No. D-494)

The claimant appeared in person.

Thomas P. O'Brien, Jr., Assistant Attorney General, *Claude H. Vencil* and *Donald L. Hall* for the respondent.

JONES, JUDGE:

In the Notice of Claim filed in this case, the claimant, Reverend F. Douglas Morgan, alleges that his 1966 Oldsmobile sedan automobile was struck by a falling rock slide as he was traveling up Matoka Hill enroute to Beckley; that there was nothing he could have done to avoid striking the slide; that the ditches along the road needed cleaning; and that his damages were $179.00. Elaborating at the hearing, the claimant and a traveling companion gave testimony that it was daylight, the claimant was driving 35 to 40 miles per hour; that they did not see the slide until it was hitting the road and rocks were bouncing up under the car. The claimant further testified that the largest rock was "about three times the size of a softball"; that he drove his car off the highway and examined it and then proceeded to his destination; and that he did not report the incident or the fact that there were rocks in the road to the respondent until the following day.

The only allegation of an act or omission which might be considered to be negligence on the part of the respondent is that the ditch along the road at the point of impact needed cleaning out, with the "opinion" of the claimant that if the ditch had been cleaned out, the rocks would not have bounced onto the road. There is nothing in the record to show how long such condition had existed or that the respondent knew or should have known that such a dangerous condition did exist as reasonably would be expected to cause injury or damage to users of the highway.

As this Court has many times held, the State is only required to exercise reasonable care and diligence in the maintenance of its highways; and in this case we do not believe the claimant has proved such a positive neglect of duty on the part of the respondent as to create a moral obligation on the part of the State.

Accordingly, this claim is disallowed.

Opinion issued February 18, 1972

ROBERT D. SMITH

vs.

DEPARTMENT OF HIGHWAYS

(No. D-526)

No appearance for the claimant.

Donald L. Hall for the respondent.

JONES, JUDGE:

In his petition the claimant, Robert D. Smith, alleges that on September 15, 1971, a paint crew employed by the respondent, Department of Highways, was spray-painting a bridge near Talcott, West Virginia, and that its employees negligently sprayed silver paint on his red 1968 Ford automobile while it was parked at his home about 150 feet from the bridge. A truck owned by the claimant also was sprayed and the claimant was able to remove the silver spots by use of gasoline but he was unsuccessful in cleaning the automobile. He claims damages in the amount of $220.42, being the amount required to repaint the automobile and thereby restore it to its condition prior to the spraying.

The respondent caused the claim to be investigated and based upon the written report of its Safety Supervisor for Districts 9 and 10, the respondent has filed an answer admitting the claimant's allegations.

The Court is of opinion that the respondent's investigation corroborates and confirms the answer filed herein, and, therefore, the admis-

sion of negligence and stipulation of the amount of the claim are approved.

Accordingly, an award hereby is made to the claimant, Robert D. Smith, in the amount of $220.42.

Award of $220.42.

Opinion issued February 22, 1972

IN THE WEST VIRGINIA COURT OF CLAIMS
BRISTOL LABORATORIES, DIVISION OF
BRISTOL-MYERS CO., Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-532)

No one appeared for the Claimant.

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

PER CURIAM

The foregoing claim is disallowed for the reasons set forth in the Opinion of this Court heretofore filed in deciding the claims of *Airkem Sales and Service, Claimant, et al, vs. Department of Mental Health, Respondent, covering Claims No. D-333 to D-347, inclusive, the factual situation and the law applicable thereto being the same as that involved in the foregoing decision of this Court.

Claim disallowed.

*Please see 8 Ct. of Cls. Rep. 180.

Opinion issued February 22, 1972

PAUL W. DIXON

vs.

DEPARTMENT OF HIGHWAYS

(No. D-295)

Charles W. Smith, for Claimant.

Thomas P. O'Brien, Assistant Attorney General, and *Donald L. Hall,* of Department of Highways, for Respondent.

DUCKER, JUDGE:

Claimant, Paul W. Dixon, of Route 1, Elk Garden, West Virginia, alleges originally damages in the sum of $1,880.70 and by amendment in the sum of $126,419.56, resulting from sodium chloride (salt) stocked and piled by respondent on premises near claimant's property situate near the intersection of U. S. Route 50 and Elk Garden Road, in Elk District of Mineral County, West Virginia, which stockpiled salt seeped into the claimant's artesian well, ruined the water therein and deprived the claimant of safe drinking and satisfactory water for his business, which business consisted of a tavern, bar, dance hall, filling station, and garage. The tavern designated as Skyline Inn had in addition to its dance hall a bar with two bathrooms, kitchen, stock and utility room, bedroom and a third bathroom. Claimant alleges damage to much of the plumbing by reason of erosion caused by the salt content in the water, and that he suffered irreparable losses of business and mental suffering. Claimant alleges a total of $46,000.00 for loss of business, $30,000.00 for mental suffering, $20,000.00 for loss of an artesian well, and $15,000.00 for loss of drinking water and water for domestic purposes. The remainder of the claim is principally for expenses incurred in replacing pipe, plumbing, fixtures and appliances.

The respondent denied the claimant's allegations and relied primarily on the testimony of one witness, James E. Rosencrance, a chemist of the West Virginia Department of Health. His testimony was to the effect that the report of the water test taken in the case related principally to the amount of chlorides in the water, and not

simply sodium chloride which is salt. He admitted that while chlorides do accelerate corrosion, that he "would be more interested to find out where the acid (in this water) is coming from".

The salt which was stockpilled by the respondent for use on the roads in winter was in an old shed-like building with no adequate flooring and with more or less open sides, apparently greatly exposed to the weather and poorly retained in the building provided for it. From the evidence we can only conclude that it was allowed to escape onto the adjoining and other nearby land, and that as testified to by several witnesses, the claimant's water was seriously affected. However, the fact that the respondent was so negligent in storing or stockpiling the salt, did not relieve the claimant of his duty in the matter. When he found himself so damaged or injured in the use of his premises, it was his duty, we think, to minimize his damages. Even though he may have complained to the respondent about this matter, he permitted this situation to continue and took only the minimal action to remedy the solution, namely, hauling water to supply his needs.

We cannot look with favor upon or give credence to the exorbitant and fantastic figures contained in the claimant's items of loss of business profits and mental suffering. There is no substantial proof of loss of business profits, and even if there were such evidence, it would be inadmissible here as speculative. There are too many factors in any attempt to prove any such loss. It is hardly reasonable to think that anyone with a business which had as substantially potential profit as alleged by claimant would allow it to disintegrate, when at relative small costs the salt situation could have been remedied. Nor do we consider mental suffering or worry on the part of the claimant as having any base for the consideration of damages in this matter.

We are of the opinion, however, that because of the respondent's negligent act of improperly stockpiling and storing the salt, the claimant has suffered specific items of damage which could have been eliminated by the claimant if he had incurred such costs and which he still can eliminate by making reasonable expenditures therefor. He could have had another well dug and a pipe line two thousand feet in length installed, which as shown by the evidence would have cost $500.00 for a well and $4,000.00 for 2,000 feet of pipe at $2.00 per foot. The estimates of costs of specific items of plumbing including labor and materials slightly exceed the sum of $2,000.00, although

the evidence in this regard is not the best; we realize that it is sufficiently substantial for a finding by this Court to the effect that this part of the claim should be allowed to the extent of $2,000.00.

Considering all the evidence, we are of the opinion to and do hereby award the claimant the total sum of $6,500.00.

Award of $6,500.00.

Opinion issued February 22, 1972

PAUL W. DIXON

vs.

DEPARTMENT OF HIGHWAYS

(No. D-400)

Charles W. Smith, for Claimant.

Thomas P. O'Brien, Assistant Attorney General, and *Donald L. Hall,* of Department of Highways, for the Respondent.

DUCKER, JUDGE:

Claimant, Paul W. Dixon, Route 1, Elk Garden, West Virginia, alleges that the respondent used without his consent real estate owned by him near the claimant's establishment called Skyline Inn at the Intersection of U. S. Route 50 and Elk Garden Road, Elk District, Mineral County, West Virginia, and that he has been damaged thereby in the sum of $2,910.00.

The property of claimant used by respondent is adjacent to real estate owned by respondent where respondent has a maintenance building and storage space for its equipment. Since December 1965 the respondent used a strip of claimant's land measuring 50 x 200 feet, and since March 1968 respondent used an additional area of claimant's land measuring 150 x 75 feet adjoining the above area. Respondent cut down trees on the two parcels of claimant's land and used the land as it saw fit without any permission or consent on the part of claimant. Claimant estimated his claim for damages as $1,800.00 for 60 months for the first parcel, $180.00 for the second

parcel, $400.00 for cutting and burning trees, $500.00 for broken guard rails, and $30.00 for survey work to establish boundaries, making a total of $2,910.00.

The facts constituting the basis of this claim are stipulated by claimant and respondent, and the sum of $1,210.00 is stipulated and agreed upon as the proper amount of all the damages herein.

As the facts as stipulated constitute a trespass on the part of the respondent for which the claimant should be compensated, we award the claimant the sum of $1,210.00.

Award of $1,210.00.

Opinion issued February 22, 1972

ROY W. POWERS

vs.

DEPARTMENT OF HIGHWAYS

(No. D-513)

No appearance in behalf of the Claimant.

Thomas P. O'Brien, Assistant Attorney General, and *Donald L. Hall,* of Department of Highways for the Respondent.

DUCKER, JUDGE:

Claimant, Roy W. Powers, of South Charleston, West Virginia, an employee of respondent, alleges damages to his automobile in the amount of $298.40, caused by his car having been struck by a large rock which was blasted out in work being done by the respondent in clearing a ditch line at the respondent's field office in South Charleston on April 7, 1971.

The facts are stipulated to the effect that the claimant had parked his automobile in the area designated by the respondent for the parking of cars of respondent's employees working on State Secondary Route 12, and while respondent was engaged in clearing a ditch line at said place respondent detonated an explosive charge

which projected a rock which struck claimant's car resulting in damage thereto in the amount of $131.32.

As the action of the respondent's employees was the direct cause of the damage, there being no fault on the part of the claimant, the claimant is entitled to be reimbursed for such damage, and we accordingly award him $131.32.

Award of $131.32.

Opinion issued February 22, 1972

TREBAG ENTERPRISES, INC.

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. D-434)

Stuart R. Waters, Attorney at Law, for Claimant.

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

DUCKER, JUDGE:

Claimant, Trebag Enterprises, Inc., owner of the minerals in a tract of land situate on the waters of Murphy's Creek in Lewis County, West Virginia, leased the property for coal mining purposes in 1964, to M & J Coal Company, and that company, as lessee constructed a ramp and loading bin or tipple, installed a fan and built a road, and by the deep mine method mined and removed coal therefrom, and when the market for that particular kind of coal decreased, the lessee company discontinued its mining operations and abandoned the property.

During 1970, claimant discovered that the ramp, tipple and fan had been destroyed or covered up and the mine opening filled in by the respondent in the latter's reclamation work. The respondent was requested by the owner of the surface to "go in and fix the eyesore up along the road," meaning, of course, to eliminate the tipple and

appurtenances, and the respondent obtained a letter from the surface owner granting to the respondent the necessary easement for that purpose. Although the claimant was the owner, by virtue of a duly recorded deed, of the coal under said property, the respondent made no investigation of the title to the coal, but assumed that the surface owner was the owner of all of the estates in said land and proceeded to destroy the improvements of the owner of the coal, for which damages in the sum of $4,500.00 are herein sought by the claimant.

The facts are not in dispute and in our opinion the respondent is liable to the claimant for a proper amount of damages. As to what is the proper amount, the evidence is not too satisfactory. The claimant relies principally on evidence in the form of estimated costs or specific items of materials and labor on the basis of reproduction new as to the tipple and other items. No deduction is made for depreciation. Nor is there any cost estimate made by any construction engineer. The claimant's witness, Harold Gregoire, testified that he had been employed by several contracting and mining companies and had acquired knowledge as to values of coal mining properties and personally knew the property involved in this case and that to rebuild the tipple would cost about $5,000.00. As the tipple and appurtenances were completely destroyed and consequently the question of depreciation can hardly be determined, we are of the opinion, that because of such insufficient and unsatisfactory proof we can only make an arbitrary finding on this question, which we now do in the form of $2,000.00 for the tipple and $1,000.00 to cover the cost of reopening the mine.

The claimant has injected into its claim damages for the loss of the profits which it could have had from coal mined from the premises, but the evidence on this part is entirely speculative and not admissible.

For the reasons herein stated, we are of the opinion that the claimant has been damaged by the unjustified acts of the respondent, and we hereby award the claimant as claimant's total damages, the sum of $3,000.00.

Award of $3,000.00.

Opinion issued February 22, 1972

VECELLIO and GROGAN, INC.

vs.

DEPARTMENT OF HIGHWAYS

(No. D-505)

Robert B. Sayre, for Claimant.

Dewey B. Jones, for the Respondent.

DUCKER, JUDGE:

This claim is for $6,540.00, which the claimant, Vecellio and Grogan, Inc., allege is owing to it under a contract entered into with the State Road Commission, now Department of Highways, on April 1, 1969, for the construction of a segment of a public highway known as Project Number S-726(3) located along W. Va. L.S. No. 1 near Medina, Jackson County, West Virginia. One of the provisions of the contract was for concrete guttering at the agreed unit price of sixteen dollars ($16.00) per square yard, and upon the completion of the contract the claimant contended that it had constructed 2,226.09 square yards of concrete gutter while the respondent measured the construction as 1,817.34 square yards.

There is no question as to the quality of the work or that this item of construction in any way failed to comply with the requirements of the contract. The method of measurement accounts for the difference in the quantity to be paid for, and the respondent either owes all of the amount claimed or none of it, depending on which method of measurement is determined to be correct.

The parties have stipulated that the correct amount of the difference in measurement is 2,185.82 square yards, which at $16.00 per square yard amounts to $5,895.68.

This case rests upon the same interpretation of the regulations and the applicable law as was determined in Claim No. 457 in this Court decided on December 14, 1971, in which case the claimant here and Foster and Creighton Company were the claimants therein and in which case this Court held that the measurement method used by claimants was correct, namely that the yardage contained in the

flat surfaces of the gutters above the edges of the shoulders should be included in yardage to be paid for, and that the yardage should not be limited to that contained only in the remainder of the gutter. As the regulations involved and the applicable law are fully analyzed in the opinion of Judge Jones in that case, we deem it unnecessary to repeat the same here. In accordance with that opinion and decision, and the facts as stipulated in this case, we are of the opinion to and do hereby award the claimant the sum of $5,895.68.

Award of $5,895.68.

Opinion issued February 23, 1972

CAPITOL PAPER SUPPLY, INC., Claimant,

vs.

DEPARTMENT OF FINANCE and ADMINISTRATION, Respondent.

(No. D-481)

Fred F. Holroyd, Esq., for Claimant.

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

PETROPLUS, JUDGE:

Claimant, Capitol Paper Supply, Inc., seeks the sum of $4,700.00 from the Department of Finance and Administration, respondent, on indebtedness of the Department for a period beginning on February 28, 1970, and ending April 31, 1971. The chronology of dates and facts giving rise to the claim are as follows.

December 18, 1968, respondent issued a purchase order for a large supply of paper in specified quantities at fixed prices aggregating $99,188.70, and deliveries were made to the State from time to time as requested by respondent. No interest was mentioned, although a 2% discount was provided for payment within 30 days.

August 5, 1970, a claim was filed in this Court for $71,307.23, that being the accumulated indebtedness invoiced to the State for requested deliveries, the case being designated Claim No. D-328.

October 14, 1970, the date set for hearing in this Court, the parties advised the Court that a settlement had been reached and the claimant would be paid the amount owing. Thereupon, the Court continued the case.

June 3, 1971, the instant claim for interest was filed in the amount of $4,700.00.

July 2, 1971, State answered setting forth two defenses:

(1) Claimant is splitting its cause of action contrary to law.

(2) Interest is barred by Chapter 14, Article 2, Section 12 of the Code of West Virginia, which provides:

> "In determining the amount of a claim, interest shall not be allowed unless the claim is based on a contract which *specifically* provides for the payment of interest." (underscoring supplied)

July 26, 1971, final installment of $5,686.20 was paid by the State to the claimant on the negotiated settlement.

August 20, 1971, claimant files a Motion to Consolidate and/or Amend Claim No. D-328 by adding thereto in its entirety Claim No. 481 (this Claim for interest).

Chapter 17, Acts 1969, of the West Virginia Legislature authorizing interest on public contracts was passed March 8, 1969, effective 90 days after passage and approved by the Governor, and applied to contracts made after March 1, 1969.

December 14, 1971, the hearing on this Claim for interest took place.

OPINION

The claimant was furnishing paper to the State on open account under a Requirement Contract dated December 18, 1968, prior to the effective date of the legislation which authorized interest payment, and for that reason we hold said Act not to be applicable to this Claim. The State incurred a liability for the purchase of supplies on the date of the Purchase Order, December 18, 1968, and deliveries were deferred until such times as the paper was needed. We cannot consider each delivery a separate contract of purchase. That the State failed to make prompt payment is not denied, yet the law of

the case at that time would be controlled by 14-2-12 Code stating that this Court cannot allow interest in determining the amount of a contractual claim unless the claim is based on a contract specifically provided for the payment of interest.

Furthermore, when the Motion to consolidate the two cases was filed on August 20, 1971, the State had finished paying the principal indebtedness on the first case designated D-328, under an arrangement that we consider to be an accord and satisfaction not requiring the payment of interest. The parties admit interest was not discussed in the settlement conference.

The tenability of the defense of splitting the cause of action, there being two Claims, one for principal, the amount due on the contract, and the other for interest on the amount due, thereby creating two controversies over a single matter, need not be decided in view of the reasons given for disallowing the Claim. The Motion to Consolidate is thereby overruled as the issues raised by Claim D-328 are now moot, the amount of the Claim having been paid before the Motion was made.

Claim disallowed.

Opinion issued February 23, 1972

TRI-STATE STONE CORPORATION, Claimant,

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND THE STATE OF WEST VIRGINIA, Respondents.

(No. D-219)

Charles W. Yeager, Esq., and *Carney M. Layne, Esq.*, for Claimant.

Dewey B. Jones, Esq., for Respondents.

PETROPLUS, JUDGE:

The claimant, Tri-State Stone Corporation, entered into a contract with the State Road Commission of West Virginia, now the West

Virginia Department of Highways, respondent, for the construction of a section of highway in the City of Clarksburg, Harrison County, West Virginia, designated as Project U-282 (18) C-2 and commonly known as the Clarksburg Expressway. The contract was awarded to the claimant as the successful bidder on a unit price bid proposal, and is dated March 19, 1963. In accordance with the custom for highway construction projects in West Virginia, the bid proposal based on estimated quantities, the plans and profiles prepared by the respondent, and the Standard Specifications Roads and Bridges, adopted in 1960, as well as Special Provisions amending and supplementing the Standard Specifications, were made a part of the contract by reference, and are all considered contract documents. The bid was in the amount of $1,062,939.30 for .8 of a mile of road, including access roads, cloverleaf ramps, relocation of streets and utilities, construction of culverts and drains, and a major fill and cut on the west side of West Fork River which bisected the project. A new bridge had previously been constructed in the job area and spanned the river, which bridge was to be used by the contractor in hauling materials from one end of the project to the other. The new road to be constructed followed the bank of the river for some distance and required a fill and embankment for its support.

From its inception, the work on this project created many difficulties and problems for the contracting company. The work was started on March 25, 1963, and was to be completed within 180 working days, subject to the imposition of liquidated damages in the amount of $165.00 per day for delayed completion. Although the scheduled completion date was in November, 1963, the project was not completed until December 31, 1964, more than a year late. After allowances for change orders and excusable delays, the claimant was assessed in the amount of $2,970.00 as liquidated damages at the final accounting, which did not take place until May 15, 1969. Final payment was made to the contractor at that time, with a reservation of rights on behalf of the contractor to file a claim in this Court for the disputed items hereinafter mentioned.

A petition claiming damages in the amount of $224,010.66 was filed by the contractor on September 10, 1969, outlining in meticulous detail fourteen different items in dispute. The Answer filed by the respondent indicated a wide divergence of views, with little or no area of agreement on any of the items in controversy. The hearing began

on November 30, 1970, and continued until seven transcribed volumes of testimony were taken of witnesses produced by both parties. More than one hundred twenty exhibits were filed, including a motion picture film and numerous photographs of various activities on the project. In addition, pre-trial discovery depositions were filed and very lengthy briefs. These matters are mentioned to show the conscientious endeavors of the claimant and respondent to present their respective claims and defenses, and the thoroughness with which the case was prepared. As stated, there was little or no disposition on the part of either party to make concessions or admissions which would shorten the travails of this Court in resolving the controversy.

In considering and deciding each item, this Court has endeavored to interpret and apply the Standard Specifications and the Special Provisions of the construction contract, in the light of applicable decisions of this Court in prior cases and decisions of the Supreme Court of Appeals of the State of West Virginia. The findings of fact are embodied in this Court's decision of each of the items which follow.

The petition charges the respondent with continually delaying and harassing the contractor by imposing additional requirements not included in the original plans and specifications, and under threat of shut-down from time to time, demanding extra work to be performed without Change Orders, Force Account, or Supplemental Agreements, as required by the specifications. The Court finds little or no basis for the contention that the respondent engaged in a plan of harassment to impede the progress of the work and embarrass the contractor because it or members of the family of Mr. C. E. Wetherall, owner and manager of the company, had filed claims for damages against the State Road Commission in other proceedings before this Court. However, it is the opinion of the Court, and it is so found in this opinion, that the claimant's performance under the contract was unduly regulated, interfered with and supervised by a zealous application of the Specifications to almost every detail of the project. It appears that the claimant was given little or no discretion to exercise judgment on reaching the desired result. The superintendent employed by the claimant, Mr. Chester Miller, a Registered Engineer, was ordered removed from the project shortly after it began because of refusal to comply with the directions of the respondent's engineer and conduct otherwise designated as insubordination, and the claimant did comply with this order by removing its engineer from the project and replac-

ing him with Mr. C. E. Wetherall and another engineer. Because of Mr. Miller's familiarity with the contract and terrain, the claimant endeavored to use him for consultation some distance away from the job site, but the respondent ordered him banished from the Clarksburg area. The dismissal of the project engineer is not involved in the adjudication of the claims, but is mentioned merely as an illustration of the importunities of the respondent on this particular project.

The respondent ordered a complete shut-down of the project on July 3, 1963, because unclassified excavation was laid by the contractor in a small area in layers that did not comply with the specifications, and it remained shut-down for thirteen working days, during which period construction equipment remained idle and no activity took place on other phases of the project not in dispute. On July 22, 1963, after the contractor yielded under protest to the demands of the respondent to lay the material in 8 inch layers rather than 24 inch layers, as the contractor contended, the work was resumed.

Mr. William C. Sandy, respondent's District Engineer, who was also familiar with the project, was replaced by W. J. Galloway, District Engineer, who ordered a shut-down a few days after his appointment. While the work was in progress, a task force from Charleston found fault with the work and reported to the Charleston office that the job was out of control and that the contractor had taken over.

The claimant has cited many acts of alleged hostility toward its personnel, impeding the progress of the work and impairing its efficiency. The delays, many of them justified and unavoidable, naturally delayed the sequence of operations, which increased costs and otherwise compounded the problems of the contractor, which was working under a "tight" contract in a congested area of Clarksburg.

All of these allegations are vigorously denied by the respondent, which took the position that it had the right to control the construction and make the contractor comply with the plans and specifications of the contract by making inspections and investigations of its working methods, to the end of achieving a proper result in the public interest. It was admitted after the final performance of the contract that the public improvement is of good quality, has held up well and that the work done by the claimant was very satisfactory.

The issues are defined as follows:

1. Did the contractor do the work and furnish the materials according to the terms and provisions of the contract?
2. Was the contractor required to do extra work not covered by the contract for which it has not been compensated?
3. Did the contractor suffer loss or damage through the misfeasance or nonfeasance of the respondent?
4. Did the contract contain ambiguous provisions or apply conflicting specifications, making it impossible for the work to pass inspection?
5. Did the contractor interpret the specifications to his advantage, and thereby save costs and increase his profits to the detriment of the respondent?
6. Did the contractor give the requisite notices under Section 1.5.11 of the Standard Specifications adopted in 1960 that it would demand extra compensation for work and material not clearly covered in the contract, or not ordered by the State's engineers as "Extra Work"?

These issues will be discussed and decided in accordance with the evidence submitted on each of the fourteen items of the claim and the findings of fact with relation thereto, applying the rule that the claimant has the burden of proving the material allegations of its complaint.

ITEM 1 UNCLASSIFIED EXCAVATION

This item is for the payment of $5,087.72, representing 4,103 cubic yards of Unclassified Excavation at the bid price of $1.24 per CY. Payment under this item is for the movement of earth excavated from the bed of the river and the river bank and was measured by the State according to cross-sections of the river made by a survey of the State's engineers in 1955. The contractor contends that with the lapse of time and the shifting of material in the river bed through floods and the action of the current, the ground line of the river bottom changed, and the cross-sections used to measure its excavation were inaccurate because of the old survey. The ground line and the elevations used for measurement purposes for paying the contractor are alleged to be inaccurate, and apparently both parties were aware of this at the time the work was performed. The contractor contends that it removed material from the river bed which was excluded from

payment because of the use of an inaccurate ground line platted as the river bottom. Respondent does not deny the obsolescence of its plans and profiles, but takes the position that the burden of proof is on the claimant, which was aware that the State's method of measurement was inaccurate, to measure the extra material in a reliable manner by making an engineering survey of its own to prove that the State's survey, plans and profiles were in error. This does not constitute, in our opinion, a proper defense, and conceding that the contractor has the burden of proof to show the measurement of excess material for which it claims compensation, it was the duty of the respondent to properly measure this material and compensate the contractor on the unit price base per CY. The State further defends this item on the ground that no notice was given under Section 1.5.11 of the Standard Specifications adopted in 1960 that extra compensation would be requested before the beginning of the work on that portion of the project. The State also attacks the method used by Mr. C. E. Wetherall, manager of the contracting firm, in measuring the extra material excavated as haphazard and inexact.

It is the finding of the Court on this item that the respondent had the duty to measure the excavated material, properly using correct cross-sections of the ground line, and failing to do so, any other method of measurement reasonably available to the contractor could be used, provided it is not conjectural or speculative. When the State fails to measure the material properly, we know of no other way that the claimant can be compensated except to measure the material itself and prove its claim. The exhibits offered by the claimant indicated graphically a ground line and quantity of excess material excavated above the true ground line and are acceptable to this Court, particularly when the State has not offered any documented evidence controverting the accuracy of these exhibits. It is also reasonable for this Court to assume that the action of the river over a period of eight years did change the ground line, and that the State's method of measuring, based on obsolete plans and elevations, would not be a reliable and satisfactory way of computing the excavated yardage.

The requirement in the specifications to give notice that extra compensation would be claimed before beginning the work, as we interpret Section 1.5.11 of the Standard Specifications, is applicable to cases where the contractor deems extra compensation will be due him for work not covered by the contract. In this instance the work

was covered by the contract as a bid item, subject to over-runs and under-runs, with relation to the proposed estimated quantity to be excavated. This is not a claim for extra work outside of the scope of the contract, but is a claim within the contract, and for that reason we hold that notice to the respondent is not required.

For the reasons stated, the Court is of the opinion to recommend an award of $5,087.72 on Item I of the claim.

ITEM II EXTRA WORK IN PLACEMENT OF FILLS

This is by far the largest item of the claim, and is in the amount of $97,140.47 for extra work performed in breaking up and crushing rock material in order to compact it in 8 inch layers, as required by the respondent in its interpretation of the Specifications and Special Provisions of the contract. The rock was drilled and shot, and placed in the fill in layers not to exceed 24 inches, that being the contractor's interpretation of the Specifications and Special Provisions. The State immediately objected, contending that the specifications required a compaction into 8 inch layers. The contention of the contractor being to the contrary led to the shut-down of the project.

The contractor's duty in making the fill by layers in an embankment is controlled by the nature of the fill material under Standard Specification 2.2.3 (E) (2) which reads in part as follows:

> "Material shall be placed in embankments in successive layers not exceeding eight (8) inches in thickness before compaction, when it has *not been necessary to use explosives* to break up the material preparatory to excavation, and not exceeding twenty-four (24) inches in thickness when *it has been necessary to use explosives.* Materials such as *shale* or other formations other than *solid rock,* shall be placed in layers as much less than twenty-four (24) inches as the size of the material will permit . . . . ."
>
> (Emphasis supplied).

The Special Provisions deleted the second sentence of the preceding Specification and substituted therefor the following:

> "Materials such as shale or other formations other than solid rock shall be placed in layers not exceeding eight (8) inches in thickness before compaction."

It is difficult for us to understand in what manner the Standard Specification was changed by the Special Provision when the first sentence of the Standard Specification relating to identifying the material by use of explosives remained. A distinction was created without a difference. It is not clear to the Court what this change in language was intended to accomplish. We definitely feel that the requirement of laying the material in lifts not exceeding 8 inches or in lifts not exceeding 24 inches is determined by whether explosives are necessary to break up the material.

The contractor and the State had divergent views as to whether the material used for filling purposes was shale or rock, the State insisting it was shale and the contractor insisting on classifying it as rock. When the contractor persisted in laying the material as if it were rock in layers not exceeding 24 inches contrary to the State's directive, the entire project was shut down, although work could have proceeded elsewhere on the project, and remained idle until work was again resumed under protest at the direction of the State's engineer nineteen days later (the project was idle from July 3, 1963, to July 22, 1963).

The contractor proceeded as directed when the project resumed in laying the material in 8 inch layers with compaction, an operation which slowed down the progress of its work with a costly increase in labor, equipment rental, and retreatment of the material. By forcing the material into 8 inch layers and retreating the same for compaction, the average material worked per day was reduced from 3,276 CY to 625 CY, or, stated otherwise, from 100% to approximately 19%.

Our interpretation of the Specification as revised by the amending Special Provision turns on the use of explosives to break up the material preparatory to excavation. We are unable to find any evidence introduced by the State which controverts the claimant's proof that explosives were used to break up the rock. The evidence introduced by both parties through geologists and soil experts was conflicting, some analyzing the material as shale, limestone or sand stone, and others analyzing it as rock. The description of material by labeling it appears to be a matter of semantics, and we are not satisfied by the expert opinions stating that it was one or the other. No doubt the samples taken for the various tests depended on who did the sampling, and it is quite evident that the analyses were of samples presented to the geologists, engineers and soil experts by the respective parties. Inasmuch as the evidence that explosives were necessary to break up

the material was not controverted by the State, it is our finding that the material was predominantly composed of solid rock and had to be crushed and broken up by additional labor and use of equipment to compact it for use in the embankment.

In our award on this Item we are of the opinion that the claimant is entitled to the loss sustained in laying the material as directed by the State, said loss being $80,882.29 after giving the State credit for payments made under the item of unclassified excavation in the bid proposal. The comparison of costs per CY before and after the imposition of the additional requirement by the respondent does not reflect the true amount of damages resulting from what we consider to be an unwarranted imposition of the specifications on the contractor before approving its work. It is our finding that the contractor performed within the terms and provisions of the contract and its specifications.

We therefore recommend that this item of the claim be allowed in the amount of $80,882.29.

ITEM III EXTRA WORK IN REMOVAL AND RECOMPACTION OF QUANTITY OF FILL

This item is for a small amount of material removed, reworked and recompacted on orders of the State Engineer because of its failure to meet a compaction test, and also involves a decision on whether the reworked material was shale or rock. The claim is in the amount of $397.18. Material laid by the contractor in a 24 inch layer was removed on orders of the State, and later laid in an 8 inch layer to meet a compaction test. The proof of this item is unsatisfactory, and the claim is disallowed.

ITEM IV EXTRA WORK OF REHANDLING UNSUITABLE MATERIAL

This item of the claim is in the amount of $10,542.00 and represents the additional cost involved in disposing of waste material when the State refused to approve the waste disposal pits selected by the contractor on or near the project, thus requiring it to first stockpile the unsuitable material and pick it up again and haul it a greater distance to another site selected by the contractor, which met the approval of the State. The disposal of unsuitable material according to the specifications requires the approval of the State's Engineer, and waste sites selected by the contractor are subject to approval by the

State. The State had future plans for the use of the area originally selected by the contractor for disposal of its waste, and was clearly within its contractual rights in refusing to approve the sites so selected by the contractor. This is a risk that the contractor assumes in any road construction project, and the additional cost requested for removal of waste to another site must be borne by the contractor. The claim is disallowed in its entirety.

ITEM V EXTRA WORK IN AERATING AND BLENDING UNSUITABLE MATERIAL

This item of the claim is in the amount of $5,000.00 to cover the cost of extra work performed in aerating and blending unsuitable material and upgrading it so it could be used on the project, and not disposed of as waste.

An eye-view of this material was presented to the Court by motion pictures. It was convincing evidence that the material was sloppy, soggy mud with a very high content of water making it impossible to use in a fill without extensive reworking and drying out to upgrade the material into a more stable state. The material displayed in the movies rippled like warmed over jelly and should have been wasted. The respondent, however, insisted on the material being used, and it is our finding that the State has a moral obligation to reimburse the contractor for excess costs in manipulating and upgrading this material. The requirement that the contractor use this soupy substance does lend some credence to its claim of harassment. A claim of 50 cents per CY for treatment of this material appears reasonable, and the claim is allowed in the amount of $5,000.00.

ITEM VI EXTRA WORK IN REMOVING UNCLASSIFIED EXCAVATION AROUND A STANDING POLE

A Western Union pole carrying a railroad signal line which was located within the construction limits of the project is the subject of this item of the claim. Approximately 1,000 CY of material had to be rehandled by shovel when the contractor had to work around the pole, which apparently had not been ordered removed by the State, and then return with equipment to remove a jutting spur of earth with the pole on top. Apparently the respondent erroneously advised the railroad company that this particular pole need not be removed. The claim for extra work is in the amount of $1,240.00 and is disal-

lowed on the ground that the contract specifications clearly state that no compensation would be allowed for delay in removal of utility appurtenances. The contractor clearly assumes this risk in his bid proposal and must absorb the costs when his work is impeded by a standing utility pole.

ITEM VII ROCK BORROW EXCAVATION

A claim of $6,829.40 is made for 2,731.76 CY of Rock Borrow excavation at the bid price of $2.50 per CY, which was measured for payment by the State in the cut by the method of cross-sectioning. The respondent refused to pay for this item because the rock material was not incorporated in the work. In other words, the contractor cut more rock than was required for use in the fill, and the excess rock was laid outside of the template line. The evidence is conflicting on which party was responsible for moving the stakes beyond the template line, and then having them moved back to where they should have been. Inasmuch as the State Engineer, who had full control and supervision over the contractor's work, acquiesced in the cutting of this extra rock to be placed in the fill erroneously marked by the stakes, and being admitted by the respondent that the rock did go into the fill, we hold that this claim should be allowed, notwithstanding the specification numbered Section 1.5.7, on which the State relies, prohibiting an inspector from altering or enlarging any requirements of the Plans, Special Provisions or Specifications. This regulation of prohibition conflicts with Section 1.5.1 which requires the contractor to perform his work and furnish materials as determined by the State's Engineer, who is authorized to supervise the work and decide all questions on the fulfillment of the contract requirements. The respondent did permit the extra rock to be cut and placed unnecessarily in the fill, and the State received the benefit of this work which stabilized the edge of the roadbed closely paralleling the river bank without objection. We deem it immaterial to determine in the decision of this item who was responsible for removing the stakes or who "eye-balled" the stakes into a different alignment. The claim is allowed in the amount of $6,829.40.

ITEM VIII EXTRA WORK IN PULLING IN TOE OF ROCK BORROW FROM RIVER BED

This item of $2,467.61 represents the cost of equipment and labor in removing rock borrow from the river bed when the Road Com-

mission personnel ordered the stakes reset and removal of rock borrow beyond template line. It should be allowed for the reasons set forth under Item VII. Claim is allowed in the amount of $2,467.61.

ITEM IX EXTRA WORK IN REHANDLING ROCK BORROW BECAUSE OF WEIGHT LIMITS IMPOSED BY THE STATE ON THE USE OF THE NEW BRIDGE BY CLAIMANT'S TRUCKS

This item in the amount of $18,455.22 represents damages and extra costs incurred by the contractor when it was prohibited from using the new bridge over the West Fork River with what were deemed to be by the State overloaded trucks. The State refused to permit the contractor to use the bridge unless it secured lighter tandem axle vehicles for hauling material over the bridge. This necessitated the stockpiling of rock material brought to the bridge in the heavy trucks and reloading the material in lighter vehicles, which required rehandling of the material. The Special Provisions of the contract required the contractor to observe the weight limits for highways as provided by the Code of West Virginia. The State weighed the vehicles on three different occasions and found them overloaded. The claimaint failed to prove to the satisfaction of this Court that its trucks were not in violation of the weight limits prescribed by law, but relied on the permissible use of the bridge with the heavier trucks before the load limits were strictly enforced. Apparently the contractor felt that having been permitted to use the heavier trucks, it had a continuing right to use the same throughout the duration of the project. We do not believe that the enforcement of the load limits was a harassment, as contended by the claimant. We hold that the respondent's belated enforcement of the load limits to be justified and within the contemplation of the contract, and that the former permissible use of the bridge with excessive limits does not constitute a waiver of this provision of the contract. The claim of $18,455.22 is disallowed in its entirety.

ITEM X CRACK IN WALL

A claim of $542.97 is made for the removal of a certain portion of a concrete retaining wall, which the State contended was cracked by the operations of the contractor. The contractor was required to rebuild this portion of the wall, but insists that it was a pre-existing crack in the wall for which it was not responsible. It is our finding from the evidence and the photographs submitted that the contractor

was not responsible for the crack, and that his operations did not cause the same. The claimant should have been compensated for rebuilding that portion of the wall with new concrete on the basis of Force Account. The claim is allowed in the amount of $542.97.

ITEM XI EXTRA WORK IN RELAYING 60 INCH DRAINAGE PIPE DUE TO ALLEGED ERROR OF ROAD COMMISSION

This item of $2,109.10 for extra work caused by the interference of a water line of the Clarksburg Water Board located in the construction area with the laying of a 60 inch drainage pipe by the contractor is disallowed for the same reasons set forth in the ruling under Item VI. Interference by utility lines is an assumed risk of the contractor under the specifications of his contract, and he must bear the expense of working around the water line. The claim is disallowed.

ITEM XII COST OF EQUIPMENT RENTAL DURING UNWARRANTED SHUT-DOWN OF PROJECT

Under this item the contractor claims the sum of $36,525.82 as equipment rental during the thirteen working day shut-down of the project, extending from July 3, 1963, through July 19, 1963, as heretofore noted in the findings of fact by this Court. The amount claimed is taken from a book published by the Associated Equipment Distributors, 1963-64 Edition, setting forth average rental rates for construction equipment. The book is generally accepted in the heavy construction industry as a standard compilation of rental values of all types of road construction equipment.

We are of the opinion and find that the shut-down order issued by W. J. Galloway, District Engineer, by letter dated July 2, 1963, which gives no specific reason for the shut-down except a difference of opinion between C. E. Wetherall, Vice President of Tri-State Stone Corporation, and the Road Commission with respect to the interpretation of the Plans and Specifications, to be an arbitrary and unwarranted act on the part of the respondent. Although the specifications permit the State to shut down a project, it is the opinion of the Court that the suspension of a million dollar project in a congested area of Clarksburg, where the contractor is working under a tight contract and on difficult terrain, is a serious matter, and although the Standard Specifications authorize the Engineer to suspend the work (1.8.4) wholly or in part for such periods as he may deem necessary, due to

conditions considered unfavorable for suitable prosecution of the work, or due to the failure of the contractor to carry out orders given or perform the provisions of the contract, we hold that under the circumstances of this case the conduct of the Engineer was hasty and ill-considered. Little or no effort was made to resolve the differences with Mr. Wetherall on the nature of the material ordered to be laid in 8 inch layers, which is the basis of Item II of this action. As we have pointed out, the regulations were ambiguous with respect to this point, and there was an honest difference of opinion on whether the shale or rock classification applied to the material being used. Besides, only a small amount of the questioned material had been applied to the fill when the shut-down order came through. The Court is reluctant to question the judgment of an engineer who is skilled in the technical knowledge of his profession, and do not find fault with the opinion he rendered in good faith. We do have grave doubts, however, whether this violation of the terms of the contract justified the drastic procedure taken to force the contractor to rectify his faulty performance, as contended by the respondent. This specification should be applied with circumspection and prudence, taking into consideration the potential damage which would result to the contractor if the engineer should be wrong in his interpretation of the specifications. In this case the engineer apparently acted on data submitted by his subordinates to the Charleston office without making an on-site inspection of the project. In a project of this magnitude, it would appear to the Court that the chief engineer should make some effort to confer with the contractor, evaluate the variances from the contract, and attempt to resolve the differences before issuing a general shut-down order, and then invite the contractor to attend a meeting in Charleston to discuss the problem.

We have ruled under Item II of the claim that the respondent was wrong in the interpretation of the specifications, and under this Item we rule that the general shut-down of the project was arbitrary and capricious. The letter of July 2, 1963, which is the only documentation of the shut-down order is set forth verbatim because of its importance in the decision of this case.

CLAIMANT'S EXHIBIT NO. 4

"July 2, 1963
Centennial Year"

Mr. C. E. Wetherall, Vice President
Tri-State Stone Corporation
Kenova, West Virginia

Dear Sir:

Re: Project U-282-(18) C-2-Harrison County

There presently exists too great a difference of opinion between you and the Road Commission with respect to the interpretation of the intent of the plans and specifications and the approved procedures for executing the work necessary to get the results required by these plans and specifications. As a result of this difference of opinion we do not feel that the work is proceeding satisfactorily. It is necessary at this time to ask you to suspend operations on this project.

You are further advised that a meeting will be arranged between your Company and the Construction Division at which time an attempt will be made to resolve our common problem.

Very truly yours,

/s/ W. J. Galloway
W. J. Galloway
District Engineer"

This brings us to the problem of what amount of rental would be reasonable compensation to the contractor for the unwarranted suspension of the project. We are inclined to accept the standard rental compilation of the Associated Equipment Distributors book.

Although we find that the State was at fault in this matter, we further find that the contractor was not entirely without fault on its part. It appears that the contractor could not arrange a meeting promptly because of "other commitments". The importance of this matter to the claimant justified sending a representative promptly to Charleston to attend the meeting in two or three days. The claimant's attorney did not call the respondent until July 12, some nine days after the

shut-down letter was received. This delay in arranging a conference cannot be attributed to the respondent, and we are not inclined to excuse the claimant for its procrastination while incurring heavy damages daily during the shut-down. It appeared that after the meeting was held in Charleston, an order was issued immediately for resuming the work.

The rental will be reduced to less than one-third of the amount claimed, it being the opinion of the Court that dilligent action on the contractor's part could have reactivated the project much sooner. Mr. Galloway, Chief Engineer, ordered the working operations resumed by letter dated July 12, 1963, setting forth the conditions imposed on the contractor to lay the "shale" material in 8 inch layers. Work was not actually resumed until July 22, 1963. Rental damage will be awarded to the claimant in the amount of $9,131.25.

ITEM XIII GAS LINE

A further claim of $36,813.27 is made for extra work entailed when the contractor was faced with problems presented by a high pressure gas main owned by the Hope Natural Gas Company situated within the construction limits. We find no merit in this claim, as utility removal is not the responsibility of the respondent. The contractor under the specifications, as previously held in this opinion, assumes all risk of inconvenience or delay caused by failure to remove obstructive utility lines. This item of the claim is denied in its entirety.

ITEM XIV LIQUIDATED DAMAGES

We cannot conscientiously permit the respondent under the circumstances of this case to impose and make effective the liquidated damages provision of the construction contract. The delays in this project, some of them excusable and unavoidable, and some of them unwarranted, were not exclusively attributed to the fault of the contractor as shown by this voluminous record of job-site problems and difficulties of securing prompt solutions to these problems. It appears that subordinate personnel of respondent had no authority to make final decisions and resorted to communication with higher echelons of authority, which was a time consuming procedure. The contractor was faced with many frustrations because of delayed decisions by the respondent and it affected the progress of its work. The contractor was also faced with many changes of State personnel during the work,

and change of engineers, in addition to the problems created by the removal of his superintendent, Chester Miller, whose physical presence was ordered out of the construction area in addition to his removal from a position of authority on the project. Under these conditions liquidated damages would be an unfair and undeserved punishment of the contractor. Liquidated damages are disallowed in their entirety.

In conclusion, we recapitulate the claims as follows:

	Amount Claimed	Amount Allowed	Amount Disallowed
ITEM I	$ 5,087.72	$ 5,087.72	
ITEM II	97,140.47	80,882.29	$ 16,258.18
ITEM III	397.18		397.18
ITEM IV	10,542.00		10,542.00
ITEM V	5,000.00	5,000.00	
ITEM VI	1,240.00		1,240.00
ITEM VII	6,829.40	6,829.40	
ITEM VIII	2,466.61	2,466.61	
ITEM IX	18,455.22		18,455.22
ITEM X	542.97	542.97	
ITEM XI	2,109.10		2,109.10
ITEM XII	36,525.82	9,131.25	27,394.57
ITEM XIII	36,813.27		36,813.27
ITEM XIV	2,970.00	2,970.00	
	$226,119.76	$112,910.24	$113,209.52

This Court should comment on Standard Specifications 1.4.1, 1.5.1, and 1.5.7, on which the respondent relies so emphatically for its defenses to the various items of claim. These Specifications state in effect that the State Road Commissioner's decision on the intent and meaning of the specifications shall be final and conclusive, the State's Engineer is authorized to decide all questions which may arise as to the interpretation of the Plans and Specifications, and inspectors may reject material and suspend the work until questions at issue can be referred to and decided by the Engineer. These broad delegations of power must be exercised in a reasonable manner under the particular circumstances of each case and not in an arbitrary or capricious manner. In essence the State is dealing with independent road contractors who have contracted to produce a result, and every contractor is

permitted by law to supervise his project and his servants and employees as to the manner in which they are to perform the details of their work. The men on the job are the agents of the contractor, who is responsible for a good and workmanlike job, that is to be inspected and supervised generally by the engineers of the State who occupy a position of authority to oversee the manner of performance and rate of progress to the end that all contract requirements are fulfilled. Such authority should be exercised in a reasonable manner and with prudence without unnecessarily impeding the progress of the work or engaging in conduct without thought of the consequences to the contractor. Controversies with contractors too often necessitate resorting to the Court of Claims for relief and payment of damages. Differences of opinion and misunderstanding of job specifications should not be permitted to snow-ball into substantial claims in the Court, unless they cannot be resolved in the field with due regard for the mutual rights and responsibilities of the parties and better communication between the parties.

Claim allowed in the amount of $112,910.24.

Opinion issued March 15, 1972

JOHN L. AND BETTY A. BECKETT

vs.

DEPARTMENT OF HIGHWAYS

(No. D-500)

C. Blaine Myers, Jr. for the Claimants.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Donald L. Hall*, of Department of Highways for the Respondent.

DUCKER, JUDGE:

Claimants, John L. Beckett and Betty A. Beckett, husband and wife, allege damages to their Chevrolet automobile in the amount of $704.35 resulting from a collision at about 2:55 p.m. on June 18, 1971, on Interstate Highway 77 at the bridge over the State Route

47 in Wood County, West Virginia, when claimant, Betty A. Beckett, was driving claimant's automobile southerly on I-77. She approached the northerly end of the highway bridge over Route 47 and being directed by warning cones and a one-lane traffic signal, she crossed over into the left or passing lane at the bridge and crashed into the rear of an automobile driven by one, Robert L. Gunnoe, causing the damage claimed by her to her car.

From the evidence the following facts appear. Claimant had come on I-77 and proceeded southerly in the right lane of the southbound portion of I-77 at a speed of approximately 70 miles an hour toward the bridge over State Route 47. A crew of the respondent was engaged in washing that bridge as well as the bridge just south of and very close to the bridge over Route 47. The bridge at the place of the accident could be seen from a point northerly thereof a distance of approximately 500 feet, although there was a gradual dip in the road as one approached the bridge. Claimant was directed by a warning sign "one lane traffic ahead" eight or nine hundred feet north of the bridge and by warning cones to take the left hand or passing lane over the bridge. She obeyed the warning signs, but immediately after she entered the left hand lane, she drove her car into the back of the Gunnoe car which had been stopped by a flagman who was directing one way traffic because of the respondent's employees washing the roadway of the bridge. There is some conflict in the testimony as to what signs the respondent had posted warning of the one-way traffic. Respondent's witness said three signs, namely, "single lane ahead", "men working" and "flagman ahead" had been placed on the road about 200 feet apart, but that after the accident only the first sign, namely, "one lane ahead" remained standing, the others having been blown or knocked down. Apparently the cone markers guiding traffic into the left lane remained standing, and apparently the one sign and the cones caused claimant to enter the left hand or passing lane. Claimant says that the dip in the road prevented her from seeing the cones in time to avoid striking the stopped car of Gunnoe. She further testified that the Gunnoe car had gone around her before being stopped. Pictures of the road and the bridge were introduced by claimant, and from these pictures it seems clear to the Court that I-77 is a well graded road as you approach the bridge in question, although there is a rather long stretch which reaches a lower level but which could not, in our opinion, be considered a "dip" as constituting a hazard to driving. Claimant asserts that she had to choose between

striking the Gunnoe car or striking respondent's workmen in the right lane. The exercise of that option is not the cause of the accident, the cause being the facts which put claimant in such a position. Claimant traveled the highway in question daily and could not have been deceived by the alleged dip in the road, and she was fully warned of one way traffic by the first sign, which was not substantially contradicted, as being 700 or 800 feet north of the bridge.

Considering all of the facts, we can only conclude that the accident was one which would not have occurred if the claimant had been exercising ordinary care in the operation of her automobile, and that the lack of such care was contributory negligence on her part, if not the proximate cause of collision, and that any alleged negligence on the part of the respondent was not the sole cause of the damages suffered by claimant. Accordingly, this claim is disallowed.

Claim disallowed.

Opinion issued March 15, 1972

IRENE LOMAS

vs.

DEPARTMENT OF HIGHWAYS

(No. D-395)

Sam B. Kyle, Jr., for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Donald L. Hall*, of Department of Highways for the Respondent.

DUCKER, JUDGE:

Claimant, Irene Lomas, owned an approximately ten acre tract of land on Route 50 between Clarksburg and Salem in Harrison County, West Virginia, which was under lease as a furniture store to Elza V. Wilson at a rental of $800 per month, expiring September 30, 1969. The property was a store building 150 x 72 feet with large parking and unloading areas together with a trailer home. Lessor and lessee had orally agreed on renewal of the lease at a rental of $1,000 per

month, but the renewal plan was cancelled when the lessee, Elza V. Wilson, learned of the intention of the Department of Highways to institute condemnation proceedings to acquire the property for road purposes. The respondent paid Wilson an undisclosed amount as assistance in his moving expenses and to his son $125.00 in regard to his trailer but negotiations between the claimant and respondent as to compensation failed, and about May, 1971, respondent obtained a right of entry and took possession of claimant's property.

The Commissioners in the condemnation suit made an award in an amount which is not disclosed in the record here, but which was satisfactory to the condemnee but not satisfactory to the respondent, which award has been appealed by the respondent. Other than the fact that the matter has been so appealed the record does not show what, if any, further proceedings have been had in the condemnation suit. Nor is this Court advised as to what has been or what will be the Court's instructions and decision of the question of the time of the "taking" of the property and other pertinent factors. In this Court the claimant alleges damages in the sum of $14,000.00 which are based upon loss of rental at $1,000.00 per month for the fourteen month period beginning October 1, 1969.

The evidence shows that the lessee, Wilson, upon hearing that the respondent was contemplating taking the Lomas property, inquired of the respondent as to such matter, and was advised by letter from the respondent dated March 17, 1969, that "a field review" was scheduled to be held within the sixty days by the respondent and Federal personnel to finalize plans, and that in the event there are no major changes in location it appeared that appraisals and negotiations for the property should be in progress in the last quarter of 1969. Shortly thereafter respondent advised Wilson that the Federal Bureau of Roads had not approved the plans. As a consequence of receipt of this information, lessee did not renew his lease, had a furniture sale in June, 1969, and moved his business in October, 1969. Claimant testified that she was unable to lease her property thereafter.

The record shows that there were negotiations in June, July and August, 1969, between respondent and claimant for the acquisition of the property and that there were "constant negotiations more or less between the time they started and the filing of the condemnation", but the parties could not agree on the price, and the condemnation suit followed.

Counsel for the parties here have filed excellent briefs in support of their positions, counsel for the claimant contending that a "taking" of claimant's property occurred approximately fourteen months before the order of entry was entered in the condemnation proceeding as there was a "de facto" taking at that time, and the respondent contending that the State was not liable until the order of entry was made because the condemnee had full title and use of the property until the State had the right to enter upon the property. The weight of authority largely supports the position of the respondent as set forth in the annotation in 37 American Law Reports 3d, at page 127, but we will not attempt here to repeat the citations of authorities therein contained, but that annotation shows respectable authority in support of the claimant's position. While the cases cited are in most instances distinguishable, there is much equity in the position that when a condemnee has been damaged, he should be compensated when there has been unreasonable delay in the institution of condemnation proceedings. Most of these cases are those where the property has been the subject of deterioration and the neighborhood rendered undesirable and its property therein less valuable, and because of the knowledge of expected condemnation resulting in such loss the courts have construed such facts as constituting a "de facto" taking and considered the value as of the date of the "de facto" taking. Such a question is, in our opinion, one for judicial determination in condemnation proceedings as to whether incidental damages of loss of rent and the like are to be either eliminated or accounted for in the amount of the award.

As has been hereinbefore indicated, the record here does not disclose the full information as to the condemnation suit pending or concluded as to this property, and consequently this Court does not know the decision made or anticipated in that suit. It could be possible that if there is a final appellate court determination that claimant's claim can be determined at common law, independent of condemnation procedure, to which common law remedy the constitutional immunity would apply, then this court could have jurisdiction. Under the present status of the case, we must first leave the decision to the court in which the condemnation proceeding is pending.

For the reasons stated, we are of the opinion to and do disallow this claim at this time, but inasmuch as this court is not advised as to the status of or of any final decision in regard to the relief sought

in the condemnation proceedings pertaining to this property, this case will remain on the docket of this Court for further consideration if proper, and to avoid the application of the statute of limitations thereto.

Claim disallowed.

Opinion issued March 17, 1972

MURL E. ATKINS, and
THE OTHER CLAIMANTS SHOWN BELOW,

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-228 A-M & D-229 A-N)

Louis R. Tabit and *George L. Vickers,* Counsel for the Claimants.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Claude Vencill,* Attorney at Law, for the Respondent.

PER CURIAM:

In accordance with the decision heretofore made by the Court on February 16, 1972, in the claim of *Firestone Tire & Rubber Company, et al* vs. *Department of Highways,* Claim No. D-227, wherein the Court determined liability of the Respondent for the damages received by the Claimants in the Montgomery Flood, the following awards are made as stipulated by the parties:

D-228 A	Murl E. Atkins	$ 945.57
D-228 B	Sam Caldwell	$ 1,082.95
D-228 D	A. M. Foley	$ 3,530.54
D-228 F	The Trustees, Kanawha Aerie No. 1040, Fraternal Order of Eagles	$ 2,776.09
D-228 G	Kayton Theatre, Inc.	$ 701.81
D-228 J	Anna Cater Murad, Widow and sole devisee of Louis F. Murad, deceased, and Ida Cater, widow	$ 1,296.95

D-228 K	Progressive Investments, Inc.	$ 1,249.04
D-228 L	Freda Tabit, widow and devisee of Andrew Tabit, deceased	$ 1,874.38
D-228 M	Algie Chiles	$ 751.57
D-229 A	Joseph W. Drasnin, trading and doing business as Drasnin's Men's Shop	$ 2,400.00
D-229 B	Mary Ellis	$ 437.00
D-229 C	John Fragale, d/b/a Top Hat Billiards	$ 159.78
D-229 C	Aetna Insurance Company, subrogee of John Fragale, d/b/a Top Hat Billiards	$ 55.11
D-229 C	Fidelity-Phenix Insurance Company, subrogee of John Fragale, d/b/a Top Hat Billiards	$ 27.55
D-229 C	Home Insurance Company, subrogee of John Fragale, d/b/a Top Hat Billiards	$ 55.11
D-229 C	New Hampshire Insurance Company, subrogee of John Fragale, d/b/a Top Hat Billiards	$ 55.11
D-229 C	Phoenix Assurance Company, subrogee of John Fragale, d/b/a Top Hat Billiards	$ 68.88
D-229 C	Phoenix Insurance Company, subrogee of John Fragale, d/b/a Top Hat Billiards	$ 68.88
D-229 D	Eddie Gonano, trading and doing business as Ed's Place	$ 3,032.53
D-229 E	Belva Halsey, d/b/a Belva's Beauty Shop	$ 1,000.00
D-229 F	L. J. Hark, trading and doing business as Drasnin's Tailor Shop	$ 2,280.88
D-229 G	Robert W. Jackson, trading and doing business as Henderson's Drug Store	$ 2,368.27
D-229 H	E. W. Kelly, trading and doing business as E. W. Kelly Store	$ 1,450.00
D-229 J	Mearns, Inc., a corporation, trading and doing business as The Fashion Shop	$11,000.00

D-229 K	Montgomery Hardware Co., Inc.	$ 5,125.01
D-229 L	Montgomery Motors, Inc.	$ 1,055.37
D-229 L	Aetna Insurance Company, subrogee of Montgomery Motors, Inc.	$ 4,723.55
D-229 L	Fidelity-Phenix Insurance Company, subrogee of Montgomery Motors, Inc.	$ 7,834.13
D-229 L	Home Insurance Company, subrogee of Montgomery Motors, Inc.	$11,336.52
D-229 L	Phoenix Insurance Company, subrogee of Montgomery Motors, Inc.	$10,000.00
D-229 M	The Phoenix Insurance Company	$37,536.42
D-229 N	O. E. Palmer, Admin., c t a d b n the estate of A. A. Mitchell, deceased, and Mary Rose	$ 269.00

Claims allowed.

Opinion issued March 17, 1972

MARY LOUISE TUTLIS

vs.

WEST VIRGINIA BOARD OF REGENTS

(No. D-433)

George A. Daugherty, for Claimant.

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

DUCKER, JUDGE:

Claimant, Mary Louise Tutlis, alleges that she is entitled to the sum of $9,801.00 as salary or wages due her according to the Federal Fair Labor Standards Act of 1938 for her services as a nurse in the Health Center of Concord College at Athens, West Virginia, during the school years from September 1968 to January 28, 1971, such sum being the difference between the total of the salary paid and the amount she would have received if the College had complied with the wage provisions of that Act.

The claimant's husband was induced, with the aid of a scholarship and the employment of claimant as a registered nurse in the Health Center of the college, to come to Concord College to play basketball, and the claimant and her husband were rented an apartment of the College adjacent to the Health Center quarters at the low rental of $45.00 per month and a salary to the claimant of $240.00 per month for the first year and $250.00 per month thereafter. Claimant was to be considered "on call" for emergencies and other health services from five o'clock in the evening until eight o'clock in the morning each day when the day nurse came on duty, and on full time duty every other weekend, and on Saturday of such weekends she was required to be in the health office three hours seeing patients and sterilizing equipment.

After the termination of claimant's employment at the College, she received information that she had a claim against the College under the Fair Labor Standards Act, and upon being advised that the Federal Authorities would not prosecute her claim, and upon being further advised by counsel that if she brought suit in other Courts the State could claim constitutional immunity, she brought action here. Since claimant's employment was terminated, the College agreed to comply with the Wage and Hour Act, and claimant apparently feels that such fact is justification for her claim here. What the College does or has done under possible or probable different conditions or circumstances cannot be the basis for prior claim.

There is no conflict in the evidence and we need only to construe and apply the law to the facts. There was never any complaint made by the claimant about her salary or of any dissatisfaction on the part of claimant as to the services she was required to render, and it is apparent that both the College and the claimant were in complete agreement in the matter during the whole period of the employment. The only question is one of possible technical liability under the Wage and Hour Act, not what the parties should in good conscience and sensitive ethics think should be done. While this Court does not like to resort to passing upon morals, it nevertheless cannot refrain from expressing thoughts of unfairness in the conduct of the claimant whose husband was given a scholarship and provided with an apartment at a rent about one-half its worth and the claimant paid a fair salary, and who after all agreements have been fulfilled in good faith and satisfaction, later feels she is justified in enforcing the technical re-

quirements of a statute. The claimant would most probably never have been brought into employment at Concord College, if the possibility of this claim had occurred to the College officials.

While the language of the statute creating this Court provides for the Court to hear and determine cases which in equity and good conscience the State should pay, and likewise not to hear cases which are not of such nature, the intention of the statute is to give this Court jurisdiction in all cases which but for constitutional immunity could be maintained in other courts of the State. This case could, but for the constitutional immunity, be brought in the other courts, and individual and corporate defendants in similar cases required to pay claims of this nature in accordance with the Federal statute. We are therefore constrained to apply such principle in this case, and decide the matter on the basis of such principles. A decision on any other basis would, in our opinion, be not only contrary to the intent of the statute to put claims against the State on the same basis as claims against others, but would defeat its manifest purpose of providing a place of remedy for such claims.

The claimant has based her claim on all the hours involved in her "on call" as well as her full weekend time, and although her duties were practically minimal for emergencies and other services, we are constrained to hold that inasmuch as she was required to be available at all times during her five o'clock evening to eight o'clock morning periods she was restrained in her activities and her salary was based upon such limited services. However, this Court is of the opinion that, if claimant considers justified in claiming all technical benefits of the wage scale of $1.60 per hour, and $2.40 per hour for overtime, then we consider it only fair to now consider the claimant as entitled to such compensation as she would have received as a registered nurse exempt as a professional under the Regulations of the Fair Labor Standards Act receiving at least $125.00 per week. By applying the basis of $125.00 per week, the amount which claimant would have received, according to a calculation made by Kevin O'Sullivan, who was in charge of the health services at the College, would have been $11,382.60 for the period of the claim not barred by the two year statute of limitations. The amount she was actually paid on her salary basis was $5,210.00. The difference between such amounts is $6,172.00.

For the reasons herein stated, we are of the opinion the claimant is entitled to only the amount of the difference as indicated, and we hereby award claimant the amount of such difference, namely, $6,172.00.

Award of $6,172.00.*

* The 1973 Legislature did not include this award in the Claims Bill; therefore, this claim has not been paid.

Opinion issued Apirl 26, 1972

JOSEPH C. JONES AND EMMA LOU JONES

vs.

DEPARTMENT OF HIGHWAYS

(No. D-509)

The claimants appeared in person.

Thomas P. O'Brien, Jr., Assistant Attorney General and *Donald L. Hall* for the respondent.

JONES, JUDGE:

This claim is for damages to the claimant Emma Lou Jones's 1965 Dodge automobile in the amount of $265.54. The facts and circumstances surrounding the claim as alleged by the claimants and supported by evidence are uncontradicted.

At about seven o'clock in the morning of a day in October, 1969, the claimant, Emma Lou Jones, was driving her automobile along the Derricks Creek Road near Sissonville, transporting several children, including a daughter, to meet a school bus, and she was traveling at a moderate rate of speed. As the asphalt road was not wide enough for two cars to pass, an approaching car caused the claimant to drive onto the berm, and in so doing the right rear wheel of her automobile fell into a deep hole. The daughter was thrown against the windshield, breaking it, and the wheel, tire, gas tank and frame also were damaged. The hole was about twelve inches from the edge of the hard surface, fourteen to eighteen inches deep and completely hidden by high grass and weeds growing along and up to the edge of the highway. The claimant's statement that she could not see the hole is sup-

ported by photographs taken later the same day. The incident was reported promptly.

The respondent, having constructed a hard surface road not wide enough for two lanes, knew that the traveling public had to drive off the hard surface in order to pass an approaching car, and, in this case, it should have known that a dangerous condition existed. Obviously, the hole had been there a long time and a full summer's growth of grass and weeds was covering it. The wheel of the claimant's automobile fell into this trap-like hole without any fault on her part, and, finding that the respondent was negligent, the Court is of opinion that the claimant should be compensated in the amount of her claim.

Therefore, the claimant, Emma Lou Jones, is awarded the sum of $265.54.

Award of $265.54.

Opinion issued Apirl 26, 1972

PAULINE M. McCARGO

vs.

WEST VIRGINIA RACING COMMISSION

(No. D-508)

Claimant appeared in person.

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

JONES, JUDGE:

The claimant, Pauline M. McCargo, of Falls Church, Virginia, alleges in her petition that her owner's license was illegally revoked by the respondent, West Virginia Racing Commission, without the due process of law, that the action of the respondent was unfair, biased and discriminatory, that the respondent acted without giving proper notice, and that as a result of respondent's alleged illegal actions and

the publicity resulting therefrom, she has sustained serious physical, economic and personal losses both to her person and property, for which she demands judgment against the respondent in the sum of $12,000,000.00.

The transcript of the evidence in this case covers a period of more than two years and is replete with charges and counter charges between the parties, the claimant being cast in the character of a chronic complainer who could not get along with her several trainers or with track officials, denouncing one and all as crooks and scoundrels trying to take advantage of an "old woman", while the claimant charged the respondent and its agents of conspiring against her and taking drastic action against her without due cause or course of procedure. Rather typical of the claimant's disregard for accurate and measured speech was her statement at the close of the direct examination of Harry L. Buch, Chairman of the West Virginia Racing Commission: "All right, Mr. Buch, you've sat there and told one lie after another - - - -". Entirely apart from the merits of this case or any harassment the claimant believes she was subjected to, the Court accepts Mr. Buch's testimony as truthful, and rejects the uncalled-for attack on his veracity. The respondent's charges against the claimant, each standing alone, are not particularly reprehensible, but the cumulative impact of her accusations and invectives, both public and private, gave the respondent cause for considerable concern and an investigation was undertaken.

After many months of strained relations, this running battle came to a showdown rather unexpectedly. On the evening of July 6, 1970 the claimant asked the Stewards at Charles Town Race Track to scratch her horse, King Howard, from a $1,500.00 claiming race, for the reason that her trainer had entered the horse without her permission. Reluctantly and contrary to usual procedure, the Stewards acceded to the claimant's request and, in effect, said "take your horse home and don't ever run him again in West Virginia" or, according to the claimant, "we're going to revoke your license". Whatever exactly was said, the claimant apparently understood that her license was then and there revoked. However, there is no record of a hearing or revocation of license by the Stewards. The following day the claimant telephoned the Racing Commission and requested a hearing. Her request was granted and she was notified that the Commission would hear her on July 10, 1970. The hearing was held as scheduled and by letter dated July 16, 1970, the claimant was notified by the respon-

dent that her license was revoked for conduct detrimental to the best interests of racing.

If, as contended by the claimant, the owner's license had been revoked by the Stewards, then the procedure would have been improper, as notice of a hearing was not given as required by law and procedural requirements for appeal were not followed. However, the Court finds that there was no hearing or a revocation of license by the Stewards. No notice is required for a revocation of license by the Racing Commission and claimant's only recourse was to appeal the respondent's ruling. Under Code 19-23-17 the claimant had the right to appeal the revocation of her license under the pertinent provisions of Code 29A-5-4. She did not appeal. Instead she chose to petition for reinstatement and on November 13, 1970, her license was restored to good standing by the respondent as of December 31, 1970.

It is apparent from the record that the claimant did suffer losses of substantial sums of money in and about her efforts to develop a winning horse. However, Hanker and King Howard either lacked their owner's burning desire or just couldn't run fast enough. The trials and tribulations of the claimant, as unfolded at the hearing of this case, were very real and unfortunate, and we sympathize, but that is as far as this Court may go. This is not a case in which the Court should invoke the conscience of the State and therefore the claim of Pauline M. McCargo against the West Virginia Racing Commission is disallowed.

Claim disallowed.

Opinion issued May 15, 1972

HARRY N. WALKER, JR.
d/b/a GAULEY ESSO SERVICE CENTER, Claimant

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-276)

Claimant appeared in person.

Donald L. Hall, Esq., and *Thomas P. O'Brien,* Assistant Attorney General, for Respondent.

PETROPLUS, JUDGE:

This is a companion case to the claim of Clyde W. Reinhart vs. Department of Highways, D-444, in which Judge Jones made an award of $3,381.99 to the owner of a service station, who was damaged in an amount exceeding the compensation he received from the State because of the failure of the State Department of Highways to perform its agreement that upon completion of the road construction the service station and approaches would be "as good or better than before". It was stipulated at the hearing of this case that the evidence taken in the Reinhart claim could be considered by the Court.

The Claimant, Harry N. Walker, Jr., doing business as Gauley Esso Service Center, appeared without counsel on his claim for damages in the amount of $20,000.00, apparently relying on the evidence of liability submitted in the former case by Clyde W. Reinhart. However, in the former case, Judge Jones predicated liability of the Respondent on a change of plans which rendered the approaches to the service station too steep for motor vehicles to safely and conveniently enter or leave the station, thereby making it practically unfit for use. Mr. Reinhart was awarded a sum that enabled him to restore his station to practical use after taking into consideration funds received for a taking under threat of condemnation.

In the case now before us the Claimant was operating the station under lease from the Humble Oil & Refining Company, a Delaware corporation, dated August 21, 1968, for a one year term beginning September 2, 1968, and ending September 1, 1969. The lease was to run from year to year unless terminated by either party at the end of the original term or at the end of any subsequent year by giving thirty

(30) days prior written notice. The renewal provision never became effective as the Claimant gave up the station in July, 1969, about two months before the expiration of the original term, because of the adverse conditions created by the road construction, which began on April 9, 1969, and ended October 3, 1969.

Mr. Reinhart had originally rented the station to Humble Oil under a five year lease, and Humble in turn subleased to the Claimant herein, on the terms stated, not only the building but also the pumps, improvements, and equipment connected with the station.

It clearly appears from the evidence that the Claimant's rights as lessee were ignored not only by the landowner Reinhart and the lessee Humble, but also by the Respondent Department of Highways, which apparently felt that only the landowner was entitled to compensation for the damage caused by the road construction.

By June, 1969, the station became inoperable, and the Claimant voluntarily surrendered the premises in July. In our opinion the Claimant sustained damages by being forced to give up a profitable business two months before the expiration of his lease. The photographs submitted as evidence of the condition of the road after excavation and the inaccessible service station on a higher level, taken in May, 1969, are convincing proof that the station was practically useless for the month of June, as well as July and August.

We, therefore, make a finding of liability, but have difficulty ascertaining damages because of the unsatisfactory nature of the proof offered. Claimant's federal income tax return, filed as an exhibit at the request of the Court after the hearing, for the six months operation in 1969, shows a net profit of $1,797.44 or approximately $300.00 per month. We are aware that loss of profits is not an element of damage where property is taken or damaged for a public use, but in this case Claimant had no property. The theory of his claim is based on a willful disregard of his contractual rights as lessee of a business wherein he was making a living, and Respondent's defense that this constitutes *damnum absque injuria* or that his claim, if any, is against his lessor is not a tenable defense.

For the foregoing reasons, an award is made to the Claimant in the amount of $900.00, covering his average loss of income for the three month period.

Claim allowed in amount of $900.00.

Opinion issued June 13, 1972

HAROLD E. BONDY, M.D.

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-438)

Claimant present in person.

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

DUCKER, JUDGE:

Claimant, Harold E. Bondy, M.D., alleges he is entitled to compensation in the amount of $2,000 for medical services rendered by him at the Fairmont Emergency Hospital, by reason of his employment for services by the Acting Administrator of said hospital during a period extending from June 1969 until May 1970 at the rate of $50 for each day's services.

The claimant was employed as a relief physician on a temporary basis for three full weeks and thereafter at such times as were designated for the performance of his services, the total time of services being forty days. Claimant's testimony as to his work is not contradicted or denied. He also stated that he was often the only physician on duty and that he would sometimes see thirty-five patients a day. He was paid $1,000 for the month of June 1969 by State Warrant, and was then retained for the remainder of the year and was never asked to sign, or advised that he needed, a written contract. Although the answer of the respondent alleges the claimant was so advised in January 1970, there is no evidence to support such statement. Nor is there any evidence to the effect that the claimant did not render the services for which he now seeks to be paid. Claimant says he was informed by L. O. Shingleton, the Finance Administrator of the hospital, and Dr. Salezar to submit his claims and that he would be paid "through a reappropriation of funds or something of that nature," but that he never was paid.

The only question in this case is whether the claim, which was not based on a written contract is legal and can be allowed. The State received the benefit of the services rendered, and there is no proof to

the effect that the rate of compensation is not reasonable for the class of services.

We are not unmindful of two cases decided by this Court denying compensation when the employment of the claimant was in contravention of specific statutes, such cases being Mountain State Consultants, Inc. vs. Workmen's Compensation Commission — Claim No. D-100, and Edward C. Freeman vs. West Virginia Department of Natural Resources — Claim No. D-398.

In the Mountain State Consultants, Inc. case, the employment of the claimant was in violation of specific provisions of a Compulsory Retirement Age Act, Chapter 5, Article 14, of the West Virginia Code, which was repealed by Chapter 45, of the 1968 Acts of the Legislature. In that case the claimant attempted to use a corporate cloak to avoid the application of the statute.

In the Edward C. Freeman case, the claimant was an attorney employed by the Department of Natural Resources to do title research in connection with one of its projects, in violation of Chapter 5, Article 3, Section 1 of the Code, which provides that it is unlawful for any state officer, other than the Attorney General, to employ attorneys for their work.

In the two above cited cases, there were specific statutory inhibitions against the employment involved. Here we have been shown no such prohibitions, or at least we are not aware of any, except that expenses of the various agencies must be kept within their budgetary limitations. Respondent has answered only with the defense that the officer acted without authority and without a written contract.

However, much as we dislike approving technically unauthorized obligations or expenses incurred by the various agencies of the State, we cannot ignore the justness of a claim. Here those in charge of the hospital employed the claimant, and he performed the service for which he was employed and the State accepted and received the benefit. We do not feel that claimant could be charged with any knowledge that there was anything not strictly legal in his employment or that he was put upon notice to enquire. As the constitutional immunity is waived to give this Court jurisdiction of cases and this claim would undoubtedly, we think, be one upon which judgment could be rendered in other courts against any one else, we feel judgment should like-

wise be rendered here against the State. Each case must be determined by the facts involved and not upon any specific principle of law.

We, therefore, are of the opinion that the claim is just and should be paid, and, consequently, we award the claimant $2,000.

Award of $2,000.

Opinion issued June 13, 1972

S. J. GROVES & SONS COMPANY, and TURMAN CONSTRUCTION COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-203)

Frank L. Taylor, Jr., Attorney at Law, for Claimants.

Dewey B. Jones, Attorney at Law, and *Wayne King,* Attorney at Law, Department of Highways, for the Respondent.

DUCKER, JUDGE:

Claimants, S. J. Groves & Sons Company, a corporation, and Turman Construction Company, a corporation, were awarded by The West Virginia Department of Highways on January 20, 1964 a contract for the grading, drainage, and paving in the construction of Projects Nos. I-64-1(41)6 Contract 1, and U-322(3) Contract 1, Cabell County, West Virginia, known as a part of Interstate Highway 64. Upon completion of the work the claimants were paid a total sum of $3,889,506.84, but said payment was accepted by the claimants subject to claimants' right to prosecute before this Court their claim for $1,327,721.71 for numerous alleged items which were disallowed by the respondent, and one item asking for a refund of the amount of the assessment of liquidated damages by the respondent against the claimant for delayed fulfillment and completion of the contract.

After the decision of this Court in the case of Tri-State Stone Company v. W. Va. Department of Highways, Claim No. D-219, decided

on February 3, 1972, in which this Court held that the State could not be held responsible for delays occasioned by the failure of public utility companies in the performance of their duties in removing or relocating utility appurtenances involved in the project, the claimants amended their petition herein, reducing their claim to $23,940.00 as the amount unjustly assessed against them as liquidated damages for delay in completing the project and $14,464.45 as the cost of replacing base and shoulder stone which claimants had not agreed to replace, making the total amount of claimants' amended claim $38,-404.45.

The many allegations of the original claim are denied by the respondent in its answer; and we need consider only those hereinbefore specified as contained in the amended petition, and which are covered by a stipulation executed by the respondent and the claimants, and filed in this Court on April 3, 1972, whereby all items of the original claim were to be considered withdrawn except the two items specified in the amended claim, namely, one relating to the work done in replacing stone and the other seeking a cancellation of the assessment of liquidated damages and the refunding of the amount of the deduction of the same from the final estimate. The respondent by said stipulation specifically admits liability for said two items in the total sum of $38,404.45.

Inasmuch as the respondent has admitted the two items of the claim as being just and that the same should be paid, this Court sees no reason to question either the admission or the facts upon which the respondent has acted, and it appearing that the agreement of the parties as so stipulated is a fair one and should be accepted and confirmed, we hereby award the claimants the sum of $38,404.45.

Award of $38,404.45.

Opinion issued June 13, 1972

NORMA LEE LYNN, a/k/a
NORMA LEE MARTIN

vs.

DEPARTMENT OF HIGHWAYS

(No. D-398)

Claimant present and represented by *Donald A. Lambert,* Attorney at Law.

Donald L. Hall of Department of Highways for the Respondent.

DUCKER, JUDGE:

Claimant, Norma Lee Lynn, also known as Norma Lee Martin, alleges damages in the sum of $250,000 by reason of injuries received and medical expenses incurred by her as the result of a collision of the automobile, in which she was riding, with a concrete pillar alongside State Highway 61, known as the South Side Expressway adjacent to the parking lot at the Chesapeake and Ohio Railway Station in Charleston, West Virginia, at about 12:30 a.m. on May 17th, 1969.

The evidence shows the respondent was at the time of the accident engaged in construction and converting the South Side Expressway from a two lane highway into a four lane road, making two lanes for traffic each way, and that the claimant was a passenger in a 1961 Chrysler automobile driven by Robert Eugene Martin, and on the evening of May 16th, Martin after having been at work for approximately fifteen hours drove to their jointly occupied home in Kanawha City (East Charleston), reached his home about eleven o'clock that night, and then with claimant drove through the South Side Expressway and on to a drive-in on the Sissonville Road (Route 21) to get something to eat, and thereafter they returned to the Expressway after passing through the intersection of the same with Thayer Street. They proceeded eastward on the Expressway to about the west end of the C & O parking lot, and while passing or about to pass a tractor-trailer truck traveling in a westerly direction the automobile collided with a concrete pillar adjacent to the curb of the eastbound traffic lane, heavily damaging the automobile which burst into flames and seriously injuring the claimant.

The claimant bases her claim, in substance, upon the allegation that the Department of Highways was negligent in not requiring the Appalachian Electric Power and the Contractor, the Mountain State Construction Company, to remove or adequately safeguard with lights or warning devices the concrete pillars abutting the highway from which pillars the electric lights therein had been removed, that the traveled portion of the highway filled with holes and out of repair created a dangerous hazard to the driving public, and that proper warning devices were not maintained to protect the public, all amounting to such negligence of the Department of Highways in all such aspects of the case as to be the cause of the accident.

The respondent filed a motion to dismiss the claim on the ground that the contractor had agreed to hold the respondent harmless from all claims relating to the road construction work, but this Court denied the motion on the basis that the State could not by any agreement avoid the consequences of a non-delegable duty.

The claimant entered into a settlement in a suit in the Common Pleas Court of Kanawha County on this claim as to the liability of the Mountain State Construction Company, the Chesapeake and Ohio Railway Company and the Appalachian Power for the total sum of $27,000, but left pending in said Court her claim against the City of Charleston. The settlement was only by way of compromise and did not admit liability on the part of any of the parties, expressly denying the same. These cases do not affect the question of liability of the respondent, except that the amount of the settlement would be a credit upon any award made in this case.

In considering the question of liability on the part of the respondent in this case, we will review the facts as to the several aspects of the claimant's basis of her claim.

It is undisputed in the evidence that the car was being driven between forty and fifty miles an hour, sometimes stated as being between forty-five and fifty. Martin, the driver of the car, said he did not see any speed or danger signs on the highway. The evidence of the respondent is positive and unequivocal that there were not only 25 mile an hour signs but also signs showing construction ahead, 2000, 1500 and 1000 feet respectively. The witness, Martin, also testified he drove through this section of the highway three or four times a week and knew of the construction work being done at the

place of the accident. He said he never saw the barrels which divided the area for the construction of an additional two lanes for westbound traffic. While it is not probable, it is possible that the age of the car and the reputation of Martin in his driving may have been factors worth consideration in the matter, namely, that the car had been purchased for $150, and had been driven seventy to seventy-five thousand miles, and the driver had had several experiences in other accidents involving reckless driving and "hit and run" charges.

The claimant bases her case primarily upon her allegation that there was a steel grated catch-basin or drain along the paved part of the road into which the right front wheel of the automobile in which claimant was riding dropped down sufficiently to throw the automobile against the curb of the C & O parking lot property and then against a concrete pillar adjacent to the curb. This catch-basin was described as being a 15 inch drain according to the plans and specifications, and otherwise as four or five inches deep by one witness and by another as 3-1/2 inches deep at one end and 5-1/2 inches at the other. The picture exhibit of the catch-basin shows that the road paving at both ends of the catch-basin was somewhat slanted and not perpendicular, thus lessening the impact of a wheel passing over the catch-basin. The catch-basin drop in road could hardly be considered as sufficient to cause the right front wheel of the car to change its course in the road. Depressions in the road such as we have here are encountered in driving and usually without noticeable incident.

The concrete pillar, which was removed after the accident, was described as being 18 to 20 inches square and 3-1/2 feet high, and 2-3/8 to 2-3/4 inches from the edge of the travel portion of the highway. These measurements were made from holes left after the pillar was removed, and are subject to serious question, as the road adjacent thereto was an open traveled highway. No satisfactory evidence of the alleged obstruction was offered. It is inherent in the fact that this was an open, much traveled highway, that the pillars at that location were not in the absence of better proof dangerous obstructions. Claimant's picture Exhibits 7A and 7B show an additional approximately one foot of hard-surfaced strip of roadway between the usually traveled part of the roadway and the curb at the location of the catch-basin. The width of the road was 10 feet on each side of the center lane, whether that included the additional foot is not clear. The catch-basin was described as being 75 to 80 feet, the exact dis-

tance according to the plans being 84 feet, westerly of the concrete pillar. All of this was approximately 300 yards east or above the Thayer Street intersection.

A quite relevant fact is that immediately prior to the accident and almost simultaneously therewith, Martin saw a tractor-trailer truck traveling in the westbound lane, which he described as having the tire of its front left wheel in and on the center line of the highway at about the time of the passing of his car and the tractor-trailer. How much the main part of the tractor-trailer extended over the wheels is not shown. The width of Martin's car was estimated at seven feet. Martin said he did not swerve away from the truck but his evidence in this particular is not very satisfactory because the pictures of his car show great impact on the front right-hand side on his car, indicating that there must have been considerable turning to the right. If he had stayed in the roadway adjacent to the curb, there would have been, and probably only, a scraping of the side of his car. Martin further testified that when he approached the truck and saw the truck's left front wheel on the center line of the road, he said that between the tractor-trailer and the curb line "I didn't have hardly any room". There is no evidence in regard to who drove the tractor-trailer truck, who owned it or where it went from the scene of the accident, and consequently whether the driver knew there had been an accident.

It seems claimant bases her case on the assumption that the condition of the catch-basin was such as to throw the car against the curb and the pillar 84 feet away. The testimony of Martin who simply said "All of a sudden I hit a hole in the road or something. I don't know exactly what it was. It threw me into the curb. I had a sudden twist, real fast" and that he didn't know he had hit a drain. Upon his later return to the scene of the accident about a week later he concluded it was the catch-basin that he hit and that it caused him to swerve over to the curb, not over the curb. A real point is how the car struck the pillar. As there was no other witness to the accident except claimant, who remembers nothing, the evidence of Martin in this respect is more an assumption than a fact, especially so when considered with the evidence as to proximity of the tractor-trailer passing him at that time.

Considering further the matter of the catch-basin, it appears not to be such a defect as would cause a car traveling thereover to swerve off the road to the curb of the road and strike an obstruction eighty-

four feet ahead on the side of the road and off the paved section of the highway. Had it done so, it would have had to jump the curb to do the apparent damage to the car, and there most likely would have been, we think, a more direct front collision instead of a front right-side collision. As has been indicated, if the car was not thrown out of the traveled roadway, a collision would most probably have been a shearing off and scraping by the pillar of the right side of the car. Whatever the fact was, the speed limit was, we think, definitely proved to be twenty-five miles an hour in the construction area, and Martin ignored the limitation and drove approximately twice that speed. He was well acquainted with the road. It does not seem reasonable to believe that the catch-basin could have caused any damage to a car passing over it at twenty-five miles per hour, especially when the only obstacle allegedly in the path was the concrete pillar 84 feet away.

The pictures, admitted as exhibits, show, and the testimony of Police Officer Carl Bender confirms the fact that the automobile struck the concrete pillar on the "front part of the automobile toward the right side," and at an angle of "between 35 to 45 degrees using the curb as a base". With the car striking the pillar eighty-four feet away from the catch-basin it does not seem reasonable to conclude that the catch-basin had caused the car to follow the curb for that distance. However, such an angle would be consistent with a swerve of the car to the right when passing the tractor-trailer. A picture of the car showed that the tire on the right front wheel had not been deflated by striking either the catch-basin or the pillar.

The claimant has incurred medical and hospital expenses in a sum of over $13,000, but since we are concluding to disallow the claim, there is no need for our consideration of such matter.

There are many details which have not been mentioned in this opinion as we consider these not pertinent enough or relevant to the real question of liability, which we must determine in this case.

The claimant has suffered irreparable damages in her suffering and bodily injuries and we are cognizant of the terrible tragedy in this case, and we naturally regret that according to law we cannot obey the inherent human impulse to make a substantial award. Our decision is required to be on a sound legal basis and an award here must depend upon the question of liability, just the same when the State is defendant as when an individual is.

From the evidence in this case, we are not convinced that either the catch-basin or the concrete pillar were such objects as created hazards dangerous to the public traveling through this section of the highway, which area was shown as limited to a speed of twenty-five miles an hour by many warning signs, and in this case by the personal knowledge of driver. Nor are we convinced that the collision of the car with the concrete pillar was the result of the condition of the catch-basin or the proximity of the pillar to the traveled portion of the highway, but we conclude that claimant's damages have been occasioned by either the negligence of the driver of the car or by someone or something other than alleged in her petition. We do not think there was actionable negligence on the part of respondent. We are, therefore, of the opinion to, and do hereby wholly disallow the claim and make no award herein.

Claim disallowed.

Opinion issued July 10, 1972

WILLIAM O. HOGUE

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-323)

J. Fred Queen for the claimant.

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

JONES, JUDGE:

The important facts in this case are not in dispute. During the evening of March 1, 1970, nine boys escaped from the Industrial School for Boys at Pruntytown, in Taylor County. Three of the boys stole an automobile, owned by a Pruntytown resident, and drove it to Elkins. As the claimant, William O. Hogue, drove his automobile into one of the city's street intersections, the driver-escapee turned the stolen car into the claimant's lane of traffic and caused a collision. The es-

capees were apprehended, and the driver later was convicted and sentenced to the State Penitentiary for the theft of the automobile. The claimant's 1965 Mustang automobile was a total loss and the claimant sustained personal injuries, loss of earnings and damage to a television set, for all which he claims damages in the amount of $7,003.30.

On the night of the escape approximately 40 boys were housed in the Administration Building, in one of the five dormitories located in separate buildings on the School grounds. The boys were locked in under the supervision of a "commander" or "cottage supervisor", and they were showering and preparing for bed. Routinely they went to the clothes-room to obtain clothing for the following morning, which they were required to take to their sleeping quarters on the floor above. The interior of the clothes-room was out of sight of the "commander" and he heard nothing over the usual noise created by the large number of boys to call his attention to any irregular happening. However, word came to him from other inmates that the nine boys had raised the window in the clothes-room and had loosened and pushed out the heavy wire grating or screen securing the window and had dropped to the ground and escaped. Probably within ten minutes the "commander" went to a telephone in another building and called and notified the Assistant Superintendent, who in turn promptly notified the several law enforcement authorities in the area. A search in the vicinity of Pruntytown was carried on through the night by employees of the School.

An analysis of the nature and purposes of the Industrial School for Boys must be made and considered in order to arrive at a reasonable judgment based upon the facts presented in this case. 28-1-1 of the Code of West Virginia, in effect prior to the amendment of 1971 and at the time this claim arose, provides that the West Virginia Industrial School for Boys shall be exclusively charged with the care, training and reformation of male youths of the State committed to its custody. 28-1-5 of said Code provides that the State Commissioner of Public Institutions shall have authority to make such rules and regulations for the management and government of the West Virginia Industrial School for Boys, and the instruction, discipline, training, employment and disposition of the boys of the School as the Commissioner may deem proper. By orders of Courts of record of the State, the offending boys, ages 10 to 18, are committed to the School until they attain the age of 21 years, for purposes of restraint, discip-

line, education and, hopefully, rehabilitation. They are all delinquents, have violated the law and many of them are incorrigible and of low mentality. However, the School is not a prison, there are no walls, security fences, bars, cells or armed guards. The School purports and tries to be a correctional institution. The average population is about 200, with such a turnover that more than 400 different boys are in custody during the period of a year. Of these, an average of 30 to 35 escape each year. The escapee who drove the stolen car into the claimant's vehicle had escaped twice before and there still were no selective security measures nor any different treatment applied to him after his escapes. Eventually, the maximum security of the State Penitentiary for this 16 or 17 year old boy seems to have been the only solution our society, as presently constituted, could provide.

While it appears from the evidence that it may be relatively easy for a boy to leave the School grounds at many times, it is true that more strict security measures are in force at night. These boys were supposed to be "locked in" their quarters, and having locked the door, the question arises as to whether the "commander" or "supervisor" was negligent in having failed to properly secure the window or detect their efforts to escape. We do not believe so. The heavy iron screens or gratings were over the windows of all the buildings on the School grounds, and while they were not iron bars, they were considered to be effective and sufficient for an institution of this type. There was no evidence that the grating was defective or previously had been tampered with. The witnesses who described the window screen or grating all agreed that it would have been difficult to dislodge and none knew how it had been accomplished. We do not know how the grating or screen was torn loose or how long it took the boys to do it, so we cannot fully know how much opportunity the "commander" or "supervisor" had to detect the escape, but as he testified, "a fellow can't be three places doing four things at the same time". With 40 boys in his charge, it is not hard to believe that the "commander" did not hear the loosening of the window cover.

Considering all of the facts in this case, including the nature, purposes and prescribed procedures of the institution involved, and the law applicable thereto, the Court is of opinion that the claimant has not established negligence on the part of the respondent's employee. While the claimant's damages are real, substantial and unfortunate, without proof of negligence as the proximate cause of the claimant's

loss, this Court may not invoke the conscience and resources of the State to redress another's wrong.

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

Claim disallowed.

Opinion issued July 10, 1972

WILLIAM B. and HELEN K. McCLURE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-518)

Claimants present in person.

Thomas P. O'Brien, Assistant Attorney General, *Donald L. Hall,* of Department of Highways, for the Respondent.

DUCKER, JUDGE:

Claimants, William B. McClure and Helen K. McClure, husband and wife respectively, allege damages in the sum of $137.55 for repairs to their 1962 Chevrolet automobile, the windshield on which was broken when a large "clearance" sign fell from an underpass of the Chesapeake and Ohio Railroad trestle located east of Logan, West Virginia, at or near Rome Junction.

The testimony is to the effect that the claimants were proceeding towards Dehue and after turning off of the main highway at Rome Junction proceeded to pass through the underpass, immediately after or about the time a coal train had passed or was passing over the railroad trestle. The state highway sign, which indicated the height of the clearance of the underpass, fell upon their car breaking the windshield necessitating replacement thereof at a cost of $137.55. The respondent admits that it had the responsibility of the maintenance of the sign over the highway. That the sign was either not properly installed or was not properly maintained is evident from the fact that it fell and caused the damage in question, without any contributing

fault on the part of the claimants. The liability of the respondent is beyond question.

Consequently, we are of the opinion to, and do hereby award the claimants the sum of $137.55.

Award of $137.55.

Opinion issued July 10, 1972

MONONGAHELA POWER COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-477)

No appearance for the Claimant.

Thomas P. O'Brien, Assistant Attorney General, *Donald L. Hall,* Department of Highways, for the Respondent.

DUCKER, JUDGE:

Monongahela Power Comany claims damages in the sum of $198.45 as the result of its power lines adjacent to County Road No. 66/7 in Hancock County, West Virginia, being broken by the acts of agents of respondent. The facts are not in dispute, being admitted by the respondent.

On March 23, 1970, a grader owned by the respondent and operated by its employee, Paul Minnies, slid off the County Road and lodged solidly between its right rear wheel and motor frame against a 12' locust tree. Respondent's foreman, Elmer Shepherd, and crew, in attempting to return the grader to the road, found it necessary to remove the tree by chainsaw. Upon falling, the tree's top branches hit claimant's power line, breaking one line and forcing the other to the ground.

Claimant and respondent have stipulated that the damages amounted to $148.84.

As the damages were caused by the negligence of the employees of the claimant, the respondent is liable for the consequences, and consequently this Court is of the opinion to, and does hereby award the claimant the sum of $148.84.

Award of $148.84.

Opinion issued July 10, 1972

MRS. JAMES E. SHERED, SR., and JAMES E. SHERED, JR., Claimants,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-511)

Thomas C. Sheppard, Jr., Esq., for the Claimants.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Donald L. Hall, Esq.*, for the Respondent.

PETROPLUS, JUDGE:

This claim, in the amount of $1,000.00, was filed on October 5, 1971, for damages to the contents of a shoe store resulting from a flood which occurred on October 11, 1967, in Montgomery, West Virginia.

The Respondent filed a motion to dismiss the action because it was not filed within the two year period of limitations as required by the Official West Virginia Code, 1931, as amended, Chapter 55, Article 2, Section 12, and Chapter 14, Article 2, Section 21.

This Court is bound by express statutory law to apply the statute of limitations in all cases where the statute would be applicable if the claim were against a private person, firm or corporation. Code 14-2-21. It is also provided that the period of limitation may not be waived or extended.

Evidence adduced at the hearing is not sufficient to suspend the statute from running because of fraud or the affirmative act of a

wrongdoer intended to conceal the wrong. At the most the evidence disclosed no reason for not instituting legal action other than ignorance of the law, and illness of the claimant. The Respondent at no time obstructed the claimants in their right to file a claim in the Court of Claims. The routine investigation of the merits of a claim by a representative of the Department of Highways in this case was not tantamount to filing a claim as required by law.

The Motion to Dismiss on jurisdictional grounds is sustained.

Claim disallowed.

Opinion issued July 10, 1972

BLISS R. WOTRING, Claimant

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-495)

Claimant appeared in person.

Thomas P. O'Brien, Assistant Attorney General, *Donald L. Hall, Esq.,* for the Respondent.

PETROPLUS, JUDGE:

Claimant filed a claim for $900.00 alleging damages to a private driveway, formerly old State Route 7, a cornfield and crops on his property due to water overflows after a heavy rain on June 14, 1971, which could not be adequately carried away by the drainage ditches and culverts maintained by the respondent on a reconstructed State Route 7 near Kingwood in Preston County, West Virginia.

The respondent answered saying claimant's claim, if any, resulted from the natural flow of surface water, a common enemy, and that the drainage resulted from an Act of God and was *damnum absque injuria.*

The evidence at the hearing disclosed by photographs that claimant's property and dwelling house is rather precariously situated ad-

jacent to and below the level of a hillside road known as the new State Route 7, which replaced the old State Route 7, now abandoned and used as a private driveway providing access to the dwelling house. The property as situated receives the natural flow of surface water from the new road and hill on the side of the road opposite to claimant's property: culverts had been installed by the State approximately 200 feet and 500 feet from the private driveway, and at the time of the flooding of claimant's property were either broken or stopped up with debris. In either event they were not functioning in such a manner as to carry off the rain water adequately so as to prevent flooding of claimant's property.

One of the culverts in question was damaged by an automobile about nine months before the flooding and the State upon notice of the accident made some effort to repair the damaged culvert. The rainfall causing the flooding appeared to be a three inch fall in a four hour period, a rather heavy rain which threw a great volume of water on to claimant's property below the road, washing the gravel away from his private road and the soil from his cornfield in gullies one to two feet deep.

Before we can hold the State responsible for the damage caused by the flooding of claimant's property, we must conclude that respondent in some manner neglected to exercise reasonable care to protect the property from foreseeable rainfalls. Adequate drainage of surface water collected and diverted by road construction must be provided, and culverts to carry away this drainage should be maintained in a reasonable state of repair by the State.

We conclude that the unusual flooding of claimant's property is attributable to either some inadequacy in placing the side ditches and drains constructed with the new road or failure to keep open and maintain the drains so as to forestall the flooding of private property below road level by heavy rainfalls.

Although no expert testimony was offered in this case to establish cause and effect, the uncontradicted evidence of the claimant that a drainage problem existed and that the State had been notified to take remedial measures is persuasive in our finding that claimant's property was damaged by the negligent failure of the respondent to provide proper and adequate drainage of surface water collected and diverted by the new road. We further conclude that the rainfall in question,

though heavy, was foreseeable and was not of such volume as to come within the defense of Act of God.

The amount of damage was not controverted by the respondent; and we fix his damages in the amount of $750.00, the lower of the estimates for resurfacing the private road. An award is accordingly made.

Claim allowed in the amount of $750.00.

Opinion issued July 11, 1972

FRANK PROZZILLO, Claimant,

vs.

DEPARTMENT OF PUBLIC SAFETY, Respondent.

(No. D-521)

Claimant appeared by his son, *Raymond Prozzillo.*

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

PETROPLUS, JUDGE:

Claimant is seeking the sum of $209.11 as damages resulting from the use of his home by members of the Department of Public Safety, claiming that his property on U. S. Route No. 19 near Fairmont, West Virginia, which was rented and occupied by the Respondent as a State Police Barracks and Headquarters, was damaged by unreasonable and improper use of the property. The tenancy of the State Police terminated in April of 1970, and the Claimant, upon inspection of the property, found several broken windows and damage to the floors caused by the storage of confiscated slot machines which had been dragged across the floors. Rugs had been nailed to the floor with large nails and damages were alleged extending beyond those that may be caused by normal wear and tear. The Claimants submitted vouchers supporting the cost of repairs.

The Respondent denied liability and demanded strict proof of the claim for damages.

At the hearing it developed that the property was leased by the State of West Virginia on June 3, 1966, for the term of twelve months with options to renew the lease for three additional one-year periods, at a rental of $145.00 per month. The lessor assumed the obligation of keeping the premises in repair, both interior and exterior, by express provision in the lease. Paragraph (8) of the lease also provides that there shall be no liability on the part of the State of West Virginia, its officers, agents or employees, for any loss or damage to the leased premises, whether caused by overloading the floors with equipment or otherwise installing fixtures and equipment commonly used in business offices.

The issue before the Court is whether the lessor has contracted in his lease not to hold the State responsible for damages to his property by the use or misuse thereof by members of the State Police.

After considering the evidence in this case it is the opinion of the Court that the lease does not contemplate releasing the State from liability resulting from negligent or willful damage to the leased premises while occupied by the State Police. The provision that absolves the State from liability is limited to loss or damage caused by overloading the floors with equipment or otherwise installing fixtures and equipment commonly used in business offices. Even a broad construction of the release of liability would not cover those damages resulting from willful acts or conduct in disregard of the property rights of the lessor. It appears from the evidence that there were six broken windows, holes in the floors, broken steps and floor damage caused by dragging slot machines over the floors. We consider these acts to be a willful disregard of the property owner's rights.

For the foregoing reasons, the Court is of the opinion to make an award to the Claimant in the amount of $155.61 and accordingly recommends. Said award excludes the broken windows item because of failure to prove that the windows were broken by the Respondent's agents or employees.

Claim allowed in the amount of $155.61.

Opinion issued July 11, 1972

THOMAS C. SHEPPARD, SR. and
NELLIE LUCILLE SHEPPARD

vs.

DEPARTMENT OF HIGHWAYS

(No. D-232)

Thomas C. Sheppard, Jr. for the claimants.

Claude H. Vencill and *John Krivonyak* for the respondent.

JONES, JUDGE:

This is one of several claims for damages to personal property caused by flood waters from an abandoned coal mine which were released during construction work on West Virginia Highway No. 61 in or near Montgomery in Fayette County. The cases were consolidated for hearing and on February 16, 1972, this Court issued its opinion overruling the respondent's motion for dismissal and holding the respondent liable as a matter of law.

At the time of the flood on October 11, 1967, the claimants, Thomas C. Sheppard, Sr. and Nellie Lucille Sheppard, owned their residence property at 409 Fifth Avenue in the City of Montgomery. The house has a full basement which was partly used as a family room and also for utilities, furnace and storage. The furnace was damaged and all of the more than 200 items on the list of damaged articles were destroyed for all practical purposes and were disposed of as rubbish.

An inquiry of damages sustained by the claimants was heard by the Court on May 16 and 17, 1972. The total damages claimed in the petition was reduced by counsel for the petitioners at that time from $5,512.62 to $5,121.00. A review of the evidence shows that the respondent did not object to the allowance of certain damages complained of, including the cost of labor and parts for repairing the furnace in the amount of $1,052.56; cleaning materials, washing and dry-cleaning in the amount of $41.78; the sum of $14.00 paid for labor in cleaning the basement; and certain items of personal property

shown to have been destroyed of the value of $429.29; a total of $1,532.63.

Of the balance of the claim, $564.00 is for labor performed by the claimants and their son and daughter-in-law in the cleaning-up operation. Obviously, much of this labor was performed in laying the foundation for and preparing this claim, and the amount of said labor attributable to the claimants' loss and the value thereof is so uncertain as to be undeterminable and is therefore, disallowed.

The other items of the claim totaling $3,024.37 are supported by varying degrees of proof. The proof of damage to personal property required by the laws of our State is stated in *Spencer v. Steinbrecher,* 152 W.Va. 490, 164 S.E. 2d 710 as follows:

> Syllabus 1: "The general rule with regard to proof of damages is that such proof cannot be sustained by mere speculation or conjecture."
>
> Syllabus 2: "In proving compensitory damages, the standard or measure by which the amount may be ascertained must be fixed with reasonable certainty, otherwise a verdict is not supported and must be set aside."

We have considered these remaining items, each on its own merit, as best we could, and in our opinion some meet the test, some do not and many are in the in-between stage where some damage is proved but not the amount claimed. Applying the "reasonable certainty" rule to each of these items, we have endeavored to be fair to both the claimants and the State and have arrived at a valuation in the aggregate amount of $911.40.

Totaling the allowances hereinabove stated, it appears that the claimants are entitled to damages in the amount of $2,444.03, and that equity and good conscience call for a recovery in that amount. Accordingly, an award is hereby made to the claimants, Thomas C. Sheppard, Sr. and Nellie Lucille Sheppard, in the amount of $2,444.03.

Award of $2,444.03.

Opinion issued August 1, 1972

A. D. STRADER AND EULAH M. STRADER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-350)

George H. Seibert, Jr. for the claimants.

Donald L. Hall for the respondent.

JONES, JUDGE:

The claimants in this case, A. D. Strader and Eulah M. Strader, contend that the respondent, Department of Highways, acted negligently during the construction of Interstate 70 in the spring and summer of 1970, by collecting water from the right of way and casting it upon property owned by them in Elm Grove, Ohio County, West Virginia, and thereby damaging the claimants' driveway.

It appears from the testimony in this case that the drainage of surface water in the vicinity of the claimants' and their neighbors' property had never been a problem, but in the course of construction of the highway, houses, trees, grass and other vegetation were removed from the right of way above these properties, greatly increasing the runoff. As a temporary measure, the respondent constructed a ditch to carry water from a culvert to a drop inlet above the claimant's property. During heavy rains the ditch and drop inlet overflowed and large quantities of water were diverted to and upon the claimants' driveway. In April, 1970, the claimants' tenant telephoned them in Florida advising that the driveway was covered with water and that portions of the driveway had been washed away. The claimants hurried home, inspected the damage, reported their loss to the respondent, and employed the Tri-State Asphalt Corporation to make an examination and estimate of the damage. Shortly thereafter, as the highway construction neared completion, the permanent drainage of the right of way, along with reseeding and replanting the graded surfaces, effectively eliminated the surface water problem. Temporary repairs, filling the deepest holes, were made by the claimants at a cost of $108.68.

The claimants produced an expert witness who testified that damage to the driveway was the result of water getting under it, causing it to "hoove up", that the claimants' property had depreciated in value by the amount it would cost to repair the damage, and that the sum of $896.00 was a fair and reasonable estimate of the cost of necessary repairs as of July 1, 1970. The same expert witness again examined the property on June 9, 1972 and testified that damages to the driveway had risen to $1,475.00 to $1,500.00.

During the opening statement of counsel for the claimants at the hearing of this case, the Court permitted the amendment of the amount of the claim upward to $1,500.00. It now appears from the evidence that the additional damages claimed are the result of normal deterioration and the failure of the claimants to mitigate damages by making timely repairs.

There also was a motion by counsel for the respondent to dismiss this claim as not having been filed within the two-year period of limitation provided by the pertinent State statute, but it clearly appears from the evidence that the claim was filed prior to the running of the statute and said motion is overruled.

The originally claimed amount of damages in the sum of $896.00 was not effectively contradicted by the respondent and the Court being of opinion that the claimants have proved their right to recover in this case, an award is hereby made to the claimants, A. D. Strader and Eulah M. Strader, in the amount of $896.00.

Award of $896.00.

Opinion issued August 30, 1972

C. VERNON HALL and LOUISE HALL, Claimants,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-278)

Claimants appeared in person without counsel.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Claude H. Vencill, Esq.*, for the Respondent.

PETROPLUS, JUDGE:

This claim was filed for damages in the amount of $564.48 to claimants' property occurring as the result of a storm on April 18, 1969, which caused water to be diverted to claimants' property by a clogged up culvert, which the respondent had been requested from time to time to repair but had failed to take any action thereon. Respondent denied having notice of this condition, and took the position that the damages, if any, resulted from a cloud-burst in the upper Middle Grave Creek watershed, which was an Act of God for which it should not be responsible.

At the hearing, claimants testified and a deposition of a neighbor witness, Olive Williams, was submitted and filed.

It appears from the evidence and the deposition that prior to the time of flooding a very heavy rainfall occurred, which was described as a cloud-burst. Middle Grave Creek overflowed its banks, and, in addition to the road, many of the neighboring properties were also flooded. The water which entered the claimants' home reached a level of approximately twelve inches, damaging rugs, furnishings and other personal property in the home. The clogged culvert, which is blamed for this condition, was approximately three-tenths of a mile from the home in question.

Although we may assume that the State Road Commission office had been notified of the clogged condition of the culvert and failed to make the necessary repairs thereto, which conduct would constitute negligence in maintaining proper drainage and a lack of proper re-

gard for the rights of adjacent property owners, it must be proved that such negligence was the proximate cause of the injury suffered by the person to whom the State owed a duty. The essential elements of actionable negligence are a duty, a breach and an injury which is the proximate result of the breach of duty. The injury must follow as the direct and natural sequence of events, unbroken by other intervening efficient causes.

It is most difficult for this Court to believe that a diversion of surface water caused by a culvert approximately three-tenths of a mile away from the claimants' home resulted in the damages claimed, especially at a time when a neighboring creek was overflowing its bank and flooding properties in the area of the claimants' property. The evidence was quite confusing as to whether the water came from the creek or down the road because of the defective culvert. The deposition of the impartial witness, Olive Williams, effectively disclosed the severity of the rainstorm and flooding of other properties as the result of the creek overflowing its banks. In the opinion of this Court, the claimants have not satisfactorily proved that the clogged culvert was the cause of their injury.

For the foregoing reasons, the claim is disallowed.

Claim disallowed.

Opinion issued August 30, 1972

JOHN C. MOORE and MARGARET MOORE, Claimants,

vs.

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

(No. D-522)

Leonard Z. Alpert, Esq., and *Edward Zagula, Esq.*, for Claimants.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Donald L. Hall, Esq.*, for the Respondent.

PETROPLUS, JUDGE:

John C. Moore and Margaret Moore, his wife, claimants herein, have stated in their petition that on September 5, 1969, they conveyed certain real estate to the respondent for a consideration of $28,000.00. The deed contained a "permanent drainage construction easement" which gave the respondent the right to place a large drain on residual real estate reserved to the claimants which adjoined the parcel conveyed to the State. The State proceeded to install the drain which has discharged water onto the claimants' property in such quantities that the residual parcel of real estate is alleged to be destroyed for any use whatsoever. Photographs of the damaged property were introduced to illustrate the permanent damage done to the property, and, according to the evidence adduced at the hearing, claimants are now unable to sell said property at any price for any use. Claimants further alleged and proved that the deed to the State was prepared by an attorney for the respondent, and that the drainage easement was never explained to them, and that they never intended to convey an easement which would depreciate and destroy their property.

The petition further alleges that the easement is tantamount to a taking of their real estate for public use. Claimants were not represented by counsel, and it was alleged that counsel for the respondent, who prepared the deed, omitted to explain to them the consequences of a drainage easement. In effect, claimants state that their property has been taken for public use without compensation. Damages are claimed in the amount of $20,000.00.

The State's position is that the drainage easement was a part and parcel of the negotiations for the sale of the property to the State, and that the State upon making payment to the claimants was released from any and all claims for damages or compensation resulting from the road construction to property owned and retained by the claimants. The State also raises a question concerning the application of the two year statute of limitations.

The claimant, John C. Moore, is a councilman of the town of Weirton and has had considerable experience in the real estate and insurance business, and presumably knew what a permanent drainage construction easement involved.

Our consideration of this claim must first be jurisdictional. Chapter 14, Article 2, Section 14 of the official Code of West Virginia, 1931, as amended, reads as follows:

> "The jurisdiction of the Court shall not extend to any claim: . . . . .5. With respect to which a proceeding may be maintained against the State, by or on behalf of the claimant in the Courts of the State."

If the claimants have an adequate remedy at law for the ascertainment of their damages, if any, by institution of eminent domain proceedings, it would appear that the Court of Claims, as constituted by the Legislature, has not been conferred with jurisdiction to entertain this case. Unjust enrichment of the State is not an issue in this case. The issue is whether the claimants' property has been taken for public use without compensation. Even if we assume that the claimants were misled by counsel for the State Road Commission or that a fraud was perpetrated upon the claimants by misrepresentation of the contents of the deed, which clearly sets forth by metes and bounds description the location of the permanent drainage easement and a release of all damages to the residue of land retained or adjoining the land sold by the claimants, a serious question is presented as to whether damages can be awarded by this Court as compensation for the taking of real estate. The Supreme Court of Appeals of the State of West Virginia seems to have settled this issue in the case of *Lynch v. State Road Commission of West Virginia, et al.,* 151 W.Va. 858, decided in 1967, wherein it was held as follows:

> "If a highway construction or improvement results in probable damage to private property without an actual taking

> thereof and the owners in good faith claim damages, the State Road Commissioner has the statutory duty to institute proceedings within a reasonable time after completion of the work to ascertain damages, if any, and, if he fails to do so, after reasonable time, mandamus will lie to require the institution of such proceedings."

A writ of mandamus was awarded to compel the State Road Commissioner to institute against the petitioner eminent domain proceedings for the purpose of ascertaining damages caused to petitioner's property by reason of the construction of a certain State road. The damages claimed were of a permanent nature, being the removal of vegetation, diversion of streams and drains from their natural course, and erosion of land by rain and surface waters because of failure to provide adequate drainage facilities to carry off the increased runoff of surface waters caused by the construction of the highway. The petitioner's property in that case was subjected to flooding from time to time prior to the construction of the highway. The Court held that the petitioner had a clear legal right to mandamus the State Road Commissioner to institute eminent domain proceedings. Where the questions raised could be considered and adjudicated upon proper pleadings and proof, even though no property was actually taken by the State, eminent domain proceedings are a proper remedy to compensate for damage to property resulting from road construction. Article III, Section 9, of the Constitution of West Virginia states: "Private property shall not be taken *or damaged* for public use, without just compensation." The question of liability, damages and the amount thereof, the Court stated, should be adjudicated in a proceeding designed for that purpose. This is in line with former decisions of our Supreme Court. See *State ex rel. Griggs v. Graney,* 143 W.Va. 610, 103 S.E. 2d 878.

It appears to the Court that the damages sustained by the claimants in this case were of a permanent nature and did not result from a willful trespass or the negligence of the respondent. Although we are sympathetic to the claimants and feel that there should be an adjudication of this case on the merits, we are a court of limited jurisdiction and cannot entertain claims that are specifically excluded by statutory law for our consideration.

It becomes unnecessary to pass upon the question of applicability of the statute of limitations, inasmuch as we are of the opinion to

sustain the respondent's motion to dismiss on the ground that the claimants were afforded an adequate legal remedy by the statutory law of our State.

For the reasons stated herein, the motion to dismiss is sustained.

Claim disallowed.

Opinion issued September 12, 1972

THOMAS EUGENE CARELLI and FRANK CARELLI,
Partners doing business as the SMOKE HOUSE, a partnership,
Claimants,

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS,
a corporation, Respondent.

(No. D-228C)

Louis R. Tabit, Esq., for the Claimants.

Claude H. Vencill, Esq., for the Respondent.

PETROPLUS, JUDGE:

This claim was submitted, without a hearing, on Petition, Answer and Stipulation of Facts. The amount of the claim is $2,300.00.

The facts are as follows: Claimants are partners in a business enterprise known as the Smoke House, situate in the Town of Montgomery, Fayette County, West Virginia, which business was operated on leased property. While the Mountain State Construction Company was engaged in doing certain excavation and construction work on the rebuilding of West Virginia Route No. 61 near Montgomery, a large impoundment of water was released from an abandoned coal mine on a hillside overlooking the City of Montgomery, flooding the Town of Montgomery, including the property leased by the claimants. Claimants incurred damages to their leasehold estate, personal property and loss of profits in an amount exceeding $2,300.00.

Respondent denied liability on the ground that the work was being performed by an independent contractor, who should be solely responsible for his negligence in releasing the flood waters. On the

question of liability, this Court refers to the opinion written in the case of Firestone Tire & Rubber Company vs. West Virginia Department of Highways, Claim No. D-227 decided February 16, 1972. No purpose can be served by repeating the position this Court has taken on a series of Montgomery flood cases insofar as liability is concerned, and reference is made to the above mentioned case, as well as other cases decided by the Court of Claims, for the determination of the respondent's liability.

The stipulation fixes damages by agreement of the parties in the total amount of $1,300.00, covering damages of every kind and description whatsoever.

Award is accordingly made to the claimants in the amount of $1,300.00.

Claim allowed in the amount of $1,300.00.

Opinion issued September 12, 1972

B. H. CHILD & CO., INC., d/b/a FORT PITT SHOE STORE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-230B)

Gordon Billheimer for Claimant.

Claude H. Vencill of Department of Highways for the Respondent.

DUCKER, JUDGE:

Claimant, B. H. Childs & Co., Inc., a corporation, doing business as Fort Pitt Shoe Store, alleges damages in the amount of $4,194.63 sustained by it in the loss and destruction of personal property located in its retail store operated by it at 312 Ferry Street, in Montgomery, Fayette County, West Virginia, on October 11, 1967, as a result of the flooding by water which had been impounded in an abandoned mine and released by operations of the Department of Highways in construction work relating to West Virginia Route 61. The personal property destroyed or damaged consisted primarily of leather and rubber shoes and footware.

The facts relating to the incident of the flood are fully set forth in the case of Firestone Tire & Rubber Company v. West Virginia Department of Highways, Claim No. D-277, decided by this Court on February 16, 1972, in which it was determined that the State was liable for the damages occasioned by and resulting from said flood. The only question for consideration in this claim is the amount of the damages sustained by claimant.

Counsel for both the claimant and the State have entered into and filed in this case, an agreed stipulation in writing that the total damages to the claimant's property amounts to $3700.00, and as we see no reason to not consider such amount to be fair, we confirm the agreement and award the claimant the sum of $3700.00.

Award of $3700.00.

Opinion issued September 12, 1972

ELSIE McCALL DUNCAN d/b/a MAC'S JEWELRY STORE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-230C)

Gordon Billheimer for the claimant.

Claude H. Vencill for the respondent.

JONES, JUDGE:

This is another of the several claims for damages to personal property arising from the "Montgomery Flood", which claims were the subject of an opinion issued by this Court on February 16, 1972, holding the respondent, Department of Highways, liable for damages. The petition of the claimant, Elsie McCall Duncan, d/b/a Mac's Jewelry Store, sought damages in the amount of $10,000.00.

The parties have negotiated a settlement of this claim and by stipulation filed on June 16, 1972, it was agreed that the total amount of damages sustained by the claimant is the sum of $2,621.30.

Both parties having been represented by able counsel and the settlement figure appearing to the Court from the record to be fair

and reasonable, the Court approves the stipulation and hereby awards the claimant, Elsie McCall Duncan, d/b/a Mac's Jewelry Store the sum of $2,621.30.

Award of $2,621.30.

Opinion issued September 12, 1972

FOREMOST INSURANCE COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-545)

Pat Ritchie, Office Claim Supervisor, for Claimant.

Donald L. Hall of Department of Highways for the Respondent.

DUCKER, JUDGE:

Claimant, Foremost Insurance Company, 3969 Meadows Drive, Indianapolis, Indiana, assignee of L. Bruce Cooper, claims by virtue of subrogation, damages in the amount of $550.00 to the mobile home of L. Bruce Cooper, caused by rocks and debris having been thrown upon the home by the blasting operations of the respondent, in the process of the widening of West Virginia Route 39 and the removal of part of the embankment on the south side of the highway in September and October, 1971. The trailer home was 90 feet from the blasting area and suffered severe damage to its roof causing the same to leak.

The facts alleged by claimant are by stipulation of counsel for respondent admitted, as well as the amount of the damage, and that the damages were the result of the negligence on the part of respondent. The amount of the cost of repairs to the trailer is stipulated to be $550.00.

As neither the question of negligence on the part of the respondent nor the amount of damages is in controversy, we award the claimant the sum of $550.00.

Award of $550.00.

Opinion issued September 12, 1972

LELIA HURST

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-349)

Clarence M. Rogers for Claimant.

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

DUCKER, JUDGE:

Claimant, Lelia Hurst, a resident of Salem, West Virginia, claims damages in the sum of $10,000 against the Department of Public Institutions on account of injuries sustained by her as a result of her having been stabbed in the back with a hunting knife by one Imogene Cross, an inmate of West Virginia Industrial Home for Girls located at Salem, West Virginia.

The claimant was in her home in Salem in the middle of the afternoon of July 14, 1969 when Imogene Cross who had left the grounds of Industrial Home, as an "elopee", that is one who leaves without permission, came into claimant's house, first holding a paring knife, saying she was going to kill claimant, and then dropping the paring knife and picking up a hunting knife which was on a buffet, and stabbed claimant as claimant attempted to escape.

The claimant's petition alleges that her injuries have been sustained by reason of careless, negligent and wilful neglect of duty by the agents of State Commissioner of Public Institutions in permitting Imogene Cross to leave the premises of the Home and in failing to properly guard, supervise and control Imogene Cross, known to them to be a former inmate of a mental hospital in the State of West Virginia and a person known to them to be a person of unpredictable actions, and in allowing her to escape resulting in her maliciously, wilfully and intentionally stabbing and injuring the claimant as hereinbefore stated.

Imogene Cross was a patient in the Huntington State Hospital from August 1967 to April 1968, and for approximately two and a

half months in the Spring of 1969. On June 28, 1969, she was adjudged a delinquent by the Juvenile Court of Raleigh County, and committed to the West Virginia Industrial Home for Girls in Salem, West Virginia, and she entered the Industrial Home on July 2, 1969. A case history of her was received at the Home on July 18th, four days after her attack upon the claimant.

The evidence shows that while Imogene Cross was a mental patient at the Huntington State Hospital she was given tranquilizing drugs to "keep her under control" and Cogentin to neutralize undesirable effects from massive dosages of the tranquilizers taken, all of such drugs so given indicating they were those which would be for "patients suffering from mental illness."

The officials and employees who received Imogene Cross were not advised or aware of anything unusual about Imogene Cross or of her prior stay in the Huntington State Hospital, except for the fact that when she first came in, another inmate recognized her and said she was acquainted with her at the Huntington State Hospital. We think that was hardly sufficient to require those in charge of the Industrial Home to make an exceptional case of Imogene Cross, or to require special custody of her.

There were one hundred girls, housed in two dormitories, in the Home at the time of the stabbing incident. A fence surrounds the grounds and there are on active daytime duty four maintenance men and at night a watchman, but these employees are not considered as guards, although they would report anything unusual occurring. The school has fifty-five permanent employees, including matrons who serve on eight hour shifts around the clock, and a regular routine schedule is maintained. The girls are not allowed to leave the grounds, or to go shopping or to take a walk beyond the grounds without a matron. They go back and forth between the cottage and the school, and to the office, and are accompanied by a couple of matrons when they go to their meals. The school has one security cell which is used for anybody who is put under restraint. Imogene Cross was not confined to such cell as the officials did not "notice anything unusual about her behavior or conduct".

The validity of this case rests entirely upon whether there was negligence, and, if there was negligence, whether such negligence was the proximate cause of the injuries sustained by the claimant. This

Court has had a similar question before it in several cases, the principles enunciated therein being applicable here, namely, *Creamer v. Department of Mental Health,* 8 Ct. Claims 13, and *Miller v. Department of Public Institutions,* 8 Ct. Claims 62, and *Hogue v. Department of Public Institutions,* Claim No. D-323 decided July 10, 1972. In these cases this Court has emphasized the fact that the institutions involved were not penal in character and that there must be negligence proved, for an award to be made and that the escaping of an inmate was not per se sufficient.

Though it is quite often true that there could be better systems or regulations in the operation and maintenance of penal institutions and so-called "reform" schools, such possibility is not alone a basis for the imposition of legal liability upon the part of those, such as the State, operating them. Any liability for damages to persons or property must depend upon faults constituting negligence which actually were the primary and proximate cause of damage. In the instant case, the act which caused the claimant's damages was the stabbing attack made by Imogene Cross, not the fact that she had not been adequately restrained or kept in custody by those in charge of the Industrial Home. The Industrial Home is primarily a school for the education and the possible reformation of delinquent girls. Though the inmates are compelled by a court commitment to live and remain within its confines, they are not incarcerated in cells like criminals are in jails and penitentiaries. Because of their delinquencies, the State requires them to take education and training to avoid further degradation and in the hope they will learn to live useful lives.

In the instant case Imogene Cross was treated as all other girls in the school, confined only to the same extent, and the officials of the school knew of no reason before the incident to treat her otherwise. The case history of her was received in the usual course of operation, four days after her entrance into the school, which was not, we think, an unreasonable length of time. She gave no indication of being violent or having unusual characteristics. No specific acts or action indicating carelessness or lack of duty on the part of the officials or employees of the school have been shown. On the contrary, Imogene Cross was apprehended in a very short time after she had left the premises of the school and after the attack upon the claimant. That was well within what could have been contemplated as reasonably necessary for the officials to do. The officials of the school could not

have been expected to anticipate that Imogene Cross was liable to commit a criminal act if she escaped, even though such things occasionally happen. Such an act was not a reasonably foreseeable consequence of the respondent's custody of Imogene Cross being kept in the same degree of custody applicable to all other inmates according to the procedure of the school.

This Court realizes that it is most unfortunate for anyone to suffer from the acts of an escapee from any institution operated by the State, and naturally regrets it cannot afford some relief, but the only defense which is waived in action against the agencies of the State is the immunity from suits specified in the Constitution, which immunity is the necessary basis of this Court's jurisdiction. All other defenses are available to the State as they are in cases where individuals and corporations are defendants. Failure to prove actionable negligence is such a defense and such negligence must be the proximate cause.

We are of the opinion that the claimant has not proved by a preponderance of the evidence that there was actionable negligence on the part of the respondent, and we, therefore, disallow her claim.

Claim disallowed.

Opinion issued September 12, 1972

DAVID McCLELLAN

vs.

DEPARTMENT OF HIGHWAYS

(No. D-228I)

Louis R. Tabit for Claimant.

Claude H. Vencill of Department of Highways for the Respondent.

DUCKER, JUDGE:

Claimant, David McClellan, alleges damages in the amount of $3,500.00, sustained by him in the loss and destruction of personal property located on premises operated by him and known as the

Fairmont Club, situate at 209 Fourth Avenue, in Montgomery, Fayette County, West Virginia, on October 11, 1967, as a result of the flooding by water which had been impounded in an abandoned mine and released by operations of the Department of Highways in construction work relating to West Virginia Route 61.

The facts relating to the incident of the flood are fully set forth in the case of *Firestone Tire & Rubber Company v. West Virginia Department of Highways,* Claim No. D-227, decided by this Court on February 16, 1972, in which it was determined that the State was liable for the damages occasioned by and resulting from said flood. The only question for consideration in this claim is the amount of the damages sustained by claimant.

Counsel for both the claimant and the State have entered into and filed in this case, an agreed stipulation in writing that the total damages to the claimant's property amounts to $1700.00, and as we see no reason to not consider such amount to be fair, we confirm the agreement and award the claimant the sum of $1700.00.

Award of $1700 00.

Opinion issued September 12, 1972

STATE FARM INSURANCE COMPANY, Assignee of MARGARET ROESER and HARRIET DAVIDSON, Claimant,

vs.

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

(No. D-230D)

Gordon Billheimer, Esq., for the Claimant.

Claude H. Vencill, Esq., for the Respondent.

PETROPLUS, JUDGE:

This claim was submitted on Petition, Answer and Stipulation of Facts by agreement of counsel, The facts are as follows:

1. A large volume of water released from an abandoned coal mine during the relocation and reconstruction of West Virginia Highway Route No. 61, in the City of Montgomery, Fayette County, West Virginia, on October 11, 1967, resulted in damages to an automobile owned by Margaret Roeser and Harriet Davidson, in the amount of $464.00. The automobile owners were indemnified through an insurance policy carried with State Farm Insurance Company, to whom the claim was assigned as subrogee.

2. The respondent had entered into a contract prior to October 11, 1967, with Mountain State Construction Company for the construction of said road, which contract required the Mountain State Construction Company to do certain excavation in accordance with plans and specifications approved by the respondent's engineers. The excavation of a portion of a hillside overlooking the City of Montgomery was within the contemplation of the contract. The contract also required the excavation of a portion of an abandoned coal mine, as shown on the plans of the project.

3. The contractor proceeded with the excavation into the abandoned coal mine following the mine entry for approximately seventy feet, when a large volume of water was suddenly released flooding many parts of the City of Montgomery.

The respondent has denied liability, relying on the principle of law that it is not responsible for the negligence of an independent contractor.

This Court has previously held in similar Montgomery Flood cases that the respondent had a nondelegable duty to plan this project with ordinary engineering skill and the exercise of reasonable care to prevent damage to innocent persons who might be damaged by the construction procedures. See Opinion, *Firestone Tire & Rubber Company vs. West Virginia Department of Highways,* Claim No. D-227 decided February 16, 1972.

This claim was originally filed in the amount of $530.95, and later increased by amended complaint to $650.00. Since no evidence was taken at the hearing and the stipulation of counsel sets forth the amount of $464.00 as the agreed amount of damage, it appears that our award should be based on the lesser amount.

Respondent's motion to dismiss for failure to answer interrogatories predates the stipulation of facts and must be treated as withdrawn in view of the stipulation of facts. The motion to require the claimant to answer interrogatories we also consider moot in view of the stipulation.

For the foregoing reasons an award is accordingly made to the claimant in the amount of $464.00.

Claim allowed in the amount of $464.00.

Opinion issued September 25, 1972

IN THE WEST VIRGINIA COURT OF CLAIMS
AMSTAN SUPPLY DIVISION,
AMERICAN STANDARD, INC., Claimant

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-547)

PER CURIAM

The foregoing claim is disallowed for the reason set forth in the Opinion of this Court heretofore filed in deciding the claims of *Airkem Sales and Service, Claimant, etal, vs. Department of Mental Health, Respondent, covering Claims No. D-333 to D-347, inclusive, the factual situation and the law applicable thereto being the same as that involved in the foregoing decision of this Court.

Claim disallowed.

*Please see 8 Ct. of Cls. Rep. 180.

Opinion issued October 23, 1972

*J. R. HARDY, Claimant,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-233)

Charles E Hurt, Esq., for Claimant.

Claude H. Vencill, Esq., for Respondent.

PETROPLUS, JUDGE:

J. R. Hardy, claimant, filed this claim alleging damages to his 1964 Rambler Sedan in the amount of $415.56, resulting from the Montgomery flood of October 11, 1967, which has been subject of a number of claims filed in this Court. The claimant had taken his automobile to Montgomery Motors for "winterizing service", and while the automobile was there it was allegedly damaged by the release of flood waters from the abandoned coal mine in the road construction area.

Respondent moved that the claim be dismissed on the ground that it was not brought by the real party in interest, it appearing that J. R. Hardy had been reimbursed by his insurance company and that the real party in interest was Celina Mutual Insurance Company by way of subrogation.

The claim was filed on October 10, 1969, one day before the statute of limitations expired. On April 7, 1971, claimant's counsel advised the Clerk of the Court of Claims that this was a subrogation claim, and in effect requested an amendment of the claim, stating that he also represented the subrogee. The pleadings in the Court of Claims are quite informal, and in the interest of doing justice we hold that the claim has been properly amended to show the real party in interest, and that substituting the subrogee for J. R. Hardy, claimant, does not constitute the filing of a new claim after the running of the statute of limitations or bringing in a new party. The motion to dismiss is therefore overruled, it being our opinion that the amendment of the claim was effectuated by notification to

* Amended as Celina Mutual Insurance Company as subrogee of J. R. Hardy vs. Department of Highways.

the Clerk without the filing of a formal motion to that effect. The Rules of Civil Procedure which apply to the Court of Claims, except where in conflict with the special rules of this Court, provide that leave to amend shall be freely given when justice so requires (R.C.P. 15).

This Court has heretofore held in other Montgomery Flood cases that damages to personal property are compensable as a result of the Montgomery flood, there being no adequate remedy at law for the claimant. See the opinion of this Court in *Firestone Tire and Rubber Company v. Department of Highways,* claim No. D-227, issued February 16, 1972.

At the hearing evidence was taken, and it appeared that the automobile had been sent to the garage for a general overhaul. There is little doubt that the flood waters caused additional damage to the car, ruining the battery and requiring cleaning of the engine. The repair bills submitted were itemized and show as additional items removing wheels, cleaning brakes, cleaning chasis, polishing the car and subletting undefined work in the amount of $175.00, aggregating $415.56. No evidence was submitted as to what repairs were required on the car before it was placed in the garage. A disinterested witness testified that the flood waters reached a height of twenty-four inches, and the position of the car in the garage would also have some relation to the level of the water in the car. Although the proof is not entirely satisfactory, it did appear from the evidence that the automobile in the repair shop was damaged by flood waters. The condition of the automobile at the time it was placed in the garage for servicing was not shown, neither were damages provided by applying the rule for measure of damages which has been reiterated by the Supreme Court of Appeals of West Virginia many times in its reported decisions. The proper measure of damages would be the difference in the market value of the automobile immediately before and immediately after the injury. Although requested to submit such testimony, counsel have not complied.

The owner is not entitled to the full cost of the repairs where they make the property more valuable than it was before the injury, and the cost of repairs is admissible as it relates to the diminution of the value of the property.

The claimant has undoubtedly suffered a loss and should be placed in the same position that he was in before the injury. See *Biederman v. Henderson,* 115 W. Va. 374, 176 S.E. 433; *Agsten & Sons v. United Fuel Gas Co.,* 117 W. Va. 515, 186 S.E. 126; *Ripley v. Whitten Transfer Co.,* 135 W. Va. 419, 63 S.E. 2d 626; *Cato v. Silling,* 137 W. Va. 694, 73 S.E. 2d 731; and *Spencer v. Steinbrecher,* 152 W. Va. 490, 164 S.E. 2d 710, all of which cases state the general rule with regard to damages. The rule for proving damages to personal property not destroyed is stated in the Cato case, as follows:

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

The proof in this case fails to comply with said rule.

In the interest of reaching a just decision on the claimant's damages, the Court will recommend an award only for those damages that are clearly the proximate consequence of the flooding, namely:

Cleaning engine	$ 48.00
Removing wheels and cleaning brakes	36.00
Clean chasis and lubrication	24.00
Clean outside of car and polish	48.00
	$156.00
Tax	4.68
	$160.68

Respondent's objection to a letter dated July 14, 1972, signed by F. J. Divita, Vice-President of Montgomery Motors, tendered

after the hearing giving his opinion as to the fair market value of the automobile before and after the flooding is sustained. The letter is incompatible with the testimony of Mr. Divita at the hearing to the effect that he had not examined the car and had no personal knowledge of its market value. To admit the letter would also be a denial of Respondent's right to cross-examine Mr. Divita on the contents of the letter.

Claim allowed in the amount of $160.68.

Opinion issued October 23, 1972

WILSON JACOBS AND S. EUGENE JACOBS

vs.

DEPARTMENT OF HIGHWAYS

(No. D-228-e)

Louis R. Tabit, for the claimants.

Donald L. Hall, for the respondent.

JONES, JUDGE:

This claim arises from the "Montgomery Flood" which occurred on October 11, 1967, causing widespread damage in the City of Montgomery and resulting in numerous claims against the Department of Highways which were the subject of an opinion of this Court, issued February 16, 1972, and holding said claims to be compensable. See opinion, *Firestone Tire & Rubber Company vs. West Virginia Department of Highways,* Claim No. D-227.

The claimants, Wilson Jacobs and S. Eugene Jacobs, are the owners of the Faymont Hotel in Montgomery, the basement of which was flooded from the floor to the 8-foot ceiling; and the claim is for damages to real estate and the destruction of all personal property then stored or used in the basement. The 3600 square feet of floor space was occupied by a private club, toilets, workshop, furnace, hot water tank and storage. The original petition claimed total damages "in excess of $6,357.60". At the

hearing the Court permitted the claimants to amend their petition to show damages of $5,751.49 to real estate and $2,256.50 to personalty, a total claim of $8,007.99.

The claimants presented C. E. Kirby, a building contractor and professional real estate broker and appraiser, who testified that he examined the subject premises in the latter part of October, 1967. Under date of November 2, 1967, he made a detailed estimate of the cost of repairs to the real estate on a "cost plus" basis in the total amount of $5,751.49. This figure included the estimated cost of replacing one back counter bar and one counter and refinishing another counter, all in the private club, at a total cost of $675.00. Kirby further testified that the difference in the fair market value of the hotel property immediately before and immediately after the flood was $5,130.00.

The respondent produced Troxell O. Mason, an engineer with substantial experience in construction, who testified that he inspected the subject premises, in the company of one of the claimants and counsel for both the claimants and the respondent, about February 2, 1972, more than four years after the flood. He was furnished a copy of Kirby's estimate and the several items of damage to the real estate were pointed out to him. Substantial repairs had been made, but other areas of damage were unchanged or only partly repaired. This witness prepared an estimate of damages to the real estate, covering all of the items shown on the Kirby estimate, and concluded that the total cost of repairs, including replacing the back counter bar and counter, and refinishing one counter, would be $2,186.30. This figure reflects deductions for depreciation, based upon limited information obtained by the witness.

This Court already has decided in the Firestone case that the claimants in this case are entitled to recover. However, the proof of specific damages is unsatisfactory and the respondent's evidence in defense of the claim leaves much to be desired. The claimants have furnished no evidence supporting its estimated damages to real estate or any evidence of the value of personal property other than the opinion of one of the claimants. The claimants produced no receipt, canceled check or other voucher showing the actual cost of the repairs or replacements. Several items appearing on the estimate did not require repair. The estimate of $5,751.49 damages

to real estate includes $811.55 in taxes and insurance and a 15 per cent profit of $750.19 with no supporting proof of either item. The building is 70 years old; and many of the items of personal property were in a state of disrepair and some apparently near discard. The claim for $500.00 for the loss of "6 used television sets and various T. V. tubes" is an example of the unrealistic valuation of some items of personal property. One of the television sets was owned by someone who left it with the claimants for repair and who made no claim against the claimants for its loss.

There is no doubt that the claimants sustained substantial losses as a result of the flood for which they are entitled to recover. However, the Court is of opinion that an award that will be fair to both the aggrieved citizens and the State of West Virginia requires the considered analysis of all the facts presented by both sides, the application of the factor of depreciation to the best of our ability, and the exercise of our best judgment in the final disposition of this difficult case.

In light of the foregoing, the Court has concluded to allow the claimants for the temporary, non-recurring damages to their real estate the sum of $3,150.00, and for the loss of personal property the sum of $1,075.00, and therefore an award is hereby made to the claimants, Wilson Jacobs and S. Eugene Jacobs, in the amount of $4,225.00.

Claim allowed in the amount of $4,225.00.

Opinion issued October 23, 1972

FLOSSIE GRACE PUDDER and ROBERT J. PUDDER
Claimants,

vs.

THE DEPARTMENT OF NATURAL RESOURCES OF THE STATE OF WEST VIRGINIA, Respondent.

(No. D-485 and D-487)

Ernest V. Morton, Jr., Esq., for the Claimants.

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

PETROPLUS, JUDGE:

The cases of Flossie Grace Pudder, Claim No. D-485, and Robert J. Pudder, her husband, Claim No. D-487, against the Department of Natural Resources of the State of West Virginia, respondent, were consolidated by agreement of counsel and were tried as one case.

The claimants seek damages in the amount of $100,000.00 for personal injuries, hospital and medical expenses and loss of consortium. The facts can be briefly stated as follows: On or about the 7th day of July, 1970, claimant, Flossie Grace Pudder, her husband Robert J. Pudder, and her three children visited the French Creek Game Farm Zoo located in Upshur County, West Virginia, which is owned and operated as a public recreational facility by the Department of Natural Resources of the State of West Virginia. The public is encouraged to attend, visit and enjoy the facility. On the aforesaid date, the claimant, her husband and family were standing on an embankment adjacent to a lot enclosed by a steel link fence wherein a bison was kept in captivity for exhibition to the public. Claimant apparently was leaning on or quite close to the fence when her attention was distracted by her sister, and as she turned away from the fence, without any provocation the bison charged into the fence, striking the claimant, who was thrown down the bank, sustaining a comminuted fracture of the left proximal tibia and was otherwise injured. She suffered con-

siderable pain of body and mind, and incurred medical expenses and hospitalization in the approximate amount of $2,000.00. It is also quite probable that she may have a permanent injury to her leg. There were no signs warning the public of the dangerous propensity of the bison, or barriers provided commensurate with the danger to be apprehended, although it appears that the fence was quite adequate to restrain the animal. The fence was not broken or damaged by the buffalo's charge, although it did have sufficient flexibility on impact to throw a person off balance who might be standing adjacent to the fence. Her husband's claim is based on the same facts, and his damages are the medical expenses incurred for hospitalization of his wife, loss of services and consortium. The respondent, in its answer, admitted that it owned and operated the French Creek Game Farm as a public attraction, but denied any negligence on the part of its agents and employees; and, even if negligence is assumed, respondent raises the defense of assumption of risk and contributory negligence.

At the hearing of this case, the unusual aspects were fully detailed, and it appeared that respondent had no knowledge of the dangerous or vicious propensities of this particular buffalo.

Before a finding can be made in favor of the claimants, it is the considered opinion of this Court that the claimants must establish negligence or lack of ordinary care on the part of the respondent or the caretaker of the Farm which proximately contributed to and caused the injuries to the claimants. It was granted and assumed by both parties that a buffalo is a wild animal, unpredictable in its nature and possibly dangerous to persons who may be in proximity to the animal. We do not find from the evidence any basis for considering Mrs. Pudder to have engaged in any misconduct or contributory negligence, and, therefore, find the defenses of assumption of risk and contributory negligence to be untenable. There also is no basis for finding that she brought the injury on herself by provoking the animal or disregarding any warnings given to her.

When the claimant left her automobile and ascended the bank to look at the buffalo in the enclosure, we find that she did so by invitation of the respondent. We also feel that the respondent had a duty not to expose spectators who were invited on the premises to attacks by animals which by nature and tendency resent and

resist confinement. We do not find from the evidence that there was any negligence on the part of the respondent in failing to properly restrain the animal or keep it securely within the enclosure. The fence did not break or give way under the charge, and in all respects appears to be adequate to confine the animal. We do find, however, that the respondent had a duty to give proper warning to the spectators to maintain a safe distance from a fence which had a degree of resiliency, or to take other measures to keep spectators at a safe distance away from the fence to protect them from any attacks from such an animal. This was not a domesticated animal where the owner may rely on its previous conduct or tame propensity. In the latter case, knowledge of vicious and mischievous propensities must be shown. As a bison is not the type of particular animal that can be tamed to some degree, it is known to be fierce or dangerous as an animal *ferae naturae,* and sudden and unexpected movements should be anticipated.

The early common law concept of liability of an owner or keeper of a wild animal was that of absolute liability for any injuries inflicted by such animal, regardless of negligence on the part of the owner, or contributory negligence on the part of the person injured. The early decisions have been substantially modified by the courts and according to the weight of authority, negligence is now the basis of liability. Where wild animals are kept for the education or entertainment of the public, recovery cannot be had unless negligence can be established. Our West Virginia Supreme Court of Appeals has adopted the modern view in the case of *Vaughn v. Miller Bros. "101" Ranch Wild West Show,* 109 W. Va. 170, 153 S.E. 289, 69 ALR 497.

It is the finding of this Court that under the circumstances of this case proper precautions were not taken by the respondent to assure the safety of spectators attracted to the buffalo enclosure. The State was remiss in permitting and attracting the public to the fence line of an enclosure confining a wild animal that weighed approximately a ton, known to be dangerous and unpredictable. We also find that the failure of the State to use proper care for the protection of the invitees to the park was the proximate cause of the claimant's injuries, and are, therefore, of the opinion to make an award on her behalf. The respondent did not controvert the seriousness or the extent of the claimant's injuries, and we must

assume that they have been fairly presented to the Court by the medical reports filed as exhibits.

For the reasons assigned, we recommend an award of $8,000.00 to Flossie Grace Pudder for the injuries sustained, and an award of $3,000.00 to her husband, Robert J. Pudder, for medical expenses and loss of services and consortium.

Claim allowed in the amount of $11,000.00.

Opinion issued October 24, 1972

JAMES B. FRAZIER; LOU IRENE FRAZIER AND JAMES B. FRAZIER; JAMY LOU FRAZIER AND JAMES B. FRAZIER; AND JAMES B. FRAZIER ADMINISTRATOR OF THE ESTATE OF MICHAEL SCOTT FRAZIER, DECEASED

vs.

DEPARTMENT OF HIGHWAYS

(No. D-502a-d)

John F. Wood for the Claimants.

Donald L. Hall for the Respondent.

JONES, JUDGE:

Upon the joint motion of all of the parties, by counsel, the above styled claims were consolidated for purposes of hearing and will be treated together in this opinion.

The following facts have been stipulated and agreed to by the parties or are otherwise undisputed. The claims arise as the result of an automobile accident that occurred July 30, 1971, at approximately 12:30 p.m., on U. S. Route 60, approximately .3 of a mile of its intersection with West Virginia Route 10 Alternate near Barboursville in Cabell County. At the time of the accident the claimant, James B. Frazier, 25 years of age, was driving his 1968 Pontiac automobile in an easterly direction along U. S. Route 60, which is a

four-lane, asphalt highway. Passengers in the car were his wife, Lou Irene Frazier, 25 years of age, in the front seat with their child, Michael Scott Frazier, 11 months, held in her lap, and Jamy Lou Frazier, 7, in the rear seat. The respondent through a private contractor had repaved a 1.08 mile portion of U. S. Route 60 with asphalt between June 24 and July 1, 1971, which section of highway was opened to traffic on July 1, 1971. The accident occurred on said repaved portion of the highway. The posted speed limit for this section of highway was 45 miles per hour and this speed limit was never reduced until later the same day of the accident when signs were erected reducing the limit to 15 miles per hour. As early as July 20, 1971, an inspection by the respondent's District Engineer and other employees of respondent showed the repaved surface to be slippery and unsafe when wet and certain steps were taken. Sand was spread on the asphalt to cut down on skidding and when that was washed off by heavy rain, sand was spread again about July 24 or 25. A "Slippery When Wet" sign, 30" x 30", attached to a post approximately 6 feet high was placed at a point 6 to 8 feet from the berm of the road near the intersection of West Virginia Route 10 Alternate and approximately 500 feet west of the new blacktop. A flasher was installed on the sign on July 29. The road was dry when the Fraziers drove to downtown Huntington to pick up a photograph of their son. The Fraziers returned in a heavy rain and as they came upon the resurfaced portion of the highway the Frazier automobile began to skid, crossed a rounded concrete median strip, approximately 12 to 18 inches wide and 2 to 3 inches high at its apex, and collided with two automobiles approaching in the westbound lanes. James Frazier, Lou Irene Frazier and Jamy Lou Frazier were injured and Michael Scott Frazier died as a result of the accident.

Floyd Hillman, District Engineer for the Department of Highways, testified that about the middle of July it became apparent that the pavement in question was becoming very smooth and shiny, indicating that the bitumin in the asphalt was rising to the top, causing the surface to be slippery in wet weather. Thereafter, sand was placed on the surface of the road, it washed off in a rain and was respread; and "Slippery When Wet" signs were erected, one west of the repaving project. On July 23 or 24, according to Mr. Hillman, "we realized we were going to have to do something to correct this thing (the slippery condition), so we inaugurated a second contract to put an additional surface on of a more open type material." Mr. Hillman

further testified that the County Supervisor had reported to him that the road had become "alarmingly slippery" or perhaps he had used such words as "slippery to the point of being dangerous"; that the need for a safe road was accentuated by the fact that approximately 10,000 vehicles traversed this road each 24 hours; that the extreme hot weather caused the bitumin to rise to the surface and that the "very light resurfacing course" used on this road also contributed to the dangerous condition; and that the maximum safe speed on the resurfaced portion of the highway would be 20 to 25 miles per hour.

Donald Tincher, Engineer in the Materials Division of the Department of Highways, in charge of conducting tests to determine the traction factor of the surface of State roads, testified that he tested the portion of the highway involved in these claims on August 3, four days after the accident. He explained that his test findings were computerized and graded 0 to 100, with the higher the reading the safer the road, and that the accepted safe range is 30 to 50. The subject tests in the eastbound lanes produced readings of 12 in the right hand lane and 20 in the left lane. Westbound readings were 19 in the right lane and 23 in the left lane. In his three years' experience and hundreds of tests all over the State, these were the lowest readings he had ever obtained, and in his opinion constituted a public hazard due to the extreme slippery condition. He further expressed the opinion that traffic was permitted on the new surface too soon, causing the aggregate in the mix to go to the bottom and the bitumin to rise to the top. Answering a question as to whether the condition of the road was hazardous for the traveling public and referring to the 15 mile speed limit which was placed in effect shortly after the accident, this witness answered affirmatively and added "something should have been done and there was."

Trooper J. R. Bias testified that he arrived at the scene of the accident one or two minutes after it happened; that it was raining extremely hard at that time with water standing on the road; that the highway appeared to be slick; that he did not see any "Slippery When Wet" signs; and he agreed that this was "a notorious strip of road".

The written agreement made by and between the parties to this claim, by counsel, and made a part of the record in this case, further stipulated as follows: That necessary medical and funeral expenses for Michael Scott Frazier were $541.95; that Jamy Lou Frazier re-

ceived a chipped tooth and was treated in the Emergency Room of St. Marys Hospital in Huntington and her reasonable and necessary expenses were $71.50; that Lou Irene Frazier was hospitalized at St. Marys Hospital from July 30 to August 2, 1971, for numerous contusions and abrasions and for neurosurgical consultation and care and that her reasonable and necessary medical expenses were $364.74; that James B. Frazier was hospitalized at St. Marys Hospital from July 30 to August 8, 1971, was treated for a ruptured spleen, two collasped lungs, a broken clavicle, broken ribs and numerous contusions and abrasions; that James B. Frazier's spleen was removed surgically and the collapsed lungs were treated by the insertion of two intercostal catheters, and the reasonable and necessary medical expenses incurred by him were $1,793.43; that Jamy Lou Frazier, Lou Irene Frazier and James B. Frazier have been released from treatment by their treating physicians and no future medical treatment for their injuries is contemplated; and that immediately prior to the accident the 1968 Pontiac owned by James B. Frazier had a fair market value of $1,760.00 and immediately after the accident had a salvage value of $250.00, a difference in value of $1,510.00. It further appears from the testimony that claimant, James B. Frazier, lost six weeks of work at $750.00 per month.

Most of our State's roads are slippery when wet and regardless of posted speed limits ordinary prudence requires a driver to take greater care in keeping control of his vehicle under such adverse conditions. It also seems fundamental that an important cross-country highway such as United States Route No. 60, with four lanes and carrying 10,000 vehicles per day, would be expected to afford safe passage at or near a posted speed limit of 45 miles per hour. Based on the evidence in this case a safe speed over the portion of the highway involved was 20 to 25 miles per hour, and a few hours after the accident the State saw fit to post 15 miles per hour signs.

We agree with counsel for the State that Mr. Frazier had a duty to exercise great care in traversing this newly laid blacktop highway, described by some witnesses as being "shiny" in the rain. And while he did not see the "Road Slippery When Wet" sign, he probably should have, although it appears from the testimony that it was not well placed for its purposes. Trooper Bias said that he did not see the sign and it seems to us that signs placed off the berm of a highway are not particularly useful in warning of a hazardous condition which

in this case would come into existence very abruptly at a point some 500 feet beyond the sign.

Counsel for the respondent very properly cites several decisions of this Court and forcefully argues that they apply to this case. Among the cases so cited are *Cassel vs. Department of Highways,* Claim No. D-108; *Criss vs. Department of Highways,* Claim No. D-137; and *Parsons vs. State Road Commission,* Claim No. D-112. The Court believes that each of these cases correctly states the law and reaches the right decision based upon the facts of each case. While they are pertinent in a general way, the facts here are not the same and the holdings in those cases will not be decisive.

The claimant James B. Frazier arrived at the resurfaced portion of the highway at a speed of 35 to 40 miles per hour. This speed was substantiated by a witness who was driving one of the approaching cars involved in the wreck. The posted speed limit was 45 miles per hour. As this claimant's car came on to the resurfaced road it began to "fishtail" as on ice and then went into a slide which he could not stop and resulted in the collision with two approaching cars. This claimant does not remember anything more. However, the facts which clearly show the cause of the accident are developed by the testimony of two witnesses who are employees of the respondent, Floyd Hillman, District Engineer, and Donald Tincher, Engineer in the Materials Division. Both are substantial men holding responsible positions and they gave fair and full answers to all questions. The respondent knew that the road was slippery and unsafe when wet. Sand was put on the road but in a hard rain it washed off. It was raining hard before and during the accident. The condition was so bad that respondent was negotiating a second contract for an additional surface of coarser material. Four days after the accident the respondent's Engineer tested the road surface at the approximate point where the "fishtailing" started and found an extremely slick condition which he described as the worst he had encountered in three years' experience and hundreds of tests throughout the State. Three other nearby tests produced slightly better readings, but still worse than any he had ever seen.

It is clear from the evidence that this portion of the highway was extremely dangerous when wet. The respondent knew this and took minor steps to correct the condition. Given time the road would have received a second resurfacing which presumably would have made

the road safe. However, the respondent did not do enough. This was a very short stretch of road, 1.08 miles, and it should have been easy to effectively warn the public, and to do the one thing so obviously called for and which respondent did after the accident — reduce the speed limit until permanent repairs could be made.

The Court finds that the respondent was negligent in its failure to protect the public, and that such negligence was the proximate cause of the claimants' damages. We further find that contributory negligence was not proved. Therefore, the Court is of opinion that the claimants are entitled to recover and awards are hereby made as follows:

To James B. Frazier,	$10,000;
To Lou Irene Frazier,	$1,000;
To Jamy Lou Frazier, an infant,	$500; and
To James B. Frazier, Administrator of the Estate of Michael Scott Frazier	$10,541.95.

Opinion issued October 24, 1972

PETER SHAFFRON, JR.

vs.

DEPARTMENT OF HIGHWAYS

(No. D-546)

Claimant appeared in person.

Donald L. Hall for respondent.

JONES, JUDGE:

The claimant, Peter Shaffron, Jr., claims damages caused when hot tar splashed on his 1969 Corvette automobile. During the summer of 1971 the claimant was a student at West Virginia University in Morgantown, residing in an apartment on Pineview Drive, State Route No. 6-1/4. The record shows that this was a dead-end asphalt road, with shoulders about one foot in width on either side, and there

was no other access to the claimant's residence. The claimant testified that when the weather was extremely hot the tar in the asphalt ran like water and formed puddles on the road which could not be avoided by any degree of care. The tar collected on the tires and spun off onto the lower parts of the car.

The claimant tried to remove the tar with a standard tar remover but when the tar came off, the paint and some of the fiberglass came off with it. He both called and went to see a Mr. Chittum, a supervisor for the respondent, and Mr. Chittum promised that something would be done to correct the situation. However, the summer went by without any attention to the faulty condition of the road. The claimant tried two or three more times to remove the tar but on each occasion the paint also came off and the fiberglass was grooved and damaged. Then the claimant took his car to Wilson Chevrolet Company in Morgantown, where he obtained an estimate for removing tar and painting both front fenders and the quarter panels in the amount of $114.33.

The claimant was the only witness in the case, the respondent offering no testimony. According to the claimant, a defective condition existed, the respondent had notice thereof, and no attempt was made to correct it, nor is any explanation made by respondent which might justify either the condition or the failure to correct it. The amount of the estimate was not contested.

The Court is not unmindful of its many previous decisions which have held that the State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of its highways under all the circumstances. However, based on the record in this particular case, the Court feels that the claimant has made a showing which in good conscience entitles him to recover. Therefore, an award hereby is made to Peter Shaffron, Jr. in the sum of One Hundred Fourteen Dollars and Thirty-three Cents ($114.33).

Award of $114.33.

Opinion issued October 24, 1972

MARY JANE STARVAGGI

vs.

DEPARTMENT OF PUBLIC SAFETY

(No. D-503)

WILMA LEE MORRIS

vs.

DEPARTMENT OF PUBLIC SAFETY

(No. D-533)

Claimants present and represented by *Leonard Z. Alpert* and *Edward Zagula,* Attorneys at Law.

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

DUCKER, JUDGE:

Claimants, Mary Jane Starvaggi and Wilma Lee Morris, allege damages in the sums of $150,000 and $25,000 respectively, for injuries and medical expenses suffered when they were wounded by a bullet from an automatic rifle alleged as negligently and carelessly discharged by a former member of the Department of Public Safety of West Virginia who was proceeding to arrest on May 13, 1971 one George Daniel Lash near an abandoned Baltimore & Ohio Railroad tunnel at Littleton, Wetzel County, West Virginia.

The injuries sustained by the claimants were inflicted by the same bullet which pierced Wilma Lee Morris' arm and shoulder and then entered the breast of Mary Jane Starvaggi, and the claims involve the same facts; hence these claims were by agreement consolidated for hearing and decision.

Although there may be slight unimportant variations in some of the testimony relating to the order in which the firing of guns occurred, practically all of the evidence as is hereafter stated is uncontradicted.

George Lash, according to his testimony, was that he was "traveling through Littleton" down U. S. Route 250, after having been in that vicinity on that day and after having stolen from Donald Smith two chickens, but which he later paid for evidently in order to avoid criminal charges on that account, and that he had found shelter from the rain in the old tunnel known as the Marshall tunnel of the Baltimore & Ohio Railroad. He said the people around Littleton had become hostile to him and he had decided to leave. When he started cooking his chickens and "fixing up some dandelions" in the tunnel he was approached by a Constable, Ray Teagarden, who, he said, "gave him 45 minutes to leave railroad property". In the meantime, Sergeant Richard Nicholson of the State Police stationed at Paden City received a call to come to Littleton to assist Trooper C. A. Bias and a Deputy Sheriff in apprehending a man in the Marshall tunnel. Bias said he was run off with the threat of being killed. Nicholson came to Littleton and met State Troopers Bias, Drain and Rader, and Deputy Sheriff Smith at the tunnel. Nicholson ordered Troopers Drain and Rader to the north end of the tunnel with Deputy Smith, and Nicholson and Bias went to the south end of the tunnel where Lash was and as they approached Lash he (Lash) proceeded to walk into the tunnel and toward the north end thereof. Nicholson called for Lash to stop and "he turned and looked and then went right on into the tunnel", and Lash exited the tunnel on the north side. Trooper Drain and Deputy Smith were armed with pump shotguns and Trooper Rader with an automatic AR-15 rifle, which was described as the same as an M-16 army rifle used by the army in Vietnam. Lash walked past the three officers stationed on the north side of the tunnel and continued on with a white plastic jug in his left hand and a shotgun in the other. Trooper Drain came off the side of the tunnel and told Lash he was under arrest and asked him to lay down his gun. Lash turned about halfway around with his gun turned down, and Nicholson ordered the officers to hold their fire. Lash proceeded a little farther and started to swing around again, but not "clear around", and stopped. Nicholson again ordered the officers to hold their fire, and Lash turned again and Trooper Drain, under order from Sergeant Nicholson to do so, fired a shot in the air as a warning shot. Then Lash proceeded out on a railroad trestle and as Lash started to turn the third time and as he "came around" the Deputy on the other side (left hand side) fired across just as Lash fired with his gun tipped down, in front of Trooper Drain, striking

Drain's shoes and throwing dirt upon him. Deputy Smith fired just as Lash "came around" the third time when Smith thought Lash was going to shoot. Nicholson "couldn't tell just when it (Lash's gun) went off, because he (Lash) turned to shoot". After Deputy Smith fired at or about the same time Lash fired, Drain fell over backwards and as he started to get up Rader opened fire with the AR-15 rifle. Lash testified that he got shot in the knee, hand and side from shotgun fire, and that when he got shot in the knee he "buckled up sort of and the gun went off over the tunnel in the air" and that when he fired he was facing the policeman and towards the mouth of the tunnel. Lash said his shotgun was an old one given to him by his grandfather and that he carried it for fear he might "get mugged", and that he had not cocked the gun to fire it but he "supposed it just went off under the weight" when he collapsed. From these facts it is apparent that the officers were faced with a situation which at the time appeared to be one in which a person carrying a shotgun which was somehow fired threatened their lives after having previously failed to halt after two previous commands to do so.

Whether the officers were originally acting legally in the matter could well depend upon whether a warrant had been issued for the arrest of Lash. Counsel for the claimants attempted to show that the officers acted without a warrant against Lash for stealing chickens worth only a dollar or two and constituting only a misdemeanor requiring a warrant. The officers contend that the emergency justified the arrest without a warrant because Lash had threatened and attempted to shoot them.

The evidence as to the existence of a warrant is not as positive as it should have been. Sergeant Nicholson was told that there was a warrant but he did not see it. However, the fact that he did not see the warrant before the arrest, does not preclude the fact that a warrant had been issued. Trooper Drain testified positively that the Deputy Sheriff had a warrant prior to the shooting for the arrest of Lash, that he was advised that a warrant had been obtained by the Deputy and by Trooper Bias and that he saw the man give the Deputy a piece of paper but that he did not look at it. The witness, Donald Smith, from whom Lash had stolen chickens, stated he did not want to press charges against Lash but that one of the State Troopers asked him to swear out a warrant, and he had the warrant laying on the dash of his pickup and his son took it out and gave it to "them"

(evidently meaning the officers) after the shooting stopped. The warrant which was issued at Hundred, West Virginia, could well have been issued prior to the shooting and the fact that it was in existence at the time of the shooting may have been sufficient inasmuch as Lash did not demand to see it. Inasmuch as our decision in this case does not rest upon a determination of the warrant question there is no need for us to pass judgment upon such question.

Our decision of this claim might well have rested either upon the fact that the officers were under the circumstances of threats or actions of Lash showing an apparent intent to kill them or upon the warrant question and the validity of the actions of the State Police, had it not been for the questionable conduct of Trooper Rader. Such conduct itself involves the real basis of the injuries suffered by the claimants.

The fact that the claimants were struck by a bullet from an AR-15 automatic rifle and that Trooper Rader fired such a weapon at the time and place of the shooting at the Marshall tunnel has been proved, we think, beyond any doubt. That such a rifle was capable of firing a .223 Remington cartridge with a 55 grain bullet at a velocity of 3200 feet per second with a trajectory of a drop of not more than two inches in 300 feet, the approximate distance of the Statlemire home in which claimants were at the time they were wounded, was proved by a well qualified expert witness in the person of Colonel Edward B. Crossman, of Alexandria, Virginia. The rifle fired by Trooper Rader was one which had semi-automotive and automatic firing, the semi-automatic requiring a pulling of the trigger for each shot, and the automatic firing in rapid succession all the bullets in the magazine as long as one holds the trigger. That the Statlemire house was struck by bullets from such a rifle fired from the direction of the tunnel was testified to by N. James Schellhase, a civil engineer and surveyor of Wheeling, West Virginia.

Lash's presence and movements in the village of Littleton had apparently created such a situation as to attract the attention of many people to see what would happen when the officers proceeded to arrest him in or about the tunnel, and the claimants decided that they could see what might happen from the bedroom window in the home of their grandmother, which home has been referred to as the Statlemire home. They acted as did all others who had gathered along the road adjacent to the railroad and near the tunnel, and practically it

cannot be said they invited injury to themselves or assumed the risk of being shot, particularly when they were in a rather distant house of their close relatives and not out on the street or other proximity to the scene of the shooting.

The real question upon which the decision of this case rests is whether the conduct of Trooper Rader in the firing of his automatic rifle amounted to such negligence as to place liability for the consequences on the respondent.

Trooper Rader was a young member of the State Police force, twenty-three or twenty-four years of age, and according to the report made of the Littleton incident it appeared that it was thought he should have shown more signs of maturity than he did and as testified to by one witness "in some respects he is like a small boy". It is difficult to conceive of any necessity for the officers to have seen any need for the use of the automatic firing of a rifle to apprehend Lash when a single shot or two could have killed him. Instead he fired the rifle or automatic and sprayed seventeen bullets in the direction of the Statlemire home with one of them wounding the claimants as they were looking out a window about 300 feet away. The testimony shows that the use by troopers of automatic rifles was generally confined to instances such as persons fleeing in automobiles where it was necessary to rapidly fire many bullets in order to hit the tires or other parts of a moving vehicle, not in instances where dead aim is sufficient on an individual or an object. While it is difficult to say what one should do in moments of peril and possible danger to one's life, we are of the opinion that there was wanton negligence on the part of Trooper Rader, and those who suffered injuries and damages as the result of such negligence should be compensated.

The injuries sustained by Mary Jane Starvaggi are serious in that her right breast and her right arm have been permanently scarred and partially destroyed, while those of Wilma Lee Morris are not nearly so substantial, though leaving a permanent scar.

We accordingly award Mary Jane Starvaggi a total of $25,000.00 and Wilma Lee Morris a total of $1,500.00.

Awards of $25,000.00 to Mary Jane Starvaggi and $1,500.00 to Wilma Lee Morris.

Opinion issued November 16, 1972

HARRY C. HENDERSON, Claimant,

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS,
a corporation, Respondent.

(No. D-332)

John F. Somerville, Jr., Esq. for the Claimant.

Thomas P. O'Brien, Assistant Attorney General, and *Donald L. Hall, Esq.* for the Respondent.

PETROPLUS, JUDGE:

The above entitled Claim arises from the application of concentrations of calcium chloride, sodium chloride, rock salt, and other chemical solutions to U. S. Route 50 at the top of the Allegheny Front near the intersection of said Route 50 with Route 5 in Mineral County, West Virginia, said roadway being adjacent to the property of the Claimant. The Claimant alleges that the continuous application over a period of time of poisonous chlorides on said highway for deicing purposes contaminated his water supply, making it unusable for human consumption and unsuitable for bathing, washing and other domestic uses. He contends that a well on his property which had regularly and consistently produced over 400 gallons of water per hour over a period of eleven years has now been reduced in quantity to approximately 40 gallons per hour, totally inadequate for the necessities of his family and a tourist stop business operated on his property adjacent to Route 50. Claimant requests monetary damages in the aggregate amount of $72,300.00 for the following items:

Loss of business during 1969 tourist season	$10,500.00
Loss of business during 1970 tourist season	$15,700.00
Hospitalization cost for plaintiff and wife, Potomac Valley Hospital, Keyser, W. Va.	$ 750.00
Doctor's fees in connection with hospitalization and continual treatment for calcium chloride poisoning	$ 350.00

Loss of 450 g.p.m. high quality well	$25,000.00
Pain, suffering and inconvenience due to fever, dry cough, and inability to sleep for eleven months, combined with general malaise	$20,000.00
TOTAL —	$72,300.00

In addition to property damage, including the well and vegetation, loss of his souvenir shop and tourist business, Claimant attributes the illness of himself and family and the deterioration of their health to the drinking of the contaminated water from the well and seeks damages for personal injuries and medical expenses. The Respondent substantially denies all of the allegations except that it is admitted during certain winter months calcium chloride and other chemicals were applied to the road surface in reasonable amounts to impede freezing and make travel safe in the mountainous area of the Allegheny Front. It is also admitted that Claimant's property fronts approximately 600 feet on Route 50 and is lower in elevation to the road surface where the chemicals were applied and lower in elevation to bins where such chemicals were stored by the Respondent, about 800 feet away at a State Road Maintenance Station.

Testimony was taken in the above-styled Claim on November 15, 1971, and after a lengthy hearing involving expert witnesses, chemical analyses on the condition of the water, photographs of the area in question and the testimony of a number of employees of the Respondent, the Court makes the following findings of fact.

Harry C. Henderson, Claimant, owned and operated a tourist stop business in the Allegheny Mountains, the area being a scenic mountainous terrain approximately 3,000 feet above sea level. The property was purchased in 1956 and bordered approximately 600 feet on and below the highway. In addition to a novelty shop and tourist stop business, claimant and his family used said property as a residence. In the year 1956 a well was drilled on the property 50 feet in depth, producing approximately 420 gallons per hour of good palatable water and at the time the claim was filed, the water flow had been reduced to 25 gallons per hour of contaminated and polluted water, having a vinegar smell, unfit for human consumption and use because of heavy concentrations of manganese and other salt chemicals. The topography of the area is such that surface water

drains from higher elevations and other properties 600 to 800 feet in distance from claimant's property. A gas station is near his property as well as a State Road Commission Maintenance Station on which the chemicals are stored. There are visible traces of dying vegetation as well as wilted trees on the claimant's property and areas of rock salt seepage are visible on claimant's property. Claimant has a health history of undiagnosed ailments, sore throat, dry hacking cough, and general debilitation which he attributes to the use of contaminated water. Mrs. Helen Henderson, his wife, established by her testimony that the water was unfit for domestic purposes such as bathing, washing and cooking, and eventually water had to be supplied to the property by transportation from another area. It is not denied that claimant's property has suffered substantial deterioration over a period of years because of the drainage and water problems. No explanation was offered in evidence as to the cause of the diminished water supply.

As for the conclusions of law, although claimant based his claim on negligence and excessive use of chemicals by the respondent in the area of his property, the evidence submitted does not support these charges of negligence. The case must be considered on the basis of the invasion of the claimant's property rights and interference with a reasonable enjoyment of his property. It appears from the evidence that the claimant and his wife made little or no effort to mitigate damages by seeking another source of water by drilling wells or having water transported to the premises, but persisted in using the inadequate and contaminated water until they were forced to suspend their business and seek medical treatment for their health problems.

It is common knowledge that percolating waters in mountainous areas ooze, seep, and filter through the ground under the surface without definite channels to properties on lower elevations. The course of subterranean water is uncertain and unknown and not discoverable from the surface. Gravity controls in such situations and wells in a lower strata rise and fall from the pressure of percolating waters. It is a difficult problem to prove that a well is injured, destroyed or endangered by the use of neighboring properties.

It is also well settled law that adjoining property owners have correlative rights and must make a reasonable use of their property as not to injure the property of others. Any injury that may result by interference with the natural flow of water which is incidental to

a lawful and proper use of the property is "damnum absque injuria". The rule of nonliability has been applied in cases where a water supply is incidentally cut off or diminished arising from the lawful and reasonable use of adjoining property.

If negligence had been established in this case, a recovery would have been allowed to the claimant. From the transcript of the testimony we conclude that although noxious substances caused the pollution of the claimant's well, the damage came from the operation of natural forces which do not constitute an actionable wrong unless this Court is prepared to hold that the respondent must refrain from the use of deicing procedures in the maintenance of its roadways during the winter months. It would appear that travel would become extremely hazardous in mountainous areas if the State refused or neglected to take reasonable measures to protect the traveling public.

Unfortunately, in the expanding economy of our State, roads in mountainous areas cannot be closed during the winter months to vehicular traffic to protect adjoining property owners from the noxious drainage of salts and chemicals which are reasonably required to remove the hazards of ice and snow on the highways, and make them passable.

The testimony clearly established that approximately 200 bags of chemicals were used by the respondent over a road area of 39 miles. According to the uncontradicted testimony of witness William B. Rannells, District Engineer for the respondent, who testified from the records of the respondent, each bag contains 100 pounds of chlorides which were applied over 31.9 miles, mixed with chips, for the entire winter of 1970, depending upon temperature. Prorating the same on the road adjacent to Mr. Henderson's property, approximately 121 pounds of chemicals were applied to the road surface, during the winter of 1969-1970, twenty-five per cent of which would be subject to drainage towards his well area. The rest would be carried away through drainage alignment. Admittedly, about 30 pounds of calcium chloride would drain as a maximum and run off onto the claimant's property. Because of the steep grades, the engineer further stated the amount seeping into the ground would be very small and the residue would be dissipated in drainage over the mountain.

The conflicting interests of the traveling public and the protection of adjacent private properties must be weighed and it is most difficult

to make an award in this case, where negligence or excessive use of chemicals on the roadway has not been established. This Court will hold that a reasonable use of deicing chemicals on roadways is a public necessity and that the emphasis must be placed on traversable highways. The consequential damage, if any, to the claimant's water supply would not be compensable as an unreasonable invasion of the claimant's property rights.

The written complaint confines its charges to drainage of contaminants from the highway, and on this state of the pleading we conclude there is no legal liability. It will not be necessary to consider the propriety of claiming damages for consequential loss of business, illness and medical expenses.

On the other hand, at the hearing photographs were introduced without objection which were taken by claimant in October, 1971, more than one year after the filing of this claim. They depict a method of storing road salt in open bins on a higher elevation about 600 feet from claimant's property, and disclose a circumstance that disturbs this Court. The State has taken no precautions to confine the chemicals in leak proof bins and it is obvious that seepage from the bins has discolored and contaminated the land in a wide area around the bins, possibly extending to claimant's property. There is no evidence that this haphazard method of storage existed prior to August 18, 1970, the date of the filing of this claim, and claimant utterly failed to introduce any proof that the faulty storage of chamicals on respondent's property was the proximate cause of claimant's damage, relying solely on continuous application of calcium chloride to the road surface as the sole cause of the damage. We have disposed of this lateral question in the foregoing opinion, but feel constrained by a sense of fairness to this claimant to keep this claim open for additional proof on the storage of chemicals and the effect this might have. This court may be furnished evidence if it is available, that large quantities of salt were stored on respondent's land in such a manner that the action of rain and melting snows would inpregnate claimant's land through percolation so as to render the water supply of claimant unfit. Upon such proof, if satisfactory, an award could be made. As the record now stands the method of storage depicted in said photographs does not relate to claimant's prior damages which occurred a number of years before the photographs were taken.

If there is a causal connection between improper storage of salt on respondent's property and claimant's damages, it may be alleged and proved in the reopening of this claim.

In conclusion, in accordance with the foregoing opinion no award is recommended under the facts and present state of the record of this case.

Claim disallowed.

Opinion issued November 16, 1972

MONONGAHELA POWER CO., a corporation, Claimant,

vs.

COMMISSIONER OF PUBLIC INSTITUTIONS FOR HOPEMONT STATE HOSPITAL, Respondent.

(No. D-566)

L. Eugene Dickinson, Esq. for the Claimant.

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

PETROPLUS, JUDGE:

The facts in this claim are stipulated by Petition and Answer and they are so found. The Answer admits each and every allegation of the Petition and requests that the claim be recognized.

The claimant, Monongahela Power Co., which was furnishing electricity to the Hopemont State Hospital, an agency of the State of West Virginia, on May 18, 1971, changed the method of billing the account from manual billing to Electronic Data Processing billing by the use of a computer; at the time the system conversion was made, the personnel of the claimant made an error in the computer programming for this account by omitting a multiplier. As a result of the error, the institution was underbilled for a period beginning June 17, 1971, to June 16, 1972, when the error was discovered and corrected. A statement was rendered for the sum of $13,699.61, being the amount due on account as a result of the underbilling.

The manager of the Hopemont State Hospital acknowledged the correctness of the statement and paid on the account the sum of $10,307.99, being the unspent budget allocation for the purchase of electricity which then remained in the operating budget of the hospital. The unpaid amount of $3,391.62 is the basis of this claim. It is clear that the claim exceeds the amount of funds allocated for electricity in the fiscal year budget, 1971-1972, of said Hopemont State Hospital.

It does not appear from the stipulation that sufficient funds were budgeted for electricity even though no error had been committed on the claimant's part. Unquestionably the State as a matter of conscience should pay the claim for an essential utility service to the institution were it not for the obstacles hereinafter mentioned.

This Court has previously held in the case of *Airkem Sales and Service,* Claimant, versus *Department of Mental Health,* Respondent, Claim D-333, and many analogous cases, that under the provisions of the West Virginia Code it is unlawful for the Superintendent of any institution, maintained by the State, to expend for any fiscal year a greater sum for the maintenance of the institution than shall have been appropriated by the Legislature therefor for such year. A similar claim was disallowed by this Court in the *Airkem* case as an illegal expenditure although admittedly a moral obligation of the State, since the spending unit clearly violated the statute by incurring liabilities which could not be paid out of the current appropriation. The statutes were passed so that funds would not be spent unless they were actually available in the appropriation.

The furnishing of electricity to an institution of the State is a contractual service and is so defined in Code 5A-1-1 which reads:

> " 'Contractual services' shall include telephone, telegraph, electric light and power, water and similar services."

Commodities by the same statute are defined to include contractual services furnished to an agency of the State government.

Code 5A-3-19 then explicitly states that if a department contracts for commodities contrary to the provisions of this article such contract shall be void and of no effect, and the department head shall be personally liable for the expenditure.

Inasmuch as the spending policies of the State are limited by law, those dealing with the State are charged with knowledge that Code provision 5A-3-19 declares such contracts to be void and of no effect.

For this Court to make an award in the face of these statutes solely on moral consideration is to flout these statutes and make a mockery of the legislation designed to circumscribe and limit the spending of state institutions. The public policy of this State as mandated is to control the public spending of state agencies. This Court was created to make awards on legal justification where there would be a remedy at law except for the constitutional immunity of the State from suit. We cannot legislate but may give relief only within the sphere of our prescribed and inhibited jurisdiction.

The jurisdiction of the West Virginia Court of Claims is statutory and additional jurisdiction cannot be conferred upon this Court by admissions or requests from the Attorney General's office that claims representing overspending be paid as lawful obligations of the State of West Virginia because the services were satisfactorily furnished and the State has received the benefit thereof. The above quoted statutes prohibit such expenditure.

Since both parties hereto admit there is no unspent budget allocation for the purchase of electricity over and above the sum that was paid according to the erroneous billings and the further sum of $10,307.99 which was applied to the account after the error was discovered, we find it impossible to distinguish this case from the *Airkem* and other cases where no awards were made.

Those dealing with public agencies who are not alerted to the caveats and limitations placed on spending units assume inherent risks which are not ordinary in transactions between private individuals and corporations. Undoubtedly they will feel aggrieved and imposed upon when they discover that they cannot collect for services rendered in good faith to agencies of the State. But they are presumed to know the law irrespective of their actual knowledge.

The fact that an error was made in computing the billings over a period of time does not change the result. The same ruling would apply if the bills had been correctly computed. Recovery would be limited to funds allocated and made available by legislative appropriation.

We are constrained to make no award in this case as a contrary ruling would be inconsistent with the former opinions of this Court. If counsel for the parties hereto are able to supplement the record in order that this case may be factually distinguished from our former rulings, the claim would be allowed without hesitation.

The claimant is not without relief as all of the claims which arose because of overexpenditure of departmental appropriations disallowed by the Court of Claims on purely statutory grounds were later paid by a special Act of the Legislature which directed their payment without condoning illegal acts contrary to the laws of the State.

For the foregoing reasons the claim is accordingly disallowed.

Claim disallowed.

Opinion issued December 4, 1972

CORY AUTO PARTS COMPANY, a corporation, Claimant,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-230A)

Gordon Billheimer, Esq., for the Claimant.

Claude H. Vencill, Esq., for the Respondent.

PETROPLUS, JUDGE:

This claim was submitted on Petition, Answer, Interrogatories, Answer to Interrogatories and a stipulation of the damages to personal property suffered by claimant as the result of the release of large volumes of water from an abandoned coal mine during the course of the relocation and reconstruction of West Virginia Highway Route No. 61, in the City of Montgomery, Fayette County, West Virginia. The Court has allowed and made awards for personal property damage to many claimants who were injured as a result of the Montgomery flood, and no purpose can be served by repeating the facts upon which the claim is based. Reference is made to the opinion, *Firestone Tire & Rubber Co., vs. West Virginia Department of High-*

ways, Claim No. D-227, issued February 16, 1972. In accordance with the stipulation of damages, it is the opinion of the Court to allow the claimant the sum of Ten Thousand Dollars ($10,000.00) for the loss and destruction of its personal property, and an award is accordingly made to the claimant, Cory Auto Parts Company, a corporation, in said amount.

Claim allowed in the amount of $10,000.00.

Opinion issued December 4, 1972

THE FIRESTONE TIRE & RUBBER COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-227)

T. D. Kauffelt for the claimant.

Anthony G. Halkias and *Claude H. Vencill* for the respondent.

JONES, JUDGE:

This is another of the many "Montgomery Flood" claims filed in this Court. The claimant, The Firestone Tire & Rubber Company, claims damages in the amount of $6,824.17 caused by the flooding of claimant's property, being a leasehold estate and personal property, in the City of Montgomery. The liability of the respondent, Department of Highways, was recognized in Judge Ducker's opinion issued February 16, 1972, overruling the respondent's motion to dismiss this and other companion cases.

The parties, by counsel, now have stipulated and agreed that the total amount of damages sustained by the claimant is $6,000.00, and the written stipulation is hereby approved. Accordingly, an award is made to The Firestone Tire & Rubber Company in the amount of $6,000.00.

Award of $6,000.00.

Opinion issued December 4, 1972

GENERAL FOODS CORPORATION

vs.

STATE TAX COMMISSIONER

(No. D-540)

Lee O. Hill for the claimant.

Thomas P. O'Brien, Jr. and *Guy R. Bucci,* Assistant Attorneys General, for the respondent.

JONES, JUDGE:

The claimant, General Foods Corporation, a corporation, filed its petition on April 21, 1972, seeking recovery of the sum of $28,590.95 from the respondent, State Tax Commissioner, said sum representing the West Virginia Soft Drink Taxes paid for soft drink tax stamps affixed to cyclamated soft drink products, which products and the stamps affixed thereto were destroyed at the direction of the respondent. The claimant contends that it has fully prosecuted its claim for a refund, which has been denied by respondent due to statutory restriction, and that, consequently, the State of West Virginia has been unjustly enriched in the amount paid for said stamps.

The facts of this case are not in dispute. By order of the Federal Commissioner of Foods and Drugs, dated October 17, 1969, it was directed that certain soft drinks and package mixes containing cyclamates be withdrawn from the general consumer market. On December 4, 1969, the respondent issued a memorandum to all manufacturers, bottlers, distributors and wholesale dealers of soft drinks containing cyclamates. This memorandum set forth the procedure to be followed for a refund of taxes prepaid on such products, and the requirements are summarized as: (1) petition for refund filed under oath; (2) affidavit of representative of the State Tax Department attesting to the destruction of the tax stamps; (3) indication in the petition as to whether the tax stamps were prepaid by taxpayers; and (4) at the discretion of the taxpayer a memorandum of legal authority. Representatives of the State Tax Department verified the destruction of various stocks of dry soft drink mixtures of the claimant

which contained cyclamates to which were affixed prepaid soft drink tax stamps in the face amount of $31,767.72. On the basis of the ten percent statutory discount allowed at the time the tax stamps were purchased, the claimant had paid $28,590.95 for such stamps. The claimant complied with the requirement set forth in the State Tax Department's memorandum of December 4, 1969, and by its petition for refund filed with the State Tax Commissioner on or about January 26, 1971, sought a refund of said $28,590.95. A hearing was held on said petition on March 24, 1971, and by administrative decision of the State Tax Commissioner rendered July 21, 1971, it was determined that West Virginia Code 11-19-5 prohibited the allowance of a refund for the soft drink stamps affixed to the cyclamated soft drink mixes which were destroyed.

The claimant's petition for a refund was filed pursuant to Code 11-1-2a, the pertinent part of which provides as follows:

> "On and after the effective date of this section [July 1, 1967], any taxpayer claiming to be aggrieved through being required to pay any tax into the treasury of this State, may within five years from the date of the filing of the return in respect of which the tax was imposed or within four years from the date the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within four years from the time the tax was paid, and not after, file with the official or department through which the tax was paid, a petition in writing to have refunded to him any such tax or any part thereof, the payment whereof is claimed by him to have been required unlawfully; and if, on such petition, and the proofs filed in support thereof, the official collecting the same shall be of the opinion that the payment of the tax collected, or any part thereof was improperly required, he shall refund the same to the taxpayer by the issuance of his or its requisition on the treasury upon which the auditor shall issue his warrant as hereinafter provided; if the official collecting the same shall be in doubt as to whether or not such taxes were unlawfully paid, or if he be of the opinion that the payment of the tax collected, or any part thereof, was lawful, and the taxpayer within thirty days after notice of such opinion is not satisfied with the ruling of such official, then such tax official may on his own initiative, and shall, upon written notice so to do from the taxpayer given within said thirty-

day period, promptly institute against said taxpayer, in a court of competent jurisdiction, a declaratory judgment proceeding to ascertain whether any such tax, or part thereof, has been unlawfully collected; ***"

Code 11-19-5 provides in part as follows:

"The Commissioner shall allow to each purchaser of tax crowns, whether for cash or credit, a discount of twelve and one half percent of the tax value of such tax crowns. Such discount, and the discount allowed on the sale of tax stamps [ten percent], shall be in lieu of the allowance of any claim for refund by reason of the breakage or destruction of containers stamped or crowned as provided in this article, the spoilation of the soft drinks or syrups, or the loss or destruction of tax stamps or tax crowns."

The summarizing paragraphs of the State Tax Commissioner's decision of July 21, 1971, were as follows:

"After an examination of the Petition for Refund, stipulation of facts, record of the Hearing, exhibits, brief of the Tax Department, reply memorandum of taxpayer, and all other relevant documents and information, it was determined that Code 11-19 provides an exclusive remedy for refund of taxes paid under said statute by providing a discount in lieu of a refund and that a claim for refund cannot be sustained under the general refund statute, Code 11-1-2a. It was further determined that the Tax Department memorandum referred to above, cannot be considered, as argued by taxpayer, as crediting a right to a refund upon the fulfilling of the conditions set forth therein for the destruction of tax bearing soft drink packages. Rather, the conditions imposed therein are for the purpose of presenting a claim for refund in a posture that is ripe for consideration. There is no question but that taxpayer has so fulfilled these requirements.

It is not necessary at this time to consider the other questions presented in this cause. The question of whether there has been a confiscatory taking of property or whether there has been an extraterritorial exercise of the State's taxing power are rendered moot by the disposition of this cause under the exclusive remedy doctrine.

THEREFORE, it is the DECISION of Charles H. Haden, II, State Tax Commissioner, that General Foods Corporation's Petition for Refund of soft drink tax in the amount of $28,590.-95 should be and hereby is denied, and in accordance with said DECISION, he will not issue his requisition on the Treasury of this State."

The State Tax Commissioner based his decision on the proposition that Code 11-19-5 has exclusive application to this claim. Now the claimant agrees with the respondent's contention and cites substantial authorities therefor. The West Virginia Supreme Court recognizes that where a statute imposes a specific excise tax, its refund procedures are exclusive, regardless of any general statute providing for tax refunds. See *State of West Virginia v. Penn Oak Oil & Gas, Inc.,* 128 W. Va. 212 (1945). Also persuasive, when applied to this case, is the general rule that interpretation of legislative language must be done on the assumption that the legislature in making any specific statute is aware of existing statutes. The general refund provisions of Code 11-1-2a were enacted by the legislature in 1939, while the provisions of Code 11-19-5 pertaining to the discount in lieu of refund was adopted in the Soft Drink Tax Statute of 1951.

On May 25, 1972, the respondent moved the Court to dismiss this claim on the grounds that claimant has not exhausted its legal remedies. Having based its decision denying relief on the exclusiveness of Code 11-19-5, the respondent now contends that the claimant had a duty to appeal under Code 11-1-2a by giving written notice within thirty days from notice of the adverse opinion to the State Tax Commissioner to institute a declaratory judgment proceeding, which time has long since expired.

The claimant contends that the State should not be permitted to have its Kool-Aid and drink it too, and the Court is inclined to agree. If the provision of Code 11-19-5 apply exclusively to this claim, as both parties now contend, and we uphold the respondent's decision on this issue, then the claimant will not be required to do a futile thing, and we conclude that the claimant does not have an adequate remedy at law.

There is no question that the State has been unjustly enriched. To permit the State to withhold refund of the prepaid tax in this case would be unconscionable. It is our view of the intention of the legis-

lature that it adopted the discount provision in lieu of refund in Code 11-19-5 to cover the loss or destruction or failure to use tax stamps in the ordinary course of business, and not to a seizure and confiscation by authority of law. We agree that the State should not operate a stamp redemption business, but we also believe that the State should not sell tax stamps to a citizen and then confiscate them without compensation.

The several tax refund decisions of this Court to which counsel for the respondent has referred, are not applicable to this case.

Accordingly, an award is hereby made to the claimant, General Foods Corporation, in the amount of $28,590.95.

Award: $28,590.95.

Opinion issued December 4, 1972

C. P. McDORMAN

vs.

DEPARTMENT OF HIGHWAYS

(No. D-551)

Claimant appeared in person.

Thomas P. O'Brien, Assistant Attorney General, and *Donald L. Hall,* for the respondent.

DUCKER, JUDGE:

Claimant, C. P. McDorman, of Route 2, Charleston, West Virginia, alleges that as he was traveling north on State Route 119 near Madison, Boone County, West Virginia, at about 8:00 o'clock P.M. on March 29, 1972, in his 1971 Buick Skylark automobile, the under portion of his car struck a piece of steel which had been placed over a hole in the bridge at a place called Low Gap on said highway. The car was damaged to the extent of $327.81, all but $50.00 of which having been paid to claimant by his insurance carrier. Claimant alleges damage in the amount of $300.00 to cover the $50.00 not paid as insurance and the value of the use of another car during the

period in which he was deprived of the use of his own car on account of the accident.

The evidence is to the effect that the piece of steel which caused the damage was a steel plate about four or five feet long which had been placed over a hole in road, and had come loose from its bolting or other fastening, and was not sufficiently visible at night to be avoided. The claimant borrowed a car from his brother-in-law without any agreement to pay for its use, although claimant said he felt morally obligated to pay for such use.

As there was no agreement or any implied understanding between the claimant and his brother-in-law about any payment or compensation for the use of the brother-in-law's car, we must hold that there was no liability for which the respondent was obligated to reimburse the claimant.

However, the claimant has proved the loss of $50.00 for which he was not reimbursed by his insurance carrier, and we, therefore, award the claimant the sum of $50.00.

Award of $50.00.

Opinion issued December 4, 1972

RADIOLOGICAL CONSULTANTS ASSOCIATION

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-560)

F. T. Graff, Jr., for Claimant.

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

DUCKER, JUDGE:

Claimant, Radiological Consultants Association, a corporation, alleges that it rendered radiological services to Fairmont Emergency Hospital, a state hospital, from December 1st, 1969 to June 30,

1970 inclusive, for which the State agreed to, but failed to pay claimant its charges of $2,815.00 for such services.

The facts, which are undisputed, are that the claimant was rendering radiological services for both Hopemont State Hospital and Fairmont Emergency Hospital under a one year contract dated July 1, 1969 which provided for the payment of $10,000.00, of which $5,000.00 was for each of the two hospitals. In December, 1969, it was concluded between claimant and respondent that it was not economically feasible to continue upon that basis, and so upon claimant's request, the contract was by mutual consent cancelled, and a new arrangement was agreed upon whereby claimant would charge only forty percent of the usual fee chargeable to patients at Fairmont Emergency Hospital who were wards of the State, inasmuch as the balance could be collected from Medicare. No fees for services were to be charged against the State for private patients, such charges and the collection therefor being left to the claimant. The claimant made regular monthly reports of its work to the respondent, giving names of patients and dates, and the charges of $6.00 each, instead of the usual full fee of $15.00. The new arrangement was agreed to by the Director of the State Department of Mental Health, the Director of Purchases for the hospital, the administrator of the hospital, and the claimants, and an untyped agreement was written up and presented to respondent, but not signed because it was not in typewritten form, and later a typed one was received in Charleston on June 23, 1970, which had stamped on it "Funds expire June 30th". There is nothing to show any lack of budget appropriation for the indebtedness.

It is clear in this case that the claimant not only acted in good faith and rendered the services for which it has not been paid, but acted to save the State a considerable sum of money in asking for and cancelling the previous agreement for services to both hospitals and to patients who were not wards of the State. The State was certainly enriched by claimant's services.

The only objection which could be made to payment of the claim is that it did not have a written contract. We think this is answered by the fact that there was a written memorandum, first in pencil untyped form, and later in typed form, but which was not formally signed by the respondent, whose clear duty it was to sign when it was receiving and continued to receive the benefit of the agreement. It was as much

the duty of the respondent as it was of the claimant to put the agreement in satisfactory legal form.

The usual valid reason for non-payment of such a claim is that funds were not provided for in the fiscal year budget. This is not claimed by the respondent, and apparently could not be so claimed, when the original agreement for a much larger amount must have been considered included in the budget of the hospital for that fiscal year.

We consider this claim as constituting a clear moral obligation which does not effectively violate legal requirements, and should be paid, and accordingly, we award the claimant the sum of $2,815.00.

Award of $2,815.00.

Opinion issued December 4, 1972

HUBERT WALTON, JR.

vs.

DEPARTMENT OF MENTAL HEALTH

(No. D-217)

Jack L. Miller, for claimant.

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

DUCKER, JUDGE:

Claimant, Hubert Walton, Jr., of Route 7, Marietta, Ohio, a 41 year old employee for over 19 years of the Union Carbide Corporation, Ferroalloys Division in Marietta, alleges damages in the sum of $5,000.00, because on May 7, 1969, he had a portion of the distal phalanx of the middle finger of his left hand cut off by a saw which he was operating as a patient taking a woodworking course or program of the alcoholic unit of Vocational Rehabilitation of the Spencer State Hospital at Spencer, West Virginia.

Claimant had become addicted to the use of alcohol, and upon the recommendation of his employer entered voluntarily the Spencer State Hospital in order to obtain aid for recovery from such addiction.

Claimant was offered several courses in the Hospital to keep him occupied part time, and he chose shop work. He told those in charge at the Hospital that "he had had a lot of shop work in school and on my (his) own" and as stated by him, "so they let me handle wood." He testified that as he was ripping out one piece of board to fit on the back side of a bird house he was making and as he was sawing half way through the board "it kicked back" and carried his hand up and cut off his finger. Loss of strength in his hand and loss of time from work at his regular employment are claimed to by claimant.

Respondent introduced evidence to show that claimant with others was instructed as to the use of the saw in question and that there was nothing defective about the saw, that it was safer without a guard on it than with one, and that there was no negligence in either the instructions given claimant or any lack of instructions, particularly in view of claimant's own representation that he had done a lot of shop work and respondent's evidence that claimant said he had operated most of the machines in the shop and that claimant had been given instructions on how to operate the machines. Nor was there anything unusual about the piece of wood which had already been sawed once and was being re-sawed to make two pieces of it. Furthermore, it was shown that claimant had been assigned to the shop approximately twelve days, of which seven or eight were class days, before the accident happened.

The evidence in this case does not show negligence on the part of the respondent either in the operation of the woodworking shop or in respondent's instruction to the patients, or any lack of adequate instruction. It is common knowledge that a saw in proper condition and properly operated will do what it is made for, but when improperly used may cause damage. We can only conclude that the loss by claimant of a part of his finger was due to his own improper operation and negligence for which he alone is responsible.

We are, therefore, of the opinion that the claim should be, and the same is hereby disallowed.

Claim disallowed.

Opinion issued December 4, 1972

VERGIE WARNER, Claimant,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-287)

No appearance for the Claimant.

Donald L. Hall, Esq., for the Respondent.

PETROPLUS, JUDGE:

The facts in this case were stipulated by the parties as follows:

1. That between July 2, 1969 and October 8, 1969, on West Virginia State Route 28/10, Pendleton County, employees of the West Virginia Department of Highways, while engaged in construction which consisted of the widening of a curve in the road, did blasting.

2. That the blasting consisted of three (3) shots, each shot containing twenty-five (25) holes loaded with one (1) to five (5) sticks of dynamite.

3. That the situs of the blasting was about 450 to 500 feet from the location of claimant's well.

4. That immediately after the blasting claimant's daughter advised Department personnel that the blasting had caused their well to become muddy.

5. That upon investigation the water in the well was observed to be muddy.

6. That after considering the circumstances surrounding the claim, the cost of litigation and the trespass involved, the parties hereto stipulate the amount of damage to be One Hundred and 00/100 Dollars ($100.00).

It appearing from the above stipulation that the claimant was damaged in the amount of One Hundred and 00/100 Dollars ($100.00) as the result of the blasting operations of the respondent, it is the

opinion of this Court that an award should be made to the claimant in said amount.

Claim allowed. Award in the amount of $100.00.

Opinion issued December 4, 1972

WEST VIRGINIA WELDING SUPPLY COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-568)

No appearance for the claimant.

Donald L. Hall for the respondent.

JONES, JUDGE:

The claimant, West Virginia Welding Supply Company, seeks to recover damages for the loss of fourteen oxygen cylinders valued at $50.00 each and sixteen actylene cylinders valued at $60.00 each, a total of $1,660.00. Oxygen and acetylene were purchased from the claimant by the respondent, Department of Highways, under a purchase order providing that the cylinders would be returned when empty or not later than a specified time, after which demurrage would be charged. In its answer the respondent says that the cylinders are lost and cannot be returned; and that the amount claimed as damages is fair and reasonable.

This claim was submitted upon petition and answer, from which it appears that the claimant is entitled to recover. Therefore, an award hereby is made to West Virginia Welding Supply Company in the amount of $1,660.00.

Award of $1,660.00.

Opinion issued December 5, 1972

VIRGIL DONALD SEEBAUGH and AVA MARIE SEEBAUGH

vs.

DEPARTMENT OF HIGHWAYS

(No. D-541)

William B. Richardson for claimants.

Donald L. Hall of Department of Highways for respondent.

DUCKER, JUDGE:

Claimants, Virgil Donald Seebaugh and Ava Marie Seebaugh, husband and wife, residents of Route 2, Parkersburg, West Virginia, owners of property located on what is known as Lost Pavement (State Route No. 38) three miles from Gihon Road, outside of City Limits of Parkersburg, West Virginia, allege that they have been damaged in the amount of $4,191.00 by reason of blasting operations of the respondent adjoining property of claimants on December 27, 1971, and by reason of a breach of contract in the form of an easement agreement with the respondent dated September 21, 1966.

The first count alleges blasting damages amounting to a total of $1,549.00 to the roof of the house, the ceilings in three rooms, two pear trees, fences on both sides of the road, and removal of blasting wire and a land slip in the barn field.

The second count specifies damages in the amount of $2,642.00 for an alleged breach of an easement agreement of 1966 by the respondent in destroying a fence which had to be rebuilt, damaging a meadow which had to be reseeded, leaving unleveled and not removed an embankment, and removing fill dirt and not placing it in claimants' field.

The evidence offered by the claimants consisted of the testimony of the claimants, and a witness who lived about three miles from the claimants' property who said she had heard the blasting and had seen the property both before and after the blasting. The evidence of the respondent consisted of the testimony of two employees of the respondent who were present at the time of the blasting, and a long time resident of the area who lived about a quarter of a mile from

claimants' property. Respondent introduced several photographs of claimants' property.

The evidence of the claimants and of the respondent as to the first count is in direct conflict, and the evidence as to the second count, except as to one witness for claimants whose testimony is not very satisfactory, contains little or no corroboration. The issues of the two counts are factually such that they must be treated separately for decision. The question of the applicability of the statute of limitation is to be considered as to the breach of contract alleged in the Second Count of the petition.

As to claim in the first count totaling $1,549.00 as damages for the blasting operations of the respondent which occurred in December 1971, this Court has repeatedly held that where there was damage done to property as the result of blasting the persons whose property was so damaged should be compensated for their loss. Such work cannot be done at the expense of others. However, the evidence must be clear that the blasting actually caused the damage and that the amount of damage is correct.

As to the act of blasting, claimants produced no witnesses who were present at the time of the blasting, while respondent produced three witnesses who were so present. It is difficult to believe that there could have been as many rocks in the yard and field as stated by claimants if there had been no blasting, in view of the testimony of respondent's witnesses present at the time of blasting to the contrary, and specifically that no rocks fell on the house. The house of claimants as shown in the pictures introduced, appears to be one which was in a poor state of repair, if not in a delapidated condition. The rocks in the yard had apparently been removed when the pictures were taken.

The testimony of the claimants as to costs of material and labor is most unsatisfactory, being mostly estimates of the claimants, conjectural in kind and without corroboration. Assuming that the evidence of the claimants as to the damage having been caused by the blasting, we cannot base an award on the figures specified by claimants. Furthermore, we are confronted with the conflict in the evidence. In view of such conflict in the evidence and the other apparent facts, we cannot give unquestionable credibility to the testimony of the claimants, although we are disposed to believe some amount of

damage was caused by the blasting even without the knowledge of the respondent's witnesses. In such case, this Court must try to reach some fair conclusion despite the absence of positive and acceptable calculations. As a fair settlement, this Court reaches the conclusion that it will award on the first count, the sum of $750.00.

As to the second count of the claimants' petition, the claim for breach of contract based upon the easement granted to the respondent on September 21, 1966, the record shows that this claim was filed in this Court on April 24, 1972. The respondent has answered with the defense that the petition fails to state a cause of action, that the claim is barred by the five year statute of limitations and that the damages alleged are excessive, speculative and conjectural.

Incidentally, it seems reasonable to this Court to think that if the respondent had failed to live up to its obligations under the easement agreement, the claimants would not have waited over five years and after the blasting before asserting their claim for breach of the easement agreement, and that the claim for damages under the easement agreement may have been more or less an afterthought.

We cannot agree to the position taken by claimants that the damage is in the nature of a continuing or recurring trespass, as the obligations of the respondent were specific and if not done in a reasonable time, the claimants could have attempted in this Court to enforce their rights, or if their land was taken proceed by mandamus to compel condemnation proceedings by the respondent.

The plea of the statute of limitations must be seriously considered. The easement for the work evidently contemplated was to be in a reasonable time, and after the expiration of that time, the right to sue would accrue and the period of limitation begin. The record is not clear as to such time and we can only be guided by the date of the agreement and a reasonable time thereafter. We are of the opinion that the time of the statute had elapsed when this claim was filed in this Court.

As to the applicability of the statute, Code 55-2-6, we are of the opinion that that statute applies, because the ten year statute specifies that the written contract sued on must have been "signed by the party to be charged thereby", otherwise the statute would be nullified. *West Virginia C & P. R. Co. v. McIntyre,* 44 W. Va. 210, 28 S. E. 696. This case is to be distinguished from cases which hold that cove-

nants in a lease agreement bind assignees of leases for ten years, because the Courts have considered the signing of a lease by the lessee as adequate and sufficient to bind the assignee of the lease inasmuch as the assignee was receiving all the benefits which the lessee, assignor, was entitled to. While it would seem the same rule should apply to an assignee who held his assignment without having signed the assignment, in such cases the courts held that statutes of limitations should be construed literally.

Whether our decision of the applicability of the statute of limitations in this case is correct or not, we are of the opinion that claimants' evidence in support of the second count of his claim is too conflicting and conjectural to support an award on that count.

We are, therefore, of the opinion to, and do hereby award the claimants the sum of $750.00 on the first count of their petition, and deny any award on the second count.

Award of $750.00.

Opinion issued January 3, 1973

LARRY L. BETONTE AND JUDITH A. BETONTE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-559)

Claimant *Larry L. Betonte* appearing in person.

Donald L. Hall for the respondent.

JONES, JUDGE:

This claim is for damages in the amount of $1,077.25 for the destruction of the household goods and personal belongings of the claimants, Larry L. Betonte and Judith A. Betonte, his wife. The damages were caused by flood waters backing up from a drain under West Virginia Route No. 19 in the City of Fairmont, in Marion County. The claimants were living in a rented trailer on the upper side of the highway.

About the year 1928 Route No. 19 was relocated and at that time, with the consent and cooperation of the property owners, the respondent, Department of Highways, then the State Road Commission, constructed a storm sewer from the property line of Ralph Truman through lands later occupied by the claimants' trailer to a manhole near the edge of the road right of way, which connected with a 24-inch culvert laid under the highway and discharging into an open ditch on the lower, opposite side of the highway. From the evidence it appears that the drainage was adequate until the year 1969. Then during heavy rains the water backed up above the manhole, flooding a considerable area and causing damage to gardens. Complaints were made by several property owners to the Governor and to the respondent State agency, and efforts were made by the respondent to clean out the culvert. However, surface water continued to flood the area in 1970 and 1971, and the respondent was aware of the problem at all times. In June, 1972, during an extremely hard rain, the water backed up above the manhole so fast and so high that within about 45 minutes time the claimants' trailer, setting on blocks, was flooded to a depth of about 1-1/2 feet above the floor. Mr. Betonte was working with other men to see if there was anything they could do to hasten the runoff through the culvert and by the time he realized the danger to his property he only had time to get his wife out of the trailer, along with their TV set and a camera, and to place some articles at higher levels. A substantial part of the claimants' belongings were rendered worthless, although certain clothing was salvaged by washing and dry cleaning.

The Court finds that the respondent knew that the culvert, either by reason of inadequate size or a clogged condition, was not carrying off surface waters in the area quickly enough to prevent damage to property owners. The damage to the claimants was a foreseeable event which could have been avoided by proper care on the part of the respondent; and the claimants were not at fault. Therefore, it is our opinion that the claimants should recover a reasonable compensation for their losses.

One of the claimants, Larry L. Betonte, has placed a value and approximate age upon each item of property destroyed, and he admits that his computations of value are based on replacement costs. Obviously, most of the figures are considerably above market values, and in cases of this kind fair market values may not be established

with absolute certainty. However, viewing all of the facts and circumstances and examining each item of damage and the probable depreciation in each case, we have arrived at total damages in the amount of $700.00.

Accordingly, the Court is of opinion to and does hereby award to the claimants Larry L. Betonte and Judith A. Betonte, the sum of $700.00.

Award of $700.00.

Opinion issued January 3, 1973

CARPENTER ADDITION WATER COMPANY, Claimant,

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-573)

No appearance for the claimant.

Donald L. Hall, Esq. for the respondent.

PETROPLUS, JUDGE:

On June 22, 1972, employees of the West Virginia Department of Highways were installing a culvert across the end of a hard surface roadway known as Secondary Route 28/1, at its intersection with Maryland Street, in Carpenter's Addition, near Ridgeley, Mineral County, West Virginia, and in the process of digging out the culvert, a backhoe bucket hooked under the claimant's water line pipe, puncturing it, and causing it to break at both ends. Repairs were immediately made by the claimant to prevent a heavy water loss. A statement showing expenditures for the repair of the water line was filed in itemized form, in the aggregate amount of $124.74 for labor and materials.

The respondent in its Answer to the claim admitted all relevant facts and after investigating the amount of the expenditure, admitted that the repairs were fair and reasonable.

There being no issue except to approve the settlement as made if it be fair and equitable, an award is accordingly made to the claimant in the amount of $124.74.

Award of $124.74.

Opinion issued January 3, 1973

WILLIAM MANUEL LONG

vs.

DEPARTMENT OF HIGHWAYS

(No. D-527)

Claimant present in person.

Donald L. Hall for the respondent.

JONES, JUDGE:

The claimant, William Manuel Long, is the owner of a tract of land situate on Route 60/20 in Greenbrier County, a 0.03-acre parcel of which was purchased by the respondent, Department of Highways, for purposes of the construction of Interstate Highway I-64. The claimant and his wife executed an option to sell said parcel of land to the respondent under date of October 27, 1966, and on May 23, 1967, they executed a deed for said land for a consideration of $200.00. In both the option and deed the grantors released the respondent from any damages to the residue of their land, the recital in the deed being as follows:

> "And for the consideration hereinbefore set forth the said parties of the first part do hereby release the party of the second part from any and all claims for damages that may be occasioned to the residue of the lands of the parties of the first part by reason of the construction and maintenance of a State Road over, upon and under the tract or parcel of land herein conveyed."

I-64 was constructed, and abutting the residue of the claimant's land is a fill 38 feet high, the toe of which is close to the claimant's

property line. Surface water draining from the highway and slope of the fill caused considerable damage to the claimant's land in the year 1970. Thereafter, the respondent constructed an asphalt ditch along the highway which diverted water from the pavement away from the claimant's property, but the water draining from the slope of the fill continued to drain upon the claimant's property with damaging effect. The claimant asks $3,560.00 to build approximately 200 feet of French drain along the base of the fill, with concrete gutter, for the purpose of diverting the slope drainage, and $1,740.00 for damages to his house, yard and garden, a total of $5,300.00.

In *Evans v. Department of Highways,* 8 Court of Claims 227, Judge Ducker wrote in the Court's opinion as follows:

> "While this Court has considerable sympathy for the claimants, it is forced to adhere to the law in such cases, and where the parties have executed formal options and deeds containing releases of the claims now asserted, this Court must abide by the provisions of such releases unless fraud or other illegality in regard thereto is shown."

There being no showing of fraud or other illegality, this statement is precisely applicable and is decisive in this case.

The respondent's motion to dismiss this claim asserts the additional reason that the claimant has an adequate remedy at law through eminent domain. While it is not necessary to decide this question, it seems clear that, if there had been no release, the continuing and permanent nature of the damages to real estate existing in this case would invoke the right of the property owner to have condemnation proceedings instituted, thereby eliminating the jurisdiction of this Court.

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

Claim disallowed.

Opinion issued January 3, 1973

DELBERT J. MATHENY, Claimant,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-550)

Claimant appeared in person without counsel.

Thomas P. O'Brien, Assistant Attorney General, and *Donald L. Hall, Esq.,* for Respondent.

PETROPLUS, JUDGE:

A claim in the amount of $200.00 was filed against the West Virginia Department of Highways, Respondent, by Delbert J. Matheny, cattle farmer, Claimant, for damages to his herd of cattle which became ill generally and lost weight as the result of eating wilted vegetation inside of the fence line that had been sprayed with a chemical designated as tandex herbicide by agents of the Respondent in the maintenance work along the right of way of Interstate 77 in the vicinity of Mineral Wells, Wood County, West Virginia.

The Claimant was the only witness produced, and the State, admitting the use of herbicide in its maintenance work, denied the toxicity of the spray. The photographs adduced by the Claimant show in vivid color wilted grass over a wide area within the fence line on his property in contrast to the verdant field beyond. According to the evidence the herd was of high quality, composed of Holstein and Angus cattle, in good health before the spraying procedure. Some of the cattle, instead of normally gaining weight at a rate of three or four pounds a day, developed diarrhea and became droopy and listless, losing weight for a period of three weeks until they recovered from the effects of eating the wilted brown grass covered with the spray material.

The Respondent offered as an exhibit a brochure giving a chemical analysis of the fluid used, which without further explanation is not too helpful to the Court, and said brochure indicates that the chemical is noncorrosive and of low mammalian toxicity. On the other hand, the Claimant has failed to adduce a report from a veterinarian supply-

ing the expert testimony that we would normally need to decide a claim of this nature.

It is common knowledge, however, that certain types of wilted vegetation develop an inherent toxicity of their own, and it is inescapable to conclude that in this case the property rights of the farmer were invaded by causing the grass inside his fence line to wilt and die over an area of three or four feet. The sickness of the animals shortly after eating the wilted grass covered with the spray material establishes a causal connection between the trespass and the damage. We hold that there is liability in this case because of the failure of the Respondent to take adequate and proper measures to protect the Claimant's property from an irresponsible spraying procedure.

The measure of damages borders on the conjectural, but the claim being modest in amount, we are of the opinion that an award should be made to the Claimant in the amount of $200.00, which represents a loss of approximately 500 pounds in cattle weight over a three week period at the market rate of 40 cents per pound. The testifying farmer was fair and honest in giving his best judgment of the loss of weight.

Award of $200.00.

Opinion issued January 3, 1973

VIOLET M. SHAFFER, Claimant,

vs.

BOARD OF REGENTS (W. VA. UNIVERSITY) Respondent.

(No. D-537)

Donald E. Price, Esq., for claimant.

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

PETROPLUS, JUDGE:

A claim was filed by Violet Shaffer, claimant, for personal injuries sustained as a result of a fall on a deteriorated and defective sidewalk on Stewart Street near its intersection with University Avenue in the

City of Morgantown, Monongalia County, West Virginia, in the amount of $12,000.00. The accident occurred on March 16, 1970, on a sidewalk where West Virginia University was the abutting property owner, and required to keep the sidewalk in good repair by virtue of an Ordinance adopted by the City of Morgantown on January 25, 1938, pursuant to Article VII of the Charter of the City of Morgantown, Chapter 126, Acts of the West Virginia Legislature, 1933, passed on February 17, 1933. Section 29-30 of said Ordinance reads as follows:

> Duties of owners of abutting property generally; liability of abutting owners for damages, etc.
>
> "In all cases where there has been heretofore established, or where there is hereafter established, one or more sidewalks along any street or alley, or part thereof, within the city, it shall be the duty of the owners of any ground fronting or abutting on such sidewalks to pave and repave the same, whenever required by an order of the city council to do so, and to keep such sidewalks in repair and to keep the same clean.
>
> Such property owners shall be responsible for any such sidewalk being out of repair, and if any person sustains an injury to his person or property by reason of any such sidewalk being out of repair and recovers damages therefor in an action against the city, such property owner shall be held liable to the city for the amount of such recovery and the cost to it of defending such action. (1-25-38, Sec. 2; 10-31-39.)"

It is alleged that notwithstanding the duty of the respondent to keep the sidewalk in good repair, it negligently permitted large cracks and depressions to exist and that loose pieces of concrete and gravel which accumulated upon the sidewalk caused it to become unsafe for travel. The claimant tripped over the debris, fell and fractured her knee and sustained other injuries, all of which have resulted in a permanent disability.

The respondent in its answer denied liability and asserted the affirmative defenses of contributory negligence and assumption of risk.

The facts developed at the hearing are as follows. The claimant was employed as a food handler at the Mountain Lair, a social center, of the University, and as a result of her disability was unable to work

for a period of five months. The accident occurred about 7:30 in the morning while she was on her way to work. The weather was clear and dry, and it was fairly light at the time. She was familiar with the condition of the sidewalk as she walked over the same route from her home to her work every morning.

The claimant in describing the cause of her fall stated "As I stepped over, my foot caught on some of that broken-up gravel and it just throwed me on my knees". She repeated a number of times that she was aware that the sidewalk was defective in that area.

Although Chapter 17, Article 10, Section 17 of the Code of West Virginia imposes absolute liability on a municipality for failure to maintain its sidewalks in good repair, no legal action was taken against the City, and the claimant has seen fit to pursue her claim against the property owner for negligent violation of a duty imposed by ordinance.

Our Court has held in a number of cases that every defect which may cause injury is not actionable. It is sufficient if streets and sidewalks are in a reasonably safe condition for travel in the ordinary modes, with ordinary care, by day or night. If a sidewalk is unsafe or hazardous, then the violation of the duty must be the proximate cause of the injury. The cases so decided and commented upon are cited in *Maxey v. City of Bluefield,* 151 W. Va. 302, 151 S.E. 2d 689, and *Burcham v. City of Mullens,* 139 W. Va. 399, 83 S. E. 2d 505.

The testimony clearly indicated that the claimant was familiar and aware of the deteriorated condition of the sidewalk having walked over it many times before on her way home or from her home to the place of her employment. It appears that she was not exercising the ordinary care required of her under these circumstances, and being forewarned of the defect, as a reasonably prudent person she should have taken precautions to avoid tripping over the loose gravel or depressions in the sidewalk.

This Court is constrained by statute to make awards only in those cases where a recovery would be allowed in the regular courts of the State except for the doctrine of sovereign immunity. Although we are most sympathetic to the claimant for the losses and injuries sustained, an award on this basis would be untenable, and would in effect make the State an insurer against accidents upon streets and sidewalks. The

evidence about her knowledge of this condition is not conflicting or subject to interpretation in her favor. Aware of the risks confronting her she proceeded over the walk without exercising the care required of her under these conditions. Further she has failed to sustain the burden of proving that the State's negligence was the proximate cause of the injuries of which she complains.

In conformity with the principles enunciated in this opinion, no award will be made.

Claim disallowed.

Opinion issued January 3, 1973

B. L. WILLIAMS, Claimant,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-557)

Claimant appeared in person without counsel.

Thomas P. O'Brien, Assistant Attorney General and *Donald L. Hall, Esq.* for Respondent.

PETROPLUS, JUDGE:

This claim was filed by B. L. Williams, claimant, against the West Virginia Department of Highways, respondent, for damages to an automobile operated by his eighteen year old daughter as the result of an accident that occurred about 11:45 P.M. on May 25, 1972, on U. S. Route 60 near Milton, West Virginia. The driver was traveling east on the two lane highway at approximately 40 miles per hour at night when she struck a barricade erected by the respondent in and across her lane of travel to divert traffic from an excavation in the right lane left by workers of the respondent who had been making repairs to the highway during the daytime hours. A deep hole in the highway from which the concrete and dirt had been removed, it is contended, was barricaded by lumber placed on the very edge of the excavation. It is further contended that two unlighted warning signs

stating "Men Working" and "One Lane Traffic" were installed respectively 220 feet and 120 feet from the excavation, and three unlighted plastic orange colored traffic pylons were installed between the excavation and "One Lane Traffic" sign.

It is charged that all unlighted signs, as well as the barricade were insufficient warning to a motorist driving at night at a reasonable speed, thereby creating a hazard to the traveling public which approached the excavation. It is also alleged that the hazard was reported to the West Virginia Police Detachment in Huntington, West Virginia, about three hours before the accident. No other automobiles were involved in the accident, nor had any accident occurred before the one in question.

The testimony and exhibits photographing the scene of the accident disclose a straight stretch of a two lane paved highway, with visibility in both directions for several hundred feet. The weather was clear and dry that night. The daughter who was driving testified that she saw three orange pylons and the barricade immediately before the accident, applied her brakes and swerved to the left to avoid the barricade, but struck the barricade, cutting the corner of the excavation, went across the road to the berm on the other side, then crossed the road again in her lane before she finally brought her car to a stop. She observed no warning lights or smudge pots at the scene of the accident. Upon being questioned by the Court she admitted that she saw the "Men Working" sign but assumed that they were working in the daytime. A police officer of Milton who arrived on the scene after the accident corroborated her testimony that there were no warning lights or smudge pots near the scene of the accident.

The State's testimony offered by two witnesses employed by the Department of Highways was in sharp and direct conflict with the testimony of the claimant. They testified the excavation was only four inches deep and the repair site was barricaded when they went home for the evening, after installing three lighted smudge pots near the approach to the site and three more beyond the excavation, as well as three orange cones in front of the barricade. A flashing yellow light was placed on a wooden horse about five feet from the hole and a "Men Working" sign was installed 150 feet from the site. A "One Way Traffic Ahead" sign was also installed about 100 feet from the site. A new battery had been placed in the flasher just before they left the scene for the day.

The issues of whether the respondent was guilty of negligence in preparing the repair site for night drivers and whether the driver was guilty of contributory negligence, and if both were guilty of negligence, and what was the proximate cause of the accident, are before this Court for a finding of facts.

If this Court finds the respondent guilty of negligence in not preparing the repair site properly for the safety of the traveling public at night, we must also find that the driver was free from negligence under the circumstances. If vandals or third parties for whom the State is not responsible had removed the lit smudge pots or extinguished the flames, negligence cannot be placed on the respondent unless it knew or had reason to know that a hazard had been created by the intervention of third parties.

It can be fairly inferred from the claimant's evidence that the driver was not exercising the prudent care required of her. She admitted seeing the one sign designated "Men Working" which was 220 feet from the accident point, and the distance her car traveled in its maneuvers after the accident implies difficulty in getting her car under control again. It would seem that a car traveling 40 miles per hour under normal conditions with adequate brakes should be brought to a stop before the distance indicated in her testimony. It is also well settled law that it is contributory negligence to drive a motor vehicle at such a rate of speed that it cannot be stopped in time to avoid hitting an object within the radius of the driver's headlights. A motorist should drive in a manner to bring his car to a stop within the assured clear distance ahead, and within his range of vision, when approaching an obstruction on the road. At night the rule has been modified to the "radius of lights" rule, and is applied unless visibility is obscured or diverted. It is a reasonable conclusion on the evidence before us that the driver was negligent on her part, and we find that her negligence was the proximate cause of the accident, rather than the negligence, if any, of the State's employees.

For the reasons stated, no award is made the claimant.

Claim disallowed.

Opinion issued January 3, 1973

OLA MARIE VARNER and OKLA OLIN VARNER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-519)

James T. Cooper for the claimants.

Donald L. Hall for the respondent.

JONES, JUDGE:

On May 26, 1971, at approximately 2:00 p.m., the claimant, Ola Marie Varner, was a passenger in a 1965 Ford Galaxie automobile driven by her husband, claimant Okla Olin Varner. They were traveling from their home in Tazewell, Virginia, to visit their daughter near Pocahontas, Virginia. Their route passed through West Virginia at an intersection near Bishop, West Virginia, they turned left off of West Virginia State Route No. 16 onto another West Virginia State Route in the direction of Pocahontas. At this point, the right lane was completely covered with water, the left lane was clear and the centerline was visible, but another car was approaching. One or more cars passed behind Mr. Varner on Route 16, but in no way interfered with the movement of his vehicle. The left lane being temporarily occupied, Mr. Varner continued on his way through the water at a speed estimated by him as 20 miles per hour. Then, according to the claimants' testimony, the right front wheels of their car struck a hole, causing the car to stop abruptly, the motor stalled, and Mrs. Varner was thrown out of her seat and against the top of the car with such force that she suffered injuries to her head, neck, right arm, elbow and shoulder. Mr. Varner testified that he started the motor and attempted to drive forward out of the hole but was unable to, so he backed out and then drove on to their daughter's home. Mrs. Varner was given a sedative and then taken to the Bluefield Sanitarium where she was a patient until May 29, 1971. The claim is for $15,000.00, including $481.82 medical expenses.

Photographs taken four days after the accident showed several rather large holes along the right edge of the highway, with the edge of the asphalt broken and jagged and the major portions of the holes

being in the highway berm. Mr. Varner described the hole he struck as "about three feet wide, two or three or four feet wide", and although the hole was standing practically full of water when the picture was taken, he estimated the depth to be six inches. Judging from the picture, it appears that the hole is about four feet wide and perhaps six inches deep at the deepest point, with about one foot of the width extending into the surfaced portion of the highway. The deepest part of the hole appears to be in the berm.

It appears from the evidence that it had rained most of the month of May, and it had rained hard for two or three days before the accident. After coming through winter, spring thaws and rains, West Virginia's asphalt highways, if not already repaired, undoubtedly showed the usual signs of deterioration, including chuck holes, broken edges and rutted, torn-up berms. Mr. Varner said he had seen quite a number of small chuck holes, both in Virginia and West Virginia, and "missed all I could but I had to hit some of them but they didn't stall the car, didn't stop it." When he reached the intersection he saw the flooded area of the highway. Mr. Varner said the water was standing still, and there is no explanation by anyone as to why it was not draining off. There is no showing that the respondent knew or should have known that there was a clogged drain or other defect causing the flooding of the highway. If the water had properly drained, the holes would have been visible (Mr. Varner testified that the visibility was good), and if they were plain to be seen, he could have and should have avoided them. But Mr. Varner could not see what was under the water. Instead of waiting for the approaching car to pass so he could have taken the clear lane around the water, he chose to challenge the flooded area and struck a hole at a speed sufficient for the impact to throw Mrs. Varner out of her seat and against the top of the car.

The consistent position of this Court since its creation in 1967 with respect to cases involving alleged highway defects is outlined in the opinion of Judge Petroplus in *Parsons vs. State Road Commission,* 8 Court of Claims 35, in part as follows:

> "This Court has many times held that the State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. The case of

Adkins v. Sims, 130 W. Va. 645, 46 S. E. (2d) 81, decided in 1947, holds that the user of the highway travels at his own risk, and that the State does not and cannot assure him a safe journey. The maintenance of highways is a governmental function and funds available for road improvements are necessarily limited."

There is no clear showing that the respondent was negligent in permitting the partial flooding of the highway; and the claimants, having chosen to proceed through the water, assumed certain risks. Under the circumstances, they should have proceeded in such a manner that injury would not result from a sudden encounter with an invisible obstacle or hole. Even driving near the centerline, which was visible, would have avoided striking the hole at the edge of the highway.

In our opinion, the claimants have not proved such a positive neglect of duty on the part of the respondent as would impose a moral obligation upon the State to pay the claimants' damages; nor do we believe that the claimants were without fault. Accordingly, the Court is of opinion to and does hereby disallow this claim.

Claim disallowed.

Opinion issued January 8, 1973

PAUL J. MULLINS

vs.

DEPARTMENT OF HIGHWAYS

(No. D-491)

The claimant appeared in person.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Donald L. Hall* for the respondent.

JONES, JUDGE:

The claimant, Paul J. Mullins alleges in his petition that on June 24, 1971, he hit a rock, the size of a basketball, which was lying in the southbound lane of traffic on State Route No. 14, known as

Ferry Branch Road, in the City of Charleston, with his 1966 Cadillac automobile, causing damage thereto in the amount of $235.48. The petitioner further alleges that the rock had fallen from the right of way above the road and that the claimant could not avoid hitting the rock because of oncoming traffic.

Further explaining the circumstances surrounding the accident, the claimant testified that he had lived in the area for about three months, had traveled the road thirty or forty times and he described the road as follows: "It's a very narrow road wrapped around a cliff. There is no berm on it at all. The rock cliff even hangs over on the road, not the right of way but the road." The claimant says that there were no "Falling Rocks" signs to warn motorists of the hazards of the roadside terrain, and charges that the failure to erect such signs constituted negligence on the part of the respondent. However, from the claimant's own description and a number of photographs made part of the record in this case it appears to the Court that a prudent driver would not need a sign to impress upon him the possibility of falling rocks in the area. This is especially true in light of the fact that the claimant was well acquainted with the road and its inherent dangers.

This Court consistently has held that the State is not a guarantor of the safety of travelers on its highways and that its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. *Parsons v. State Road Commission,* 8 Court of Claims, 35; *Criss v. Department of Highways,* 8 Court of Claims, 210; and *Lowe v. Department of Highways,* 8 Court of Claims, 175. In this case it does not appear that the failure of the respondent to provide "Falling Rocks" signs was a contributing factor in the circumstances surrounding the accident, and in the Court's opinion, the claimant has not proved such a positive neglect of duty on the part of the respondent as would impose a moral obligation upon the State to compensate him for his unfortunate loss. Accordingly, this claim is disallowed.

Claim disallowed.

Opinion issued January 10, 1973

SCOTT WOLVERTON, Claimant,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-530)

William R. Talbott, Esq., for the Claimant.

Donald L. Hall, Esq., for the Respondent.

PETROPLUS, JUDGE:

This claim was instituted by the Claimant, Scott Wolverton, against the Respondent, West Virginia Department of Highways, for damages in the amount of $20,000.00, based on tort.

When the case was called for trial, the following facts were established:

The Claimant was walking along a highway known as State Route No. 15 between Webster Springs and Cherry Falls, West Virginia, at approximately midnight on June 17, 1971, when he was seriously injured when struck in the left leg by an automobile being driven by one Ronald Larry Cochran. He suffered fractures of the left tibia and fibula and severe shock and has been hospitalized in a number of hospitals for orthopedic treatment because of the nonunion of the fractures. His expenses for medical care and confinement have been quite substantial, exceeding the sum of $2500.00. As a result of the accident and the severe injury to his left leg, it appears that he will be crippled the remainder of his life.

Just prior to his departure from Webster Springs he conversed with a city policeman named Denver Gregory, approximately one-half hour before the accident, who testified that the Claimant appeared to be under the influence of intoxicants but not sufficiently under influence to justify an arrest. In rebuttal the Claimant testified that on his visit to Webster Springs that day he drank only two beers, one in the afternoon and one about 8:00 P.M. that evening in an unnamed pool room. He was quite emphatic that his total consumption of alcoholic beverages was limited to two beers.

The night was foggy and misty and he was thoroughly familiar with the roadway over which he was traversing and aware of the existence of a large gravel pile on the berm of the highway, kept there by the West Virginia Department of Highways for road maintenance purposes. As he walked along the berm of the highway approaching this large gravel pile which extended about two feet over onto the paved portion of the highway, he was forced to go around the gravel pile into the highway in order to continue his journey. He did not see or hear the approach of the Cochran automobile from his rear, was struck and lay in a state of insensible shock until removed to the hospital. The highway where the accident occurred is comparatively straight and there was no obstruction to his view of vehicles approaching him from either direction with lit headlights, notwithstanding the foggy and misty nature of the atmosphere. The fog was not of sufficient density to impair the visibility of an approaching automobile. As the Claimant approached the gravel pile he observed no vehicles coming from either direction and contends that after looking in both directions he stepped out into the highway to go around the obstruction. The berm on the opposite side of the highway was too narrow for a pedestrian walk and the gravel pile being close to an embankment on the right side, it was impossible for the Claimant to go around it without traversing on the paved portion of the highway.

The Claimant contends he has a legal right to use the highway and that it was negligence on the part of the Respondent to place the gravel as to obstruct his passage over the highway or the berm thereof. Claimant's theory of liability also is based on the contention that if the gravel had not been piled in such a negligent manner the accident would not have occurred as he would have been walking on the berm of the highway, safe from the hazard of approaching automobiles.

Because of the severe injuries sustained, the substantial medical expense, hospitalization, and permanent disability, this Court has given careful consideration to all of the evidence concerning the placing of gravel in such a position which would cause pedestrians to walk around it, exposing themselves to the hazards of vehicular traffic.

Since the Claimant contends his personal injuries were caused by the negligent obstruction of the gravel pile, we may assume for the

purpose of this Opinion that the Respondent was guilty of negligence to position the gravel in such a manner as to expose pedestrians to the hazards of walking on the highway to reach their destination. The assumption that the gravel was negligently stored in itself would not entitle the Claimant to recover unless he was free from contributory negligence which proximately contributed to or caused his personal injuries. Notwithstanding that it was a dark night and somewhat foggy, vehicles on the traveled portion of the road would be visible particularly when their headlights were burning.

The Claimant, according to the uncontradicted evidence, showed a disregard for his own safety. It is the duty of the pedestrian to exercise ordinary care for his safety, use his eyes, and protect himself against impending danger. If he does not do so when he has the opportunity so to do, he will be guilty of contributory negligence as a matter of law, *Jackson vs. Cockill,* 149 W. Va. 78. In the latter case it was held by our Supreme Court that a pedestrian who could have observed the lights of an approaching automobile had he looked effectively and who walked across a highway with his head down, is guilty of contributory negligence as a matter of law when struck and killed by such vehicle driven by a motorist who failed to observe the pedestrian until the time of impact.

As indicated herein, it is clearly apparent in this case that notwithstanding the negligence of the Respondent, if it be negligence to store gravel on the side of a road, the Claimant under the evidence presented in the record of this case was guilty of contributory negligence as a matter of law. Had he exercised the reasonable care required of him under the circumstances and maintained a proper and effective lookout for approaching vehicles, he should have seen the vehicle in time to avoid injury. To be actionable the negligence of the Respondent must be the proximate cause of the injury complained of. Proximate cause is a vital and essential element of his case, and he must sustain the burden of proving it to justify recovery in any action based on negligence. The Claimant had a duty to exercise care to avoid an injury, particularly when he realized and appreciated the danger involved in stepping out into a State highway at night. An ordinary prudent person would have done so with full appreciation of the dangers to which he would be exposed if walking on a highway in the darkness of night, and taken the necessary precautions against the hazards involved.

The Court is of the opinion and finds that under the circumstances of this case the negligent storage of gravel was not the proximate cause of the accident, but on the contrary the Claimant's failure to take the necessary precautions for own safety was the proximate cause of his injury.

For the foregoing reasons we are constrained to deny a recovery and no award will be made.

Claim disallowed.

Opinion issued February 6, 1973

SCOTT WOLVERTON, Claimant,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-530)

William R. Talbott, Esq., for the Claimant.

Donald L. Hall, Esq., for the Respondent.

PETROPLUS, JUDGE:

The Claimant has filed a petition for re-hearing of the above-captioned case, setting forth three grounds for said petition:

1. The decision was contrary to the laws and undisputed facts governing the accident in question.

2. The Court assumed to be true factual situation upon which there was no evidence.

3. Uncontradicted facts were assumed to be untrue by the Court.

Rule 15 of the Rules of Practice and Procedure of the Court of Claims states that a motion for re-hearing may be entertained and considered ex parte, unless the Court otherwise directs. A re-hearing shall not be allowed except where good cause is shown.

The petition in effect requests a re-hearing of the case on its merits.

Although the Claimant's attorney has filed a very persuasive Brief, the Court reiterates its position that even though it is assumed that

the storage of gravel on the highway constitutes negligence on the part of the Department of Highways, such negligence was not the proximate cause of the accident and the injuries sustained by the Claimant. The Claimant was faced with an obstruction which he knew existed on the berm of the road. It was obvious to him that he would necessarily have to walk around it on the traveled part of the highway. He also knew the dangers incidental to walking on a highway traversed by vehicular traffic approaching from both directions. It appears that he failed to take the precautions that a person of ordinary prudence would have taken to avoid being struck by automobiles using the highway at night.

For the foregoing reasons we affirm our decision that the Claimant was guilty of contributory negligence and voluntarily assumed the risks, and, therefore, the petition for re-hearing is denied.

Petition for re-hearing denied.

Opinion issued January 16, 1973

CENTRAL ASPHALT PAVING CO. a corporation and V. N. GREEN & CO. INC., a corporation, Claimants,

vs.

THE STATE OF WEST VIRGINIA and the STATE ROAD COMMISSION OF WEST VIRGINIA, an agency of the State of West Virginia, Respondents.

(No. C-30)

Ralph C. Dusic, Jr. Esq., and *Kay, Casto & Chaney,* for the Claimants.

Dewey B. Jones, Esq., for the Respondents.

PETROPLUS, JUDGE:

The claimants, Central Asphalt Paving Co. and V. N. Green & Co. Inc., corporations, in the year 1963, performed certain work for the respondents on contracts for a road project in Cabell County, West Virginia. They have filed a claim in the amount of $159,915.50

for unclassified excavation and special rock fill. The contracts required the petitioners to make excavations, install metal and concrete pipes and secure and place certain types of stone, gravel and sand for underdrains; to construct concrete gutters and inlets; to secure and place guard rails and posts; to secure and place special rock fill; to engage in special compaction; provide dust palliatives; to supervise and maintain traffic during the progress of the work on the project; secure and install fences; secure and place limestone and fertilizers; and to attend to requisite seeding and mulching.

The wide variety of work was performed under the contract obligations and the work was accepted as satisfactory by the respondents. In accordance with routine procedures, a final estimate was made by the respondents and on June 14, 1966, when payment was made to the claimants, certain claims were made for additional compensation arising from extra services and additional materials furnished by the claimants, which apparently were not covered by the contract provisions or documented by change orders or supplemental agreements as provided in the Standard Specifications for Roads and Bridges, adopted in 1960, by the State Road Commission of West Virginia. The record is silent as to whether the extra work was handled on a unit price basis or on a Force Account basis. The contractors accepted the final estimate as prepared by the respondents, released their claims subject to exceptions, and the disputed items were reserved for adjudication by the Attorney General of the State of West Virginia under the statute then in existence covering claims against the State (Chapter 14, Article 2, Section 1 to 12 inclusive, West Virginia Code). These statutes authorized the Attorney General to act as a special instrumentality of the Legislature for the purpose of considering and adjudicating claims against the State or any of its agencies. The present West Virginia Court of Claims was established by Chapter 27, Acts of the Legislature of 1967, which repealed the former statutes and in lieu thereof enacted Chapter 14, Article 2, which latter statutory provisions relate to the present Court of Claims. The 1967 legislation provided that a person who had a claim against the State or any state agency pending before the Attorney General on the effective date of the statute (July 1, 1967) could present such claim to the Court of Claims.

The claimants have followed this procedure and have filed their claim before this Court as of June 29, 1967.

The respondents have filed a special plea of release, stating that the claimants are barred from seeking relief in this Court because on June 13, 1966, under seal and for a valuable consideration, they released all claims against the State except the certain disputed items which were reserved for adjudication by the Attorney General, provided they filed their claim with the Attorney General within ninety (90) days. Therefore, the respondents contend that the claim is now barred because the condition was not complied with, and this Court has no jurisdiction to consider the same or make any recommendations to the Legislature in connection therewith.

The original contract provided for a contract price of $1,037,855.-02 and with overruns and underruns, a payment of $1,009,102.94 was made to the claimants and accepted as full and complete payment of all claims and demands whatsoever, except for the disputed items which were to be presented to the Attorney General under the provisions of Chapter 14, Article 2 of the official code of West Virginia, as amended, within ninety (90) days from June 13, 1966.

The exact date that the claim was submitted to the Attorney General's office does not appear in the record but at the hearing on December 5, 1972, counsel stated that the claim was not filed until about a year and a half after final payment to the contractors.

This case raises one issue and one issue only:

> "Are the contractual provisions fixing a ninety (90) day limitation, which differ from the time fixed by the general statute of limitations, valid and enforceable in this Court?"

No briefs having been filed by counsel, the Court conducted its own research and is now of the opinion that such contractual provisions fixing a limitation period, unless precluded by statute or public policy, or unless the same are unreasonable or unreasonably short, are binding on the contracting parties and will relieve the obligor from the general limitation statute. This general rule has been applied frequently in contractual limitations provisions in insurance policies, fraternal benefits certificates, in bonds and various other types of contracts.

We have been unable to find a West Virginia case on the validity of voluntary contractual limitations which supersede the general statute of limitations. A Virginia case, *Smith vs. Northern Neck Mutual*

Fire Association of Virginia 112 Va. 192, 70 S. E. 482, decided in 1911, involving a claim on a fire insurance policy, held that a contractual limitation on the time within which the suit or action may be brought, is valid and enforceable if reasonable. This issue is annotated in 6 *A.L.R.* (3*d*) 1197.

It is the opinion of this Court and we so find that under the circumstances of this case, a ninety (90) day limitation of time for filing the claim before the Attorney General, which was voluntarily agreed to by all parties, is reasonable and not unreasonably short. There is no commonly accepted or well defined test of standards for determining whether contractual limitation periods are reasonable. If the limitation period is so short that it abrogates a person's right of action, it should be held invalid and against public policy. The parties agreed to the ninety (90) day provision and these disputed items should have been presented within the time fixed by the contract of the parties. The purpose of the limitation was to bring to an end and resolve the dispute, and it does not appear to the Court that undue advantage was taken of the claimants.

The shorter limitation prescribed by the written contract of the parties, in our opinion, is not in conflict with public policy or merely permissive. It is a condition of the settlement and a contractual modification of the period of limitation which the claimants otherwise would have under general law. The claimants will not now be permitted, at this late date, to revise or modify their contract when many personnel changes have occurred in the offices of the West Virginia Department of Highways and records, diaries and other documentation of the project may be missing or unavailable.

For the foregoing reasons, the special plea of release will be sustained and no award will be made in this case.

Claim disallowed.

Opinion issued January 23, 1973

ROBERT H. ASHCRAFT and JUANITA M. ASHCRAFT

vs.

DEPARTMENT OF HIGHWAYS

(No. D-564)

Mike Magro, Jr., and *S. J. Angotti,* Attorneys-at-Law for claimants.

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

DUCKER, JUDGE:

Claimants, Robert H. Ashcraft and Juanita M. Ashcraft, his wife, respectively, of Fairmont, West Virginia, allege that he suffered damages by reason of a defective county road known as Halleck Road off U. S. Route No. 119, in Monongalia County, on April 9, 1972, when the automobile he was driving struck a hole in the road, causing him to lose control of his car and causing the car to leave the road and strike a tree, resulting in bodily injuries to him and damages to his car. The claim of Juanita M. Ashcraft is for loss of consortium, companionship and society of her husband. A total claim, involving medical and hospital services, car, pain and suffering, loss of present and future earnings, and car damages, is alleged to be in a total sum of $75,000.00.

The respondent's answer is to the effect that the claimant was guilty of contributory negligence which was the proximate cause of the accident, that the petition failed to state a cause of action, that respondent had no notice of the condition of the road as alleged by claimant, and that respondent is not an insurer of the highways.

The evidence is to the effect that claimant, Robert H. Ashcraft, on the morning of the day of the accident had gone to play golf at the Paradise Lake Golf Course off Route 119 from the Halleck Road to Morgantown, and had left the golf course to have breakfast at Corker's Inn on Route 73 which intersects with Halleck Road. While on Halleck Road the truck, which claimant was driving alone, struck a hole which he said was six to eight inches deep and either three-fourths across the road or at least across the right hand lane. The

State Trooper who investigated the accident testified that the road had an approximately six foot berm, that there were no skid marks on the road but the vehicle had run down the berm for approximately 132 feet before leaving the road, that he did not observe any pot holes or large holes in the immediate area where the vehicle ran off the road although "down below there was a lot of holes in the road itself." This evidence is contradicted by the testimony of other witnesses, and there seems to be no doubt that there were holes in the road which were the result of the previous winter weather and the usual deterioration therefrom. The testimony was also that the claimant was approaching a curve which was estimated to be about a forty-five degree turn just about the point where claimant's car left the berm of the road, and the pictures offered as exhibits would seem to confirm the testimony of the Trooper. The evidence was also that the paved portion of the road was considerably broken for some 60 to 70 yards before reaching the curve where claimant struck the tree. It would seem also from the testimony of the Trooper that the roughness of the road before reaching the hole area would have forewarned claimant as to the conditions of the rest of the road. It is difficult to attribute the accident to the hole when the car traveled so far on the berm before leaving the berm and striking the tree.

All road accidents are regrettable and while we sympathize with any one injured because roads are not in perfect condition, we must abide by the decisions of the Supreme Court of Appeals that the State is not an insurer of its highways.

We are of the opinion that the claimant was negligent and that his negligence contributed to the accident, and, therefore, we deny the claim.

Claim disallowed.

Opinion issued January 23, 1973

CHARLES GRAVELY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-580)

No appearance for the claimant.

Donald L. Hall for the respondent.

JONES, JUDGE:

This claim was submitted to the Court for decision upon the petition of Charles Gravely and the answer of the respondent, Department of Highways.

The petitioner contends that the respondent placed a steel plate over a hole in United States Route No. 60 in Kanawha County, and that in so doing the respondent negligently used a plate of insufficient size and weight, which was likely to and, when the claimant's car ran over it, did fly up and strike the claimant's 1965 Plymouth automobile, resulting in damages thereto in the amount of $106.61.

The Chief of Claims of the respondent made a prompt and thorough investigation of this claim and recommended that it be paid. The detailed written report of the investigation supports this claim, and the respondent's answer admits the substantial allegations of the petition. Therefore, the Court is of opinion to allow the claim and hereby awards the claimant, Charles Gravely, the sum of $106.61.

Award of $106.61.

Opinion issued January 23, 1973

MONONGAHELA POWER COMPANY

vs.

NATIONAL GUARD AND OFFICE OF THE ADJUTANT GENERAL

(No. D-563)

Gene Dickinson, Attorney-at-Law for the claimant.

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

DUCKER, JUDGE:

Monongahela Power Company claims the West Virginia National Guard and the Office of the Adjutant General are liable to it in the amount of $298.43 on account of damages done to its 7200 volt electric power line near Terra Alta, Preston County, West Virginia, on the night of February 11-12th, 1972, when, in a parachute drop exercise, one of 200 parachutists of the Mississippi National Guard landed in the claimant's power line. The damages claimed are the costs of repairing the line and there is no dispute as to the amount.

The West Virginia National Guard and the Mississippi National Guard were engaged in a joint military training mission effort wherein the special forces personnel were to come to Camp Dawson in West Virginia and conduct winter training. Camp Dawson was one of the three locations in the whole country for such purpose, and it was on the night of February 11th that 200 airborne-type army National Guard troops were picked up in Mississippi and flown to West Virginia. All preparations to receive the parachutists when they landed were made by the coordinating officers and the Camp Dawson officials, and everything apparently went off as planned, except one of the parachutists "got off track in the air" and instead of making "an exit exactly on target" landed in the power line of the claimant.

From the evidence, it would seem that inasmuch as the Trooper who landed in the power line was a member of the Mississippi National Guard, that outfit should be responsible for the damage. There is no question but that there was human error which caused the para-

chutist to miss the landing area, but it is not clear whose error in calculation or timing caused the mishap. The troops were transported in an Air Force MC-141 Starlight aircraft which was moved to Mississippi for such purpose. It was joint venture of both States' National Guard in cooperation with the United States Army for mountain training and winter indoctrination. As the venture was a joint one in which all principals were involved, and was one in which cases the principals are generally considered legally liable, jointly and severally, we are of the opinion that the claimant is entitled to recover its damages from the respondent, the Office of the Adjutant General, which has supervision of the West Virginia National Guard, in the sum of $298.43.

Award of $298.43.

Opinion issued January 23, 1973

AMOS PREECE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-577)

Claimant present in person.

Thomas P. O'Brien, Assistant Attorney General, and *Donald L. Hall,* Attorney-at-Law for the Respondent.

DUCKER, JUDGE:

Claimant, Amos Preece, alleges damages in the amount of $1,200.-00 sustained by him in the loss of five head of cattle and one hog, which animals died from poisoning by lead obtained from a bucket used by the respondent in the painting of a bridge in 1971 on U. S. Route 52, across Marrowbone Creek at the Wayne-Mingo County, West Virginia line.

The evidence is to the effect that claimant had twelve cattle in his barnyard, and he saw six or seven of them eating out of a paint bucket and fighting over it, five of which died within a period of around

10 or 12 days, as did also one hog which was in the barn lot. Rags which had lead paint on them and the paint bucket were found in the lot, and the cattle and hog were seen by claimant eating and fighting over the bucket and chewing the rags. The rags according to claimant's testimony were thrown by the painters on the bridge to his property. Claimant did not know how the paint bucket got on his premises. A report from the Agricultural Research Service, A N H Division, signed by James P. McCoy, confirmed the fact that the cattle had died from lead poisoning.

Respondent admitted using lead paint to paint the bridge, and that an uncovered bucket, with about a half inch of solid lead paint, had been left by the painters, when they quit work the previous evening, behind the crane which was part of the equipment being used by the respondent in its work there. Neither the respondent nor the claimant knew how the bucket got into the claimant's lot.

The value placed on the cattle and hog by the claimant is $1,200.-00, which would seem reasonable for the five cattle and one hog, according to market then and the weight of the animals lost. Respondent did not contest the value estimated by claimant.

The question at issue is whether the respondent was negligent and is, therefore, liable. We are of the opinion that, inasmuch as respondent knew, or should have known, of the deadly effect of lead poisoning, it should have stored any unused and unsealed buckets or quantity in such a way as not to leave it available to anyone for any disposition by others, especially so when there was cattle on property adjoining its operations. Claimant had no reason to expect a bucket containing poison to be placed or thrown by anyone on his property, and the matter would not have occurred if respondent had not left it available for such result. We conclude that the respondent was negligent in this matter.

We are of the opinion to, and do hereby award the claimant as his damages, the sum of $1,200.00.

Award of $1,200.00.

Opinion issued January 23, 1973

OSCAR VECELLIO, INC.

vs.

DEPARTMENT OF HIGHWAYS

(No. D-459)

C. E. Byron, Attorney at Law, *Cunningham & Sparacino,* for the Claimant.

Dewey B. Jones, Attorney at Law, Department of Highways, for the Respondent.

DUCKER, JUDGE:

Claimant, Oscar Vecellio, Inc., was awarded a contract by the respondent to construct a bridge and its approaches on State Route 61, over Loop Creek, a tributary of the Kanawha River, between Robson and Deep Water, in Fayette County, West Virginia, such bridge having been designated as Bridge No. 2339, and the work involved being Project S-17 (5) performed in 1969 and into 1970. The work included the construction of the permanent bridge, a temporary bridge to keep traffic open, and the necessary crib walls to protect the bridge approaches.

When the contractor, claimant herein, had erected the temporary bridge and sixty to seventy percent of the main bridge it discovered that it was practically stymied in the work, because with the temporary bridge located as it was, it could not build the crib wall which extended into the temporary bridge location. A conference was had between the claimant and the representatives of the respondent, the claimant was allowed to remove the temporary bridge and construct a temporary crossing about fifty feet further up Loop Creek, the temporary crossing consisted of two large tank car cylinders with their ends removed so as to permit the flow of the creek water through them, and of rock and dirt filled in and on the tank car cylinders to make a road to sustain the rerouted traffic. During July and August of 1969 there were heavy rains in the vicinity and the fill that had been made in connection with a part of the crib wall

and most of the temporary crossing were washed out, and it is for the cost of restoring the fill and temporary crossing the claimant now seeks to recover in this case.

The claimant alleges that the flooding caused the damages sustained by the claimant and that such flooding was so great as to constitute an Act of God, for which claimant was not responsible, and for the loss so occasioned it should be compensated. The amount of the damages has been stipulated by the parties as being $4970.48 for the structural excavation and repair work on the fill and crib work and $1365.86 for the restoration of the temporary crossing.

As all questions as to the amount of damages have been stipulated and agreed upon by the parties, the question of liability is primarily, if not solely whether or not the facts should be construed as an Act of God.

Although the claimant may have been in error in construing the plans as to building the temporary bridge and the crib wall which resulted in such a conflict which rendered it unable to pursue such work simultaneously, the situation was recognized by the respondent which later gave its consent to the removal of the temporary bridge and the construction of the temporary crossing some fifty feet away. It is, therefore, our opinion that the claim for damages sustained in connection with the crib work stands on a better basis than that of the damages done to the temporary crossing. The construction of the temporary crossing was one solely in the judgment of the claimant, and the possibility or probability of its destruction by the high water was one which was primarily the risk of the claimant.

As stated, liability of the respondent must be based upon this Court's finding that the flooding was an Act of God under the 1960 Standard Specifications, Roads and Bridges, Sec. 1.7.12. The provisions of said specifications relieved the claimant of the duty to repair at its own cost any damage resulting from such Act.

The evidence is to the effect that, according to the information supplied by the U. S. Army Corps of Engineers, the rainfall in the Loop Creek area was 0.5 to 1.0 inches on August 19th, 1969 and 2.5 to 3.0 inches on August 20th, 1969. The normal water elevation of Loop Creek at the bridge site was 854.7 feet above sea level and the water level of the creek at the time of the flooding was 860.5 feet, the latter having been calculated immediately after the flooding.

The plans showed an extreme water elevation of 865 feet, but the witness who testified as to such figure could not tell just where the extreme water elevation figure came from, or on what basis the same was calculated. The only positive figures of normal and extreme water levels indicate about six feet difference. When these figures are considered with the other evidence, we are of the opinion that there did occur an "extraordinary flood" other than one of "normal intensity" as specified in the Standard Specifications, and that the flooding in this instance came within the definition of an Act of God.

As to the two items of damages, we are constrained to conclude that the cost of repairing the temporary crossing is one that should be borne by the claimant, as we cannot say that the construction of that crossing was of such soundness as to have been able to withstand much flooding of any degree, and that, therefore, any extraordinary flooding need not be considered.

We are of the opinion to and do hereby award the claimant the sum of $4970.48 for his costs in connection with the crib wall work, but disallow its claim for the damages to the temporary crossing.

Award of $4970.48.

Opinion issued February 6, 1973

CARL A. BROWN

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-409a)

CLARENCE E. BROWN

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-409b)

MARLENE J. DOWNEY

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-409c)

HARRY ELLISON

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-409d)

No appearance by Claimants.

Donald L. Hall, Attorney at Law for the Respondent.

DUCKER, JUDGE:

These claims were submitted on a written stipulation, agreed to by counsel for claimants and counsel for respondent, both as to the facts of the claims and the respective amounts of damages sustained by claimants.

The facts stipulated show that claimants, who had water wells on their several parcels of lands in an area approximately two miles southwest of Union, Monroe County, West Virginia, on U. S. Route

219, suffered damages to their wells on account of the chloride content of the water therein which came from the road salt stored by the respondent on nearby property owned or leased by the respondent. Respondent caused or allowed approximately forty tons of "road salt" to lie on its property for the entire summer periods of two years without covering it or having a floor beneath it or walls around it, so that the natural rain and precipitation of nature fell onto it, ran through it and then into the earth below, and thence affected the water which flowed into the wells of the claimants. The water in the wells prior to the acts of respondent was clear and had no taste or smell of salt and caused no damage to plumbing or utensils due to salt content. As the claimants' allegations of damages and the cause therefore are admitted by respondent, further proof thereof was unnecessary.

At the request of the respondent tests were conducted by the Department of Health of West Virginia which showed that the water from the claimants' wells was "very high" in chlorides, to-wit, 4880 chloride units in the water from the well of Carl Brown, 4400 chloride units in the water from the Clarence Brown well, 2830 chloride units in the water from the Marlene Downey well, and 7200 chloride units in the water from the Harry Ellison well.

We are of the opinion that the respondent was negligent in its care and custody of the rock salt which resulted in the damages alleged by the claimants herein, and accordingly we hereby award to them respectively the stipulated amounts of their damages, namely to Carl A. Brown the sum of $750.00, to Clarence D. Brown the sum of $600.00, to Marlene J. Downey the sum of $100.00, and to Harry Ellison the sum of $1500.00.

Award of $750.00 to Carl A. Brown.

Award of $600.00 to Clarence E. Brown.

Award of $100.00 to Marlene J. Downey.

Award of $1500 to Harry Ellison.

Opinion issued February 6, 1973

LEO R. HARRAH, Claimant,

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-454)

E. Garth Atkins, for the Claimant.

Thomas P. O'Brien, Asst. Attorney General, and *Donald L. Hall,* for the Respondent.

PETROPLUS, JUDGE:

The claimant, Leo R. Harrah, of Nitro, West Virginia, alleges damages in the amount of $20,000.00, by reason of injuries sustained by him on March 16, 1969, when he fell stepping down from a bus on a bridge owned and maintained by the West Virginia Department of Highways over Boggs Creek, in the City of Rainelle, West Virginia. The uncontroverted material facts developed at the hearing are as follows:

The claimant was employed as a driver by the Greyhound Corporation, and was driving his bus through the City of Rainelle at night on a journey from Lexington, Virginia, over U. S. Route 60, when engine trouble developed in the bus. He drove in low gear until he came to the City of Rainelle, made a stop at a bus station in a drug store there and called for another bus to take over his passenger load. Proceeding over the westerly part of the bridge to discharge his passengers, he stopped and then stepped down from the bus, striking his foot on a piece of steel which protruded above the level of the sidewalk on the bridge, lost his balance and fell, suffering injuries for which damages are claimed herein. The largest item of damages is the loss of wages amounting to $4,459.22. It appears that his left foot stepped on an angular piece of steel which extended about three inches above the level of the sidewalk on the bridge. The concrete of the sidewalk had deteriorated in such a manner that it crumbled away, leaving a protruding piece of steel projecting vertically from the sidewalk. The claimant also sustained damages for medical and hospital bills and experienced considerable pain and suffering as the result of the accident.

Respondent admits that U. S. Route 60, which runs through the incorporated town of Rainelle, is a part of the State Highways System and that the bridge in question is maintained by the respondent, but takes the position that the duty of keeping the sidewalk in repair is not on the respondent but rather on the town of Rainelle. Consequently, respondent denies all liability in the matter. The theory of respondent's defense is that the law does not require the State to maintain and keep sidewalks in repair on roads that are a part of the State Highways System, and that the duty to repair and maintain the roads is confined to the vehicular traveled part of a highway. The respondent further takes the position that even though it might have a duty to keep the bridge in question in repair and safe for travel, since the bridge is in the City of Rainelle, and the City Charter and Ordinances of the village impose a duty on the village to keep its sidewalks in repair, the claimant must look to the City of Rainelle exclusively for relief.

The sole issue in this case is whether the West Virginia Department of Highways had a duty to keep the sidewalk in repair on the bridge in question. Whether the City of Rainelle had a similar duty is irrelevant to the main issue.

There is no question that the sidewalk had deteriorated and constituted a hazard, especially to those walking thereon at night. The evidence in this case does not support any defense of contributory negligence or assumption of risk. The bus driver had a right to stop his bus on the bridge, and the further right to assume that when he stepped off the bus in the dark he would be stepping down on a safely maintained sidewalk.

It is the finding of this Court that the sidewalk is an integral part of the bridge crossing Boggs Creek, and that the State's duty of keeping the bridge in a reasonably safe condition for travel also extended to the sidewalk. Any obstructions thereon or defects which may cause injury to travelers would be actionable if the Department of Highways were guilty of negligence. The case of *Burdick v. Huntington,* 133 W. Va. 724, 57 S.E.(2d) 885 (1950) held that the user of the sidewalks of a town has a right to assume that the sidewalks of the town are reasonably safe for ordinary travel, and it is not necessary that the user keep his eyes continuously on the sidewalk. The State is not held to the doctrine of absolute liability as a municipality may be held under the statutes of this State. The claimant has a cause of

action for breach of the duty to keep the sidewalk in repair and free from obstructions which rendered it dangerous to persons using it with ordinary care in the usual mode of travel.

Chapter 17, Article 4, Sections 26 and 27 specify that State highways and bridges, so designated by the State Road Commissioner as part of the State Road System, include bridges or streets within a municipal corporation. The words "bridge" and "street" are used disjunctively in these Sections. *Appalachian Electric Power Co. v. State Road Commission,* 117 W. Va. 200, 185 S.E. 223 (1936). Although the case of *Smith v. Bluefield,* 132 W. Va. 38, 55 S.E. (2d) 392 (1948) held that the word "street" as used in these Sections relates only to the designated municipal thoroughfares which are devoted to vehicular traffic, and not to "sidewalks", it is the opinion of the Court that the duty imposed on the State Road Commissioner to maintain bridges as part of the primary road system at the expense of the State does include a duty to maintain the sidewalks on the bridges, which are an integral part of the structure.

The meaning of the term "street" in a statute is determined by the context, and the word "street" taken from a statute, isolated from its context, could be interpreted to include or not to include a sidewalk. We do not consider *Smith v. Bluefield* controlling in its construction of the word "street".

In a former opinion of this Court, *Bowman v. State Road Commission,* Volume 3, page 11, W. Va. Court of Claims, this Court made an award to an infant who stepped on a board which broke on a sidewalk on the Third Avenue Bridge on State Route 2 in the City of Huntington. The claim was approved by the Attorney General's office and payment was recommended by the State Road Commission.

This case has given the Court considerable difficulty, and the research of West Virginia decisions has not been helpful because of the unusual circumstances of this case.

For the foregoing reasons, the Court is of the opinion to and does hereby make an award to the claimant of $6,000.00 which will reasonably compensate him for his medical expenses, loss of wages and the pain and suffering resulting from the accident.

Award of $6,000.00.

Opinion issued February 6, 1973

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

vs.

BOARD OF REGENTS

(No. D-581)

Ralph Quick, Charleston Office Manager, appeared for the claimant.

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

JONES, JUDGE:

Joe L. Smith, Jr., Inc., dba Biggs-Johnston-Withrow, a printing firm in Beckley, has filed this claim covering four printing jobs, completed and delivered to the respondent, Board of Regents, and not paid for, in the total amount of $448.48.

Item No. 1 was invoiced on June 23, 1971, in the amount of $54.20 for "Disability Insurance Benefits" forms delivered to West Virginia University Hospital. The hospital has no record of the order or receipt of the booklets but the proof is clear that an order was filled and delivery made, and the hospital benefited thereby. This item will be allowed.

Items 2 and 3, totaling $318.78, are set out in two separate invoices, dated June 23, 1971, and May 9, 1972, for postage and mailing costs incurred in mailing "The West Virginia Law Review" for the West Virginia University College of Law. This portion of the claim is not contested, the respondent admitting the allegations of petitioner's notice of claim. The validity of the claim is supported by the evidence and the same is allowed.

Item 4 relates to a purchase order invoiced August 25, 1971, in the amount of $75.50 covering bus charges for shipping a partial order of "Schedule of Courses—1st Semester 1971-72". The evidence adduced at the hearing of this case disclosed that this invoice was paid in full and no sum is due the claimant therefor. Accordingly, this item of the claim is disallowed.

Further considering the foregoing statements relating to the several items of the claim, the Court is of opinion to and does hereby award the claimant, Joe L. Smith, Jr., Inc., dba Biggs-Johnston-Withrow, the sum of $372.98.

Award of $372.98.

Opinion issued February 6, 1973

WEST VIRGINIA BOARD OF REGENTS,
A STATE AGENCY, Claimant,

vs.

STATE BOARD OF VOCATIONAL EDUCATION, DIVISION OF VOCATIONAL REHABILITATION, Respondent.

(No. D-587)

Chauncey Browning, Attorney General of the State of West Virginia, for the Claimant.

William Wooten, Assistant Attorney General, for the Respondent.

PETROPLUS, JUDGE:

The State Board of Vocational Education, Division of Vocational Rehabilitation, an agency of the State of West Virginia created by Statute, Chapter 18, Article 10A, Section 2, of the Official Code of West Virginia, as amended, incurred an obligation of $317.57 to the Board of Regents, also a state agency, created by Statute, Chapter 18, Article 26, Section 3, of the Official Code of West Virginia, as amended, for the treatment of a patient at the West Virginia University Hospital from November 29, 1970, to December 8, 1970, and because of a lack of communication the bill remained unpaid. All parties concerned, including the Attorney General who represents both the claimant and respondent, in order to resolve the dilemma agreed that the bill should be paid by filing a claim in this Court, having it approved, and by award in favor of the Board of Regents, eventually the bill would be paid by legislative appropriation.

At the hearing, William Wooten, Assistant Attorney General who represented both state agencies, stated that the bill was not paid

within the statutory period because of restrictions imposed upon the respondent, which wanted to make payment but could not do so.

The legislative auditor and the Attorney General's office requested that this Court make an advisory determination of the legal or equitable status of the claim under the powers conferred in Chapter 14, Article 2, Section 18, of the West Virginia Code as amended.

The Court has considered the matter and makes an advisory determination that there is a legal claim against the respondent in the amount of $317.57, and recommends that the claim be paid.

Inasmuch as this is not an adversary proceeding, no award is made by the Court.

The Clerk of this Court shall transmit a copy of the Opinion to the officer who referred the claim for advisory determination.

Opinion issued February 20, 1973

VERNON COMBS and DAISY COMBS

vs.

BOARD OF REGENTS

(No. D-543)

Thomas M. Chattin for the claimants.

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

JONES, JUDGE:

The claimants, Vernon Combs and Daisy Combs, seek damages from the respondent, Board of Regents, in the amount of $1,486.78, and the facts upon which they base their claim are set out in their petition as follows:

"Claimants were employed at W. Va. State College as custodial workers. During the period beginning March, 1966, through March 22, 1969. They worked a total of 785-1/2 hours overtime for which they were never paid. Several demands were made on the Respondent, which demands were ignored."

On September 14, 1972, this claim came on for hearing upon the respondent's motion to dismiss the claimants' petition upon the ground that it appears on the face of the petition that the right of action set forth did not accrue within two years next before the commencement of this claim and that the claim is barred by the provisions of Chapter 21, Article 5C, Section 8 of the Code of West Virginia and/or 29 United States Code, Section 255; whereupon counsel for the claimants stated that the claim was not based upon either of said statutes but upon a contract of employment; and upon consideration of the claimants' petition, the respondent's motion to dismiss and statements of counsel, it was ordered that the Court's ruling on the motion to dismiss be deferred, leave was given the claimants to amend their petition, and the claim was continued generally. The claim was again set for hearing on December 5, 1972, and upon agreement of counsel for claimants that the petition would be amended to conform to such testimony as might establish a claim based upon contract the Court proceeded to hear testimony of the claimants.

Dr. William J. Wallace, President of West Virginia State College, was subpoenaed as a witness by the claimants and was present at the hearing but was not called upon to testify. Counsel for the claimants was granted leave to take the deposition of Mr. Albert Henderson if such deposition were taken promptly but it now appears that nothing further will be done in that regard.

In the Court's opinion sufficient evidence was not presented in this case to prove a contract between the parties which would extend to and support the claim for overtime compensation. The claimants' petition has not been amended and it appears that amendment within the bounds of the proof offered would not alter the Court's view of this case.

Upon consideration of the entire record it appears that the claimants have not alleged and cannot establish and substantiate a valid claim against the respondent and, therefore, this claim is disallowed and dismissed.

Claim disallowed.

Opinion issued February 20, 1973

G. B. JEFFRIES

vs.

DEPARTMENT OF HIGHWAYS

(No. D-554)

The claimant was present in person.

Donald L. Hall for the respondent.

JONES, JUDGE:

The claimant, G. B. Jeffries, lives on a farm along State Route 219/15 near Lewisburg, in Greenbrier County. The septic tank serving the claimant's premises is located in a low area of his land and drainage therefrom is piped into a "sewer well". The respondent Department of Highways for many years has maintained a culvert under the highway which discharges surface water along with gravel, dirt and debris upon the lower area of the claimant's land through which it drains to the vicinity of the well, 150 to 200 feet from the highway. The well was drilled about eight to ten years ago to a depth of approximately 186 feet. About six years ago it clogged and closed off and the claimant had it redrilled and opened. At that time, gravel, dirt and mixed debris resembling the materials discharged upon the claimant's land from the highway culvert were removed from the well. No claim against the State was made by the claimant at that time. Now the well is filled with solid materials to a point 94 feet from the surface and the State Department of Health has ordered the claimant to drill another sewer well. The estimated cost is $910.00.

The well has casing down to solid rock, approximately 80 feet, and the casing extends 18 inches to 2 feet above the ground. All witnesses are certain that no surface water or extraneous material enters the well from the top, and no witness could explain how anything could get into the cased well at any other point. The claimant testified in part: "I couldn't tell you how it's getting in. That's something I can't say but it's going in and down somewhere around that casing"; and again "We'd have to dig down and uncover it to find out anything".

A neighbor and witness for the claimant admitted that he did not know what is in the well or how the substance filling the well got there. He explained that the area was "limestone type land" with crevasses in the rock strata which make it permeable by water, indicating that the underground percolation of water may have something to do with the filling up of the well.

While there is some indication that the respondent may have caused or contributed to the cause of clogging of the claimant's well, the Court is of opinion that the proof in this case is so highly speculative as not to be the basis of an award. From the evidence the Court cannot say what is in the well, how it got there, or whether there may be some break in the well casing or other defect for which the respondent would not be responsible.

The Court is sympathetic and if a proper showing were made that additional evidence may be offered in support of this claim, the Court stands ready and willing to reopen the case for the hearing of such evidence.

Claim disallowed.

Opinion issued February 20, 1973

RALPH W. WAUGH

vs.

DEPARTMENT OF HIGHWAYS

(No. D-598)

No appearance for the claimant.

Donald L. Hall for the respondent.

JONES, JUDGE:

The claimant, Ralph Waugh, and the respondent, Department of Highways, have submitted to the Court an agreed statement of facts pertinent to the decision of this case and said facts are stipulated by the parties as follows:

In the summer of 1971, employees of the respondent were engaged in the construction of a sub-station at Kanawha Head in Upshur County, at a location where for many years the respondent had stored salt and other abrasives. During the construction of the sub-station the respondent's employees pushed a great quantity of salt and dirt over and upon the claimant's property and over a cliff into the claimant's spring, located about 15 feet from the respondent's right of way line. The respondent had no easement or agreement of any kind with the claimant which would justify such encroachment. Upon investigation the respondent has determined that the spring was rendered unfit for use and was still contaminated and unusable in January 1973. It was further determined by the respondent that the salt cannot be completely removed from the spring because it is in and between the rocks and crevasses of the cliff and surrounding earth. As a result of said contamination, the claimant, who is 86 years old, has personally carried water from a half-mile away for approximately one and one-half years. Several estimates of cost of drilling a well to replace the claimant's water supply were obtained, the lowest being $700.00 which the respondent admits is fair and reasonable.

The Court is of opinion that the foregoing stipulated facts are a proper basis for an award in this case and, accordingly, an award is hereby made to the claimant, Ralph Waugh, in the amount of $700.00.

Award of $700.00.

Opinion issued March 21, 1973

THE CITY OF CHARLESTON, a municipal corporation

vs.

WEST VIRGINIA DEPARTMENT OF FINANCE AND ADMINISTRATION

(No. D-574)

Robert R. Harpold, Jr., City Solicitor for the Claimant.

Thomas P. O'Brien, Jr., Asst. Atty. General for the Respondent.

DUCKER, JUDGE:

Claimant, The City of Charleston, a West Virginia Municipal Corporation, alleges that, by virtue of the authority contained in a duly adopted ordinance of that City, it rendered fire protection service to the respondent's buildings and property in the said City for the fiscal years July 1, 1969 to June 30, 1970, and July 1, 1970 to June 30, 1971, as well as July 1, 1971 to June 30, 1972, for which the respondent was assessed $36,231 for the first of said years, $55,098 for the second of said years, and $73,965 for the third of said years, and that the claimant has been paid only the amount of $73,965 for the said third year, and that the respondent is indebted to the claimant for the said first and second years, totaling $91,329.

The respondent has answered by saying that the whole claim is barred by laches, and as to the time prior to September 26, 1970 the claim is barred by the statute of limitations, which would mean as to second plea that the amount of $36,231 for the first fiscal year would be barred by the statute of limitations.

The facts are stipulated and are shown to be in accordance with the allegations as hereinbefore stated and are not in anywise in controversy so leaving the question of liability only one of law. The plea of laches is neither proven nor seriously contended. The one and only question for decision is whether the claim is barred by the two year statute of limitations as specified in West Virginia Code Chapter 55, Article 2, Section 12, which is in the following language:

> "Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the

> right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries . . ."

And whether the action is one which can be brought within five years as provided in Section 6 of the same Chapter and Article, as follows:

> "Every action to recover money, which is founded upon an award, or on any contract other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have accrued, that is to say . . . and if it be upon any other contract, express or implied, within five years . . . . ."

In other words, is this claim one which comes within the class for which no limitation is otherwise prescribed and is for damages to property or for personal injuries, which are claims ex delicto and must be brought within two years, or is this claim one to recover money founded on an award or on any contract and must be brought within five years? If this claim is one of tort, the respondent can be held only for the amount of the first fiscal year, but if it is one on contract, claimant is entitled to the charges made for both the said first and second fiscal years.

In order for the five years statute to apply we must conclude the claim is not one in tort, but in some manner is on some sort of contract, quasi or implied. Certainly the claim is not in tort. As the ordinance levying the fee designated it as "a charge against the owners" of the property, it must be considered as an "action to recover money" as defined in the five year statute. And as the claim is one for money, the claimant has placed upon the property owner the obligation to pay the same not in the form of a fine, but in the form of a debt. When one owes a debt on account of his ownership or property, we are of the opinion that he is impliedly obligated to pay the same as debt, thus placing the matter in the class of implied contracts, and making the five year statute applicable.

We have not had cited to us, nor have we found any specifically applicable authority in point on the question presented, and consequently nothing to afford us thoughts to the contrary in the matter.

The fact that the owners of property, including the claimant, have received the protection of these services would seem to render the matter one of implied contract.

As the service rendered by the claimant was to the property of the State and not to property of the City, and such service was, therefore, for the benefit of the State as a whole, in equity and good conscience the obligation is one which should be borne by the State as a whole, not by the City alone. Such fact in itself is, we think, justification for the allowance of this claim.

For the reasons stated above, we are of the opinion that there is here a debt imposed by a valid ordinance and that the five year statute grants the claimant the right to maintain its action and to have judgment for the full amount of its claim, and we, therefore, award the claimant the sum of $91,329.00.

Award of $91,329.00.

Opinion issued March 21, 1973

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AS SUBROGEE OF CORLISS P. MacDORMAN

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-605)

Robert J. Louderback, Attorney for the Claimant.

Donald L. Hall, Attorney for the Respondent.

DUCKER, JUDGE:

Claimant as the Subrogee of Corliss P. MacDorman, its insured, claims damages in the sum of $327.81 which is the amount of the claim of said Corliss P. MacDorman in the Claim No. D-551 decided by this Court on December 4, 1972, in which the said MacDorman was awarded only the sum of $50.00 as the amount which was not paid to him by the claimant herein, the said $50.00 being the amount

deductible under the policy of insurance in which claimant was the insurer.

The facts are as stated in the opinion in said Claim No. D-551, and as to which we decided the respondent was liable for the damages sustained, and we see no need for repeating them here, as this claim is to recover a part of the damages sustained in the same accident and proven to the satisfaction of this Court in said Claim No. D-551.

Accordingly for the reasons shown in the opinion in said previous claim, in which we held the respondent liable, and showing the remaining balance of said claim unpaid, we hereby award the claimant the sum of $277.81.

Award of $277.81.

Opinion issued March 21, 1973

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AS SUBROGEE OF DIANA K. SMITH, Claimant,

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-606)

Robert J. Louderback, Attorney for the Claimant.

Donald L. Hall, Attorney for the Respondent.

DUCKER, JUDGE:

Diana K. Smith, who assigned her interest herein to the Claimant, had lawfully parked her 1968 Ford Convertible automobile near her place of employment on Wyatt Road, near Shinnston, Harrison County, West Virginia, on February 26, 1971, and while so parked the employees of the respondent were blasting across the highway and cleaning debris caused by heavy rains. As the result of one such blast, stones were thrown into the air, landing upon said automobile thus causing damage in the amount of $78.80.

Respondent admits the alleged facts, that the damage caused was the result of negligence on the part of the respondent's employees, and that the amount of damage is correct and reasonable.

As we have frequently held in similar blasting cases, where the damages were caused by the negligence of the respondent and there was no contributory negligence on the part of the claimant or other proper defense, the claimant is entitled to recover, and accordingly we hereby award the claimant the sum of $78.80.

Award of $78.80.

Opinion issued March 26, 1973

J. S. LATTA, INC., Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-593)

PER CURIAM

The foregoing claim is disallowed for the reason set forth in the Opinion of this Court heretofore filed in deciding the claims of *Airkem Sales and Service, Claimant, etal, vs. Department of Mental Health, Respondent, covering Claims No. D-333 to D-347, inclusive, the factual situation and the law applicable thereto being the same as that involved in the foregoing decision of this Court.

Claim disallowed.

*Please see 8 Ct. of Cls. Rep. 180.

Opinion issued April 23, 1973

DARRELL BAILEY, Claimant,

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS,
a corporation, Respondent.

(No. D-589)

No appearance for the Claimant.

Donald L. Hall, Esq., for the Respondent.

PETROPLUS, JUDGE:

This claim is an outgrowth of the same facts and circumstances surrounding the claim of Charles Gravely vs. Department of Highways, Claim No. D-580, heretofore decided favorably for the claimant by this Court in an opinion written by Judge W. Lyle Jones of this Court on January 23, 1973. Respondent has admitted the allegations contained in the Claimant's "Notice of Claim" and the damages have been accepted as reasonable. Claimant's automobile travelling on U. S. Route 60 was damaged by a loose plate which was placed over a hole by the Department of Highways. An award is accordingly made in the amount of $437.13.

Award of $437.13.

Opinion issued April 23, 1973

THE FAIRMONT TIMES and WEST VIRGINIAN, Claimant

vs.

THE GOVERNOR'S OFFICE, Respondent.

(No. D-608)

George M. Amos, Jr., Esq. for Claimant.

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

PETROPLUS, JUDGE:

The Fairmont Times and West Virginian, a newspaper of Fairmont, West Virginia, filed a notice of claim for the publication of a legal advertisement which ran in the newspaper in December, 1971, relating to corporations which were delinquent in the payment of their corporate license fees to the State. The bill for the publication was originally sent to the Attorney General's office rather than to the Governor's office. The error was later rectified and repeated efforts to collect from the Governor's office met with no response. The legal advertisement was published under the provisions of Chapter 12, Article 12, Section 68 of the West Virginia Code and was duly authorized by law.

The amount of the claim is in the amount of $210.00 and the Respondent in its Answer admits that the invoice was not paid because of an error and misunderstanding between the parties. After the funds for the fiscal year 1971-1972 had been exhausted the bill could not be paid although at the time the bill was incurred, there were sufficient funds to pay for the publication.

Inasmuch as the Respondent admits liability to the Claimant in the amount of $210.00 and the Court being of the opinion that this is a valid contractual claim against the State, an award is accordingly made to Claimant in the amount of the claim.

Award of $210.00.

Opinion issued May 2, 1973

JOE KIRK, aka CARY JOE KIRK, Claimant,

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS, Respondent.

(No. D-569)

Paul J. O'Farrell, Esq. for Claimant.

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

PETROPLUS, JUDGE:

This claim arises for the theft of certain tools, dies, ladders, and other equipment which were taken from Claimant's truck, parked on his property north of the village of Neola, Greenbrier County, West Virginia, on May 10, 1972. The Claimant is a small contractor who used said equipment to earn his livelihood. The persons suspected of the theft were two juveniles, aged 16 and 20 years, who escaped from the Anthony Correctional Center at Neola about two hours before the theft was discovered. The truck cab had been locked but in some manner the thieves broke into the truck and drove it to Huntington, West Virginia, where it was recovered by the city police about three weeks later, where it had been parked in a garage and the truck was apparently undamaged. The equipment and other personal property therein was missing, and an itemized list was submitted at the hearing showing the value of the stolen property to be in the amount of $899.63. The circumstantial evidence points very strongly to the escaped inmates.

Lack of proper supervision of the Correctional Center or negligence by the agents of the State is the basis of liability. The Respondent denies negligence on the part of the employees of the State, and in the alternative states that even if the State were negligent in its supervision of the Correctional Center, such negligence was not the proximate cause of the Claimant's alleged damages.

The evidence at the hearing established the following facts:

The Claimant's home is about two miles from the Anthony Correctional Center and the tools were in a locked wooden tool box on

an open bed pickup truck. The truck was started by manipulating the wires in the engine and the theft was attributed to the male juveniles entirely through hearsay evidence and suspicion.

No evidence was submitted as to any specific act of negligence on the part of the guards for the Center and the position of Claimant's counsel seems to be that inasmuch as the State assumes the responsibility of reorienting and rehabilitating the juveniles, it should be held responsible for their depredations. The Correctional Center is not a maximum security prison but constitutes a facility for the handling of youthful offenders as a processing center to determine their capabilities, interest, and responsiveness to control and responsibility. It is the public policy of this State that delinquents be first given an opportunity to reestablish their ability to live peaceably in our society through a humane and efficient program under the supervision of the Commissioner of Public Institutions. The juveniles are classified through a reception and examination procedure and are under supervision rather than confinement. The program is one of training and care of children rather than incarceration.

The testimony of a Mr. Freeman, who is the Superintendent of the Anthony Correctional Center in Neola, described the institution as a pre-release center for juveniles who are assigned there from the Boys' Industrial School in Pruntytown. After the boys have served in Pruntytown they are sent to the Center for screening and to work on a program with the United States Forest Service. The windows of the buildings at the Center have no bars and the doors are not locked. Ordinarily two or three correctional officers are on the premises and the boys are free to go out on their own and engage in any worthwhile employment. They leave in the morning and return at night, with little or no supervision. The purpose is to give them vocational training and after they have acquired some skills and established good work habits, they are released. Mr. Freeman's testimony further developed that the State Police and the Sheriff's office were notified and someone was sent out in pursuit of the boys about fifteen minutes after their "escape". The boys were captured about a month later in Huntington and transferred back to Pruntytown.

It is the finding of the Court that the correctional procedures of the State cannot be questioned by the public in this Court when they are established by a legislative policy of care, training, and reformation. The juveniles are not agents of the State Agency and any damages

that they might inflict on property owners who live in the vicinity of a correctional center are not compensable by the State, unless the State or its agents have breached some legal duty to the inhabitants of the area where the Center is located. The evidence in this case does not establish the breach of any such duty or support any finding of negligence on the part of the institution.

In accordance with the foregoing opinion, no award will be made in this case. To do so would make the State an insurer of the conduct of these juveniles at the Center.

Claim disallowed.

Opinion issued May 15, 1973

JOEL V. PAULEY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-558)

W. Dale Greene for the claimant.

Donald L. Hall and *Thomas P. O'Brien, Jr.,* Assistant Attorney General, for the respondent.

JONES, JUDGE:

On or about June 14, 1972, the 1971 Chevrolet Impala automobile owned by the claimant, Joel V. Pauley, was damaged when a large tree limb fell on it, while it was parked along the side of West Virginia Secondary Route No. 16/2, known as Myrtle Tree Road, near the claimant's residence. This was a rock base road, much narrower than the 30-foot right of way owned by the State, and the offending tree was growing on the public right of way. The tree was a large Ash, about 50 feet tall, with two large forks. The base of the tree was about half rotten, and it was leaning as though it might fall in a line with the road. A space under this tree was the claimant's regular parking place until he became apprehensive that the tree might fall and damage his car. His father then agreed to move his

car to another location, permitting the claimant to park in front of the residence across the road about 25 or 30 feet from the tree. The claimant and his mother both testified that they noted the rotten condition of the tree trunk and the fact that the tree was leaning in a direction away from the claimant's new parking place. The claimant's mother called the State Road Commission two or three months before the tree fell, giving notice of the tree's condition and an employee of the respondent assured her that the tree would be taken care of. However, nothing was done and sometime during the night of June 13-14, 1972, one of the large forks fell across the road onto the claimant's automobile damaging the front end of the car including fenders, grill, hood and windshield. After the accident the respondent again was notified and a crew was dispatched to cut down the remaining portion of the tree.

We are satisfied from the evidence that the rotten condition of the tree caused it to be a hazard to the public generally, and having received notice of the dangerous condition it was the duty of the respondent to eliminate the hazard. The respondent's agents and employees failed to exercise ordinary care under the circumstances, and the Court finds that their negligence was the proximate cause of the damage.

There were only a few places along this narrow road where a car could be safely parked and the claimant had moved from a location he believed to be dangerous to one which appeared to be out of line of the rotting, bending tree. Harm to someone should have been foreseen by the respondent; but we do not consider the claimant to have been contributorily negligent in parking where he did as his choice of parking places was extremely limited and he reasonably believed that if the tree fell it would fall away from his vehicle.

The amount of the claim is based on an estimate of damages in the amount of $469.80, and the amount actually paid Holland Chevrolet Company to repair the car was $559.23. The amount claimed as damages has not been questioned by the respondent and the same appears to be fair and reasonable. Therefore, we find in favor of the claimant, Joel V. Pauley, and award to him the sum of $469.80.

Award of $469.80.

Opinion issued May 21, 1973

BAXTER CURTIS GRIFFITH ADMINISTRATOR OF THE ESTATE OF BERNARD WILLIAM GRIFFITH, DECEASED,

vs.

WEST VIRGINIA DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-365)

John H. Tinney, Attorney for the Claimant.

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

DUCKER, JUDGE:

Claimant, Baxter Curtis Griffith, as Administrator of the Estate of Bernard William Griffith, deceased, alleges that the decedent, Bernard William Griffith, eighteen years of age, was an incarcerated inmate serving an indeterminate sentence of one to ten years in the West Virginia State Penitentiary in Moundsville, West Virginia, when he was killed by a fellow inmate, Roy Allen Thomas, on June 12, 1969; that the respondent was negligent in the care, control and custody of the decedent; that the respondent knew that a fight had occurred on the day of the slaying and no precautionary measures were taken to see that the assailant and the victim were separated; that respondent had knowledge of the drinking of liquor by inmates in the boiler room of the prison on the day of the slaying and were negligent in failing to take affirmative corrective action; and that the supervising officers in the boiler room were negligent in failing to take affirmative corrective action; and that the supervising officers in the boiler room were negligent in their duty of maintaining order, in not remaining at their assigned duty posts, thus rendering it impossible to do their duty; and that by reason of such alleged negligence and the resulting death of Bernard William Griffith, the claimant alleges damages in the sum of $113,000.

There is little, if any, controversy or dispute of the facts as testified to by the witnesses, and our decision must rest upon the question as to whether such facts prove negligence on the part of the agents of the respondent which could be considered the proximate cause of the death involved and render the respondent liable in damages therefor.

Counsel for the claimant and counsel for the respondent have submitted excellent briefs in support of their respective positions and the reading of their briefs leaves the Court with a difficult decision in the matter, as the pro and con of the question of liability depends so largely upon how much protection must be afforded an inmate from his fellow inmates, and upon what amounts to negligence in that regard which according to law is compensable.

We will first review the principal facts. Claimant's decedent had been convicted on August 30, 1968, of grand larceny in Greenbrier County, and on September 10, 1968, he entered the prison at Moundsville. After successive work assignments in the prison he was on his last day on the morning shift in the prison boiler room. Prior to his death, he was placed in the guard house for one day for fighting with his fellow inmate, Robert Mullens, and subsequently he was placed in a segregated cell for sixty days for being intoxicated and, upon being released on May 15, 1969, returned to his boiler room assignment. On June 11, 1969, he was placed in the guard house for one day for cursing an officer when he was awakened for work to be done in the boiler room.

On the day the decedent met his death Roy Allen Thomas, another inmate who had been returned to the prison some eleven days prior to Griffith's death and who, it appears, had a previous rather bad reputation both in and out of prison, was also assigned to duties in the boiler room, and during the morning of the day of Griffith's death, Griffith and Thomas consumed some contraband liquor commonly referred to as "julep", and later that morning they were engaged in an altercation in which Thomas was struck in the face and suffered a broken nose, and about 2:00 p.m. that afternoon, Thomas was "locked up" for being drunk. The body of the decedent was found about twelve o'clock noon that day in the shower room adjacent to the boiler room, and an autopsy revealed that death had been caused by "skull fracture", and that Griffith had been bludgeoned to death with a pipe wrench. There was found on the deceased after his body was taken to the hospital for the autopsy a dagger made out of a screwdriver. Thomas was later indicted for the killing and upon his plea of guilty of involuntary manslaughter was sentenced to a one year term in the penitentiary.

Counsel for the claimant in his brief relies largely upon the following facts in support of his claim.

There was only one guard assigned to the general area of the boiler room and that guard also had the responsibility of maintaining security and maintenance in the carpenter shop, plumbing shop, electric shop and engine room. There was only one guard stationed at the end of the alley which extends in front of the boiler and shower rooms, and he had the responsibility of maintaining two gates in the prison industries fence and his position was not where he could observe the alley or inmates standing or passing through the gates.

Tools, including hammers, screwdrivers, and pipe wrenches were contained in the prison industries area of the boiler room, plumbing shop and carpenter shop, which tools were checked out to various inmates to perform their work duties by other inmates from a locked cabinet in the plumbing or carpenter shop, and one guard is responsible for such check-outs and returns, and such guard would be asked for the tools or the inmate could get tools from the cabinet sometimes when the cabinet was not locked, and return it sometimes when the guard was not present. One witness testified that on the day of the death a tool shack located beside the boiler room which contained a hammer was wide open and unattended. William Pugh, an inmate, testified that he had had an argument with decedent that day and decedent had threatened him with a hammer, and also that he had observed Roy Allen Thomas standing in the door of the shower room and that it was evident that Thomas had been drinking and that his face and nose were swollen.

Evidence of other facts which we consider of a minor nature was introduced in support of claimant's contention that the prison was not properly operated and that such facts were evidence of a pattern of conduct which amounted to actionable negligence on the part of the officials of the respondent. Although we have heard and considered all the facts proven in considerable detail, we cannot in this opinion attempt to recite all of them, and we can only refer to such of the evidence as we consider vital or pertinent in our determination of the issues of the case.

As indicated by counsel for the claimant there are two questions presented for decision; namely, (1) did the respondent violate its duty to the claimant's decedent of exercising reasonable and ordinary care under the circumstances to protect decedent from harm, and (2) did respondent's negligence proximately cause the death of the claimant's decedent.

The following language in the annotation in 41*ALR* 3d 1021, describes the problem confronting prison officials in cases of this kind:

> "The prison environment has been a fertile ground for assaults, as it normally consists of confinement in close quarters and under unpleasant conditions of large numbers of persons, many of whom are predisposed to violence and frequently, to grudges, racial hatred, and homosexual jealousy. To these factors may be added the frequent impossibility of maintaining the desirable degree of isolation of the prisoners from each other, and the extreme difficulty of preventing them from fashioning weapons out of articles at hand, in which respect prisoners have demonstrated considerable ingenuity."

And in *Johnson v. United States,* 258 F. Supp. 372, it was held that where one inmate stabbed another, the stabbing was not due to any negligence on the part of the prison officials and that the Government was not an insurer of the safety of the inmates.

And in *Brown v. United States,* 342 F. Supp. 986 (1972), the Court said:

> "It is well established that those holding prisoners or convicts in custody are not insurers of their safety. However, the custodians owe a duty to their charges to exercise ordinary care for their safety, and that duty includes the duty to use ordinary care not to expose a prisoner to an unreasonable risk of injury at the hands of some other inmate or inmates . . . In order to meet the requirements of 'ordinary care' the care employed must be commensurate with the danger that is apparent or reasonably to be foreseen."

Counsel in their briefs have cited numerous decisions from various jurisdictions as to the law relating to the duties of wardens and others in charge of incarcerated prisoners, but there appears to be none from our Supreme Court which is of aid on the question. As the facts in the cases cited are all more or less different from those in this case, it will serve no purpose, we think, to cite or quote from them here.

In our consideration of this case, we must weigh the evidence as a whole and not be guided by one or more single items or facts occurring mainly in the course of one day to determine whether or not

the respondent has exercised reasonable and ordinary care as to the incarceration of claimant's decedent or his assailant. If respondent has done that which was apparently reasonably necessary, it has fulfilled such duty, but, if not, and respondent has been so negligent that such failure was the proximate cause of the death of the inmate, it is liable. In this connection, we do not attach much significance to what might appear as the bad reputation of inmates prior to entering the prison, because prison officials are not investigators of the previous characters of inmates who by their convictions have become felons. However, prison officials cannot ignore bad conduct of inmates while in the prison. Generally, it takes more than a few days, or even a few months sometimes, to reach the conclusion that a particular inmate should be isolated from the others. We do not think that the previous record of Thomas was sufficient to place extra precautions for the safety of the decedent or to isolate either Thomas or the decedent during their confinement, especially since all the dangerous conduct occurred mainly in the space of a few hours of the day of the tragedy. While the matter of making and drinking the so called "julep" cannot be condoned, nevertheless, that was a problem with which the authorities had to come to grips, as to the whole prison population and to prevent it, if possible.

The evidence as to the location of the crews and the sufficiency of the guards in the operation of the prison industries, the guarding of area of the alley, boiler room, shower room, and the accessibility of tools for the work are all stressed by the claimant as constituting negligence on the part of the officers of the prison. We cannot agree with such a conclusion, and surely not to the extent that such negligence can be construed as the proximate cause of the death of Griffith. While it is the duty of prison officials to exercise ordinary care for the safety of their charges, such care need only be commensurate with the danger that is apparent or reasonably to be foreseen. We cannot conclude that the availability of the tools used in the work of the prison for some illegal attack with the tools could be the real proximate cause of the death of claimant's decedent, no more than it could be said that because one had a shovel to fire a furnace, and struck another fireman over the head with it, the possession of the shovel was the proximate cause of the death of the other. Nor was the conduct of the decedent anything but an aggravation, and it was more of a probable cause of the resulting death than anything else. The decedent was entitled only to reasonable and ordinary care for

his safety, not extraordinary care. He, too, should have exercised ordinary care for his own safety.

While prison reform is very desirable and necessary today, it cannot be a substitute for the law of this case. Neither can the widely publicized shortcomings and failures of our State prisons be a subject for consideration. This Court may not be influenced by the broadly held opinion that our prisons are not efficently operated. Our plain duty is to decide this case upon the evidence in the record and the law as we believe it to be applicable.

We are of the opinion that the evidence in this case has not shown such negligence as proves a failure of the officials to perform their duty in taking reasonable care of the decedent or was the real proximate cause of the claimant's decedent's death. We, therefore, hereby disallow the claim of the decedent's administrator.

Claim disallowed.

Opinion issued June 11, 1973

GERTRUDE A. MYERS and LENA M. BROWN

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-582)

Bonn Brown, Attorney for the claimants.

Donald L. Hall, Attorney for the respondent.

DUCKER, JUDGE:

Claimants, Gertrude A. Meyers and Lena M. Brown, owners of property on Harrison Avenue Extension (Norton Road), a State controlled highway in Elkins, West Virginia, alleged destruction by fire of an outbuilding and its contents, numerous trees, and shrubbery, resulting from the use by employees of the respondent of an acetylene torch in repairing a sign on the highway. The blaze from the torch set the grass on fire which spread to the property of the claimants, allegedly causing damages in the amount of $3,823.24.

Respondent admits that the fire and resulting damage were caused by the negligence of the employees of the respondent.

The parties have stipulated and agreed upon an amount of damages in the amount of $1,000.00, as being fair and reasonable, and this Court, so considering and approving the same, hereby awards to the claimants the sum of $1,000.00.

Award of $1,000.00.

Opinion issued June 11, 1973

MEADE J. MOORE

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-480)

James H. Wolverton, Attorney-at-Law, for the claimant.

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

DUCKER, JUDGE:

Claimant, Meade J. Moore, of Richwood, West Virginia, alleges damages in the amount of $1,292.14, which was the cost of the erection of a retaining wall behind claimant's residence on Copeland Street in Richwood, allegedly necessitated by road slippage caused by water drained across the Hinkle Mountain Road behind the residence of claimant.

Four or five culverts, each sixteen inches in diameter within a distance of approximately two thousand feet up the road, were alleged and proven to have been completely clogged or stopped up and left unrepaired or unreplaced from 1963 to 1969. After a road slide in 1969, claimant built in 1970 the retaining wall behind his house to prevent further slide damage to his property. In 1971, the respondent replaced with new culverts all the old culverts, in order to avoid further damage to claimant's premises.

The evidence showed that claimant had repeatedly notified the respondent of the condition of the culverts on the road and of the water being diverted and prevented from passing through the culverts, but causing the water to flow upon, over and across the road to claimant's property, and causing the hillside to slide towards claimant's residence. No correction of the situation was made until 1971 after the erection by claimant of the retaining wall.

There is no conflict in the evidence, nor is there any denial of the facts alleged and proven by the claimant. We are of the opinion that the claimant has shown negligence on the part of respondent in the latter's duty to properly maintain its highway, and that claimant is entitled to recover his alleged and proven damages, and, accordingly, we award the claimant the sum of $1,292.14.

Award of $1,292.14.

Opinion issued June 11, 1973

EMMA GAS COMPANY

vs.

OFFICE OF FEDERAL-STATE RELATIONS

(No. D-565)

F. Lyle Sattes for the claimant.

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

JONES, JUDGE:

The Buffalo Creek flood on February 26, 1972 in Logan County left a toll of 118 dead and more than 4,000 persons homeless. The disaster called for extraordinary emergency measures by both government and private citizens. In order to provide housing for the homeless, the State of West Virginia through its Office of Federal-State Relations authorized the United States Corps of Engineers to prepare mobile-home sites, including the placement of utilities, all at the State's responsibility and expense. In pursuance of this project, the Corps of Engineers through its agents asked the claimant, Emma

Gas Company, for permission to close down a gas well owned by the claimant in order to relocate service lines from the well which interfered with the installation of a trailer park for emergency housing. Permission was given by the claimant and on or about March 10, 1972, the well was shut in. The well was turned into the relocated lines on or about April 2, 1972. Subsequent production records showed that the relocated lines were leaking and a large quantity of gas was being lost into the air. Two efforts were made to repair the lines and finally on or about June 1, 1972, the leaks were repaired and the lines restored to efficient service.

At the hearing of this claim, counsel for the respondent opined that "* * * after the disaster down there at Buffalo Creek, all state agencies moved rapidly and did not leave behind the usual trail of paper work to establish what was done." It is true that the "trail" establishing privity between the claimant and the respondent may be somewhat tenuous. However, we must consider the grave emergency which influenced the authorization of the work which resulted in damage to the claimant. Also, we may not overlook the fact that the claimant voluntarily submitted to the shutting in of its well and thereby lost 23 days' production.

All things considered the Court is of opinion that the parties have stipulated that the amount of damages sustained by the claimant due to the loss of gas from its well is $550.62, and the Court approves that amount as fair and reasonable.

The claimant's original claim was for $2,500.00, including $500.00 for "Travel". An agent for the claimant testified that he made five trips from Manassas, Virginia to the Buffalo Creek area in connection with matters involved in this case. The claim for travel expense was not set out in the amended claim filed on March 27, 1973, but counsel for the claimant contends that the trips were made in an attempt to mitigate damages and should be allowed. However, the evidence in this regard is not sufficiently persuasive and at best the amount is highly speculative. The Court is of opinion not to allow this part of the claim.

Accordingly, the Court awards the claimant, Emma Gas Company, the sum of $550.62.

Award of $550.62.

Opinion issued June 11, 1973

JOHN S. HAINES

vs.

DEPARTMENT OF HIGHWAYS

(No. D-576)

N. Howard Rogers and *Donald C. Hott* for the claimant.

Donald L. Hall for the respondent.

JONES, JUDGE:

The claimant, John S. Haines, and the respondent, Department of Highways, have agreed to and stipulated all of the matters pertinent to the Court's consideration of this case as follows:

"1. The claimant owns realty situate in Mineral County, West Virginia on Hershey Hollow Road (State Road 50/2) .4 miles north of the junction of U. S. Route 50 and State Road 50/2.

2. A small run (stream) flows adjacent to claimant's home and bisects Hershey Hollow Road which is located in front of his home.

3. For the past 33 years, the Department of Highways, and its predecessors, have maintained a bridge with a span of more than 10 feet and a clearance of approximately 5 feet 5 inches on Hershey Hollow Road over the stream in question.

4. During the summer of 1971, the Department of Highways removed said bridge, to which the claimant objected, and installed a 58 inch by 36 inch oval metal culvert. At the time of removal, the claimant advised the respondent that the bridge had been adequate in the past and that the newly installed culvert would prove to be inadequate in times of heavy rain.

5. According to James Taylor, of Fountain, West Virginia, Official Weather Observer, on June 29-30, 1972, between the hours of 7:00 P.M. and 7:00 A.M. the Keyser area had 2.17 inches of rain.

6. The previously installed culvert, because of its size and debris carried along the stream, proved to be inadequate to completely carry the run off and as a result thereof, the claimant's property was flooded and damaged.

7. After the waters had receded, the respondent removed the oval drain and installed a metal drain with a diameter of 5 feet 6 inches.

8. The respondent admits the allegations contained in claimant's claim insofar as they are consistent with this stipulation.

9. The parties hereto stipulate the amount of damages to be Seven Hundred Fifty Dollars ($750.00) which is a settlement of all the matters contained in this claim."

The Court has inspected photographs and other exhibits filed with this claim and has considered statements of counsel, and it appearing that the foregoing stipulation fully and accurately states the matters involved in this claim, including a fair and reasonable assessment of the claimant's damages, the Court is of opinion to and does accept and approve said stipulation.

Pursuant to the Court's findings, an award is hereby made to the claimant, John S. Haines, in the amount of $750.00.

Award of $750.00.

Opinion issued June 26, 1973

ORPHA E. JONES, Claimant,

vs.

STATE BUILDING COMMISSION, Respondent.

(No. D-538)

Sam B. Kyle, Jr., Esq., for the Claimant.

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

PETROPLUS, JUDGE:

This claim was filed for damages sustained by the Claimant in the amount of $7,560.00, representing loss of rentals beginning with the month of September, 1971, and continuing through the month of March, 1972, during which time twelve rental units owned by the Claimant remained vacant.

The State Building Commission, Respondent, notified tenants in the apartment building owned by the Claimant in the months of March and April, 1970, that the apartment building must be vacated by July 30, 1970. This Court previously held in a claim filed by Orpha E. Jones against the State Building Commission, Claim D-357, that the notification to the tenants prior to the actual taking of the property by the State by the institution of eminent domain proceedings constituted an unwarranted interference with the owner's right to use her property as she saw fit. In the prior case it was disclosed that the tenants moved out of the building in accordance with the State's notice, leaving the Claimant with an unoccupied building for a long period of time. It now appears that condemnation proceedings, delayed because of financing problems, were never instituted by the State and that the Claimant and Respondent negotiated a sale of the property at a satisfactory price to be consummated in the month of April, 1972 by delivery of a deed to the State Building Commission in exchange for payment of the purchase price. There was a meeting of the minds on February 23, 1972, and an option agreement was executed by the Claimant at a stipulated price.

Inasmuch as the Claimant was awarded loss of rentals from April, 1971, to August, 1971, in the amount of $5,425.00 in the former Opinion, it is reasonable and equitable for the Claimant to be awarded the additional amount of $6,480.00, representing rentals from the month of September, 1971, to the time of the execution of the option agreement at the end of February, 1972. We feel that the State should be allowed a reasonable time for consummating the sale required in the preparation of a Deed and the examination of title.

It is manifestly unjust to deprive the Claimant of rentals during the vacancy of the property when the State delayed almost two years in the actual taking of the property after causing the tenants to vacate the same.

Reference is made to the foregoing Opinion for a more comprehensive statement of the reasons the Court made an award in the former case, and for the same reasons an award will be made in this case.

Award of $6,480.00.

Opinion issued June 26, 1973

W. DALE ENOCHS, Claimant,

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS,
a corporation, Respondent.

(No. D-588)

Claimant appeared in person.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Donald L. Hall, Esq.*, for the Respondent.

PETROPLUS, JUDGE:

This case involves a claim filed by W. Dale Enochs against the West Virginia Department of Highways, as Respondent, for recovery of damages to his 1966 Chevrolet automobile alleged to have been caused by a deposit of tar under his car emanating from a fresh tarred road in Huntington, West Virginia. The Respondent in its answer admitted that an asphalt emulsion had been placed on the road by a tar distributor truck consisting of a mixture of 60 per cent water and about 40 per cent diesel oil by a spraying process designed to seal the road. A sand truck followed the sprayer and covered the oil base with sand to prevent motor vehicles from sliding on the oil base which took about 18 to 20 hours to dry. Although the State contended that there was no tar in the mixture, signs had been posted reading "Fresh Tar" for the purpose of slowing up vehicles that traveled the road. The Claimant emphatically denied the presence of the signs and produced evidence that not only was his vehicle covered underneath by a black substance appearing to be a tar compound, but further the oily substance on the manifold and under his car caused the engine to ignite, burning the distributor, coils, wires, valves, and other components of the engine.

The damages appear to be the proximate result of the oily substance that was deposited on the car igniting from the heat of the engine. The Respondent's witnesses testified that the substance used for sealing the road was non-inflammable.

Although the evidence supporting the charge of negligence of the employees of the State was not too satisfactory, it is the finding of the

Court that sufficient evidence was offered to establish that the substance, whatever it might have been, was flammable when it came into contact with a heated engine. The extent with which the black substance was deposited on the car also indicates that it was profusely distributed without a proper sanding follow-up operation. It is the further finding of the Court that a driver of a motor vehicle over such road could not reasonably foresee the hazard of a fire resulting from the oily substance coming into contact with the undercarriage of the vehicle. Road maintenance should be performed with ordinary and proper care and not expose the traveling public to danger or extraordinary hazards. Road sealing operations are not intrinsically dangerous if properly performed, and usually do not require the suspension of traffic unless of a major nature. In this case the State admittedly made no effort to keep traffic off the freshly oiled road, its witnesses stating that the sanding truck which followed the distributor tank removed any hazard of sliding or spraying of the oil in an indiscriminate manner.

We, therefore, conclude that the sealing operation was improperly conducted, without the exercise of reasonable care, and that the Claimant's damages are the proximate consequence of said negligence. Although the Claimant may have had notice of the existence of the oily substance, we do not hold that he assumed the risks of driving over a dangerous roadway with an awareness of the dangers involved. No evidence of contributory negligence was offered by the State.

For the foregoing reasons, an award will be made to the Claimant in the amount of $175.27, that being the lower of the two estimates offered by him as to the cost of repairing the car, replacing the burnt components, and otherwise cleaning the car.

Award of $175.27.

Opinion issued June 26, 1973

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, as Subrogee for Ralph Henne, its Insured, Claimant,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-600)

No appearance for Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Donald L. Hall, Esq.,* for Respondent.

PETROPLUS, JUDGE:

Claimant, as Subrogee of Ralph Henne, its insured, filed this claim in the amount of $36.05, representing the cost of cleaning an automobile which was damaged on June 2, 1972, while driven over the Poca River Bridge on W. Va. Route 62 during a paint spraying operation conducted by agents of the Respondent. The claim was filed by stipulation, and it is before us on a Petition alleging negligence, supported by affidavit of Virginia Henne, wife of the insured, who was driving the car. The affidavit discloses that upon arriving home an unsuccessful effort was made to remove a blue-colored paint that covered the surface of the car. The damages represent the cost of cleaning in accordance with an estimate furnished by the Claimant.

There being no proof to the contrary, the affidavit is accepted as proof of the negligence and damages, and an award is accordingly made.

Award of $36.05.

Opinion issued June 26, 1973

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, as Subrogee of Robert L. Hulett, its Insured, Claimant,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-601)

No appearance for Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Donald L. Hall, Esq.*, for the Respondent.

PETROPLUS, JUDGE:

This claim in the amount of $46.35 was submitted on the Petition, Answer, and Affidavit of the Claimant, without the taking of evidence. It arises from damages to the automobile of Robert L. Hulett on June 6, 1972, while driven by his wife over the Poca River Bridge on W. Va. Route 62, while agents of the Respondent were engaged in painting the bridge by a spraying operation. A silver colored paint was negligently permitted to be sprayed or dropped on the automobile, covering the entire surface of the car. Hulett's insurance company paid the claim for removing the paint and cleaning the car, and seeks reimbursement by way of subrogation.

Inasmuch as the Respondent is not offering any proof to the contrary, the affidavit is accepted as proof of the Claimant's allegation of negligence and the amount of damages. An award is accordingly made.

Award of $46.35.

Opinion issued June 26, 1973

BILLY KEFFER AND STATE FARM FIRE AND CASUALTY COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-604)

No appearance for the claimants.

Donald L. Hall for the respondent.

JONES, JUDGE:

Billy Keffer and State Farm Fire and Casualty Company, insured and insurer, have filed this claim for damages to the Keffer residence at Shoals, West Virginia, resulting from blasting operations of the respondent, Department of Highways. The case was submitted upon petition and answer.

The petition alleges and the answer admits that on April 29, 1971, employees of the respondent, while widening a State road, set off an explosive charge which cast rock and debris upon and against the Keffer residence, causing damages thereto in the amount of $82.94. The respondent avers that its answer is based upon a complete investigation of the facts and circumstances surrounding the claim, including the fairness of the amount of damages specified.

It appearing that the respondent has wrongfully trespassed upon and damaged the Keffer property, the Court is of opinion to and does allow to the claimants the sum of $82.94 as just compensation for the damages sustained.

Award of $82.94.

Opinion issued June 26, 1973

MELBOURNE BROTHERS CONSTRUCTION CO., Claimant,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-534)

George S. Sharp, Esq., for the Claimant.

Dewey B. Jones, Esq., for the Respondent.

PETROPLUS, JUDGE:

This is an action to recover the sum of $55,817.82, an alleged underpayment arising from a contract, dated April 1, 1970, for a road construction project in Mason County, West Virginia, designated No. ERO485 (002), wherein Melbourne Brothers Construction Co., an Ohio corporation, hereinafter referred to as the Claimant or the Contractor, agreed with West Virginia Department of Highways, hereinafter referred to as the Respondent or the State, to construct according to plans and specifications furnished by the State, certain roads designated U. S. 35 and W. Va. Route 2, including fills for embankments and ramps, and grading and paving certain segments thereof. The contract was awarded on a bid proposal setting forth estimated quantities with unit prices for each bid item, and the aggregate estimated cost of the project was in the amount of $1,819,-679.41. The two bid items in controversy are:

Item 2
Unclassified excavation, estimated quantity of 33,570 cubic yards at $1.71 per cubic yard — $57,404.00

Item 3-1
Borrow excavation, estimated quantity of 305,125 cubic yards at $1.71 per cubic yard — $521,763.00

By way of explanation, unclassified excavation is earth movement in the project area, while borrow excavation is material brought into the area from excavations elsewhere. In both instances the material is used to complete the roadway and embankments. In this case both items happened to be the same price per cubic yard.

In the defined work area extending approximately 1000 feet, U.S. Route 35 and W. Va. Route 2 intersected. An overpass and four ramps, identified on the Plans as Permanent Ramps A, B, C, and D, as well as two ramps designated "Temporary Ramp A" and "Temporary Ramp B", provided approaches to the Silver Bridge crossing the Ohio River and the Shadle Bridge crossing the Kanawha River to Point Pleasant. The ramps designated Temporary "A" and "B" and the Permanent Ramps A and B were functioning prior to the contract as part of the traffic patterns for the existing Silver Bridge and Route 2. Only Permanent Ramps C and D were new construction and they required substantial fill material for proper elevation. Segments of Route 35 and Route 2 requiring fills and embankments were also new construction. All ramps provided connections with the two main highways and accommodated traffic in all directions.

The construction entailed grading, draining, paving, placing embankments, and the maintenance of traffic during the period of construction, all in accordance with the State Road Commission Standard Specifications for Roads and Bridges, adopted 1960, as amended by Special Provisions adopted in 1965. Among the contract documents are General Notes furnished to the Contractor, which set forth a so-called "Sequence of Operation". The latter, by reason of its importance in deciding this case, is hereinafter set forth verbatim:

"SEQUENCE OF OPERATIONS

1. The contractor shall erect and maintain all necessary traffic control devices required to safeguard the public within the areas of work at all times.
2. Construct the embankment for U. S. 35, Ramp "C" omitting embankment between Stations 997+30 and 981+35, and Ramp "D" and extend the concrete box culvert on W. Va. 2 at Station 38+55.
3. Construct temporary fence on school property.
4. Construct the proposed drainage east of existing W. Va. 2.
5. Construct the proposed W. Va. 2 embankment for the northbound lanes while maintaining traffic on the southbound lanes of W. Va. 2.
6. Complete all the remaining work on U. S. 35 and W. Va. 2 including the pavement, guard rails and roadway items.

7. Complete all work on Ramp "C" once school property has been vacated.

8. Remove the pavement and excavate the embankment from Temporary Ramp "A" and Temporary Ramp "B". The contractor shall so schedule his work that the excavated material shall be incorporated in the roadway embankment of this contract. Cost of placing the material shall be included in the unit price bid for unclassified excavation. Place 3" penetration macadam shoulder on outside of Ramp "A" from Station 31+43 to Station 43+15 and on outside of Ramp "B" from Station 59+00 to Station 60+50 and from Station 63+80 to Station 65+30 as directed by the engineer.

9. The contractor shall be responsible for maintaining traffic as outlined above until completion and acceptance of the roadway pavement.

The contractor's attention is directed to Section 1.4.6 of the Standard Specifications requiring the maintenance of local traffic."

The 8th specification required the material resulting from removal of Temporary Ramp "A" and Temporary Ramp "B" to be utilized on the project as fill to form embankments for the new road segments.

By strictly adhering to the "Sequence of Operations" the Contractor found himself in a dilemma. After completing the new road with borrow material, it was impossible under Item 8 to incorporate the excavated material derived from the removal of Temporary Ramp "A" and Temporary Ramp "B" into the already completed roadway embankments required by the contract, and he was compelled to waste said material off the project site. For the fills and embankments of the new roadway, previously constructed with borrow material, the Contractor received payment at the unit bid price of $1.71 per cubic yard. The borrow excavation estimated in the bid proposal at 305,125 cubic yards actually overran into an additional 33,035 cubic yards. For this the Contractor was fully paid. The fill material from the removal of the Temporary Ramps could not be used and had to be wasted, as surplus material.

The Contractor now seeks payment for 32,642 cubic yards of the wasted material at $1.71 per cubic yard under the item of Unclassi-

fied Excavation in the bid proposal, or a total of $55,817.82. All of the above facts were undisputed.

At the hearing, evidence was adduced by both parties on the issue of whether the plans and specifications which required the Contractor to use the excavated material and incorporate it in the work were in error, making it impossible for the Contractor to perform, thereby requiring the Contractor to waste the material, or whether the Contractor could have performed his work without wasting this material and still comply with the maintenance of traffic provisions of the contract.

The Claimant's contention is that he was required to adhere strictly to the Sequence of Operations, completing each phase as outlined and then going on to the next phase. The Respondent contends that the plans and specifications are not in error, and that there is a certain flexibility in the sequence which permits the Contractor to work on different items at the same time, dovetailing his work, and still maintaining a traffic flow. By so doing the Contractor could have followed the specifications and used the material as fill in the project without waste.

The testimony was in sharp conflict on whether the construction sequence required the Contractor to complete the grading and paving of Route 35 and ramp approaches before the removal of the Temporary Ramps in order to maintain a reasonable and safe traffic pattern.

The president of the contracting company, who was a civil engineer, testified that it was impossible to establish a safe and feasible traffic plan by an earlier removal of the Temporary Ramps. In this he was corroborated by the job superintendent. The State's engineers, admittedly self-interested, testified to the contrary and specifically described how a traffic flow could have been established by using crossovers, four-way stops, flagmen, warning signs, and channeling devices without undue hazard to the traveling public. This issue must be resolved in favor of the State.

It is the factual finding of this Court that an operational plan for traffic could have been devised by the Contractor after the removal of the Temporary Ramps and before the building of the embankments of the new road and approaches, which would have been safe and feasible. The excavated material would then have been available and

incorporated into the project as contemplated by the contract specifications, and the Contractor would have been paid for the same under the item of Unclassified Excavation. In that event less material would have been required under the item of Borrow Excavation for the fills, thereby reducing the overrun on that item substantially. It is coincidental that the wasted material is substantially equivalent to the additional material borrowed for the fills, and prices for unclassified excavation and borrow excavation are the same.

A road contractor is required to build the road in accordance with plans and specifications under the supervision of the State's engineer and produce a result. The *modus operandi* is under his control and if the State impedes the progress of the work this Court has often held that the expenses arising from unwarranted delays are compensable. The materials used and the quality of the work are subject to inspection by the State, and it would be an officious act for the State to interfere with the coordination devised by the Contractor in order to efficiently accomplish his result.

Every road contractor with the State is confronted by a maze of regulations that are incorporated into the contract by reference. In addition, he is faced with special provisions, supplemental specifications, general conditions, construction sequence, and other contract documents such as plans, profiles, cross-sections and change orders, all of which must be followed under the supervision of the State's engineers who are charged with the duty of requiring the contractor to fulfill his contract according to its terms and conditions. Quite often other contractors are at work in the project area and must not be impeded. The contractor's position is not enviable, and he is faced with many problems, many of which were not in the contemplation of the contract when the work commenced.

All regulations which are a part of the contract are complimentary and provide for a complete result — the fulfillment of the contract. This requires a high degree of coordination and no specification can be blindly adhered to in disregard of other specifications that may be conflicting. The contractor is presumably free to exercise his sound judgment as to the prosecution of the work from as many different points and in such part or parts and at such times as he deems expedient to insure the completion of the contract in a timely manner and provide for the safety and convenience of the traveling public. The State Engineer decides all questions which may arise as to the inter-

pretation of the plans and specifications to assure the satisfactory and acceptable fulfillment of the terms of the contract.

This brings us to the so-called "Construction Sequence", which is a contract document, and its relation to the other specifications. The scheduling of the different phases of the work is primarily the responsibility of the contractor, and the construction sequence is for his guidance and intended to help him coordinate his work rather than hinder or impede him. It cannot be followed ordinarily in such a rigid manner as to preclude the fulfillment of the other requirements of the contract. It is a general outline of procedure, with some degree of flexibility for adaptation to the other specifications, and intended for ultimate fulfillment of the contract according to all the plans and specifications. It should not be used in such a manner as to give rise to unnecessary claims for extra compensation not contemplated by the contract.

The problem with which this Claimant was faced did not arise from conditions developing which are not anticipated by the parties. It existed from the very beginning of the Contract. If it was a problem it could have been resolved at the preconstruction conference, the forum intended for that purpose. In this case the Claimant completed his fills, embankments, and paving for the new construction and then wrote to the Respondent that it had a problem — what shall we do with the surplus material excavated from the Temporary Ramps, which we promised to use as fills for the new road but cannot do so because the fills were all made with borrowed material. This in effect was the problem.

It is our finding that notwithstanding the difference of opinion among the witnesses who testified, the fact that traffic could have been maintained in some manner after the removal of the Temporary Ramps was satisfactorily established. It may not have been an ideal plan, but there was a plan. The record does not disclose any effort on the part of the Contractor to seek the guidance of the State's engineer on devising such a plan. It appears that the Contractor waited almost a year after the work commenced to present this problem to the Department of Highways, and then after completion of the new paving it was too late to do anything other than seek an outlet for the surplus material that could not go into the project.

The argument of the Contractor that a departure from the Sequence of Operations would have been a violation and breach of his

contract to build according to plan, although persuasive, is not controlling when the sequence outlined by the State obviously shows that it is impossible to perform a successive step if a prior step is completely finished.

The Contractor must abide by his contract and perform his undertaking no matter at what cost, unless performance is absolutely impossible. In this case the Contractor made it impossible to perform by completing his new paving before making the excavation of the old. We must distinguish that which is foreseeable from the outset of the contract from that which could not have been foreseen by the Contractor. When a contract is clear, unqualified and absolute, it must be performed, unless performance is absolutely impossible.

Attention is called to a provision in the General Notes for the project which reads as follows:

> "Any modification of the construction sequence or method of maintaining traffic, which the Contractor might wish to make shall be submitted in writing to the engineer at least fifteen days prior to beginning work for approval from the commission."

The above implies a degree of flexibility in following a construction sequence where a problem may arise between the contracting parties. A sequence of construction does not require rigid adherence when the consequences result in the inability to perform the contract. Rigid compliance with a sequence may be required under some circumstances, especially where a critical path must be followed to prevent interference with other phases of the project, but under the circumstances in this case we find no critical factor that afforded a compelling reason to complete one phase to the exclusion of another. The testimony in fact revealed that work proceeded on a number of phases in the construction sequence concurrently.

For the reasons stated in this Opinion the Contractor is not entitled to compensation for the wasted and surplus material, and no award will be made in this case.

Claim disallowed.

Opinion issued June 26, 1973

BARBARA PACE

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. D-567)

Frederick A. Jesser, III for the claimant.

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

JONES, JUDGE:

The claimant, Barbara Pace, of Philadelphia, Pennsylvania seeks damages from the respondent, Department of Natural Resources, for injuries sustained by her when she fell on an asphalt-paved path in Hawks Nest State Park in Fayette County on August 21, 1970. She was visiting her sister, Quantina Peck, in Beckley and they, along with a friend, Bernard Malloy, of Camden, New Jersey were on a sightseeing drive when they stopped at the Park recreation area. The claimant and her sister both testified that the party of three walked along a path or paths to a picnic table on an elevated shelf on the side of the hill where they spent some time and then started to walk down a steep path directly below the picnic table. Walking in front of her two companions the plaintiff testified that her heel caught in a root growing across the path which was hidden from sight by leaves and pine needles. She fell to the ground and according to her version of the accident she rolled down and against a log at the foot of the short walkway where she was helped to a sitting position until an ambulance arrived and took her to the Montgomery General Hospital. The claimant's testimony was corroborated by that of her sister. Bernard Malloy did not testify and no reason was given for his absence. At the hospital it was found that the claimant's left ankle was fractured and she underwent a closed reduction with cast application. She was discharged on August 27, 1970 "in good condition", but she required further medical treatment and a second cast after she returned to Philadelphia. The claimant lost 70 days' work as an employee of the Aviation Supply Office, Department of the Navy, and incurred substantial medical and hospital expenses.

A different version of the accident was sworn to by a witness for the respondent, directly contradicting the claimant concerning vital, factual issues. James Ingram, a caretaker at the park for fourteen years, testified that he saw the claimant and her companions in the vicinity of the gift shop and later saw them walking down the asphalt-paved path which leads to a museum farther up the hillside and also has a fork leading to the picnic area. Describing the fall, Ingram testified as follows: "I was carrying souvenirs from the supply room just above the snack bar and I heard this woman holler. As I was walking up the steps with the box of souvenirs, I saw her slip and fall. One foot went under her and she just more or less sat on her foot as she went down." This witness placed the fall at a point on the pathway above and to the left of the picnic area and about 100 feet from where he was standing. He went to the claimant and with her companions helped her up and to the steps near where she fell. There the claimant sat down and later, according to Ingram, she was helped by her companions, hopping on one foot, to the log from which she was taken to the ambulance. Another employee of the respondent, Paul M. Seacrist, identified the claimant and described the lay-out of the area, but was not present at the time of the fall.

In view of the contradictory testimony and the obvious importance of a better understanding of the terrain, location and grade of paths and other physical aspects of the site of the accident, the Court determined to exercise its right to gather information on its own initiative, as provided in Section 15, Article 2, Chapter 14 of the Code of West Virginia. On May 16, 1973, the Court went upon the subject premises, carefully inspected the area and arrived at certain conclusions as follows: Visibility as affected by foilage was substantially the same as on the day of the accident; the witness Ingram easily could have seen the claimant fall at the place he described his testimony; both paths in question lead to the picnic tables; the paths apparently were unchanged except that the one directly in front of the picnic tables where the claimant says she fell had been resurfaced and roots could be seen imbedded in the asphalt; the latter path is very steep and it is obvious that an ordinary, prudent person would exercise great care in traversing it; the fork from the museum walkway to the picnic tables has only a slight grade and is a much safer exit from that location; the museum path is not so steep as the one directly below the picnic area, but it too calls for a high degree of care; the type of footwear worn would affect the degree of danger in traversing the

walkways; and this is a rustic park area where walkways are called "paths" and while they are asphalt-paved, they are not the sophisticated sidewalks found in urban areas or around more conventional public buildings.

Both paths in question in this case lead to and from the picnic tables where the claimant was shortly before the accident, but obviously she did not fall and break her ankle while walking along both of them at the same time. Before its view of the premises, the Court contemplated a decision wherein it would be compelled to conclude that the witnesses for one side or the other were not telling the truth or were strangely confused or misled. However, there are facts and circumstances in this case which provide a substantial basis for decision without reference to the veracity of the several witnesses.

The claimant testified that she was wearing sandal-type shoes, but she could not remember the composition of the heels or soles. The Court found from personal experiments that while wearing ordinary shoes with leather soles and rubber heels, the descent along the short walkway on which the claimant marks her fall was one requiring considerable caution. The steep descent is enough to put a person on notice that he should proceed with care and that each step should be closely watched. In view of this situation and assuming that this is where the claimant fell, we believe that she must have been aware of and therefore assumed a patent risk, particularly in view of the fact that there was a safer walkway available to her. The Court is further of the opinion that if the claimant had exercised ordinary care for her own safety, this accident would not have occurred. This was a bright, sunny day and if the claimant had seen the condition of the walk, as she could have and should have, and had proceeded carefully, as the circumstances required, she could have avoided any obstruction and would not have fallen. There is a duty on the respondent to maintain the paths or walks in a reasonably safe condition as befits a rustic park area; but regardless of fault on the part of respondent under one conflicting version of the accident, the Court finds that the claimant failed to exercise due and reasonable care and that her negligence proximately contributed to her injuries, thereby barring a recovery in this case.

Claim disallowed.

Opinion issued June 29, 1973

MILLARD RINEAR, as the parent, natural guardian and next friend of LINDA SUE RINEAR, for and on behalf of LINDA SUE RINEAR, an infant, and MILLARD RINEAR, an individual

vs.

BOARD OF REGENTS

(No. D-525)

John S. Sibray for the claimants.

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

JONES, JUDGE:

At the hearing of this claim on March 19, 1973, it was determined that the injury complained of occurred on December 11, 1969, and not on December 18, 1969, as alleged in the petition, and as the petition was filed on December 17, 1971, it was conceded by counsel that the claim of Millard Rinear for medical care and treatment of his daughter was barred by the Statute of Limitations and therefore the same was dismissed. Linda Sue Rinear, having been an infant at the time of her injury and since having attained her majority, was not barred from prosecuting her claim in her own right.

On December 11, 1969, Miss Rinear was a student at Concord College, at Athens, in Mercer County, West Virginia, an institution of higher learning under the control, supervision and management of the respondent. She was engaged in an organic chemistry laboratory class along with some twenty other students. The assignment was an experiment in the nitration of benzine and during the course of the experiment being conducted by one of the other students, an explosion occurred causing glass and other materials to be thrown about the classroom resulting in injuries to several students, including the claimant. The petition alleges that there was not proper faculty supervision of the experiments at the time the explosion occurred and that such failure on the part of the respondent's agents, servants and employees was negligence directly and proximately causing injury to the plaintiff.

The organic chemistry course was divided into three lecture periods a week on Monday, Wednesday and Friday, and on Tuesday and Thursday there was a three-hour laboratory class at the beginning of which the instructor, Professor Lucile Dunlap Bird, discussed the experiment assigned for that day. Each student had a workbook describing the procedure to be followed in each experiment. Admittedly, the nitration of benzine experiment was known by both instructor and students to be somewhat hazardous. Both the instructor and the claimant testified that the class was warned of the danger of an explosion if the ingredients of the experiment were heated above a certain temperature or permitted to boil dry; and the workbook instructions further warned: "Collect the portion boiling at 200°-215°, but do not go above this temperature nor distill to dryness, because the small quantity of residue contains dinitrobenzene, which may decompose vigorously at high temperature."

The claimant contends that the laboratory class was very loosely supervised. A student assistant was assigned to the class and he helped set up equipment, furnished necessary supplies and generally was available for questioning or other assistance but apparently was out of the laboratory for one reason or another at frequent intervals. It appears that he was not present in the laboratory at the time of the explosion but was on the same floor. There is a conflict as to how much supervision was afforded, the claimant saying there was practically none and Professor Bird averring that there was general supervision and instruction but not continuous surveilance of any individual experiment.

These students were not children. This was an advanced course, all of the students having had an introductory first year course in chemistry and considerable laboratory experience. The claimant was twenty years old and the perpetrator of the explosion was a graduate of the University of Tennessee and had been in the Army for three years. The claimant contends that Mike Scott, whose distilling flask exploded, had a reputation for recklessness known to the faculty and should have been watched or restrained in some way. Professor Bird testified that she had no knowledge of such a reputation and to the contrary thought Mike Scott a very responsible student.

In any event, Mike Scott did blow up the place and he was severely injured. There is no positive evidence of the cause of the explosion but circumstantially it appears a reasonable certainty that despite ade-

quate warnings, Mike Scott let his experiment boil dry. The claimant's partner, Carrie Shearis, was painfully injured and the claimant assisted and went with her to the infirmary. The claimant did not know that she herself was hurt but while at the infirmary discovered a small amount of blood on her left temple and a cut was cleaned and a band-aid applied. Later she experienced numbness of the left side of her face and became very apprehensive. The next day she went to Dr. J. I. Markell in Princeton, West Virginia, who removed a fragment of glass from her left temple. He diagnosed her injury as temporary nerve damage, examined her on two other office visits and recommended that she see a specialist. The claimant finished the school term and enrolled in a medical technology program at the Beckley Appalachian Regional Hospital at Beckley, West Virginia. She experienced recurrent swelling and numbness of the left side of her face and was treated at the Emergency Room of the Hospital on three occasions. On October 19, 1970, the claimant returned to her home in New Jersey where she consulted a neurosurgeon. X-rays were taken of her skull and Dr. Donahue's report contained the following statements: "I felt that the problem was one of anxiety and tension and there was no intrinsic damage to the central nervous system."; and "I told Linda following my first examination that there would be no reason for her to return to this office, and reassured her that nothing serious would arise from the accident in which she was involved."

This was not an unusual experiment. Professor Bird testified that it was performed by chemistry students every place and was in every lab manual she knew of. She further testified that the laboratory assistant generally was in the laboratory in a supervisory and instructional capacity, but that his duties took him to other parts of the building for equipment, chemicals or other supplies. Both she and the assistant checked out experiments and she was in the lab frequently. However, there were many times, as at the time of the accident, that neither she nor her assistant was in the laboratory.

There is considerable conflict in the testimony as to how much supervision of the particular experiment was furnished by the respondent's agents and employees. There also is disagreement about how much supervision was reasonably required. Considering all the circumstances it is hard to say that there was such a positive neglect of duty on the part of Professor Bird or her assistant as would con-

stitute negligence and create a moral obligation upon the State to pay damages to the claimant.

However, assuming some negligence on the part of the respondent, we are of the opinion that the lack of supervision complained of could only have been a remote and incidental cause of the claimant's injury and not the efficient proximate cause thereof. The facts and circumstances as developed by the testimony of witnesses for both parties in this case convinced the Court that the carelessness of Mike Scott was the proximate cause of the explosion and the resultant injury to the claimant. It is our judgment that the claimant has not proved the legal liability of the State and where no legal obligation exists there may be no moral obligation. Therefore, this claim is disallowed.

Claim disallowed.

REFERENCES

ACT OF GOD

Claimant was awarded the sum of $4,970.48 for the costs of repair work in connection with a bridge construction contract, such repairs having been necessitated by flooding which constituted an act of God. *Vecellio v. Department of Highways* (No. D-459)..... 237

ADJOINING LANDOWNERS

Claimants were awarded the sum of $2,950.00 for damages to their wells caused by road salt stored by respondent on nearby property and entering claimant's wells. *Brown v. Department of Highways* (No. 409a). 240

Claimant, whose well was damaged when respondent negligently permitted salt to seep into it, was denied recovery for loss of business profits and mental suffering. *Dixon v. Department of Highways* (No. D-295)..... 81

The fact that respondent was negligent in storing or stockpiling salt, which seeped into claimant's artesian well, did not relieve claimant of his duty to minimize his damages, where although claimant complained to respondent about the matter, he permitted the situation to continue and took only minimal action to remedy the solution, namely, hauling water to supply his needs. *Dixon v. Department of Highways* (No. D-295). 81

Claimant was awarded $6,500.00 for damages sustained when salt stockpiled by respondent on premises near claimant's property seeped into claimant's artesian well, ruined the water therein and deprived the claimant of safe drinking water and satisfactory water for his business. *Dixon v. Department of Highways* (No. D-295). 81

Claimant was awarded $1,210.00 where respondent cut down trees on two adjoining parcels of claimant's land and used the land as it saw fit without any permission or consent on the part of claimant. *Dixon v. Department of Highways* (No. D-400)..... 83

Roads in mountainous areas cannot be closed during the winter months to vehicular traffic to protect adjoining property owners from the noxious drainage of salts and chemicals which are reasonably required to remove the hazards of ice and snow on the highways, and make them passable. *Henderson v. Department of Highways* (No. D-332). 183

Any injury that may result from the natural flow of water which is incidental to a lawful and proper use of the property is "damnum absque injuria." *Henderson v. Department of Highways* (No. D-332). 183

Adjoining property owners have correlative rights and must make a reasonable use of their property so as not to injure the property of others. *Henderson v. Department of Highways* (No. D-332)..... 183

ANIMALS—See also Livestock

ARREST

ATTORNEY GENERAL

AVIATION

BISON—See Animals

BLASTING—See also Explosions and Explosives; Rockslides

BRIDGES

Claimant was denied recovery for injuries sustained when he fell from a bridge, where respondent knew or should have known that a detached wire mesh and missing guardrail created an unsafe and hazardous condition, the claimant's own careless conduct being the proximate cause of his injuries. *Davis v. Department of Highways* (No. D-244) 49

Claimant was awarded the sum of $27.86 for damage caused to his automobile when paint, which was being used by highway personnel in painting a bridge, fell on the vehicle. *Harmon v. Department of Highways* (No. D-486). 35

The duty imposed on the State Road Commissioner to maintain bridges as part of the primary road system at the expense of the State includes a duty to maintain the sidewalks on the bridges, which are an integral part of the structure. *Harrah v. Department of Highways* (No. D-454) 242

Claimant was awarded $6,000.00 where the sidewalk was an integral part of the bridge in question and the State's duty of keeping the bridge in a reasonably safe condition for travel also extended to the sidewalk. *Harrah v. Department of Highways* (No. D-454) 242

Claimants were awarded $137.55 for damages caused to their automobile when a state highway sign, which indicated the height of the clearance of an underpass, fell upon their car, breaking the windshield. *McClure v. Department of Highways* (No. D-518) 135

Claimant recovered $50.00 left unpaid by his insurer for damages sustained when the under portion of his car struck a piece of steel which had been placed over a hole in a bridge, *MacDorman v. Department of Highways* (No. D-551) 197

Claimant was awarded the sum of $4,970.48 for the costs of repair work in connection with a bridge construction contract, such repairs having been necessitated by flooding which constituted an act of God. *Oscar Vecellio, Inc. v. Department of Highways* (No. D-459) ... 237

Claimant was awarded $220.42 for damages sustained when a paint crew employed by respondent negligently sprayed silver paint on his automobile while it was parked at his home, about 150 feet from the bridge. *Smith v. Department of Highways* (No. D-526) 79

Claimant was awarded the sum of $36.05, representing the cost of cleaning its insured's automobile, which was damaged while driven over a bridge during a paint-spraying operation conducted by respondent's agents. *State Farm Mut. Ins. Co. v. Department of Highways* (No. D-600) 277

Claimant was awarded the sum of $46.35, representing the cost of cleaning its insured's automobile, which was damaged while driven over a bridge during a paint-spraying operation conducted by respondent's agents. *State Farm Mut. Ins. Co. v. Department of Highways* (No. D-601) 278

Claimant recovered $106.75 for damages sustained while he was crossing a bridge at night and, even though he was exercising ordinary care, he was unable to see the protruding object that tore a large hole in the muffler of his car and pulled loose the emergency brake cable. *Wright v. Department of Highways* (No. D-498) 64

BUILDING CONTRACTS

The construction sequence should not be used in such a manner as to give rise to unnecessary claims for extra compensation not contemplated by the contract. *Melbourne Bros. Constr. Co. v. Department of Highways* (No. D-534)..... 280

The construction sequence should not be followed ordinarily in such a rigid manner as to preclude the fulfillment of the other requirements of the contract, for it is a general outline of procedure, with some degree of flexibility for adaptation to the other specifications, and intended for ultimate fulfillment of the contract according to all the plans and specifications. *Melbourne Bros. Constr. Co. v. Department of Highways* (No. D-534)..... 280

The scheduling of the different phases of the work is primarily the responsibility of the contractor, and the construction sequence is for his guidance and intended to help him coordinate his work rather than hinder or impede him. *Melbourne Bros. Constr. Co. v. Department of Highways* (No. D-534)..... 280

A road contractor is required to build the road in accordance with plans and specifications under the supervision of the State's engineer and produce a result; the *modus operandi* is under his control and if the State unreasonably impedes the progress of the work, the expenses arising from unwarranted delays are compensable. *Melbourne Bros. Constr. Co. v. Department of Highways* (No. D-534)..... 280

The materials used in building a road and the quality of the work are subject to inspection by the State, and it would be an officious act for the State to interfere with the coordination devised by the contractor in order to efficiently accomplish his result. *Melbourne Bros. Constr. Co. v. Department of Highways* (No. D-534)..... 280

Claimant was awarded the sum of $4,970.48 for the costs of repair work in connection with a bridge construction contract, such repairs having been necessitated by flooding which constituted an act of God. *Oscar Vecellio Inc. v. Department of Highways* (No. D-459)..... 237

Claimant recovered $5,928.00 for labor and materials for the erection of two fire escapes at Weston State Hospital where the only reason that claimant did not receive payment for its work was because funds for the fiscal year had expired before claimant was able to complete the work, but additional funds were available from respondent's current budget. *Singer Sheet Metal Co. v. Department of Mental Health* (No. D-408)..... 22

Every road contractor is permitted by law to supervise his project and his servants and employees as to the manner in which they are to perform the details of their work. The men on the job are the agents of the contractor, who is responsible for a good and workmanlike job, that is to be inspected and supervised generally by the engineers of the State who occupy a position of authority to oversee the manner of performance and rate of progress to the end that all contract requirements are fulfilled. Such authority should be exercised in a reasonable manner and with prudence without unnecessarily impeding the progress of the work or engaging in conduct without thought of the consequences to the contractor. *Tri-State Stone Corp. v. State Road Comm'n* (No. D-219)..... 90

The refusal of the State to approve waste disposal sites selected by the contractor is a risk that the contractor assumes in any road construction project. *Tri-State Stone Corp. v. State Road Comm'n* (No. D-219)..... 90

Interference by utility lines was an assumed risk of the contractor under the specifications of his contract, and he had to bear the expense of working around a utility line. *Tri-State Stone Corp. v. State Road Comm'n* (No. D-219)..... 90

Claimants recovered $5,331.25 owing to them under a contract entered into with respondent for the construction of a public highway including a provision for concrete guttering, notwithstanding a dispute over design specifications, where claimant's interpretation of the contract was accepted. *Vecellio & Grogan, Inc., v. Department of Highways* (No. D-457). See *Vecellio & Grogan, Inc. v. Department of Highways* (No. D-505)..... 87

COLLEGES AND UNIVERSITIES

Claimant was awarded $750.00 for services rendered to West Virginia State College, where the sole reason for nonpayment of his claim was that the agreement had not been formally authorized before the service was rendered, and where formal approval would have been obtained after the completion of the work, as was admitted by the president of the college. *Appraisal & Realty Serv., Inc. v. Board of Regents* (No. D-416)..... 26

A claim in the amount of $74.35 was allowed for damages to claimant's household furnishings and other personal property caused when respondent's employee negligently caused a ceiling to collapse in a "faculty house" which claimant had rented from respondent. *Klein v. Board of Regents* (No. D-483)..... 18

Claimant recovered $65.75 where a power mower under the control of respondent's employees negligently was permitted to roll down a steep slope and into claimant's automobile, which was properly parked. *Moore v. Board of Regents* (No. D-488)..... 32

Claimant, a law student at West Virginia University, recovered the difference between in-state and out-of-state tuition, where the university's change of his residency status because of the remarriage of his mother and her subsequent removal from the State was unreasonable and arbitrary, and totally unsupported by any facts indicating residency out of the state. *Mucklow v. Board of Regents* (No. D-492)..... 60

No college can function without an adequate supply of water to meet the needs of the students, the personnel, and the various public buildings. *Peraldo v. Moore* (No. D-412)..... 10

An award was made in the amount of $11,119.33, for the drilling of wells to make an emergency water supply available to Concord College, where the governor had requested claimant to drill such water wells as might be necessary to furnish the college with an adequate supply of water, and claimant had been advised that his services would be paid from the Governor's contingent fund. *Peraldo v. Moore* (No. D-412)..... 10

A college student's claim for damages for injuries caused by an explosion in a chemistry laboratory at Concord College was disallowed, where the carelessness of a fellow student, rather than alleged lack of supervision by respondent's agents, was the proximate cause of the explosion and the resultant injuries to claimant. *Rinear v. Board of Regents* (No. D-525)..... 290

Claimant, a printing firm, was awarded $372.98 for four printing jobs, completed and delivered to the respondent and not paid for. *Smith v. Board of Regents* (No. D-581)..... 245

CONCORD COLLEGE—See Colleges and Universities

CONDEMNATION—See Eminent Domain

CONTRACTS—See also Building Contracts; Options; Releases

DAMAGES

DEEDS

DRAINS AND SEWERS—See also Sanitation; Waters and Watercourses

Claimant was awarded the sum of $750.00 for flood damage sustained when a culvert installed by respondent proved to be inadequate to completely carry the runoff caused by new rain. *Haines v. Department of Highways* (No. D-576)..... 272

Claimant was denied recovery where it appeared that the collision of a car in which claimant was riding with a concrete pillar was not the result of the condition of a catch-basin or the proximity of the pillar to the traveled portion of the highway, but rather the damages were occasioned by either the negligence of the driver of the car or by someone or something other than alleged in claimant's petition. *Lynn v. Department of Highways* (No. D-398)..... 127

Claimant was awarded the sum of $1,292.14 for the cost of erecting a retaining wall behind his residence, necessitated by road slippage caused by water drained across a nearby state road. *Moore v. Department of Highways* (No. D-480)..... 269

Claimants recovered $2,585.00 for damage to their household furnishings which was the proximate result of a flooding caused by an improperly designed and inadequate culvert. *Thomas v. Department of Highways* (No. D-304)..... 62

Claimant was awarded the sum of $750.00, where unusual flooding of his property was attributable to either some inadequacy on the part of respondent in placing side ditches and drains constructed with a new road or negligent failure to keep open and maintain the drains so as to forestall the flooding of private property below road level by heavy rainfalls. *Wotring v. Department of Highways* (No. D-495)..... 138

EASEMENTS

Claimant recovered $3,381.99 for out-of-pocket expenses incurred in lowering his service station lot to match the road bed, where, after highway construction had been completed, the approaches to the station were so steep that ordinary motor vehicles could not safely enter or leave the station, and for practical purposes the property was unfit for use as a service station. *Reinhart v. Department of Highways* (No. D-444)..... 54

Where an easement for work evidently contemplated was to be in a reasonable time, and after the expiration of that time the right to sue would accrue and the period of limitation begin, and where the record was not clear as to such time, the Court could only be guided by the date of the agreement and a reasonable time thereafter. *Seebaugh v. Department of Highways* (No. D-541)..... 204

ELECTRICITY

Claimants were awarded the sum of $725 for damages sustained when respondent's employees allowed a tree to fall across a high-voltage electric power line causing a surge of electricity to be conducted into the electrical system in claimants' home. *Bukovinsky v. Department of Highways* (No. D-572)..... 39

Claimant was awarded the sum of $298.43 for damage to its power lines sustained when a Mississippi National Guard parachutist, on joint maneuvers with the West Virginia National Guard, landed in the lines. *Monongahela Power Co. v. Adjutant General* (No. D-563). 234

The furnishing of electricity to an institution of the State is a contractual service. *Monongahela Power Co. v. Commissioner of Pub. Institutions* (No. D-566)..... 188

Claimant electric utility was denied recovery for its under billing in regard to supply of electricity to the Hopemont State Hospital, where there was no unspent budget allocation for the purchase of electricity over and above the sum paid according to erroneous billings. *Monongahela Power Co. v. Commissioner of Pub. Institutions* (No. D-566)..... 188

Claimant was awarded the sum of $148.84 for damages sustained when its power lines adjacent to a county road were broken by the acts of respondent's agents in removing a tree while attempting to move a road grader. *Monongahela Power Co. v. Department of Highways* (No. D-477)..... 136

EMINENT DOMAIN

Claimant property owner was allowed recovery for the loss of rentals, where notices to vacate sent to his tenants constituted a "de facto" taking, and the inaction and unreasonable delay of the State in instituting eminent domain proceedings tended to depreciate the market value of an unrentable building. *Jones v. State Bldg. Comm'n* (No. D-357)..... 65

When eminent domain proceedings are instituted, the claimant receives the fair market value of his property as damages, without any allowance for loss of rentals therefrom which result from the anticipation of a public improvement which does not constitute an actual taking. *Jones v. State Bldg. Comm'n* (No. D-357)..... 65

A "taking" of property does not require an actual physical taking, but may consist of an unwarranted interference with the rights of ownership, use, and enjoyment of the property. *Jones v. State Bldg. Comm'n* (No. D-357)..... 65

Claimant was awarded the sum of $6,480.00 for loss of rentals, where the State delayed almost two years in the actual taking of claimant's property after causing his tenants to vacate. *Jones v. State Bldg. Comm'n* (No. D-538)..... 273

Claimant was denied recovery for a "de facto" taking, where the record did not disclose full information as to the condemnation suit pending or concluded in regard to the subject property, or whether there had been a final appellate court determination that claimant's claim could be determined at common law, independent of condemnation procedure, to which common-law remedy the constitutional immunity would apply, giving the Court of Claims jurisdiction. *Lomas v. Department of Highways* (No. D-395)..... 109

Whether there has been a "de facto" taking is a question for judicial determination in condemnation proceedings and to so determine the Court must decide whether incidental damages of loss of rent and the like are to be either eliminated or accounted for in the amount of the award. *Lomas v. Department of Highways* (No. D-395)..... 109

Where the questions raised can be considered and adjudicated upon proper pleadings and proof, even though no property was actually taken by the State, eminent domain proceedings are a proper remedy to compensate for damage to property resulting from road construction. *Moore v. State Road Comm'n* (No. D-522)..... 148

The Court of Claims sustained a motion to dismiss a claim that claimants' property had been taken for public use without compensation, where claimants had an adequate remedy at law for the ascer-

of an agency of the State which paid premiums into the Workmen's Compensation Fund and was in good standing, and the remedies provided by Workmen's Compensation were exclusive and final. *Hodges v. Department of Mental Health* (No. D-469)..... 76

EXPLOSIONS and EXPLOSIVES—See also Blasting

A college student's claim for damages for injuries caused by an explosion in a chemistry laboratory at Concord College was disallowed, where the carelessness of a fellow student, rather than alleged lack of supervision by respondent's agents, was the proximate cause of the explosion and the resultant injuries to claimant. *Rinear v. Board of Regents* (No. D-525)..... 290

FIRES AND FIRE PROTECTION

Claimants' damages were reduced from $9,580.00 to $2,700.00, where although respondent was guilty of trespassing on claimants' private road, it was not a deliberate or willful trespass, respondent having apparently believed it had a right of way over the land, and where the property benefited by a good farm road, which also served as a fire break and fire access road. *Blair v. Department of Natural Resources* (No. D-442)..... 69

Where a city had enacted an ordinance levying a fee for fire protection and designated the fee as "a charge against the owners" of the property, the city's claim for fire protection services was considered as an "action to recover money" as defined in the five-year statute of limitations. *City of Charleston v. Department of Fin. & Admin.* (No. D-574)..... 252

Claimants were awarded the sum of $1,000.00 for damage caused by a fire resulting from the use by respondent's employees of an acetylene torch in repairing a road sign. *Myers v. Department of Highways* (No. D-582)..... 268

FLOODING—See Drains and Sewers; Waters and Watercourses

GAS AND GAS UTILITIES

Claimant recovered $550.62 for gas lost through leaks in lines relocated by the Corps of Engineers at the State's direction following a major flood. *Emma Gas Co. v. Office of Fed.-State Relations* (No. D-565)..... 270

GOVERNOR

Claimant was awarded the sum of $210.00 for the costs of publishing legal advertisements of corporations delinquent in payment of license fees to the State, such advertisements having been duly authorized by the governor's office but left unpaid. *Fairmont Times & W. Virginian v. Office of the Governor* (No. D-608)..... 258

The chief executive is vested with discretion by the constitution and laws of the State respecting his official duties, and this discretion should not be subject to review or control by the Court of Claims. *Peraldo v. Moore* (No. D-412)..... 10

HOMICIDE

HORSE RACING

HOSPITALS

Claimant was denied recovery for the death of her decedent, who was injured while acting within the scope of her employment as a nurse's aide at Lakin State Hospital, where decedent was an employee of an agency of the State which paid premiums into the Workmen's Compensation Fund and was in good standing, and the remedies provided by Workmen's Compensation were exclusive and final. *Hodges v. Department of Mental Health* (No. D-469)..... 76

Claimant electric utility was denied recovery for its under billing in regard to supply of electricity to the Hopemont State Hospital, where there was no unspent budget allocation for the purchase of electricity over and above the sum paid according to erroneous billings. *Monongahela Power Co. v. Commissioner of Pub. Institutions* (No. D-566). 188

Claimant was awarded $2,815.00 for radiological services, where it had not only acted in good faith and rendered the services for which it had not been paid, but had acted to save the State a considerable sum of money in asking for and cancelling a previous agreement for services to two state hospitals and to patients who were not wards of the State. *Radiological Consultants Ass'n v. Department of Pub. Institutions* (No. D-560)..... 198

Claimant was denied recovery for the partial loss of a finger, which was cut off by a saw in the woodworking shop of Spencer State Hospital, where claimant's injury was due to his own improper operation and negligence. *Walton v. Department of Mental Health* (No. D-217)..... 200

INDEPENDENT CONTRACTORS

Claimant was denied recovery where he alleged respondent's employees, while transferring tar from a tank to a tar spreader, caused claimant's vehicle to become covered by the tar, but the evidence indicated the truck's operator was an independent contractor, and that respondent could not be held accountable for the contractor's negligent acts. *Safeco Ins. Co. v. Department of Highways* (No. D-407)... 28

INDUSTRIAL SCHOOLS

The West Virginia Industrial School for Boys is exclusively charged with the care, training and reformation of male youths of the State committed to its custody. *Hogue v. Department of Pub. Institutions* (No. D-323)..... 132

Claimant was denied recovery for damages sustained in an automobile collision caused by an escapee of the West Virginia Industrial School for Boys, where there was no proof of negligence on the part of institution employees as the proximate cause of claimant's loss. *Hogue v. Department of Pub. Institutions* (No. D-323)..... 132

Claimant was denied recovery of damages for injuries sustained by her as a result of having been stabbed in the back with a hunting knife by an inmate of the West Virginia Industrial Home for Girls, where claimant did not prove by a preponderance of the evidence that there was actionable negligence on the part of respondent. *Hurst v. Department of Pub. Institutions* (No. D-349)..... 155

The correctional procedures of the State cannot be questioned by the public in the Court of Claims when they are established by a legislative policy of care, training, and reformation. *Kirk v. Department of Pub. Institutions* (No. D-569)..... 259

It is the public policy of the State that delinquents be first given an opportunity to reestablish their ability to live peaceably in our society through a humane and efficient program under the supervision of the Commissioner of Public Institutions. *Kirk v. Department of Pub. Institutions* (No. D-569)..... 259

INTEREST

Claimant was denied recovery of interest on past-due accounts where it was furnishing paper to the State on open account under a requirement contract dated prior to the effective date of the legislation which authorized interest payment, and there were no specific contract provisions providing for payment of interest. *Capitol Paper Supply v. Department of Fin. and Admin.* (No. D-481)..... 88

JUDGMENTS AND DECREES

The Court of Claims made an advisory determination that there was a legal claim against respondent in the amount of $317.57 for the treatment of a patient at the West Virginia University Hospital, the bill having remained unpaid due to a lack of communication between State departments. *Board of Regents v. Board of Vocational Educ.* (No. D-587)..... 246

A summary judgment will be granted where there is no factual dispute and the moving party is entitled to judgment as a matter of law. *Hodges v. Department of Mental Health* (No. D-469)..... 76

JUDICIAL NOTICE

It is common knowledge that percolating waters in mountainous areas ooze, seep, and filter through the ground under the surface without definite channels to properties on lower elevations. *Henderson v. Department of Highways* (No. D-332)..... 183

It is common knowledge that certain types of wilted vegetation develop an inherent toxicity of their own. *Matheny v. Department of Highways* (No. D-550)..... 212

JURISDICTION

The jurisdiction of the Court of Claims shall not extend to any claim with respect to which a proceeding may be maintained against the State, by or on behalf of the claimant in the regular courts of the State, but the above exclusion is not applicable where the claimant has proceeded against the State on a theory of nonfeasance or neglect of duty which proximately results in damages to real estate. *Barton v. Department of Highways* (No. D-378)..... 2

While the Court of Claims disapproves of technically unauthorized obligations or expenses incurred by the various agencies of the State, it cannot ignore the justness of a claim. *Bondy v. Department of Pub. Institutions* (No. D-438)..... 123

Where claimant established that he was the lawful heir of decedent and that the residue of an estate was wrongfully escheated to the State and documents having been produced establishing his identity and relationship to the deceased, the Court of Claims was the proper forum for the filing of the claim. *Gal v. Gainer* (No. D-399)..... 24

Where the evidence shows that one is fatally injured while in the course of his employment as an employee of a department of the State and such state department at the time of the injury is a subscriber to the State's Workmen's Compensation Fund, has paid the premiums and complied with all the provisions of the code, the Court of Claims is without jurisdiction to make an award for the death of such employee. *Hodges v. Department of Mental Health* (No. D-469). 76

The correctional procedures of the State cannot be questioned by the public in the Court of Claims when they are established by a legislative policy of care, training, and reformation. *Kirk v. Department of Pub. Institutions* (No. D-569). 259

Claimant was denied recovery for a "de facto" taking, where the record did not disclose full information as to the condemnation suit pending or concluded in regard to the subject property, or whether there had been a final appellate court determination that claimant's claim could be determined at common law, independent of condemnation procedure, to which common-law remedy the constitutional immunity would apply, giving the Court of Claims jurisdiction. *Lomas v. Department of Highways* (No. D-395). 109

The Court of Claims was created to make awards on legal justification where there would be a remedy at law except for the constitutional immunity of the State from suit, and it cannot legislate but may give relief only within the sphere of its prescribed and inhibited jurisdiction. *Monongahela Power Co. v. Commissioner of Pub. Institutions* (No. D-566). 188

The jurisdiction of the Court of Claims is statutory and additional jurisdiction cannot be conferred upon the court by admissions or requests from the Attorney General's office that claims representing overspending be paid as lawful obligations of the State because the services were satisfactorily furnished and the State has received the benefit thereof. *Monongahela Power Co. v. Commissioner of Pub. Institutions* (No. D-566). 188

The Court of Claims sustained a motion to dismiss a claim that claimants' property had been taken for public use without compensation, where claimants had an adequate remedy at law for the ascertainment of their damages, if any, by institution of eminent domain proceedings. *Moore v. State Road Comm'n* (No. D-522). 148

The Court of Claims is a court of limited jurisdiction and cannot entertain claims that are specifically excluded by statutory law. *Moore v. State Road Comm'n* (No. D-522). 148

The statutes relating to jurisdiction of the Court of Claims must be read together. *Nichols Eng'r & Research Corp. v. Haden* (No. D-363). 4

A taxpayer who has not exhausted his administrative and judicial remedies cannot avail himself of the jurisdiction of the Court of Claims. *Nichols Eng'r & Research Corp. v. Haden* (No. D-363). 4

Section 14-2-12, W. Va. Code, excludes from the jurisdiction of the Court of Claims any and all claims where administrative and statutory remedies are provided in the regular courts of the State to review administrative decisions of state agencies and particularly where a judicial remedy is also provided in the regular courts of the State. *Nichols Eng'r & Research Corp. v. Haden* (No. D-363). 4

The Court of Claims is constrained by statute to make awards only in those cases where a recovery would be allowed in the regular courts of the state except for the doctrine of sovereign immunity. *Shaffer v. Board of Regents* (No. D-537)..... 213

LANDLORD AND TENANT

Claimant was awarded the sum of $6,000.00 for damages to its leasehold estate and personal property caused by respondent's negligent release of flood waters, where the parties stipulated and agreed as to the total amount of damages. *Firestone Tire & Rubber Co. v. Department of Highways* (No. D-227)..... 192

Claimant property owner was allowed recovery for the loss of rentals, where notices to vacate sent to his tenants constituted a "de facto" taking, and the inaction and unreasonable delay of the State in instituting eminent domain proceedings tended to depreciate the market value of an unrentable building. *Jones v. State Bldg. Comm'n* (No. D-357)..... 65

Claimant was awarded the sum of $6,480.00 for loss of rentals, where the State delayed almost two years in the actual taking of claimant's property after causing his tenants to vacate. *Jones v. State Bldg. Comm'n* (No. D-538)..... 273

A claim in the amount of $74.35 was allowed for damages to claimant's household furnishings and other personal property caused when respondent's employee negligently caused a ceiling to collapse in a "faculty house" which claimant had rented from respondent. *Klein v. Board of Regents* (No. D-483)..... 18

Claimant was awarded the sum of $155.61 for damages resulting from the negligent use of his home by members of the Department of Public Safety, where even a broad construction of a release of liability contained in the lease would not cover damages resulting from willful acts or conduct in disregard of the property rights of the lessor. *Prozzillo v. Department of Pub. Safety* (No. D-521)..... 140

A lease of property to the State for use by the Department of Welfare was properly terminated, where lessee complied with a provision of the lease requiring it to send notice of termination by certified mail; if such notice was not delivered because of the negligence of the postoffice, lessor's damages, if any, might be recovered as a postal claim. *Southern Realty Co. v. Department of Welfare* (No. D-222)... 13

In the case of a lease of property to the State for use by the Department of Welfare, there was no moral obligation on the part of the State to pay rent after the date of termination because of a failure to remove a safe from the premises that was not owned by the State. *Southern Realty Co. v. Department of Welfare* (No. D-222)..... 13

Retention of the keys or some of the keys to the property does not constitute an unlawful withholding of the premises, especially when the lessor had access to the property through other available keys at the time of the tenant's removal. *Southern Realty Co. v. Department of Welfare* (No. D-222)..... 13

Claimant, sublessee of a gasoline filling station, recovered $900.00 for lost profits, where his rights as sublessee were ignored not only by the landowner and the lessee, but also by respondent, which apparently felt that only the landowner was entitled to compensation for damage caused to the station by road construction. *Walker v. Department of Highways* (No. D-276)..... 121

LIMITATION OF ACTIONS

A ninety-day limitation of time for filing a claim before the Attorney General, which was voluntarily agreed to by all parties, was reasonable and not unreasonably short. *Central Asphalt Paving Co. v. State* (No. C-30). 227

If a limitation period is so short that it abrogates a person's right of action, it should be held invalid and against public policy. *Central Asphalt Paving Co. v. State* (No. C-30)..... 227

Where a city had enacted an ordinance levying a fee for fire protection and designated the fee as "a charge against the owners" of the property, the city's claim for fire protection services was considered as an "action to recover money" as defined in the five-year statute of limitations. *City of Charleston v. Department of Fin. & Admin.* (No. D-574)..... 252

When one owes a debt on account of his ownership of property, he is impliedly obligated to pay the same as debt, thus placing the matter in the class of implied contracts, and making the five year statute applicable. *City of Charleston v. Department of Fin. & Admin.* (No. D-574)..... 252

Where an easement for work evidently contemplated was to be in a reasonable time, after the expiration of that time, the right to sue would accrue and the period of limitation begin and the record was not clear as to such time, the Court could only be guided by the date of the agreement and a reasonable time thereafter. *Seebaugh v. Department of Highways* (No. D-541)..... 204

The Court of Claims is bound by express statutory law to apply the statute of limitations in all cases where the statute would be applicable if the claim were against a private person, firm or corporation. *Shered v. Department of Highways* (No. D-511)..... 137

The period of limitation may not be waived or extended. *Shered v. Department of Highways* (No. D-511)..... 137

LIVESTOCK

Claimant was awarded the sum of $200.00 for damages to his herd of cattle which became ill generally and lost weight as the result of eating wilted vegetation inside of a fence line that had been sprayed with a chemical designated as tandex herbicide by respondent's agents. *Matheny v. Department of Highways* (No. D-550)..... 212

Claimant was awarded the sum of $1,200.00 for the death of his stock from poisoning by lead obtained from a bucket used by respondent in the painting of a bridge. *Preece v. Department of Highways* (No. D-577)..... 235

MANDAMUS

If a highway construction or improvement results in damage to private property without an actual taking thereof and the owners in good faith claim damages, the State Road Commissioner has the statutory duty to institute proceedings within a reasonable time after completion of the work to ascertain damages, if any, and, if he fails to do so, after reasonable time, mandamus will lie to require the institution of such proceedings. *Moore v. State Road Comm'n* (No. D-522)..... 148

MINES AND MINERALS

Claimants were awarded the sum of $2,950.00 for damages to their wells caused by road salt stored by respondent on nearby property and entering claimants' wells. *Brown v. Department of Highways* (No. D-409a) 240

Claimants were awarded $1,300.00 for damages caused by waters negligently released from an abandoned mine by respondent's contractor in the course of highway construction, when the contractor acted under the express or implied direction of the State. *Carelli v. Department of Highways* (No. D-228C) 151

Claimant recovered $2,444.03 to cover damages to personal property caused by flood waters negligently released by respondent's contractor from an abandoned mine. *Sheppard v. Department of Highways* (No. D-232) 142

Claimant insurer was awarded the sum of $464.00 for flood damage to its insured's automobile resulting from a contractor's excavation into an abandoned coal mine, where respondent had a nondelegable duty to plan its projects with ordinary engineering skill and the exercise of reasonable care to prevent damage to innocent persons who might be damaged by the construction procedures. *State Farm Ins. Co. v. State Road Comm'n* (No. D-230) 159

Claimant was awarded the sum of $3,000.00 for damages sustained when its ramp, tipple and fan were destroyed or covered up and its mine opening filled in by respondent during reclamation work. *Trebag Enterprises v. Department of Natural Resources* (No. D-434). 85

Claimant, whose mine opening had been filled in by respondent during reclamation work, was denied recovery for the loss of profits which it could have had from coal mined from the premises, where the evidence in this regard was entirely speculative and not admissible. *Trebag Enterprises v. Department of Natural Resources* (No. D-434). 85

MOTOR VEHICLES

Claimant was denied recovery for damages to her automobile resulting from a collision with a vehicle which had been stopped by a flagman at a state-maintained bridge, where the accident was one which would not have occurred if claimant had been exercising ordinary care in the operation of her automobile, and the lack of such care was contributory negligence on her part, if not the proximate cause of collision. *Beckett v. Department of Highways* (No. D-500). 107

Claimant was denied recovery for damages to her automobile resulting from a collision with a rock adjacent to the side of a secondary road, where it did not appear that the work of respondent's employees was the proximate cause of the damage. *Bryan v. Department of Highways* (No. D-390) 33

Claimant was awarded the sum of $171.96 for damages caused to her truck when it passed over a metal plate used to cover a hole in a bridge floor. *Buckner v. Department of Highways* (No. D-468) 38

Claimant recovered $44.59 for damages sustained when its station wagon was damaged while crossing a cattle guard entrance to a campground at Watoga State Park. *Budget Rent-A-Car of Cleveland, Inc. v. Department of Natural Resources* (No. D-474) 37

Claimants recovered $12,041.95 for personal injuries suffered in an automobile accident which occurred on a slippery pavement, where respondent knew that the highway was extremely dangerous when wet, but took only minor steps to correct the condition. *Frazier v. Department of Highways* (No. D-502a) 171

Most of the State's roads are slippery when wet and regardless of posted speed limits ordinary prudence requires a driver to take greater care in keeping control of his vehicle under such adverse conditions. *Frazier v. Department of Highways* (No. D-502a) 171

Claimant was awarded the sum of $106.61 for damages sustained when his automobile ran over a steel plate which had been negligently placed over a hole in a state-maintained highway. *Gravely v. Department of Highways* (No. D-580) 233

Claimant was awarded the sum of $160.68 where, his automobile, while in a repair shop, had been damaged by flood waters negligently released by respondent. *Hardy v. Department of Highways* (No. D-233). 162

The owner of a damaged automobile is not entitled to the full cost of repairs where they make the property more valuable than it was before the injury, and the cost of repairs is admissible as it relates to the diminution of the value of the property. *Hardy v. Department of Highways* (No. D-233) 162

Claimant was awarded the sum of $226.88 for damages done to the automobile of its insured, resulting from debris falling upon insured's automobile when respondent was blasting rock without proper warning signals having been given to motorists. *Harleysville Mut. Ins. Co. v. Department of Highways* (No. D-484) 34

Claimant was awarded the sum of $27.86 for damage caused to his automobile when paint, which was being used by highway personnel in painting a bridge, fell on the vehicle. *Harmon v. Department of Highways* (No. D-486) 35

Travel would become extremely hazardous in mountainous areas if the State refused or neglected to take reasonable measures to protect the traveling public. *Henderson v. Department of Highways* (No. D-332) 183

Roads in mountainous areas cannot be closed during the winter months to vehicular traffic to protect adjoining property owners from the noxious drainage of salts and chemicals which are reasonably required to remove the hazards of ice and snow on the highways, and make them passable. *Henderson v. Department of Highways* (No. D-332). 183

Claimant was awarded $265.54 for damages sustained when the wheel of her automobile fell into a trap-like hole, in the berm near the edge of a highway, without any fault on her part. *Jones v. Department of Highways* (No. D-509) 117

Claimant was denied recovery where it appeared that the collision of a car in which claimant was riding, a concrete pillar was not the result of the condition of a catch-basin or the proximity of the pillar to the traveled portion of the highway, but rather the damages were occasioned by either the negligence of the driver of the car or by someone or something other than alleged in claimant's petition. *Lynn v. Department of Highways* (No. D-398) 127

Claimants were awarded $137.55 for damages caused to their automobile when a state highway sign, which indicated the height of the clearance of an underpass, fell upon their car, breaking the windshield. *McClure v. Department of Highways* (No. D-518)..... 135

Claimant recovered $50.00 left unpaid by his insurer for damages sustained when the under portion of his car struck a piece of steel which had been placed over a hole in a bridge. *MacDorman v. Department of Highways* (No. D-551)..... 197

Claimant was denied recovery for damages to his automobile, which skidded off the road while being driven by his son, where it was unquestioned that some loose slag or gravel had worked its way from the berms onto the hard surface of the road, but the rain, the darkness, the sharp curve and the generally slick propensities of blacktop all called for a degree of care which was not exercised by claimant's son. *McMellon v. Department of Highways* (No. D-437)..... 73

Claimant recovered $65.75 where a power mower under the control of respondent's employees negligently was permitted to roll down a steep slope and into claimant's automobile, which was properly parked. *Moore v. Board of Regents* (No. D-488)..... 32

Claimant was denied recovery for damages suffered in a rockslide which struck his car, where the only allegation of an act or omission which might be considered to be negligence on the part of respondent was that the ditch along the road at the point of impact needed cleaning out and there was nothing in the record to show how long such condition had existed or that respondent knew or should have known that such a dangerous condition did exist as reasonably would be expected to cause injury or damage to users of the highway. *Morgan v. Department of Highways* (No. D-494)..... 78

A claim for damages sustained when claimant's automobile struck a rock on a state highway was disallowed, where it appeared that respondent's failure to provide "Falling Rocks" signs was not a contributing factor in the circumstances surrounding the accident. *Mullins v. Department of Highways* (No. D-491)..... 221

Claimant was awarded the sum of $469.80 for damage caused when a tree limb fell on his parked automobile, where the negligence of respondent's employees was the proximate cause of the damage. *Pauley v. Department of Highways* (No. D-558)..... 261

Claimant was awarded the sum of $131.32 for damages sustained when respondent detonated an explosive charge which projected a rock which struck claimant's car. *Powers v. Department of Highways* (No. D-513)..... 84

Claimant was awarded $42.23 where he passed one of respondent's trucks, driven by an employee of respondent, at which time another employee of respondent was shoveling stone chips upon the road, and respondent's truck stopped abruptly, causing the employee on the truck bed to spill stone chips upon claimant's automobile. *Robey v. Department of Highways* (No. D-524)..... 75

Claimants recovered $553.65 where respondent's drilling and blasting was the cause of the precipitation of rocks and debris off and down a cliff, striking claimants' car. *Runyon v. Department of Highways* (No. D-470)..... 44

Claimant was denied recovery where he alleged respondent's employees, while transferring tar from a tank to a tar spreader, caused claimant's vehicle to become covered by the tar, but the evidence indi-

cated the truck's operator was an independent contractor, and that respondent could not be held accountable for the contractor's negligent acts. *Safeco Ins. Co. v. Department of Highways* (No. D-407).... 28

Claimant was awarded the sum of $114.33 for damages caused when hot tar splashed on his automobile. *Shaffron v. Department of Highways* (No. D-546)..... 176

Claimant was awarded $220.42 for damages sustained when a paint crew employed by respondent negligently sprayed silver paint on his automobile while it was parked at his home, about 150 feet from the bridge. *Smith v. Department of Highways* (No. D-526)..... 79

Claimant was awarded the sum of $36.05, representing the cost of cleaning its insured's automobile, which was damaged while driven over a bridge during a paint-spraying operation conducted by respondent's agents. *State Farm Mut. Ins. Co. v. Department of Highways* (No. D-600)..... 277

Claimant was awarded the sum of $46.35, representing the cost of cleaning its insured's automobile, which was damaged while driven over a bridge during a paint-spraying operation conducted by respondent's agents. *State Farm Mut. Ins. Co. v. Department of Highways* (No. D-601)..... 278

Claimant was awarded the sum of $78.80 for damages to its subrogor's parked automobile, which was struck by stones which were thrown into the air when respondent's employees were conducting blasting operations. *State Farm Mut. Ins. Co. v. Department of Highways* (No. D-606)..... 255

A motorist should drive in such a manner as to bring his car to a stop within the assured clear distance ahead, and within his range of vision, when approaching an obstruction on the road; at night the rule has been modified to the "radius of lights" rule, and is applied unless visibility is obscured or diverted. *Williams v. Department of Highways* (No. D-557)..... 216

It is contributory negligence to drive a motor vehicle at such a rate of speed that it cannot be stopped in time to avoid hitting an object within the radius of the driver's headlights. *Williams v. Department of Highways* (No. D-557)..... 216

A motorist should drive in a manner to bring his car to a stop within the assured clear distance ahead, and within his range of vision, when approaching an obstruction on the road; at night the rule has been modified to the "radius of lights" rule, and is applied unless visibility is obscured or diverted. *Williams v. Department of Highways* (No. D-557)..... 216

A claim for injuries, sustained by claimant when he was struck by an automobile while walking on a highway, was disallowed, where he had been guilty of contributory negligence and voluntarily assumed the risk. *Wolverton v. Department of Highways* (No. D-530)..... 223

Claimant recovered $106.75 for damages sustained while he was crossing a bridge at night and, even though he was exercising ordinary care, he was unable to see the protruding object that tore a large hole in the muffler of his car and pulled loose the emergency brake cable. *Wright v. Department of Highways* (No. D-498)..... 64

MOVING EXPENSES

Claimant was denied recovery for moving expenses, where there was no showing of any statutory authority providing for the payment of moving expenses of an employee of respondent, either by reimbursement or by permitting the employee to extend the State's credit directly to claimant. *Shiflet v. Department of Health* (No. D-431)..... 57

MUNICIPAL CORPORATIONS

Where a city had erected an ordinance levying a fee for fire protection and designated the fee as "a charge against the owners" of the property, the city's claim for fire protection services was considered as an "action to recover money" as defined in the five-year statute of limitations. *City of Charleston v. Department of Fin. & Admin.* (No. D-574)..... 252

NATIONAL GUARD

Claimant was awarded the sum of $298.43 for damage to its power lines sustained when a Mississippi National Guard parachutist, on joint maneuvers with the West Virginia National Guard, landed in the lines. *Monongahela Power Co. v. Adjutant General* (No. D-563). 234

Claimant received $50.00 for damages to his crops caused by National Guard parachutists who overshot their drop zone and invaded his property without consent. *Murphy v. Adjutant General* (No. D-445)..... 9

NEGLIGENCE—See also Blasting; Bridges; Motor Vehicles; Rockslides; Streets and Highways

Claimant was awarded $2,531.00 for damage to her property due to a landslide caused by a clogged roadway drain where it appeared that respondent's employees had previously worked on the road and patched the road surface and had knowledge of the drainage problem or in the exercise of ordinary care would have had such knowledge and should have detected the hazard to which claimant's property was exposed. *Barton v. Department of Highways* (No. D-378)..... 2

Claimant was denied recovery for damages to her automobile resulting from a collision with a vehicle which had been stopped by a flagman at a state-maintained bridge, where the accident was one which would not have occurred if claimant had been exercising ordinary care in the operation of her automobile, and the lack of such care was contributory negligence on her part, if not the proximate cause of collision. *Beckett v. Department of Highways* (No. D-500)... 107

Claimant was allowed $400.00 for damages to his mobile home, automobile, and lawn caused by the propulsion of debris and rocks through the blasting activities of the respondent, where respondent's employees had been cleaning out a ditch line in front of claimant's property and failed to take reasonable precautions to protect claimant's mobile home and automobile, which were in the vicinity of the blasting, from injury resulting from the blasting activities. *Bryant v. Department of Highways* (No. D-439)..... 3

Claimant was denied recovery for injuries sustained when he fell from a bridge, where respondent knew or should have known that a detached wire mesh and missing guardrail created an unsafe and

hazardous condition, the claimant's own careless conduct being the proximate cause of his injuries. *Davis v. Department of Highways* (No. D-244)..... 49

The essential elements of actionable negligence are a duty, a breach and an injury which is the proximate result of the breach of duty; the injury must follow as the direct and natural sequence of events, unbroken by other intervening efficient causes. *Hall v. Department of Highways* (No. D-278)..... 146

Claimant and her husband were awarded $11,000.00 for personal injuries and loss of consortium, where claimant had been charged by a bison at a public recreational facility, proper precautions not having been taken by respondent to warn or to assure the safety of spectators attracted to a buffalo enclosure at the facility. *Pudder v. Department of Natural Resources* (No. D-485 and D-487)..... 168

A college student's claim for damages for injuries caused by an explosion in a chemistry laboratory at Concord College was disallowed, where the carelessness of a fellow student, rather than alleged lack of supervision by respondent's agents, was the proximate cause of the explosion and the resultant injuries to claimant. *Rinear v. Board of Regents* (No. D-525)..... 290

A claim for damages sustained as a result of the partial flooding of a highway was disallowed, where there was no clear showing of respondent's negligence and claimants, having chosen to proceed through the water, assumed certain risks and should have proceeded in such a manner that injury would not result from a sudden encounter with an invisible obstacle or hole. *Varner v. Department of Highways* (No. D-519)..... 219

If vandals or third parties for whom the State is not responsible remove lit smudge pots or extinguish the flames, negligence in preparing a repair site properly for the safety of the traveling public at night cannot be charged against the State unless it's agents knew or had reason to know that a hazard had been created by the intervention of third parties. *Williams v. Department of Highways* (No. D-557)..... 216

It is contributory negligence to drive a motor vehicle at such a rate of speed that it cannot be stopped in time to avoid hitting an object within the radius of the driver's headlights. *Williams v. Department of Highways* (No. D-557)..... 216

Proximate cause is a vital and essential element of a claimant's case, and he must sustain the burden of proving it to justify recovery in any action based on negligence. *Wolverton v. Department of Highways* (No. D-530)..... 223

A claim for injuries, sustained by claimant when he was struck by an automobile while walking on a highway, was disallowed, where he had been guilty of contributory negligence and voluntarily assumed the risk. *Wolverton v. Department of Highways* (No. D-530)..... 223

It is the duty of the pedestrian to exercise ordinary care for his safety, effectively use his eyes, and protect himself against impending danger, and if he does not do so when he has the opportunity so to do, he will be guilty of contributory negligence as a matter of law. *Wolverton v. Department of Highways* (No. D-530)..... 223

NOTICE

A lease of property to the State for use by the Department of Welfare was properly terminated, where lessee complied with a provision of the lease requiring it to send notice of termination by certified mail; if such notice was not delivered because of the negligence of the postoffice, lessor's damages, if any, might be recovered as a postal claim. *Southern Realty Co. v. Department of Welfare* (No. D-222)..... 13

NUISANCES

Claimants recovered damages in the amount of $3,246.00 as the result of the negligent conduct of respondent in installing a septic tank on their property which later developments disclosed to be a health hazard and public nuisance because of the failure of respondent to make a proper evaluation of soil conditions and site location as well as other factors required for the adequate sewage disposal on their property. *Rivers v. Department of Highways* (No. D-436)..... 45

OFFICE EQUIPMENT AND SUPPLIES

Claimant was denied recovery of interest on past-due accounts where it was furnishing paper to the State on open account under a requirement contract dated prior to the effective date of the legislation which authorized interest payment, and there were no specific contract provisions providing for payment of interest. *Capitol Paper Supply v. Department of Fin. and Admin.* (No. D-481)..... 88

Claimant was awarded the sum $3,186.80 for carbon paper and other supplies, where it appeared that either the State's purchasing procedures had been negligently handled, or irresponsibly documented by badly informed personnel, or that the State's files had been ransacked and spurious invoices and supporting documents substituted for the genuine papers in such a manner as to divert payment to another party who was not entitled to payment. *Columbia Ribbon & Carbon Mfg. Co. v. Department of Fin. & Admin.* (No. D-448)..... 19

OPTIONS

Where the parties have executed formal options and deeds containing releases of the claims asserted, the Court of Claims must abide by the provisions of such releases unless fraud or other illegality in regard thereto is shown. *Long v. Department of Highways.* (No. D-527)..... 210

PARKS AND PLAYGROUNDS

Claimant recovered $44.59 for damages sustained when its station wagon was damaged while crossing a cattle guard entrance to a campground at Watoga State Park. *Budget Rent-A-Car of Cleveland, Inc. v. Department of Natural Resources* (No. D-474)..... 37

A claim for damages for injuries sustained when claimant fell on an asphalt-paved path in Hawks Nest State Park was disallowed, where claimant failed to exercise due and reasonable care and her negligence proximately contributed to her injuries. *Pace v. Department of Natural Resources* (No. D-567)..... 287

Claimant and her husband were awarded $11,000.00 for personal injuries and loss of consortium, where claimant had been charged by a bison at a public recreational facility, proper precautions not

having been taken by respondent to warn or to assure the safety of spectators attracted to a buffalo enclosure at the facility. *Pudder v. Department of Natural Resources* (Nos. D-485, D-487)..... 168

PHYSICIANS AND SURGEONS—See also Hospitals

PLEADING

Pleadings in the Court of Claims are informal. *Hardy v. Department of Highways* (No. D-233)..... 162

The Rules of Civil Procedure which apply to the Court of Claims, except where in conflict with the special rules of the Court, provide that leave to amend shall be freely given when justice so requires. *Hardy v. Department of Highways* (No. D-233)..... 162

A claim was properly amended to show the real party in interest, where substituting the subrogee for claimant did not constitute the filing of a new claim after the running of the statute of limitations or bringing in a new party. *Hardy v. Department of Highways* (No. D-233)..... 162

Rule 15 of the Rules of Practice and Procedure of the Court of Claims states that a motion for rehearing may be entertained and considered ex parts, unless the Court otherwise directs, and a rehearing shall not be allowed except where good cause is shown. *Wolverton v. Department of Highways* (No. D-530)..... 223

POISONS

A claim for damages resulting from respondent's use of poisonous chlorides on the highway for de-icing purposes was disallowed, where claimant failed to introduce any proof that the faulty storage of chemicals on respondent's property was the proximate cause of claimant's damage, relying solely on continuous application of calcium chloride to the road surface as the sole cause of the damage. *Henderson v. Department of Highways* (No. D-332)..... 183

It is common knowledge that certain types of wilted vegetation develop an inherent toxicity of their own. *Matheny v. Department of Highways* (No. D-550)..... 212

Claimant was awarded the sum of $200.00 for damages to his herd of cattle which became ill generally and lost weight as the result of eating wilted vegetation inside of a fence line that had been sprayed with a chemical designated as tandex herbicide by respondent's agents. *Matheny v. Department of Highways* (No. D-550)..... 212

Claimant was awarded the sum of $1,200.00 for the death of his stock from poisoning by lead obtained from a bucket used by respondent in the painting of a bridge. *Preece v. Department of Highways* (No. D-577)..... 235

POLICE

Claimants, who were wounded by state police who were attempting to apprehend a suspect, were awarded $26,500.00, where there was wanton negligence on the part of a trooper in firing a burst of auto-

POST OFFICE

PRINTING

PRISONS AND PRISONERS—See also Industrial Schools

PUBLIC OFFICERS

PUBLIC UTILITIES—See also Electricity; Gas and Gas Utilities; Water Utilities

Interference by utility lines was an assumed risk of the contractor under the specifications of his contract, and he had to bear the expense of working around the utility line. *Tri-State Stone Corp. v. State Road Comm'n* (No. D-219)..... 90

RACING COMMISSION—See Horse Racing

REHEARING

Rule 15 of the Rules of Practice and Procedure of the Court of Claims states that a motion for rehearing may be entertained and considered ex parte, unless the Court otherwise directs, and a rehearing shall not be allowed except where good cause is shown. *Wolverton v. Department of Highways* (No. D-530)..... 223

RELEASES

Where the parties have executed formal options and deeds containing releases of the claims asserted, the Court of Claims must abide by the provisions of such releases unless fraud or other illegality in regard thereto is shown. *Long v. Department of Highways* (No. D-527). 210

Claimant was awarded the sum of $155.61 for damages resulting from the use of his home by members of the Department of Public Safety, where even a broad construction of a release of liability contained in the lease would not cover damages resulting from willful acts or conduct in disregard of the property rights of the lessor. *Prozzillo v. Department of Pub. Safety* (No. D-521). 140

ROCKSLIDES

Claimant was denied recovery for damages suffered in a rockslide which struck his car, where the only allegation of an act or omission which might be considered to be negligence on the part of respondent was that the ditch along the road at the point of impact needed cleaning out and there was nothing in the record to show how long such condition had existed or that respondent knew or should have known that such a dangerous condition did exist as reasonably would be expected to cause injury or damage to users of the highway. *Morgan v. Department of Highways* (No. D-494)..... 78

A claim for damages sustained when claimant's automobile struck a rock on a state highway was disallowed, where it appeared that respondent's failure to provide "Falling Rock" signs was not a contributing factor in the circumstances surrounding the accident. *Mullins v. Department of Highways* (No. D-491)..... 221

SANITATION—See also Drains and Sewers

Claimants recovered damages in the amount of $3,246.00 as the result of the negligent conduct of respondent in installing a septic tank on their property which later developments disclosed to be a health hazard and public nuisance because of the failure of respondent to make a proper evaluation of soil conditions and site location as well as other factors required for the adequate sewage disposal on their property. *Rivers v. Department of Highways* (No. D-436)..... 45

SCHOOLS—See also Colleges and Universities; Industrial Schools

SIDEWALKS—See Streets and Highways

SOFT DRINKS

Claimant was awarded the sum of $28,590.95, representing the West Virginia soft drink taxes paid for soft drink tax stamps affixed to cyclamated soft drink products, which products and the stamps affixed thereto were destroyed at the direction of the respondent. *General Foods Corp. v. State Tax Comm'r* (No. D-540)..... 193

STATE

The State cannot by any agreement avoid the consequences of a non-delegable duty. *Lynn v. Department of Highways* (No. D-398).... 127

The jurisdiction of the Court of Claims is statutory and additional jurisdiction cannot be conferred upon the Court by admissions or requests from the Attorney General's office that claims representing overspending be paid as lawful obligations of the State because the services were satisfactorily furnished and the State has received the benefit thereof. *Monongahela Power Co. v. Commissioner of Pub. Institutions* (No. D-566)..... 188

Those dealing with public agencies who are not alerted to the caveats and limitations placed on spending units assume inherent risks which are not ordinary in transactions between private individuals and corporations. *Monongahela Power Co. v. Commissioner of Pub. Institutions* (No. D-566)..... 188

It is unlawful for the superintendent of any institution, maintained by the State, to expend for any fiscal year a greater sum for the maintenance of the institution than shall have been appropriated by the legislature therefor for such year. *Monongahela Power Co. v. Commissioner of Pub. Institutions* (No. D-566)..... 188

The furnishing of electricity to an institution of the State is a contractual service. *Monongahela Power Co. v. Commissioner of Pub. Institutions* (No. D-566)..... 188

Claimant electric utility was denied recovery for its under billing in regard to supply of electricity to the Hopemont State Hospital, where there was no unspent budget allocation for the purchase of electricity over and above the sum paid according to erroneous billings. *Monongahela Power Co. v. Commissioner of Pub. Institutions* (No. D-566).188

Claimant was awarded the sum of $155.61 for damages resulting from the negligent use of his home by members of the Department of Public Safety, where even a broad construction of a release of liability contained in the lease would not cover damages resulting from willful acts or conduct in disregard of the property rights of the lessor. *Prozzillo v. Department of Public Safety* (No. D-521).... 140

STATUTES

Interpretation of legislative language must be done on the assumption that the legislature in making any specific statute is aware of existing statutes. *General Foods Corp. v. State Tax Comm'r* (No. D-540). 193

STATUTE OF LIMITATIONS—See Limitation of Actions

STIPULATION AND AGREEMENT

STREETS AND HIGHWAYS

Claimant was awarded the sum of $437.13 for damages to his automobile caused by a loose plate which had been placed over a hole in the road by respondent's employees. *Bailey v. Department of Highways* (No. D-589)..... 257

Claimants' damages were reduced from $9,580.00 to $2,700.00, where although respondent was guilty of trespassing on claimants' private road, it was not a deliberate or willful trespass, respondent having apparently believed it had a right of way over the land, and where the property benefited by a good farm road, which also served as a fire break and fire access road. *Blair v. Department of Natural Resources* (No. D-442)..... 69

Claimant was denied recovery for damages to her automobile resulting from a collision with a rock adjacent to the side of a secondary road, where it did not appear that the work of respondent's employees was the proximate cause of the damage. *Bryan v. Department of Highways* (No. D-390)..... 33

Claimants were awarded $1,300.00 for damages caused by waters negligently released from an abandoned mine by respondent's contractor in the course of highway construction, when the contractor acted under the express or implied direction of the State. *Carelli v. Department of Highways* (No. D-228C)..... 151

Claimant recovered $124.74, the costs of repairing a broken water main caused by respondent's employees who were installing a culvert across the end of a hard surface roadway, and in the process of digging out the culvert, allowed a backhoe bucket to become hooked under claimant's water line pipe, puncturing it, and causing it to break at both ends. *Carpenter Addition Water Co. v. Department of Highways* (No. D-573)..... 209

The fact that respondent was negligent in storing or stockpiling salt, which seeped into claimant's artesian well, did not relieve claimant of his duty to minimize his damages, where although claimant complained to respondent about the matter, he permitted the situation to continue and took only minimal action to remedy the situation, namely, hauling water to supply his needs. *Dixon v. Department of Highways* (No. D-295)..... 81

Road maintenance should be performed with ordinary and proper care and not expose the traveling public to danger or extraordinary hazards. *Enochs v. Department of Highways* (No. D-588)..... 275

Claimants recovered $12,041.95 for personal injuries suffered in an automobile accident which occurred on a slippery pavement, where respondent knew that the highway was extremely dangerous when wet, but took only minor steps to correct the condition. *Frazier v. Department of Highways* (No. D-502a)..... 171

Most of the State's roads are slippery when wet and regardless of posted speed limits ordinary prudence requires a driver to take greater care in keeping control of his vehicle under such adverse conditions. *Frazier v. Department of Highways* (No. D-502a)..... 171

Claimant was awarded the sum of $106.61 for damages sustained when his automobile ran over a steel plate which had been negligently placed over a hole in a state-maintained highway. *Gravely v. Department of Highways* (No. D-580)..... 233

The meaning of the term "street" in a statute is determined by the context, and the word "street" taken from a statute, isolated from its context, could be interpreted to include or not to include a sidewalk. *Harrah v. Deparment of Highways* (No. D-454) 242

The duty imposed on the State Road Commissioner to maintain bridges as part of the primary road system at the expense of the State includes a duty to maintain the sidewalks on the bridges, which are an integral part of the structure. *Harrah v. Department of Highways* (No. D-454) 242

A claim for damages resulting from respondent's use of poisonous chlorides on the highways for de-icing purposes was disallowed, where claimant failed to introduce any proof that the faulty storage of chemicals on respondent's property was the proximate cause of claimant's damage, relying solely on continuous application of calcium chloride to the road surface as the sole cause of the damage. *Henderson v. Department of Highways* (No. D-332) 183

Roads in mountainous areas cannot be closed during the winter months to vehicular traffic to protect adjoining property owners from the noxious drainage of salts and chemicals which are reasonably required to remove the hazards of ice and snow on the highways, and make them passable. *Henderson v. Department of Highways* (No. D-332). 183

Travel would become extremely hazardous in mountainous areas if the State refused or neglected to take reasonable measures to protect the traveling public. *Henderson v. Department of Highways* (No. D-332). 183

Claimant was awarded $265.54 for damages sustained when the wheel of her automobile fell into a trap-like hole, in the berm near the edge of a highway, without any fault on her part. *Jones v. Department of Highways* (No. D-509) 117

Claimant was denied recovery for damages to his automobile, which skidded off the road while being driven by his son, where it was unquestioned that some loose slag or gravel had worked its way from the berms onto the hard surface of the road, but the rain, the darkness, the sharp curve and the generally slick propensities of blacktop all called for a degree of care which was not exercised by claimant's son. *McMellon v. Department of Highways* (No. D-437) 73

A road contractor is required to build the road in accordance with plans and specifications under the supervision of the State's engineer and produce a result; the *modus operandi* is under his control and if the State unreasonably impedes the progress of the work, the expenses arising from unwarranted delays are compensable. *Melbourne Bros. Constr. Co. v. Department of Highways* (No. D-534) 280

The materials used in building a road and the quality of the work are subject to inspection by the State, and it would be an officious act for the State to interfere with the coordination devised by the contractor in order to efficiently accomplish his result. *Melbourne Bros. Constr. Co. v. Department of Highways* (No. D-534) 280

The State is only required to exercise reasonable care and diligence in the maintenance of its highways. *Morgan v. Department of Highways* (No. D-494) 78

Claimants were awarded the sum of $1,000.00 for damages caused by a fire resulting from the use by respondent's employees of an ace-

tylene torch in repairing a road sign. *Myers v. Department of Highways* (No. D-582)..... 268

Claimant recovered $3,381.99 for out-of-pocket expenses incurred in lowering his service station lot to match the road bed, where, after highway construction had been completed, the approaches to the station were so steep that ordinary motor vehicles could not safely enter or leave the station, and for practical purposes the property was unfit for use as a service station. *Reinhart v. Department of Highways* (No. D-444)..... 54

Claimant was awarded $42.23 where he passed one of respondent's trucks, driven by an employee of respondent, at which time another employee of respondent was shoveling stone chips upon the road, and respondent's truck stopped abruptly causing the employee on the truck bed to spill stone chips upon claimant's automobile. *Robey v. Department of Highways* (No. D-524)..... 75

It is sufficient if streets and sidewalks are in a reasonably safe condition for travel in the ordinary modes, with ordinary care, by day or night. If a sidewalk is unsafe or hazardous, then the violation of the duty must be the proximate cause of the injury. *Shaffer v. Board of Regents* (No. D-537)..... 213

Claimant was denied recovery where she was familiar and aware of the deteriorated condition of the sidewalk having walked over it many times before on her way home or from her home to the place of her employment; she was not exercising the ordinary care required of her under these circumstances, and being forewarned of the defect, as a reasonably prudent person she should have taken precautions to avoid tripping over the loose gravel or depressions in the sidewalk. *Shaffer v. Board of Regents* (No. D-537)..... 213

Interference by utility lines was an assumed risk of the contractor under the specifications of his contract, and he had to bear the expense of working around a utility line. *Tri-State Stone Corp. v. State Road Comm'n* (No. D-219)..... 90

The refusal of the State to approve waste disposal sites selected by the contractor is a risk that the contractor assumes in any road construction project. *Tri-State Stone Corp. v. State Road Comm'n* (No. D-219). 90

Every road contractor is permitted by law to supervise his project and his servants and employees as to the manner in which they are to perform the details of their work. The men on the job are the agents of the contractor, who is responsible for a good and workmanlike job, that is to be inspected and supervised generally by the engineers of the State who occupy a position of authority to oversee the manner of performance and rate of progress to the end that all contract requirements are fulfilled. Such authority should be exercised in a reasonable manner and with prudence without unnecessarily impeding the progress of the work or engaging in conduct without thought of the consequences to the contractor. *Tri-State Stone Corp. v. State Road Comm'n* (No. D-219)..... 90

The maintenance of highways is a governmental function and funds available for road improvements are necessarily limited. *Varner v. Department of Highways* (No. D-519)..... 219

The State is not a guarantor of the safety of travelers on its highways and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the

circumstances. *Mullins v. Department of Highways* (No. D-491); *Varner v. Department of Highways* (No. D-519); *Shaffron v. Department of Highways* (No. D-546). 221

The user of the highway travels at his own risk, and the State does not and cannot assure him a safe journey. *Varner v. Department of Highways* (No. D-519). 219

The State is not a guarantor of the safety of its travelers on its roads and bridges. *Varner v. Department of Highways* (No. D-519). 219

A claim for damages sustained as a result of the partial flooding of a highway was disallowed, where there was no clear showing of respondent's negligence and claimants, having chosen to proceed through the water, assumed certain risks and should have proceeded in such a manner that injury would not result from a sudden encounter with an invisible obstacle or hole. *Varner v. Department of Highways* (No. D-519). 219

Claimants recovered $5,331.25 owing to them under a contract entered into with respondent for the construction of a public highway including a provision for concrete guttering, notwithstanding a dispute over design specifications, where claimant's interpretation of the contract was accepted. *Vecellio & Grogan, Inc. v. Department of Highways* (No. D-457). See Vecellio & Grogan, Inc. v. Department of Highways (No. D-505). 87

If vandals or third parties for whom the State is not responsible remove lit smudge pots or extinguish the flames, negligence in preparing a repair site properly for the safety of the traveling public at night cannot be charged against the State unless its agents knew or had reason to know that a hazard had been created by the intervention of third parties. *Williams v. Department of Highways* (No. D-557). 216

Claimant was denied recovery where he was faced with an obstruction which he knew existed on the berm of the road, it was obvious to him that he would necessarily have to walk around it on the traveled part of the highway and it appeared that he failed to take the precautions that a person of ordinary prudence would have taken to avoid being struck by automobiles using the highway at night. *Wolverton v. Department of Highways* (No. D-530) 223

A claim for injuries, sustained by claimant when he was struck by an automobile while walking on a highway, was disallowed, where he had been guilty of contributory negligence and voluntarily assumed the risk. *Wolverton v. Department of Highways* (No. D-530). 223

It is the duty of the pedestrian to exercise ordinary care for his safety, effectively use his eyes, and protect himself against impending danger, and if he does not do so when he has the opportunity so to do, he will be guilty of contributory negligence as a matter of law. *Wolverton v. Department of Highways* (No. D-530). 223

TAXATION

Where a statute imposes a specific excise tax, its refund procedures are exclusive, regardless of any general statute providing for tax refunds. *General Foods Corp. v. State Tax Comm'r* (No. D-540). 193

Claimant was awarded the sum of $28,590.95, representing the West Virginia soft drink taxes paid for soft drink tax stamps affixed to cyclamated soft drink products, which products and the stamps affixed thereto were destroyed at the direction of the respondent. *General Foods Corp. v. State Tax Comm'r* (No. D-540)..... 193

The petitioner who has failed, refused or neglected to avail itself of the judicial reviews afforded by the statutes cannot later, after the assessment of taxes has become final, come into the Court of Claims and raise questions concerning the constitutionality of the tax or the illegal action of the State Tax Commissioner. *Nichols Eng'r & Research Corp. v. Haden* (No. D-363)..... 4

At a tax sale, when land is purchased by the State, its tax lien is merged in its purchased title. *Stepp v. Department of Highways* (No. D-259)..... 58

Property which is acquired by the State in its sovereign capacity is thereupon absolved and freed of a further liability for the taxes previously assessed against it, and a subsequent sale thereof for such taxes is void. *Stepp v. Department of Highways* (No. D-259)..... 58

TREES AND TIMBER

Claimants were awarded the sum of $725 for damages sustained when respondent's employees allowed a tree to fall across a high-voltage electric power line causing a surge of electricity to be conducted into the electrical system in claimants' home. *Bukovinsky v. Department of Highways* (No. D-572)..... 39

Claimant was awarded $1,210.00 where respondent cut down trees on two adjoining parcels of claimant's land and used the land as it saw fit without any permission or consent on the part of claimant. *Dixon v. Department of Highways* (No. D-400)..... 83

Claimant was awarded the sum of $148.84 for damages sustained when its power lines adjacent to a county road were broken by the acts of respondent's agents in removing a tree while attempting to move a road grader. *Monongahela Power Co. v. Department of Highways* (No. D-477)..... 136

Claimant was awarded the sum of $469.80 for damage caused when a tree limb fell on his parked automobile, where the negligence of respondent's employees was the proximate cause of the damage. *Pauley v. Department of Highways* (No. D-558)..... 261

TRESPASS

Claimants' damages were reduced from $9,580.00 to $2,700.00, where although respondent was guilty of trespassing on claimants' private road, it was not a deliberate or willful trespass, respondent having apparently believed it had a right of way over the land, and where the property benefited by a good farm road which also served as a fire break and fire access road. *Blair v. Department of Natural Resources* (No. D-442)..... 69

Claimant was awarded $1,210.00 where respondent cut down trees on two adjoining parcels of claimant's land and used the land as it saw fit without any permission or consent on the part of claimant. *Dixon v. Department of Highways* (No. D-400)..... 83

WAGES

WATERS AND WATERCOURSES—See also Drains and Sewers; Wells

Claimant was awarded the sum of $6,000.00 for damages to its leasehold estate and personal property caused by respondent's negligent release of flood waters, where the parties stipulated and agreed as to the total amount of damages. *Firestone Tire & Rubber Co. v. Department of Highways* (No. D-227)..... 192

A claim for damage to property caused by flooding was disallowed, where claimants did not satisfactorily prove that a clogged culvert, which was blamed for the flooding, was the proximate cause of their injury. *Hall v. Department of Highways* (No. D-278)..... 146

Claimant was awarded the sum of $160.68 where, his automobile, while in a repair shop, had been damaged by flood waters negligently released by respondent. *Hardy v. Department of Highways* (No. D-233)..... 162

It is common knowledge that percolating waters in mountainous areas ooze, seep, and filter through the ground under the surface without definite channels to properties on lower elevations. *Henderson v. Department of Highways* (No. D-332)..... 183

Any injury that may result from the natural flow of water which is incidental to a lawful and proper use of the property is "damnum absque injuria." *Henderson v. Department of Highways* (No. D-332)..... 183

Claimants were awarded the sum of $4,225.00 for temporary, non-recurring flood damage to their real estate and for the loss of personal property. *Jacobs v. Department of Highways* (No. D-228e). 165

Claimant was awarded $1,700.00 where counsel for both claimant and the State filed an agreed stipulation in writing as to the total damages to claimant's property from flooding caused by respondent. *McClellan v. Department of Highways* (No. D-228I)..... 158

Claimant was awarded the sum of $4,970.48 for the costs of repair work in connection with a bridge construction contract, such repairs having been necessitated by flooding which constituted an act of God. *Oscar Vecellio, Inc. v. Department of Highways* (No. D-459)..... 237

Claimants recovered $2,444.03 to cover damages to personal property caused by flood waters negligently released by respondent's contractor from an abandoned mine. *Sheppard v. Department of Highways* (No. D-232)..... 142

Claimant insurer was awarded the sum of $464.00 for flood damage to its insured's automobile resulting from a contractor's excavation into an abandoned coal mine, where respondent had a nondelegable duty to plan its projects with ordinary engineering skill and the exercise of reasonable care to prevent damage to innocent persons who might be damaged by the construction procedures. *State Farm Ins. Co. v. State Road Comm'n* (No. D-230)..... 159

Claimants recovered the sum of $896.00 for damages caused to their driveway when respondent, during the construction of an interstate highway, negligently collected water from the right of way and cast it upon claimants' property. *Strader v. Department of Highways* (No. D-350)..... 144

A claim for damages sustained as a result of the partial flooding of a highway was disallowed, where there was no clear showing of respondent's negligence and claimants, having chosen to proceed through the water, assumed certain risks and should have proceeded

in such a manner that injury would not result from a sudden encounter with an invisible obstacle or hole. *Varner v. Department of Highways* (No. D-519)..... 219

Claimant was awarded the sum of $100.00 for damages sustained when, during the construction of a sub-station, respondent's employees pushed a great quantity of salt and dirt over and upon claimant's property and over a cliff into his spring. *Waugh v. Department of Highways* (No. D-598)..... 250

WATER UTILITIES

Claimant recovered $124.74, the costs of repairing a broken water main caused by respondent's employees who were installing a culvert across the end of a hard surface roadway, and in the process of digging out the culvert, allowed a backhoe bucket to become hooked under claimant's water line pipe, puncturing it, and causing it to break at both ends. *Carpenter Addition Water Co. v. Department of Highways* (No. D-573)..... 209

WELLS

Claimants were awarded the sum of $2,950.00 for damages to their wells caused by road salt stored by respondent on nearby property and entering claimant's wells. *Brown v. Department of Highways* (No. 409a)..... 240

Claimant was awarded $6,500.00 for damages sustained when salt stockpiled by respondent on premises near claimant's property seeped into claimant's artesian well, ruined the water therein and deprived the claimant of safe drinking water and satisfactory water for his business. *Dixon v. Department of Highways* (No. D-295)..... 81

The fact that respondent was negligent in storing or stockpiling salt, which seeped into claimant's artesian well, did not relieve claimant of his duty to minimize his damages, where although claimant complained to respondent about the matter, he permitted the situation to continue and took only minimal action to remedy the situation, namely, hauling water to supply his needs. *Dixon v. Department of Highways* (No. D-295)..... 81

A claim for damage to a well was disallowed, where, although there was some indication that respondent might have caused or contributed to the cause of clogging of the well, the proof in the case was so highly speculative as not to be the basis of an award. *Jeffries v. Department of Highways* (No. D-554)..... 249

An award was made in the amount of $11,119.33, for the drilling of wells to make an emergency water supply available to Concord College, where the governor had requested claimant to drill such water wells as might be necessary to furnish the college with an adequate supply of water, and claimant had been advised that his services would be paid from the governor's contingent fund. *Peraldo v. Moore* (No. D-412)..... 10

Claimant was awarded the sum of $100.00 where respondent's blasting operations caused his well to become muddy. *Warner v. Department of Highways* (No. D-287)..... 202