STATE OF WEST VIRGINIA

Report

of the

Court of Claims

1975-1977

Volume

11

STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the Period from July 1, 1975
to June 30, 1977

By
CHERYLE M. HALL
Clerk

VOLUME XI

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PERSONNEL

OF THE

STATE COURT OF CLAIMS

HONORABLE JOHN B. GARDEN .....Presiding Judge

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

HONORABLE DANIEL A. RULEY, JR. .....Judge

CHERYLE M. HALL .....Clerk

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

FORMER JUDGES

HONORABLE JULIUS W. SINGLETON, JR. .....July 1, 1967
—July 31, 1968

HONORABLE A. W. PETROPLUS .....August 1, 1968
—June 30, 1974

HONORABLE HENRY LAKIN DUCKER .....July 1, 1967
—October 31, 1975

HONORABLE W. LYLE JONES .....July 1, 1967
—June 30, 1976

LETTER OF TRANSMITTAL

To His Excellency
The Honorable John D. Rockefeller, IV
Governor of West Virginia
Sir:

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

Respectfully submitted,
CHERYLE M. HALL,
Clerk

TERMS OF COURT

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

STATE COURT OF CLAIMS LAW

CHAPTER 14 CODE

Article 2. Claims Against the State.

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§14-2-1. 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 regular courts of the State; and to provide for proceedings in which the State has a special interest.

§14-2-2. Venue for certain suits and actions.

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

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

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

(b) Any proceeding for injunctive or mandamus relief involving the taking, title, or collection for or prevention of damage to real property may be brought and presented in the circuit court of the county in which the real property affected is situate.

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

§14-2-3. Definitions.

For the purpose of this article:

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

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

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

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

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

"State agency" means a state department, board, commission, institution, or other administrative agency of state government: Provided, that a "state agency" shall not be considered to include county courts, county boards of education, municipalities, or any other political or local subdivision of 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 and a deputy clerk. The salary of the clerk and the deputy clerk shall be fixed by the joint committee on government and finance, and shall be paid out of the regular appropriation for the court. The clerk shall have custody of all records and proceedings of the court, shall attend meetings and hearings of the court, shall administer oaths and affirmations, and shall issue all official summonses, subpoenas, orders, statements and awards. The deputy clerk shall act in the place and stead of the clerk in the clerk's absence.

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

§14-2-6. Terms of court.

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

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

§14-2-7. Meeting place of the court.

The regular meeting place of the court shall be at the state capitol, and the joint committee on government and finance shall provide adequate quarters therefor. When deemed advisable, in

order to facilitate the full hearing of claims arising elsewhere in the State, the court may convene at any county seat.

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

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

§14-2-9. Oath of office.

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

§14-2-10. Qualifications of judges.

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

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

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

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

The court shall, in accordance with this article, consider claims which, but for the constitutional immunity of the state from suit, or for some statutory restrictions, inhibitions or limitations, could be maintained in the regular courts of the state. No liability shall be

imposed upon the state or any state agency by a determination of the court of claims approving a claim and recommending an award, unless the claim is (1) made under an existing appropriation, in accordance with section nineteen of this article, or (2) a claim under a special appropriation, as provided in section twenty of this article. The court shall consider claims in accordance with the provisions of this article.

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

§14-2-13. Jurisdiction of the court.

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

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

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

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

§14-2-14. Claims excluded.

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

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

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

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

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

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

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

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

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

§14-2-16. Regular procedure.

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

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

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

3. During the period of negotiations and pending hearing, the state agency, represented by the attorney general, shall, if possible,

reach an agreement with the claimant regarding the facts upon which the claim is based so as to avoid the necessity for the introduction of evidence at the hearing. If the parties are unable to agree upon the facts an attempt shall be made to stipulate the questions of fact in issue.

4. The court shall so conduct the hearing as to disclose all material facts and issues of liability and may examine or cross-examine witnesses. The court may call witnesses or require evidence not produced by the parties; may stipulate the question 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 the 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 corporation and the constitutional immunity of the State from suit were not involved and such period of limitation may not be waived or extended. The foregoing provisions shall not be held to limit or restrict the right of any person, firm or corporation who or which had a claim against the State or any state agency, pending before the attorney general on the effective date of this article [July 1, 1967], from presenting such claim to the court of claims, nor shall it limit or restrict the right to file such a claim which was, on the effective date of this article [July 1, 1967], pending in any court of record as a legal claim and

which, after such date was or may be adjudicated in such court to be invalid as a claim against the State because of the constitutional immunity of the State from suit.

§14-2-22. Compulsory process.

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

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

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

§14-2-24. Records to be preserved.

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

§14-2-25. Reports of the court.

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

Claims and awards shall be separately classified as follows:

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

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

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

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

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

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

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

§14-2-26. Fraudulent claims.

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

§14-2-27. Conclusiveness of determination.

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

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

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

§14-2-29. Severability.

If any provision of this article or the application thereof to any person or circumstance be held invalid, such invalidity shall not affect other provision 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

RULE
1. Clerk, Custodian of Papers, etc.
2. Filing Papers.
3. Records.
4. Form of Claims.
5. Copy of Notice of Claims to Attorney General and State Agency.
6. Preparation of Hearing Docket.
7. Proof and Rules Governing Procedure.
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RULES OF PRACTICE AND PROCEDURE

OF THE

COURT OF CLAIMS

STATE OF WEST VIRGINIA

RULE 1. CLERK, CUSTODIAN OF PAPERS, ETC.

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

RULE 2. FILING PAPERS.

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

(b) The Clerk, upon receipt of a notice of a claim, shall enter of record in the docket book indexed and kept for that purpose, the name of the claimant, whose name shall be used as the title of the case, and the 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 8½ 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 hearing by the Court, and showing the respective dates, as fixed by the Court for the hearing thereof. The Court reserves the right to add to, rearrange or change said docket when in its judgment such addition, rearrangement or change would expedite the work of the term. Each claimant or his counsel of record and the Attorney General shall be notified as to the date, time, and place of the hearing.

RULE 7. PROOF AND RULES GOVERNING PROCEDURE.

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

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

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

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

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

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

RULE 8. APPEARANCES.

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

RULE 9. BRIEFS.

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

(b) All briefs filed with, and for the use of, the Court shall be in quadruplicate—original and three copies. As soon as any brief is

received by the Clerk he shall file the original in the Court file and deliver the three copies, one each, to the Judges of the Court.

RULE 10. CONTINUANCES: DISMISSAL FOR FAILURE TO PROSECUTE.

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

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

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

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

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

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

No original paper in any case shall be withdrawn from the Court files except upon special order of the Court or one of the Judges thereof in vacation. When an official of a State Department is testifying from an original record of his department, a certified copy of the original record of such department may be filed in the place and instead 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 July 1, 1975 to June 30, 1977

(1) Approved claims and awards not satisfied but to be referred to the Legislature, 1978, for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-76-136	Boley, Downer B.	Department of Highways	$ 926.83	$ 926.83	6-30-77
CC-76-119	Boone Sales, Inc.	Department of Highways	3,758.30	*...	6-28-77
CC-77-30	Bradbury, Lonnie W.	Nonintoxicating Beer Commission	1,569.20	1,569.20	6-30-77
CC-76-17	Clark, David L., Sr.	Department of Highways	50,000.00	5,572.00	6-30-77
CC-77-34	Dunbar Printing Company	Department of Education, Division of Vocational Education	759.20	759.20	6-30-77
CC-77-41	Eastes, Clarence V.	Department of Highways	144.20	144.20	6-30-77
CC-77-21	Henson, Barbara	Department of Highways	128.14	128.14	4-29-77
CC-77-29	Honsaker, Clifford E., Jr.	Department of Highways	10.14	10.14	6-30-77
CC-77-12	Kidd, Marvin	Department of Highways	52.50	52.50	6-9-77
D-992	Kolesar, Moses	Department of Highways	50,000.00	6,500.00	6-28-77
CC-77-13	Perkins, Mr. & Mrs. John C., Jr.	Department of Highways	72.30	72.30	5-13-77
D-884	Ratcliff, Thelma and William Glen	Department of Highways	75,000.00	4,500.00	6-30-77
D-919	Reed, Ray R. and Sharon	Department of Highways	75,000.00	5,000.00	6-30-77
CC-77-14	Tucker, Paul Edward	Department of Highways	93.32	93.32	6-30-77

*Motion to dismiss overruled in a written opinion. Award made at a later date.

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, 1975, to June 30, 1977:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-76-128a	Adams, Randy R.	Department of Public Institutions	$ 73.15	$ 73.15	1-13-77
D-1036	Aetna Casualty & Surety Co., subrogee for Jimmy L. McKinney	Department of Highways	989.55	989.55	10-5-76
D-965	American Can Company	Department of Mental Health	1,125.85	1,125.85	1-8-76
CC-76-101	American Road Insurance Company (The), subrogee of Shellie Morgan, Jr.	Department of Highways	199.26	199.26	10-26-76
D-1018	Anderson, Verla R.	Department of Highways	15.45	15.45	6-1-76
CC-76-145	Asbury, Virginia F.	Department of Highways	89.26	89.26	3-17-77
D-928	Ashland Chemical Company	Department of Public Institutions	249.65	249.65	2-10-76
D-991	Associated Dry Goods d/b/a The Diamond Department Store	Department of Public Safety	456.05	441.96	9-19-75
D-933	Baker, Robert Douglas	Department of Highways	35.00	35.00	10-31-75
CC-76-4	Block, K. L. & Patricia A.	Department of Highways	35,000.00	2,500.00	1-13-77
D-597	Black Rock Contracting, Inc.	Department of Highways	141,644.18	30,759.09	11-19-76
D-684a	Bohrer, Lane S. & Barbara S.	Department of Highways	35,000.00	9,750.00	1-13-77
D970	Brassfield, Roy E., Jr.	Department of Highways	69.21	69.21	10-6-75
D-764	Buckeye Union Insurance Co., subrogee of Raymond L. Maddy	Department of Highways	207.93	207.93	9-9-75
D-674	C & P Telephone Company of West Virginia	Department of Highways	3,856.86	3,856.86	10-6-75

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, 1975, to June 30, 1977:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-900	C & P Telephone Company of West Virginia	Department of Highways	10,731.08	10,731.08	6-16-76
D-997	C & P Telephone Company of West Virginia	Department of Highways	308.61	308.61	3-17-77
D-1006	Cadle, Jay H. d/b/a Cadle Sanitary Ser.	Office of Emergency Ser.	10,545.21	10,492.50	1-8-76
D-744	Casto, Nelson Gilbert & Patricia Joyce	Department of Highways	25,000.00	15,000.00	3-17-77
D-1014	Charleston Area Medical Center, Inc.	Division of Vocational Rehabilitation	2,972.37	2,972.37	1-19-76
D-913	Clowser, James R.	Department of Mental Health	1,020.00	1,020.00	10-7-75
CC-76-93	Conley, Larry G. & Bonita E.	Department of Highways	278.52	278.52	3-17-77
D-702	Cook, Ronald L.	Department of Finance and Administration	4,375.00	4,375.00	10-6-75
D-922	Cooper, Randy	Department of Highways	71.44	71.44	7-7-75
D-980	Cremeans, Helen	Department of Highways	391.45	391.45	10-7-75
D-790	Crockett, Daniel	Department of Highways	257.96	257.96	10-7-75
D-944	Day, Archie, Sheriff	John M. Gates, Auditor	18.00	18.00	10-22-75
CC-76-69	DeBoer, Marvin E.	Board of Regents	2,033.00	1,605.00	3-17-77
D-1029	Dorsey, Robert B.	Department of Highways	89.55	89.55	7-19-76
D-1015	Dunbrack, Everett L.	Department of Highways	432.00	200.00	1-29-76
CC-76-6	Dunlap, Betty H.	Department of Highways	1,500.00	750.00	10-6-76
D-684c	Durig, W. E. & Minnie	Department of Highways	35,000.00	28,000.00	1-13-77
D-905	Duvernoy, Russell E. & Henry Todd	John M. Gates, Auditor & John H. Kelly, Treasurer	775.00	775.00	11-13-75
CC-76-50	England, Robert	Department of Highways	7,000.00	1,000.00	3-17-77
D-904	F. & M. Schaefer Brewing Co. (The)	Nonintoxicating Beer Commission	24,474.67	24,474.67	12-10-75

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, 1975, to June 30, 1977:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-880	Ferguson, Ronald E.	Department of Highways	210.73	210.73	7-7-75
CC-76-8	Foster, James P. d/b/a Western Virginia Demolition Company	Department of Highways	687.00	499.00	1-13-77
CC-77-9	Gambro, Inc.	Board of Vocational Education, Division of Vocational Rehabilitation	536.40	536.40	3-17-77
D-675	Gannon, Wanda M.	Department of Highways	7,500.00	3,450.00	1-19-76
CC-76-128c	Gilbert, Louis E.	Department of Public Institutions	375.63	375.63	1-13-77
CC-76-43	Giles, Twila Jean	Department of Highways	107.84	107.84	3-17-77
CC-76-128d	Gough, John	Department of Public Institutions	982.70	982.70	1-13-77
D-972	Gregory, Fred H.	Department of Highways	35.63	35.63	2-3-76
CC-76-128e	Gwinn, Lacy	Department of Public Institutions	477.27	477.27	1-13-77
D-842	Hale, Thomas Edison	Department of Highways	25,000.00	8,250.00	1-29-76
CC-76-128f	Hamons, Beecher D.	Department of Public Institutions	135.85	135.85	1-13-77
CC-76-58	Hamrick, Ina M.	Department of Highways	1,800.00	1,800.00	3-17-77
D-1016	Harmon, Grover A.	Department of Highways	35,000.00	12,039.52	5-5-76
D-831	Hedges, Elizabeth Ann Executrix of the Estate of A. Bruce Hedges, dec.	Board of Regents	8,756.00	8,756.00	8-9-76
CC-76-128g	Hefner, William E.	Department of Public Institutions	252.06	252.06	1-13-77
D-932	Heitz, Michael E.	Department of Highways	100.00	100.00	9-9-75
CC-76-128h	Hill, Edward L.	Department of Public Institutions	125.40	125.40	1-13-77

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, 1975, to June 30, 1977:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-76-128i	Hill, Robert L.	Department of Public Institutions	39.54	39.54	1-13-77
D-981	Inland Mutual Ins. Co., subrogee of Tabitha V. Partlow	Department of Mental Health	342.83	342.83	10-22-75
D-1026	IBM Corporation	Secretary of State	70.23	70.23	1-8-76
D-917	J.J. Englert Company	Department of Public Institutions	5,834.40	5,834.40	9-19-75
D-785	James, Larry	Office of the Governor and Dept. of Natural Resources	2,300.00	1,500.00	10-6-75
D-1023	Jefferson, Robert L.	Department of Highways	250.00	100.00	1-19-76
D-680	Jordan, McGettigan & Yule	Department of Mental Health	10,861.95	5,942.20	11-13-75
D-810	Kayser, Kenneth S.	Department of Highways	100.00	100.00	9-9-75
CC-76-29	Kelly, Helen M.	Department of Highways	110,000.00	6,000.00	3-17-77
D-882	Kelly, Mrs. Samuel	Department of Highways	58.00	58.00	9-9-75
D-971	Kitching, Richard D.	Division of Vocational Rehabilitation	405.00	405.00	9-19-75
CC-76-31	Landes, Deborah Ann	Board of Regents	5,000.00	3,144.65	4-17-77
D-685	Lang Brothers, Inc.	Department of Highways	28,732.36	27,458.16	3-17-77
D-912	Liberty Mutual Ins. Co., subrogee of Charles C. Simpson	Department of Highways	1,775.00	1,775.00	9-16-76
CC-76-14	Linville, James D.	Department of Highways	306.00	306.00	6-16-76
D-910	Lohan, Larry W. & Pamela	Department of Highways	38.37	38.37	10-7-75
D-1027	McConaha, Larry	Department of Highways	31.93	31.93	6-16-76
D-909	McFann, Patricia G.	Department of Highways	61.14	61.14	9-10-75

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, 1975, to June 30, 1977:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-932	Maryland Casualty Co., subrogee to Michael E. Heitz	Department of Highways	134.88	134.88	9-9-75
D-684b	Mason, Richard L. & Jeanne	Department of Highways	35,000.00	9,750	1-13-77
D-629	Melrose, Mark A. Executor of the Estate of J. J. Melrose, Dec., & Frank R. Melrose	Department of Highways	3,000.00	3,000.00	10-31-75
D-962	Mid-Mountain Mack, Inc.	Department of Motor Vehicles	2,088.02	2,088.02	1-19-76
CC-76-128t	Miller, Robert	Department of Public Institutions	296.55	296.55	1-13-77
CC-76-128j	Mitchell, Carl	Department of Public Institutions	828.72	828.72	1-13-77
CC-76-128k	Moats, Clyde	Department of Public Institutions	227.35	227.35	1-13-77
D-957	Monongahela Power Co.	Department of Highways	106.85	106.85	10-31-75
D-1001	Montgomery General Hospital	Department of Public Safety	2,898.59	2,898.59	8-9-76
D-1009	Motors Insurance Corp., subrogee of Quincy C. Holstein	Department of Highways	228.00	228.00	1-29-76
D-954	Mullins, Lois	Department of Highways	3,500.00	300.00	1-13-77
CC-76-1281	Mullins, William	Department of Public Institutions	621.36	621.36	1-13-77
CC-76-133	Murphy, Chester	Department of Highways	350.00	350.00	1-13-77
D-753a	National Engineering & Contracting Co.	Department of Highways	5,059.01	5,059.01	6-16-76

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, 1975, to June 30, 1977:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-76-7	Neal, Janice M.	Department of Mental Health	52.48	52.48	9-9-76
D-968	Nohe, Paul G. & June D.	Department of Highways	100.00	100.00	10-6-75
CC-77-5	North-Central Dairy Herd Improvement Association, Inc.	Department of Public Institutions	82.04	82.04	3-17-77
D-1028	Parke, Daivs & Company	Department of Mental Health	586.80	545.96	1-8-76
D-981	Partlow, Tabitha V.	Department of Mental Health	57.68	57.68	10-22-75
D-973	Peak, Raymond	Department of Highways	20,000.00	9,000.00	9-9-76
D-1012	Peck Brogan Building & Remodeling	Workmen's Compensation Fund	14,695.00	14,695.00	6-16-76
CC-76-57	Perkins, Romeo G. & Shelva Jean	Department of Highways	3,500.00	3,500.00	3-17-77
D-956	Pfizer, Inc.	Department of Mental Health	473.23	473.23	10-7-75
D-816e	Physicians Fee Office	Department of Public Institutions	111.92	111.92	10-31-75
CC-76-83	Pittsenbarger, Harold L.	Department of Highways	149.35	149.35	1-13-77
D-672	Plants, Kenneth E.	Department of Highways	35,000.00	14,500.00	12-16-75
CC-76-135	Potomac Edison Co. (The)	Department of Highways	93.41	93.41	1-13-77
D-921	Prudential Property & Casualty Ins. Co., subrogee of Beverly J. Maxwell	Department of Highways	194.67	194.67	7-7-75
D-923	Queen City Brewing Company (The)	Nonintoxicating Beer Commission	8,974.82	8,974.82	1-19-76
CC-76-146	Ralston Purina Co.	Department of Public Institutions	620.96	620.96	3-17-77

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1975, to June 30, 1977:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-76-128n	Reynolds, Charles	Department of Public Institutions	212.52	212.52	1-13-77
CC-76-128o	Reynolds, Homer	Department of Public Institutions	291.60	291.60	1-13-77
D-947	Riddle, Carmie	Department of Highways	87.55	87.55	10-31-75
CC-76-126	Roberts, Alan MacKenzie	Department of Highways	80.70	80.70	3-17-77
CC-77-128p	Robinson, Ronald	Department of Public Institutions	271.70	271.70	1-13-77
D-1022	Rocchio, Frank A., Sheriff of Hancock Co.	John M. Gates, State Auditor	16.00	16.00	1-8-76
CC-77-22	Romeo, Mike	Department of Highways	279.27	190.00	3-17-77
D-570	Ryan, Incorporated of Wisconsin	Department of Highways	181,994.12	40,000.00	11-13-75
D-898	Shafer, Bobby	Department of Highways	305.85	305.85	10-31-75
CC-76-60	Simpson, Charles C.	Department of Highways	125.00	125.00	9-16-76
D-903	Ski South Magazine	Department of Commerce	679.50	179.50	9-10-75
CC-76-121	Sloane, Fred E., Jr. & Minnie Arlene	Department of Highways	194.22	194.22	3-17-77
D-946	Smith, Christine Ambrosone	Department of Highways	125,000.00	16,000.00	3-17-77
CC-76-140	Southern States Morgantown Cooperative, Inc.	Department of Public Institutions	7,425.98	7,425.98	3-17-77
D-865	Sowards, Gail	Department of Highways	250.00	250.00	6-30-77
D-865	Sowards, Paul W.	Department of Highways	201,000.00	11,000.00	6-30-77
D-865	Sowards, Paul W. as father & next friend of Christina Gail Sowards	Department of Highways	500.00	500.00	6-30-77
D-865	Sowards, Paul W. as father & next friend of Christopher Sowards	Department of Highways	250.00	250.00	6-30-77

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, 1975, to June 30, 1977:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-906	Speer, Clyde & Mildred	Department of Highways	328.60	328.60	9-10-75
D-780	State Farm Mutual Automobile Ins. Co., subrogee of Thelma Criner	Department of Highways	195.70	195.70	8-28-75
D-1035	State Farm Fire & Casualty Co., subrogee of Edgar & Bessie Damewood	Department of Highways	1,653.53	1,200.00	6-16-76
D-1040	State Farm Mutual Automobile Ins. Co., subrogee of Monroe Hamon	Department of Highways	289.69	289.69	4-2-76
CC-76-128s	Stemple, Melvin	Department of Public Institutions	683.36	683.36	1-13-77
D-954	Stephy, Florence I.	Department of Highways	1,500.00	1,281.53	1-13-77
D-1037	Stonewall Casualty Co., subrogee of Lloyd Fox	Adjutant General	894.00	894.00	3-4-76
D-881a&b	Swisher, J. Wilbur & Alice V. d/b/a Swisher's Feed & Supply Co.	Department of Mental Health	2,580.76	2,580.76	10-31-75
CC-76-128q	Sypolt, Harold	Department of Public Institutions	33.00	33.00	1-13-77
D-795	Tabit, Louis	Adjutant General	5,000.00	2,204.89	10-5-76
D-795	Tabit, Louis father & next friend of Mary Janet Tabit	Adjutant General	100,000.00	12,150.00	10-5-76
CC-76-3	Teets, Wilmer W. and Sharon J.	Department of Highways	7,216.51	9,216.51	3-17-77
CC-76-10	Thompson, Chloe	Department of Highways	200.00	174.10	7-19-76
D-979	Tinsley, Gerald E.	Department of Highways	163.10	163.10	1-8-76
D-987	Toppings, Spencer	Department of Highways	2,500.00	710.00	7-19-76

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1975, to June 30, 1977:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-901	Travelers Insurance Co., subrogee of William R. Beckner	Department of Highways	78.28	78.28	7-7-75
CC-76-142	Tri-State Builders Hardware, Inc.	Department of Public Institutions	131.40	131.40	1-13-77
CC-76-53	Underwood, Ralph, Jr.	Department of Mines	1,055.00	1,754.35	3-17-77
D-820b	Valley Welding Supply Company	Department of Public Institutions	25.70	25.70	2-10-76
D-370a	Wang, Shen K.	Department of Public Institutions	15,300.00	15,300.00	10-22-75
CC-76-137	Warner P. Simpson Co.	Department of Commerce	406.18	406.18	3-17-77
D-859	Westfield Insurance Co., subrogee of David Sago	Department of Highways	106.02	106.02	9-9-75
D-751	White, Ernest L. & Florence	Department of Highways	5,000.00	2,500.00	6-16-76
D-1004	White, James E.	Department of Highways	300.00	43.26	10-22-75
D-781	Wiley, Hershel Ray	Department of Highways	594.50	300.00	10-6-75
CC-76-112	Williams, William N.	Department of Highways	1,900.00	1,128.66	3-17-77
CC-76-128r	Wilson, Charles	Department of Public Institutions	222.41	222.41	1-13-77
D-885	Wilson, Ralph	Department of Highways	5,000.00	3,000.00	6-1-76
D-843	Wingate, Larry Lee	Department of Highways	50,000.00	11,000.00	1-29-76
CC-76-130	Woodley, Robert	Department of Highways	55.00	55.00	3-17-77
CC-76-87	Wray, Jesse	Department of Highways	1,101.45	542.00	3-17-77
D-963	Wright, D.A., Sheriff	John M. Gates, Auditor	762.00	762.00	10-22-75
D-948b	Xerox Corporation	Department of Public Institutions	1,166.18	1,166.18	10-31-75
CC-76-76	Yanasy, Marie	Department of Highways	79.25	79.25	3-17-77

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

REPORT OF THE COURT OF CLAIMS (Continued)

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-1000	Ace Doran Hauling & Rigging Co.	Public Service Commission	$ 600.00	Disallowed	6-16-76
D-1011	Adams, Clinton, Et al	Department of Highways	3,800.00	Disallowed	3-17-77
CC-76-45	Anton, Gladys A.	Department of Highways	20,000.00	Disallowed	3-17-77
D-966b	Barker, Joyce Elaine	Department of Highways	10,000.00	Disallowed	11-19-77
D-966a	Barker, William F. & Elfa Mae	Department of Highways	12,500.00	Disallowed	11-19-77
CC-76-24	Bastin, Olie G. & Priscilla	Department of Highways	4,500.00	Disallowed	3-17-77
D-1024	Beaucham, Edna	Department of Highways	174.95	Disallowed	5-5-76
D-746	Bickerstaff, Ronald L.	Department of Highways	50,000.00	Disallowed	4-18-77
D-934a	Bird, Sylvester	Department of Highways	50.00	Disallowed	1-27-76
CC-76-28	Bodo, John J.	Department of Highways	863.71	Disallowed	10-6-76
CC-76-64	Burgher, Ronald	Board of Regents	13,140.00	Disallowed	6-30-77
D-967	Butcher, Athel	Department of Highways	65.97	Disallowed	10-31-75
D-690	Caldwell, Maude	Department of Highways	15,000.00	Disallowed	10-31-75
D-240	Cantrell, Margaret Mae Adm. of the Estate of Melvin Aaron Cantrell, deceased	Department of Highways	112,000.00	Disallowed	5-28-76
D-725e	Carroll, Ora J. and Gwendolyn Y.	Department of Highways	16,000.00	Disallowed	10-31-75
D-964	Catlett, Dorotha Jean	Department of Public Institutions	1,500.00	Disallowed	6-1-76
D-715	Clarke, Mrs. Harold P.	Department of Highways	193.17	Disallowed	9-10-75
D-725a	Cunningham, Robert G. & Barbara L.	Department of Highways	15,000.00	Disallowed	10-31-75
CC-76-18	Davis, William L.	Department of Highways	66.00	Disallowed	7-19-76
D-938	Dickinson, Sharon L.	Department of Highways	416.02	Disallowed	12-10-75
D-691	Early, Florence N.	Department of Highways	17,000.00	Disallowed	10-31-75
D-692	Eddy, Arza	Department of Highways	8,000.00	Disallowed	10-31-75

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-955	Ervin, Curtis L.	Department of Highways	1,600.00	Disallowed	9-9-76
CC-76-8	Foster, James P., d/b/a Western Virginia Demolition Company	Department of Highways	678.00	Disallowed	9-2-76
D-899	Fox, Lynne B.	Department of Highways	75,000.00	Disallowed	4-18-77
D-725c	Fricker, Ilene and Harold, and Pearl G. and Eugene Cyphers	Department of Highways	3,000.00	Disallowed	10-31-75
D-725d	Fricker, Ilene and Harold A.	Department of Highways	15,000.00	Disallowed	10-31-75
D-1017	Gibson, Virgie	Department of Public Institutions	25,000.00	Disallowed	5-13-77
D-796	Hammond, John Dee	Department of Highways	50,000.00	Disallowed	3-17-77
D-988	Heflin, Pansy	Department of Highways	4,000.00	Disallowed	7-19-76
D-607	Holdren, Paul W. Committee for Franklin T. Fleming, Incompetent	Department of Highways	20,000.00	Disallowed	12-10-75
D-769	Hoover, Karl	Department of Highways	4,768.00	Disallowed	5-5-76
CC-76-61	Horace Mann Insurance Co., subrogee of Agnes Stewart Bradshaw	Department of Highways	3,356.62	Disallowed	3-17-77
D-683	Hott, Brown & Harold Miller d/b/a Hott and Miller, General Contractors	Department of Highways	473.91	Disallowed	7-30-75
D-771	Huffman, Lewis	Department of Highways	190.84	Disallowed	9-9-75
D-941	Hundley, Emmett and Frances	Department of Highways	20,000.00	Disallowed	6-30-77
CC-76-5	Hutchens, Karen	Department of Highways	102.00	Disallowed	7-19-76

REPORT OF THE COURT OF CLAIMS (Continued)

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-76-20	Jeter, Nancy C.	Department of Highways	48.15	Disallowed	7-19-76
D-725b	Joy, Harry E., Jr. and Nelda L.	Department of Highways	14,000.00	Disallowed	10-31-75
CC-76-44	Lafferty, Eugene and Wanda	Department of Highways	2,000.00	Disallowed	3-17-77
CC-76-27	Lashley Tractor Sales	Department of Public Institutions	513.47	Disallowed	8-9-76
CC-76-59	Lee, Frances N., Mother and next friend of Rodney K. Lee	Board of Education	2,959.24	Disallowed	5-13-77
D-853	Lovejoy, J. E. and Edith	Department of Highways	28,000.00	Disallowed	9-2-76
D-879	Lyons, Edna May	Department of Highways	50,000.00	Disallowed	6-30-77
CC-76-118	Martinsburg Concrete Products Company	Department of Highways	7,922.22	Disallowed	6-30-77
CC-77-64	Null, Macil J. and Melvin L.	Board of Regents	20,000.00	Disallowed	6-30-77
D-767	Paden City (Town of), a municipal corporation	Department of Highways	2,328.00	Disallowed	10-31-75
CC-76-128m	Poling, Fred, Sr.	Department of Public Institutions	391.34	Disallowed	2-18-77
D-693	Postlethwait, Daniel A. and Betty D.	Department of Highways	33,411.00	Disallowed	10-31-75
D-924	Price, Robert K.	Department of Public Safety	3,198.00	Disallowed	7-30-75
D-794	Riffle, Harold William and Vernia	Department of Highways	95,000.00	Disallowed	3-17-77
CC-76-111	Riffle, Mamie M.	Department of Highways	76.00	Disallowed	3-17-77
D-982	Robinette, Dewey and Shirley	Department of Highways	10,000.00	Disallowed	10-6-76

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-614	S. J. Groves & Sons Co.	Department of Highways	11,437.40	Disallowed	6-30-77
D-735	Sanitary Board of the City of Wheeling (The)	Department of Highways	8,544.42	Disallowed	4-2-75
CC-76-42	Shawver, Roy G.	Department of Highways	183.91	Disallowed	10-6-76
D-984	Shortridge, Rockford A.	Department of Highways	748.40	Disallowed	10-22-75
CC-76-86	Simms, Eloise Ballard	Department of Highways	110.22	Disallowed	3-17-77
D-694	Smith, Roger H. and Ramona C.	Department of Highways	10,260.00	Disallowed	10-31-75
D946	Smith, William Joseph	Department of Highways	25,000.00	Disallowed	3-17-77
D-908	Snyder, Ira D.	Department of Highways	10,000.00	Disallowed	9-2-76
D-934b	State Farm Mutual Automobile Ins. Co., Subrogee of Sylvester Bird	Department of Highways	515.39	Disallowed	1-27-76
D-723	Vance, Oather T.	Department of Highways	600.00	Disallowed	3-26-75
D-696	Webb, Myrtle	Department of Highways	25,000.00	Disallowed	10-6-75
D-811b	West Virginia State Industries	Department of Public Institutions	15,572.06	Disallowed	1-16-76
D-758	White, Lucy	Department of Highways	10,000.00	Disallowed	6-1-76
D-268o	White, William Fredrick Adm. of the Estate of James A. White, dec.	Department of Highways	110,000.00	Disallowed	5-28-76
D-937	Whittington, John G. & Merlene M.	Department of Highways	25,000.00	Disallowed	10-31-75
CC-76-1	Widlan, Marilyn	Department of Highways	312.79	Disallowed	6-16-76
D-985	Wine, L. E.	Department of Highways	10,000.00	Disallowed	6-30-77

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-798a	Department of Employment Security	Department of Public Institutions	$ 14,047.01	Advisory Determination	8-28-75
D-798b	Department of Employment Security	Department of Public Institutions	12,747.42	Advisory Determination	8-28-75
CC-76-138	Department of Highways	Department of Public Institutions	1,673.19	Disallowed	2-4-77
CC-77-105	Slack, Robert B.	Insurance Board	1,496.92	$ 1,496.92	6-29-77
D-876a	West Virginia State Industries	Department of Mental Health	1,268.50	Advisory Determination	9-18-75
D-876b	West Virginia State Industries	Department of Mental Health	1,039.40	Advisory Determination	9-18-75
D-811b	West Virginia State Industries	Department of Public Institutions	575.30	Advisory Determination	1-16-76

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriation by the Legislature in the 1976 and 1977 Legislative sessions:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-928	Ashland Chemical Co.	Department of Public Institutions	$ 51.80	Disallowed	2-10-76
CC-76-105	C & P Telephone Company of W. Va.	Department of Public Institutions	3,305.55	Disallowed	1-20-77
CC-76-110b	Columbia Gas of West Virginia, Inc.	Department of Public Institutions	156.72	Disallowed	1-13-77
CC-77-20a	Cox, Lewis Edmon	Department of Mental Health	185.64	Disallowed	4-29-77
D-969	Doctors Butler, Aceto & Assoc., Inc.	Department of Public Institutions	8.00	Disallowed	10-9-75
CC-76-91a&b	Exxon Company, U.S.A.	Department of Public Institutions	514.75	Disallowed	1-20-77
D-1013	International Business Machines Corporation	Sinking Fund Commission	61.40	Disallowed	11-20-75
CC-77-20b	McPherson, Ruth	Department of Mental Health	1,267.25	Disallowed	4-29-77
D-772	Mellon-Stuart Company	Department of Public Institutions	5,919.64	Disallowed	11-20-75
CC-76-15	Mountaineer Motel, Inc.	Department of Public Institutions	250.79	Disallowed	3-4-76
CC-76-98	Ohio Valley Drug Company	Department of Public Institutions	656.58	Disallowed	1-20-77
CC-77-20c	Racer, John C.	Department of Mental Health	178.80	Disallowed	4-29-77
CC-76-94	Reynolds Memorial Hospital	Department of Public Institutions	8,742.00	Disallowed	1-20-77
CC-76-114 A-F	St. Joseph's Hospital	Department of Mental Health	6,155.56	Disallowed	2-10-77
CC-77-10	St. Joseph's Hospital	Department of Mental Health	1,790.46	Disallowed	3-17-77

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriation by the Legislature in the 1976 and 1977 Legislative sessions:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-76-96	Standard Exterminating	Department of Public Institutions	476.00	Disallowed	1-20-77
D-811b	West Virginia State Industries	Department of Public Institutions	3,857.84	Disallowed	1-16-76
CC-76-103	Wheeling Electric Company	Department of Public Institutions	4,281.21	Disallowed	1-20-77
D-948a	Xerox Corporation	Department of Public Institutions	798.46	Disallowed	10-31-75

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

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Opinion issued July 7, 1975

RANDY COOPER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-922)

PER CURIAM:

Due to negligent construction of a culvert by respondent's employees across a public road, an unsecured metal clamp caught the underside of claimant's automobile, damaging the oil pan and other parts. Liability and damages in the amount of seventy-one dollars and forty-four cents are stipulated.

Award of $71.44

Opinion issued July 7, 1975

RONALD E. FERGUSON

vs.

DEPARTMENT OF HIGHWAYS

(No. D-880)

PER CURIAM:

Claim for damages to automobile by striking a loose steel plate negligently placed by respondent's employees on a public bridge. Liability and damages stipulated.

Award of $210.73.

Opinion issued July 7, 1975

PRUDENTIAL PROPERTY & CASUALTY
INSURANCE CO., SUBROGEE OF
BEVERLY J. MAXWELL

vs.

DEPARTMENT OF HIGHWAYS

(No. D-921)

PER CURIAM:

Beverly J. Maxwell's automobile was negligently sprayed with paint by respondent's employees, and claimant as her insurer sustained a loss of $194.67. Liability of respondent and the amount of damages were stipulated.

Award of $194.67.

Opinion issued July 7, 1975

TRAVELERS INSURANCE COMPANY
AS SUBROGEE OF
WILLIAM R. BECKNER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-901)

PER CURIAM:

Claim for damages to truck caused by negligent spraying of paint by respondent's employees stipulated as to liability and damages in the amount of Seventy-eight Dollars and Twenty-eight cents ($78.28).

Award of $78.28.

Opinion issued July 30, 1975

BROWN HOTT and HAROLD MILLER
d/b/a Hott and Miller, a partnership

vs.

DEPARTMENT OF HIGHWAYS

(No. D-683)

Marvin Downing, Esq. for claimant.

Dewey Jones, Esq. for respondent.

GARDEN, JUDGE:

Although this claim was originally filed on behalf of "Hott and Miller, General Contractors", it developed at the hearing that this entity was actually a partnership consisting of Brown Hott and Harold Miller. In the spirit of liberality, we permitted an amendment to reflect the name of the claimant as being "Brown Hott and Harold Miller d/b/a Hott and Miller, a partnership." In 1971 the Department of Highways had undertaken certain road construction in Oak Flats in Pendleton County and as a result of this construction, it became necessary to relocate a community water line. The claimant was an unsuccessful bidder on the road construction but was later requested by a representative of the Department of Highways to submit a bid for the relocation of the community water line. The claimant submitted a bid of $4,275.00 which was approved by the Department of Highways on April 19, 1971, Claimant's Exhibit No. 1. The work was performed by claimant in May and June of 1971, and the same was approved by the Department of Highways on July 13, 1971, Claimant's Exhibit No. 2.

Claimant was not paid its bid price of $4,275.00 until July 24, 1973, and no explanation for the delay was given. No formal contract was entered into between claimant and the Department of Highways, and while the record does not so disclose, we assume that an agreement was entered into between the Department of Highways and the owners of the community water line to the end that the Department of Highways would defray this expense in conjunction with the road project. This assumption is based on the fact that when the state warrant in payment of the $4,275.00 was finally issued on July 17, 1973, it was made payable to the individual owners of the water line who, in turn, endorsed the same

and delivered the same to the claimant on July 24, 1973, Respondent's Exhibit No. 1. Claimant is requesting an award of interest on the sum of $4,275.00 for a period of 150 days after July 13, 1971, (the date the work was approved) to July 24, 1973, the date of ultimate payment, in accordance with Code 14-3-1.

The Legislature in creating this Court set forth our general powers in Code 14-2-12 but, in addition, explicitly limited our right to award interest on claims which we allowed by providing in the above-mentioned section as follows:

> ". . . . . 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."

Had the respondent not paid the $4,275.00 and had this claim sought an award of that amount, we could make an award for the principal amount but could not allow interest because of the lack of any contract specifically providing for the payment of interest. Lacking jurisdiction to award interest, we must as a result deny this claim.

No award.

Opinion issued July 30, 1975

ROBERT K. PRICE

vs.

DEPARTMENT OF PUBLIC SAFETY

(No. D-924)

Claimant present in person.

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

GARDEN, JUDGE:

The claimant, Robert K. Price, an employee of the Department of Public Safety for over thirty years was retired on August 28, 1972. At the date of retirement he had accumulated 30 days annual leave time and 90 days sick leave time. Respondent paid claimant for his accrued annual leave time but not any compensation for accrued sick leave time. At the date of his retirement he was earning a

monthly salary of $1066.00 and he thus seeks an award of $3198.00 representing the 90 day sick leave time.

The claimant contends that he is being penalized by the respondent for being in good health. We believe the issue unfortunately is governed by the Rules and Regulations Governing the Working Hours, Leaves, Weekly Time Off Duty, filed by the West Virginia Department of Public Safety on June 11, 1970.

Section 5 of the regulations specifically authorizes the payment of accrued annual leave under the facts of this claim, said section reading as follows:

> "5. A member who has resigned, or who has been discharged shall be entitled to and shall receive all accrued annual leave, except that a member discharged for misconduct may, at the discretion of the Superintendent, be denied all or any part of accrued leave. . ."

Section 17 of the regulations relates to Sick Leave, and it is to be noted that it does not contain a corresponding provision authorizing the payment of accrued sick leave upon the termination of employment. To the contrary Section 17 provides that upon termination of employment all sick leave credited is to be canceled as of the employee's last working day, said section reading as follows:

> "17. When the services of a member have been terminated, all sick leave credited to him shall be cancelled as of his last working day with the Department."

Being of the opinion that respondent did not and does not have any statutory authority or regulation authorizing the payment of accrued sick leave, we are of the opinion to deny the claim.

No award.

Opinion issued August 28, 1975

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY AS SUBROGEE
OF THELMA CRINER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-780)

PER CURIAM:

Due to blasting operations conducted by employees of the Department of Highways, a truck owned by Thelma Criner was damaged to the extent of $195.70 on August 2, 1973 near the Town of Amma in Roane County, West Virginia. Liability and damages have been stipulated.

Award—$195.70.

Opinion issued August 28, 1975

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS
(Hopemont State Hospital)

(No. D-798a)

and

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS
(Pinecrest Hospital)

(No. D-798b)

Herman E. Rubin, Special Counsel, West Virginia Department of Employment Security, for Claimants.

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

GARDEN, JUDGE:

These claims were consolidated for hearing and opinion because, with the exception of the amounts involved, they involve identical

factual situations. Furthermore, in view of the fact that the issues presented are between two state agencies, this Court is rendering an advisory determination pursuant to Code 14-2-18.

Public Law 91-373 (HR 14,705) approved and passed by Congress on August 10, 1970, cited as the Employment Security Amendments of 1970, effective January 1, 1972, made it mandatory that the states and the District of Columbia amend their unemployment compensation laws to cover services rendered in employment for state hospitals, and state institutions of higher education, and for non-profit organizations exempt from payment of income tax employing four or more individuals for some portion of a day in each of twenty weeks within the current or preceding calendar year. With the exception of non-profit organizations, said amendment of 1970 extended coverage to employers of one or more individuals in contrast to the prior statute covering employers of four or more individuals.

In compliance with that Congressional mandate, the West Virginia Legislature amended the West Virginia Unemployment Compensation Law effective January 1, 1972, which covered employment in state hospitals and reads as follows (Chapter 21A, Article 1, Section 3, Subsection 7, of the West Virginia Code of 1931, as amended,):

> "Any employing unit which, after December thirty-one, one thousand nine hundred seventy-one, (i) in any calendar quarter in either the current or preceding calendar year paid for service in employment wages of one thousand five hundred dollars or more, or (ii) for some portion of a day in each of twenty different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year had in employment at least one individual (irrespective of whether the same individual was in employment in each such day);"

and Chapter 21A, Article 1, Section 3, Subsection 9,

> "(9) Service performed after December thirty-one, one thousand nine hundred seventy-one, by an individual in the employ of this State . . . when such service is performed for a hospital . . ."

The West Virginia Unemployment Compensation Law, Chapter 21A, Article 5, Section 17 of the West Virginia Code of 1931, as amended, provides as follows:

"Interest on past-due payments.

"Payments unpaid on the date on which due and payable, as prescribed the commissioner, shall bear interest at the rate of one percent per month, until payment plus accrued interest is received by the commissioner.

"Interest collected pursuant to this section shall be paid into the employment security special administration fund."

Hopemont State Hospital failed to pay unemployment compensation contributions for the first and second quarters of 1972 in a total amount of $10,467.45, and with statutory interest of one percent per month on said sum through April 21, 1975, a total of $14,047.01 was due claimant as of April 21, 1975.

Pinecrest Hospital failed to pay unemployment compensation contributions for the first and second quarters of 1972 in a total amount of $9,490.64, and with statutory interest of one percent per month on said sum through April 21, 1975, a total of $12,747.42 was due claimant as of April 21, 1975.

It was developed at the hearing that the Legislature had failed to appropriate funds for expenditure in fiscal year ending June 30, 1972, in anticipation of unemployment taxes that became due and payable for the taxable periods from January 1, 1972 through June 30, 1972, and consequently, the Commissioner of Public Institutions had no funds available to make payment of these taxes. Any attempted payment of these taxes by the Commissioner of Public Institutions would have been illegal. This being an advisory determination, we could not make awards even if we were so inclined. We believe that the issue in these claims are governed by the decision of this Court in the *Airkem* case, 8 Ct. Cl. Rep. 180, and that these claims would be denied were it not for the fact that this is an advisory determination. It is suggested that this matter could be rectified by the Legislature through a special appropriation if it so desires.

The clerk of this Court is directed to forward copies of this opinion to the respective heads of the state agencies involved in these claims.

Opinion issued September 9, 1975

BUCKEYE UNION INSURANCE CO.,
SUBROGEE OF RAYMOND L. MADDY

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-764)

No appearance for the claimant.

Emerson Salisbury, Attorney at Law, for the respondent.

PER CURIAM:

Claimant, as subrogee of Raymond Lee Maddy, alleges that on June 17, 1974, said Maddy, a resident of Princeton, West Virginia and an employee of the respondent, parked his 1970 Plymouth automobile on State property and while his car was so parked it was subjected to paint spray by employees of the respondent resulting in damages therefor in the sum of $207.93. The facts of negligence and the reasonableness of the amount of damages having been stipulated by the parties hereto, the claimant is hereby awarded the sum of $207.93.

Award of $207.93.

Opinion issued September 9, 1975

LEWIS HUFFMAN

vs.

DEPARTMENT OF HIGHWAYS

(No. D-771)

Claimant appeared in person.

Emerson Salisbury, Attorney at Law, for Respondent.

GARDEN, JUDGE:

Around 5:00 A.M. on May 17, 1974, the claimant was operating his 1974 Plymouth Satellite automobile in a westerly direction on U.S. Route 60 about one mile west of Cedar Grove. Route 60 at this point is a two-lane road. It is level and comparatively straight. Except for a slight haze, the weather conditions were excellent. The terrain to

the right of a motorist proceeding in a westerly direction is mountainous, and the claimant who was very familiar with this particular area testified that rock slides frequently occurred near this section of the road, and that the road had been closed a week before as a result of a large slide.

As the claimant proceeded west at a speed of about 45 miles per hour, he testified that he observed small rocks about the size of a skillet falling from the hillside and into the westbound lane. In order to avoid these rocks, he swerved to the left and into the eastbound lane where he struck a large rock which was in the center of the eastbound lane. According to the claimant, this rock weighed about 400 pounds and was about 18 inches thick. No testimony was presented to indicate how long this rock had been present in the road, but the claimant did testify that he had passed an eastbound tractor-trailer about 100 feet before he struck this rock, and that he had not observed this tractor-trailer make any unusual movements indicative that the tractor-trailer was attempting to avoid this rock. It could therefore be assumed that this rock had fallen into the eastbound lane between the time the tractor-trailer passed the point of the accident and the arrival of the claimant's vehicle. Cost of repairs to claimant's car amounted to $190.84, and this claim was filed to recover that amount.

As indicated above, the claimant was well aware that rock slides occurred in this area and that "he had seen it happen before" to use his own words. Asked on cross examination why he didn't see this rock, the claimant responded, "Just lack of concentration. I hadn't been out of bed that long anyway." Again, on cross examination, he was asked if he could have seen this rock had he been looking, and he replied, "Yes, if I had been looking closely."

We are of the opinion that the evidence in this case fails to establish any negligence on the part of the respondent. No evidence was presented to demonstrate that the respondent knew or should have known of the presence of this rock, and that it had sufficient time to remove the same. As a matter of fact, the evidence would support an inference that the rock had fallen only seconds before being struck by the claimant's car. This claim is closely akin factually to *Lowe v. Department of Highways*, 8 Ct. Cl. 210, where this Court stated:

> "From all of the evidence in this case, it seems to the Court that this highway cut and resultant hillside with its many layers of

> rock and shale is little different from the hundreds and hundreds of other cuts and hillsides along highways all round the State of West Virginia. The unhappy reality of the situation is that our Department of Highways cannot guarantee the traveling public that rocks or trees may not fall upon our highways and thereby cause injury and damage to persons and property."

The duty owed by respondent to the claimant in this case was also clearly set forth in *Parsons v. State Road Commission*, 8 Ct. Cl. 35, where this Court said:

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

Leaving the issue of the negligence of the respondent, we are of the further opinion that the testimony of the claimant establishes that he was guilty of negligence which proximately and directly caused the accident and resultant damage to his car. He admitted that his failure to see the rock resulted from a lack of concentration and that he would have seen it had he been looking closely. Having observed small rocks falling in the westbound lane and thus being aware that a slide of some magnitude was occurring, we believe that claimant failed to act as a reasonably prudent man, and for these reasons, we are of the opinion to deny this claim.

No award.

Opinion issued September 9, 1975

KENNETH S. KAYSER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-810)

No appearance for the claimant.

Emerson Salisbury, Attorney at Law, for the respondent.

PER CURIAM:

Kenneth S. Kayser, owner of a tract of land in Lewis County, West Virginia, claims damages in the amount of $100.00 by reason of the acts of employees of the respondent on July 31, 1974 in cutting a right of way for a road and destroying claimant's strawberry patch containing approximately 175 plants on a parcel of his land sixteen feet wide and forty-eight feet long. The parties have stipulated facts which constitute negligence and that the amount of damages claimed is reasonable. The claimant is, accordingly, awarded the sum of $100.00.

Award of $100.00.

Opinion issued September 9, 1975

MRS. SAMUEL KELLY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-882)

Claimant appeared in person.

Emerson Salisbury, Attorney at Law, for respondent.

GARDEN, JUDGE:

On the morning of October 30, 1974, at about 8:10 A.M., the claimant was proceeding in a southerly direction on West Virginia Route No. 21 toward Charleston where she was employed by the County Court of Kanawha County. In route she was stopped by a flagman employed by the respondent. After being detained for a

short time, she was directed by the flagman to proceed, she being the first car in the line of stopped traffic. At that time she did not observe any road work being conducted, and she was directed by the flagman to continue her journey in the southbound lane. Route 21 at and near the subject area is a two-lane roadway, one lane for northbound traffic and one lane for southbound traffic.

After proceeding some 200 to 300 feet, the claimant testified that her car's movements felt strange and that she thought one of her tires had become flat. She thereupon pulled off the road and onto the berm and thereupon discovered that her car, and in particular, the tires were covered with tar. Apparently the respondent's employees had been engaged in tarring this particular section of Route 21. The claimant testified that it had been raining that morning, and that she had been unable to visualize the fresh tar on the asphaltic surface of the road. Claimant testified that the tar had not been applied on the northbound lane, and that as she proceeded south in the southbound lane, she did not observe any traffic coming north on the northbound lane. Claimant further testified that she and her husband worked almost all day in attempting to remove the tar from her car, and that they suffered a combined loss of income of $36.00; that they spent $2.00 for diesel fuel for use in removing the tar; and that clothing valued at $20.00 was ruined. The respondent offered no evidence to dispute the testimony of the claimant.

We are of the opinion that the undisputed evidence establishes negligence on the part of the respondent's employee flagman. We must assume that this employee was aware of the tarring operation taking place in the southbound lane but failed to warn the claimant of the freshly applied tar in the southbound lane and failed to instruct her to proceed south temporarily in the northbound lane.

For the reasons stated above, we are of the opinion to and do hold that the claimant is entitled to an award in the amount of $58.00.

Award of $58.00.

Opinion issued September 9, 1975

MARYLAND CASUALTY COMPANY,
SUBROGEE OF MICHAEL E. HEITZ

vs.

DEPARTMENT OF HIGHWAYS

(No. D-932)

No appearance for the claimant.

Emerson Salisbury, Attorney at Law, for the respondent.

PER CURIAM:

Maryland Casualty Company, as subrogee of Michael E. Heitz of Parkersburg, West Virginia, alleges that said Heitz, on December 31, 1974, was traveling in a westerly direction on State Route 50 near the town of Gormania, West Virginia, when the automobile he was driving struck some steel tie rods protruding from the road surface of a bridge near the intersection of Routes 50 and 560. The tie rod extended a foot above the road surface and caught the underside of the automobile causing damage in the amount of $234.88.

As the verity of the allegations and the reasonableness of the amount of damages are stipulated by the parties, and the negligence so proven, we hereby award the claimant the sum of $134.88 which it paid, and $100.00 to Michael E. Heitz which was not paid by the claimant because the latter amount was deductible under the provisions of the insurance policy.

Award of $134.88 to Maryland Casualty Company.

Award of $100.00 to Michael E. Heitz.

Opinion issued September 9, 1975

WESTFIELD INSURANCE COMPANY,
SUBROGEE OF DAVID SAGO

vs.

DEPARTMENT OF HIGHWAYS

(No. D-859)

P. A. Rush, representative of Insurance Co., for the claimant.

Emerson Salisbury, Attorney at Law, for the Respondent.

PER CURIAM:

Claimant, as subrogee of David Sago, alleges that on the 15th of March, 1974, while employees of the respondent were cutting brush and trees along State Route 19 at a point on said highway near what is known as Swisher's Barbecue, David Sago, driving his automobile, was waved or signaled by a flagman of the respondent to pass through the area of such cutting, and while doing so his car was struck by a falling tree which damaged the car in the amount of $106.02. The parties having stipulated as to verity of such facts and the reasonableness of the amount of damages, we hereby award the claimant the sum of $106.02.

Award of $106.02.

Opinion issued September 10, 1975

MRS. HAROLD P. CLARKE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-715)

Claimant appeared in person.

Emerson Salisbury, Attorney at Law, for the respondent.

JONES, JUDGE:

The claimant, Mrs. Harold P. Clarke seeks recovery of the sum of $193.17 from the respondent, Department of Highways, for damages to the loss of use of her 1973 Dodge automobile, resulting when she drove her car into flood waters on Guyan River Road in

or near the City of Huntington as she was going to work at Barboursville State Hospital at about 5:50 a.m. on November 29, 1973. The claimant was alone at the time of the incident, and she was the only witness at the hearing.

Claimant testified that it was very dark at the time and her car lights were on. It was not raining and she was not sure whether it had rained during the night, although the road was clear when she returned home from work the night before. She testified that she did not see the water on the road and ran into it to the depth of three feet.

Her car choked and stopped, but thanks to a "miracle" she was able to start the car and back it out of the water. She then turned her car around and drove it home. Major replacements and repairs to the vehicle include installation of a new windshield wiper motor at a cost of $50.11 and a new starter for $77.00. She also presented an invoice for one week's car rental in the amount of $51.81.

It is the contention of claimant that respondent should have provided flagmen at the flood area or that the area should have been marked with flares or other warnings of danger. However, there is nothing in the record to show when the water crossed the road or when, if at all, the respondent had notice of the flooding. The claimant had been traveling this road for about fourteen years and she was well aware of the occasional flooding of the area.

There is considerable question as to whether the respondent is guilty of any negligence whatever in this case. As this Court has consistently held the State is not an insurer, and its duty to travelers is one only of reasonable care and diligence in the maintenance of a highway under all the circumstances. Furthermore, evidence of any causal connection between the flood water and the alleged damages to the claimant's car is unsatisfactory. However, the aforementioned issues need not be finally resolved, as in the Court's opinion the claimant is barred from recovery by her own negligence.

If claimant's car had been under proper control, as the law requires; if she had seen, what in the careful operation of her vehicle, she should have seen; and even thereafter if she had not carelessly continued into the flood water to the depth of three feet, no damage would have occurred. Either her car was not under proper control, or she assumed the risk of injury by proceeding through the waters to a hazardous depth. Accordingly, we

conclude that the claimant's damages are the proximate result of her own acts and omissions, and her claim is disallowed.

Claim disallowed.

Opinion issued September 10, 1975

PATRICIA G. MCFANN

vs.

DEPARTMENT OF HIGHWAYS

(No. D-909)

PER CURIAM:

The Court has examined the stipulation of liability, injury and damages in this case and pursuant thereto finds that the respondent, Department of Highways, is liable to the claimant, Patricia G. McFann, in the amount of sixty-one dollars and fourteen cents ($61.14).

Award of $61.14.

Opinion issued September 10, 1975

SKI SOUTH MAGAZINE

vs.

DEPARTMENT OF COMMERCE

(No. D-903)

Claimant appeared through its President, *James Richard Wells*.

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

JONES, JUDGE:

The Travel Division of the respondent, Department of Commerce, through its regularly retained Publicity Agent, Robert Goodman Agency of Baltimore, Maryland, contracted for the publication of two-page centerfold "SKI CANAAN VALLEY" advertisements in the January and February, 1973, issues of the claimant Ski South Magazine at a price of $679.50 for each publication.

Confusion developed in the billing process and only the invoice for the January issue was paid before the expiration of funds for the fiscal year 1972-73. The invoice for the February publication in the amount of $679.50 was submitted under date of March 1, 1973, and funds were available for payment. However, the invoice was disregarded in the belief that it had been paid, and when the confusion was cleared, the fiscal year had expired and payment could not be made.

The claimant's proof of its claim is not contradicted; and the Court is of opinion that the amount claimed is due and owing. Therefore, the claim of Ski South Magazine in the amount of $679.50 is hereby allowed.

Award of $679.50.

Opinion issued September 10, 1975

CLYDE SPEER and MILDRED SPEER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-906)

PER CURIAM:

Pursuant to stipulation, the claim of Clyde Speer and Mildred Speer against Department of Highways for blasting damage to the claimants' house in the amount of three hundred twenty-eight dollars and sixty cents ($328.60) is hereby allowed.

Award—$328.60.

Opinion issued September 18, 1975

W. VA. STATE INDUSTRIES

vs.

DEPARTMENT OF MENTAL HEALTH
(Huntington State Hospital)

(No. D-876a)

and

W. VA. STATE INDUSTRIES

vs.

DEPARTMENT OF MENTAL HEALTH
(Spencer State Hospital)

(No. D-876b)

Claimant appeared through its business manager, *Kenny Hinds.*

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

GARDEN, JUDGE:

These claims were heard on a consolidated basis because they involved factual situations that were almost identical. The claimant in each of these claims is an entity established pursuant to Chapter 28, Article 5B, of the Official Code of West Virginia of 1931, as amended, the "Prison-Made Goods Act of 1939."

This organization's primary purpose is to afford prisoners at the state prison in Moundsville with some means of occupying their time. At the prison the claimant organization produces clothing, license plates, paint, road signs, etc. and it also purchases tobacco in bulk and re-packages the same for re-sale. The claimant then sells these products to other state agencies.

In respect to Claim No. D-876a, in January, 1970, the respondent by purchase order ordered a quantity of smoking tobacco from claimant for delivery to the Huntington State Hospital. This tobacco was shipped at intervals, the final shipment being made in September of 1970, and claimant then on September 22, 1970 invoiced Huntington State Hospital for $1,268.50. Although the delivery of the tobacco and the invoice price were not disputed, the claimant's invoice was not paid.

In Claim No. D-876b, the respondent purchased both paint and tobacco from the claimant for delivery to the Spencer State Hospital. These items were ordered and shipped in June of 1970, and claimant invoiced Spencer State Hospital under date of June 30, 1970 for a total amount of $1,039.40 but has never received payment. Here again, no dispute arose as to the delivery or the invoice price.

No evidence was presented at the hearing to establish whether there were sufficient funds appropriated from which these invoices could have been paid during fiscal year ending June 30, 1970. However, the Deputy Attorney General subsequent to the hearing filed a memorandum with this Court clearly indicating that there were funds available in both the account of Huntington State Hospital and the account of Spencer State Hospital from which these claims could have been paid. Consequently, these are not claims which would have involved an over expenditure had they been paid. This is simply a case where the appropriated funds expired before the invoices reached the proper hands for payment.

We further believe that these claims should have been filed by the Commissioner of Public Institutions rather than by an entity within that State agency. However, we are treating these claims as requests for advisory determinations pursuant to Code 14-2-18 and thus we will make no formal award; however, we are of the opinion that there are legal claims against the respondent in the respective amounts of $1,268.50 and $1,039.40, and we recommend that the claims be paid.

The Clerk of this Court shall transmit copies of this Opinion to the proper parties within the Department of Public Institutions and Department of Mental Health.

Opinion issued September 19, 1975

ASSOCIATED DRY GOODS
D/B/A THE DIAMOND DEPARTMENT STORE

vs.

DEPARTMENT OF PUBLIC SAFETY

(No. D-991)

No appearance on behalf of claimant.

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

GARDEN, JUDGE:

This claim was submitted on the pleadings which consisted of the claimant's Notice of Claim and the respondent's Answer and Amended Answer, the latter of which admits the issues of liability and damages.

It would appear from the pleadings that on February 17, 1975, two representatives of the West Virginia Department of Public Safety stopped the claimant's tractor trailer and used it to establish a roadblock in order to capture two thieves fleeing south in a stolen car on Interstate 77 in Kanawha County. As a result of the roadblock, the stolen car crashed into claimant's tractor trailer causing damages admitted to be in the amount of $441.96. The Notice of Claim also requests interest on the amount of damages in the sum of $14.09.

While we are prohibited from awarding interest on this claim by Code 14-2-12, we are of opinion that the claimant is entitled to an award in the amount of the actual damages to its tractor trailer in the sum of $441.96.

Award of $441.96.

Opinion issued September 19, 1975

J. J. ENGLERT COMPANY

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-917)

Claimant appeared through its President, *Raymond J. Englert.*

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

GARDEN, JUDGE:

Sometime prior to May 15, 1974, the respondent entered into a contract with the Commissioner of Public Institutions whereby the former was to perform certain window replacement work and glazing at the West Virginia Penitentiary at Moundsville, a project involving a total contract price of $116,688.00. On May 15, 1974, the claimant submitted its Estimate No. 6 in the amount of $5,834.40, representing the balance due on the contract. For some reason, not apparent on the face of the record, this estimate was not approved by the respondent's architect, Henry Elden & Associates, until October 24, 1974, well beyond the close of fiscal year 1973-74.

At the hearing counsel for respondent admitted that the work had been performed by claimant in a satisfactory manner, and that sufficient funds were available in the respondent's appropriation during fiscal year 1973-74 from which Estimate No. 6 could have been paid. The problem arose when the estimate was not presented to the respondent until subsequent to October 24, 1974, the date when the same was approved by respondent's architect. Unfortunately, by this time, the prior available funds had been expired by operation of law.

Subsequent to the hearing, the claimant, by counsel, submitted additional claims in the form of a claim for interest on the unpaid amount as reflected on Estimate No. 6 from May 15, 1974, until paid, and a claim for reinbursement of expenses incurred by Raymond J. Englert in attending the hearing in Charleston on July 30, 1975 in a total amount of $108.35. In respect to the claim for interest, Code 14-2-12 prohibits us from making such an award unless the claim is based on a contract which specifically provides for the payment of interest, and the contract in this case makes no such provision. We are also of the opinion that the claim for expenses incurred in attending the hearing cannot be allowed.

These expenses, much like attorney's fees, must in cases such as this, be treated as an unfortunate expense of litigation and must be borne by the party incurring them.

On the other hand, we believe the claimant has clearly established its right to recover the remaining balance due on the contract in the amount of $5,834.40, and that equity and good conscience dictates that the same should be paid.

Award of $5,834.40.

Opinion issued September 19, 1975

RICHARD D. KITCHING

VS.

DIVISION OF VOCATIONAL REHABILITATION

(No. D-971)

No appearance on behalf of claimant.

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

GARDEN, JUDGE:

This claim has been submitted for decision on the pleadings filed which consist of the claimant's Notice of Claim and the respondent's Answer and Amended Answer.

It appears from the Amended Answer that the claimant's services were requested by the respondent, that the services were rendered and the charges in the total amount of $405.00 were reasonable and that there were sufficient funds in the respondent's appropriation at the close of fiscal year 1973-74 from which the claim could have been paid at the end of such fiscal year.

Based on the foregoing, an award in the amount of $405.00 in favor of the claimant is hereby made.

Award of $405.00.

Opinion issued October 6, 1975

ROY E. BRASSFIELD, JR.

vs.

DEPARTMENT OF HIGHWAYS

(No. D-970)

PER CURIAM:

This claim was submitted for decision upon a written stipulation of fact which revealed that the claimant on May 16, 1975, was operating his automobile on West Virginia Route 65 in Logan County, West Virginia, near the Town of Holden, when it struck a hole in the paved portion of the highway. The stipulation further reveals that the claimant was a resident of Kanawha County, West Virginia, and had not regularly travelled this section of the highway and had not travelled the same for several months prior to the date of his accident. The hole which was struck was in or just beyond a curve in the highway, and that at the time of the accident, it was dark and the hole was hidden by water with no warning signs or markers of any kind notifying the public of the existence of the hole. Most importantly, the stipulation further sets forth the fact that the respondent had prior notice of the existence of the hole but did not repair the same until subsequent to the claimant's accident. Damages in the amount of $69.21 were sustained as a result of claimant's automobile striking this hole.

We conclude on the basis of the stipulation, that liability does exist and that the damages claimed are reasonable.

Award—$69.21.

Opinion issued October 6, 1975

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA

vs.

DEPARTMENT OF HIGHWAYS

(No. D-674)

Robert D. Lynd, Attorney at Law, for the claimant.

Dewey Jones, Attorney at Law, for the respondent.

DUCKER, JUDGE:

The Chesapeake and Potomac Telephone Company of West Virginia claims damages in the amount of $3,856.86 allegedly caused by the West Virginia Department of Highways through its contractor, Bayless & Ramey, Inc., in the work of the latter in the installation of traffic control signals at the intersection of U.S. Route 60 and Smith Street in the town of Milton, Cabell County, West Virginia. The contractor proceeded with its work without knowledge of the underground cable conduits of the claimant and in doing so bored through one of the telephone wire cables, necessitating repairs which cost the amount alleged.

On March 14, 1957 the claimant made application to the respondent pursuant to Section 6, Article 15, Chapter 17 of the Code of West Virginia, for a permit to enter upon and under U.S. Route 60 at said place for the purpose of placing underground conduits beginning at the southwest corner of Pike Street and continuing in an easterly direction along Route 60 for a distance of approximately 707 feet, and on March 26, 1957 the application was approved in behalf of respondent by the District Engineer of District Two. Prior to October 9, 1971 the firm of Bayless & Ramey, Inc., electrical contractors, was awarded a contract by respondent to install traffic signal control devices along the same portion of Route 60 as claimant had earlier placed its underground conduits.

The contractor was provided by respondent with a construction plan or print covering the construction which, although appearing to be sufficiently complete for the purpose, contained no reference to or information about the claimant's conduits at that place. So without knowledge of the existence of the conduits, one of claimant's cables in the conduit was cut by the contractor in the progress of his work.

Respondent does not deny the facts alleged and proven by claimant except to say claimant's manhole was adequately marked, and to say it has nothing in its files in regard to the permit issued to claimant or in regard to the existence of the conduits. The claimant filed complete copies of its application, permit and drawing accompanying the application and permit, showing exactly where the conduits were to be placed, and proved that the conduits were placed in accordance with the permit. Evidently the respondent had lost or misplaced its records as to the permit and the conduits.

The respondent first moved to dismiss this claim on two grounds, namely, first, that the facts do not show a breach of duty on the part of the respondent, and secondly, that according to Regulation No. 9 of the respondent in respect to the permit issued by the respondent to an applicant and under the provisions of Paragraphs Nos. 5 and 10 of the permit, the claimant has waived any right to damages, said Regulation No. 9 and paragraphs 5 and 10 being in the following language:

> "9. It is understood and agreed that the issuance of a permit under these or any other regulations to any applicant therefor does not, in any event, impose upon the State Road Commission any responsibility or liability for damages which may be incurred by the applicant by reason of the location of the pole lines within the right of way limits of the state road, whether such damages may be the result of injury to the line caused by passage of State Road Commission equipment thereunder or otherwise."
>
> "5. The State Road Commission will not assume any liability for damage to the proposed work by reason of construction or maintenance work on the road in question."
>
> "10. The applicant, his heirs or assigns, shall repair, in a manner satisfactory to the Commission or its duly authorized agents, all damage done to the State Roads by reason of the work authorized by the permit, and all damage that may result therefrom and agrees to save the State Road Commission harmless from any damage or recourse whatsoever arising from the permission granted under this permit."

We are of the opinion that the provisions of Regulation No. 9 are intended to eliminate any responsibility or liability on the part of the respondent for damages which the applicant may suffer from traffic or road equipment passing on the right of way over the

conduit line, and not for damages of the nature here involved, and that Paragraphs 5 and 10 of the permit are intended to release the respondent only from liability for damages which the claimant itself might cause to the road by reason of claimant's own work. Furthermore, the provisions of paragraph 10 to save the respondent harmless from any damage or recourse whatsoever arising from the permission granted under this permit is so self-serving in its attempt to release the respondent from its own negligence or the negligence of its agents as to be contrary to public policy and, therefore, invalid. For these reasons the motion of respondent to dismiss the claim and for this Court to enter a summary judgment in its favor was and is denied; and the consideration of the claim is now heard upon its merits.

Respondent contends the manhole into which the damaged conduit entered was not sufficiently marked to indicate its location to the contractor and that consequently the claimant was guilty of contributory negligence. Witnesses for the claimant testified that the manhole cover had lettering of the utility's initials on it, although how clearly the cover was visible is not clear. We are of the opinion that regardless of any positive evidence as to that question, the respondent gave the claimant ample authority to place its conduit in the right of way according to the plan and design contained in the application and permit.

Considerable testimony was taken as to the distance from the line of the conduit from the southern boundary of a brick building located on the northeast corner of U.S. Route 60 and Smith Street and as to the distance from the line of said building to the right of way line of Route 60. The proof was that the first distance was 19'3" and the second 3' or 4', all of which showed that the conduit line was within the right of way and wholly in accordance with the print or plan which was made a part of the application made by claimant and the permit granted to it by the respondent.

We are of the opinion that the claimant had the right under the permit to have and maintain its telephone and conduit lines located in the Route 60 right of way and that it was not guilty of contributory negligence, that it was the duty of the respondent to notify its contractor of the existence of the conduit and lines, that the lack of records on the part of the respondent is the latter's own fault and is no defense to this claim, and that the claimant is entitled to recover for the damages done by respondent's agent, and we, therefore, award the claimant the sum of $3,856.86.

Award of $3,856.86.

Opinion issued October 6, 1975

RONALD L. COOK

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(No. D-702)

Warren McGraw, Attorney at Law for the Claimant.

Henry C. Bias, Jr., Assistant Attorney General for the Respondent.

DUCKER, JUDGE:

Ronald L. Cook, of Oceana, Wyoming County, West Virginia, claims damages in the amount of $4375.00 against the West Virginia Department of Finance and Administration on account of the latter's failure to pay rent for eighteen sites or spaces in the claimant's mobile homes park at Oceana.

On March 9, 1972, Hoy G. Shingleton, Jr. and Thomas L. Craig, Jr. contacted claimant by phone and arranged a meeting with claimant in Man, West Virginia, for the purpose of securing mobile home spaces in Oceana for victims of the Buffalo flood disaster, which had just previously thereto occurred. The meeting of the claimant with said Shingleton and Craig took place as arranged and the latter, acting as agents of the respondent, inquired of claimant as to the latter's park and if claimant would lease the park to the State, whereupon they were told by claimant that he had ten spaces already available and shortly thereafter would have eighteen more available, and that he would lease them all to the State for a year at $25 per month per space. The claimant was then given a letter which read as follows:

3/10/72

Mr. Ronald Cook:

I agree to lease in the name of the State of West Virginia, twenty-eight mobile home sites in Pine Acres Park in Oceana, W.Va., upon completion of all necessary installations of utilities and other services.

I agree to lease 10 spaces which are presently available, and the other 18 spaces upon completion, which should be within 30 days.

All spaces shall be leased at $25 per space.

Hoy Shingleton
Thomas L. Craig, Jr.

The respondent immediately took possession of the ten spaces and claimant proceeded to complete grading and arranging for utilities on the remaining eighteen spaces. A formal contract for the first ten spaces at $250 per month dated March 10, 1972 was signed by both Lessors, Ronald L. Cook and Betty A. Cook, and the State of West Virginia as Lessee, and approved by the Attorney General on March 21, 1972, but no reference was made therein as to the additional eighteen spaces. At the expiration of the one year period the agreement was renewed for a second year as to the ten spaces and the rental paid, and the claim here does not involve the first ten spaces.

Claimant contends that he made it clear to respondent's agents, Shingleton and Craig, that in order to complete the work on the eighteen spaces he would need funds to finance the work and in order to obtain money he would have to have written assurance about the deal; Shingleton and Craig then gave claimant the letter herein before shown.

Claimant testified that he immediately borrowed from the Castle Rock Bank in Pineville $6,000 to complete the work, and that within a three week period he had the additional eighteen spaces ready, and he then advised the agents of such fact, but two days later he was told that due to cancellations of people who had applied for sites the respondent was not going to need the spaces. The respondent did not confirm by formal agreement the leasing of the eighteen additional spaces or give claimant any formal revocation of the purported agreement.

The evidence of the respondent consisted only of the testimony of one witness, Joseph Edwin Neil, a program design specialist for the Office of Federal State Relations, an employee of the State, and who was assisting in getting relief for victims of the Buffalo flood disaster. He testified that he visited the park on April 1, 1972, and had to walk through mud and water around the homes, two to six inches deep in some places, that some of the tenants had complained about the water and that a drainage ditch did not drain the water off. He said the same situation prevailed at the time of a second visit at the end of April and a third visit in the middle of May. He said that Cook indicated he would do something about the

condition but nothing was done. The Court does not consider this evidence sufficient to eliminate a contractual liability, if there was one, and such question of liability is the real issue involved in this case, even though such evidence may have some feeble semblance of supporting the right of the respondent to refuse to proceed further with a formal consummation of the agreement as to the additional eighteen spaces.

The real question for decision then is that of the validity of the agreement alleged by claimant to have been made by claimant with the respondent. If there was no valid agreement, then attempts to revoke it were not necessary. If there was a valid contract, evidence to the effect that the respondent no longer needed the eighteen spaces and gave notice to the claimant of such fact does not, in our opinion, create for respondent a legal basis for cancellation of the purported agreement.

The agreement of the two agents of the respondent with the claimant is not in the form required by law, and it may be difficult to understand why claimant, when he signed the formal agreement as to the first ten spaces, did not then or shortly thereafter demand a similar formal contract as to the remaining eighteen spaces. However, it should be remembered that claimant is not a lawyer and could not be expected to be aware fully of the legal requirements necessary to make a perfectly formal contract with the State. Here we have two of respondent's agents, one of them, Shingleton, admittedly being the leasing agent of the respondent, giving claimant a written memorandum covering all twenty-eight spaces when told by claimant that the latter needed some proof of agreement in order to enable claimant to borrow money for the completion of all of the spaces. So when claimant's work under the agreement was completed, claimant had eighteen spaces left which he could not rent and so suffered the loss of rent on all the spaces he could not otherwise lease. The claimant made the spaces available to respondent and the latter was thus unjustly enriched at claimant's expense.

The Court cannot absolve the State of liability from a contract which its agents made without compliance with the letter of the law where a private citizen has been injured by the agents' actions in behalf of the State, especially when there has been no question, except technically, as to the agents' authority.

Accordingly we are of the opinion to, and do hereby award the claimant the sum of $4,375.00.

Award of $4,375.00.

Opinion issued October 6, 1975

LARRY JAMES

VS.

OFFICE OF THE GOVERNOR
AND
DEPARTMENT OF NATURAL RESOURCES

(No. D-785)

Thomas Myles, Attorney at Law, for the claimant.

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

DUCKER, JUDGE:

In May 1970 pursuant to a proclamation of the Governor establishing a program designed as "The West Virginia Rolling River Campaign and Celebration", the respondent sent to a designated Chairman in each County a brochure for the purpose of the celebration and for the paying of statewide tribute to workers in the campaign and to "establish a scholarship for high school students pursuing conservation careers". Larry James of Oak Hill, Fayette County, West Virginia, now claims that pursuant to the representations made in the brochure and by the respondent he performed services in response to and in accordance with the brochure and that he is now entitled to a scholarship in a State college or compensation for the time he worked on the project in the amount of $2300.00.

The evidence is that about three months before the end of the school year in the Spring of 1970 and when claimant was a Junior in the high school in Fayette County, the brochures were handed out to the students and about twenty of the students, including claimant, applied for service in the project. They were advised to see the Project Chairman in the County, Harry Marshall, who was also a Probation Officer of the Circuit Court. All of the twenty students, except the claimant and one Keith Smith, dropped out of the project, with only James continuing his work thereon for over a year.

Claimant testified that he and Keith Smith drew up plans for the reclamation of a strip mining area by eliminating water flooding through an old mine air shaft, which had caused soil washout and erosion in the Minden area in the County. The plans which the

claimant made were submitted to the respondent, the Department of Natural Resources, and though claimant was never notified that the plans had been accepted, apparently the plans were adopted, as the work was later done on the reclamation strip in accordance with the plans.

From the testimony, while not specific as to time, it would appear that the claimant started immediately at work on the project but was unable to get specific information or direction from the Governor's Office or the respondent's office or officers as to any details of the program or the scholarships. Some of the testimony indicated that the project had been abandoned and that no one wanted to take any responsibility for the brochures or the work of any student. Claimant testified that he made numerous trips to the Capitol to see about his claim but to no avail. There is no evidence which indicates that the claimant was ever notified of a termination of the project or that claimant should cease to pursue or perform further work on the project. Unquestionably the respondent completely abandoned the project outlined in its brochure, but the claimant in good faith relied upon the brochure and expended his time and effort to perform, and his work was impliedly accepted.

As is so often the case in dealings of citizens with public authorities, the strictness and clearness of contractual relations do not exist and we feel it necessary in order to do justice that we should be liberal in interpreting the acts of individuals in such dealings. In view of all the facts, we are of the opinion that to disallow this claim would be to approve unfair conduct on the part of State officers.

Inasmuch as the nature and kind of scholarship was too vague and uncertain, compensation to claimant can only be made on the basis of monetary compensation for the work done and therefore, on a quantum meruit basis we hereby award the claimant the sum of $1500.00.

Award of $1500.00.

Opinion issued October 6, 1975

PAUL G. NOHE & JUNE D. NOHE

VS.

DEPARTMENT OF HIGHWAYS

(No. D-968)

PER CURIAM:

On or about August 13, 1974, respondent as a result of spraying its right-of-way adjacent to claimants' property with a chemical known as HY-VOR XL destroyed considerable vegetation in claimants' meadow and pasture. Respondent by stipulation has admitted liability, and damages have been agreed to in the amount of $100.00.

Award of $100.00.

Opinion issued October 6, 1975

MYRTLE WEBB

VS.

DEPARTMENT OF HIGHWAYS

(No. D-696)

Jerry W. Cook, Attorney at Law, for the claimant.

Gregory W. Evers, Attorney at Law, for the respondent.

DUCKER, JUDGE:

In December 1971, the respondent was engaged in the construction of what was designated as "Corridor G", in Boone County, West Virginia, the work being done by the W. & H. Contracting Company under contract with the respondent. Right of way over claimant's property had been obtained and paid for by the respondent, but the procurement of an access road for claimant was the obligation of the contractor. In order to enable the claimant to receive her mail, her mail box was moved from time to time along the construction work of the principal highway, and on December 18, 1971 claimant, in returning from her mail box then erected in the corridor right of way at or about the junction of her access road, stepped and fell on some wet slate which had been

placed to fill up a muddy surface in the way to the mail box. Claimant alleges she suffered injuries to her back and here seeks damages in the sum of $25,000 from the respondent. By way of compromise with the contractor and the latter's release from liability she received $1500.00.

The evidence consists only of the testimony of claimant herself and of Charles M. Shady who was Project Supervisor for the respondent in connection with the construction work. The total medical expenses of claimant were stipulated by the parties as $179.50. The injuries which claimant alleged she suffered were to her dorsal vertebra T-2 requiring a back brace which she said she must continue to wear.

The witness Shady testified that claimant had to traverse the access road to go to her mail box which was in the right of way of the main road; that when he found the access road in bad condition he instructed the contractor to repair it. It was evidently in response to this that the shale was placed to offset mud near where claimant fell.

Claimant says that about eleven o'clock of the morning of December 18, 1971 she went to the mail box to pick up her mail, describing the situation as follows: "as I came back down a high bank which they had put in gray slate, down I went"; "the slate hadn't been there too long but it had been a mud hole till you couldn't get in and out over the bank at all"; and that "was why the slate was put in".

The issues in this case appear to be, first whether there was a breach of duty on the part of the respondent, and secondly, whether there was contributory negligence on the part of the claimant.

There may have been some duty on the part of the respondent through its contractor to provide some access by claimant to her mail box, but more than some reasonable passage way could not be expected under the circumstances of construction. The contractor attempted to relieve the muddy condition by placing gray slate on the route to the mail box and it can reasonably be said was all that should have been expected. It is, therefore, very doubtful in the minds of the Court whether any negligence creating liability has been established.

As to the conduct of the claimant who testified she had been over to the mail box, evidently by the same route, and was returning

over the slate covered path, it is clear that she had seen the condition of the way and admittedly knew blue slate was slippery. We are of the opinion that her own negligence proximately caused her accident and bars recovery. Accordingly, we make no award.

Claim disallowed.

Opinion issued October 6, 1975

HERSHEL RAY WILEY

VS.

DEPARTMENT OF HIGHWAYS

(No. D-781)

PER CURIAM:

The respondent while performing maintenance work on Local Service Route 83 in Whittaker, West Virginia, between January and July of 1974, damaged the claimant's property including a portion thereof where the claimant had planted a substantial garden. The respondent has stipulated liability and damages of $300.00, all of which we deem to be proper.

Award of $300.00.

Opinion issued October 7, 1975

JAMES R. CLOWSER

VS.

DEPARTMENT OF MENTAL HEALTH

(No. D-913)

Claimant appeared in person.

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

JONES, JUDGE:

Pursuant to the provisions of House Bill No. 1187, Acts of the Legislature of West Virginia, Regular Session 1973, effective July 1, 1973, certain pay raises to State employees for the fiscal year 1973-74 were authorized. Guidelines also were established by the

Bill requiring that no increase in the salary of any appointive State officer should be paid until and unless every full-time employee employed in such appointive State officer's Department was paid at an annual rate of $4,200.00 or more, and that every full-time employee receiving compensation of less than $10,000.00 annually was paid at a rate of 105% of the rate of compensation such employee was paid on June 30, 1972.

The respondent did not have available sufficient funds to grant all of the required salary increases at the same time, so the increases were put into effect throughout the fiscal year, effective July 1, 1973, or retroactively to that date, giving attention first to the employees receiving less than $4,200.00 annually, then to those receiving less than $10,000.00 annually, and lastly attention was given to those whose annual salaries were over $10,000.00. Dr. Mildred Bateman, Director of the Department of Mental Health, who was to receive a specific statutory salary increase of $2,500.00 per year, and the claimant, James R. Clowser, Deputy Director of Mental Health, delayed the processing of their salary raises until it was certain that budgeted funds would be available at the end of the fiscal year. Having sufficient funds on hand for the purpose, the raises of Dr. Bateman in the amount of $2,500.00 and the claimant in the amount of $1,020.00, bringing his annual salary to $21,900.00, in accordance with the Department's Expenditure Schedule of budgeted funds for personal services, were requisitioned on July 25, 1974, funds were duly encumbered and payments made on July 30, 1974, all within the 30 day grace period provided by law. Thereafter, or so it appears from statements of witnesses in this case, the Legislative Joint Committee on Government and Finance questioned the legality of both of these retroactive salary payments and urged that the respective sums be refunded to the State until some legal determination could be made. Pursuant to the Committee's request, both Dr. Bateman and the claimant did refund the entire sums received by them and filed claims for recovery in this Court.

In an opinion of this Court issued on February 6, 1975, based on the petition of Dr. Bateman and the answer of the Department of Mental Health by its counsel, the Attorney General of West Virginia, admitting the allegations of the petition, Dr. Bateman was awarded the full amount of her claim in the sum of $2,500.00.

It is our belief that the clear intention of the Legislature was that the several Departments of State Government involved in the pay

increases were to proceed exactly in the manner prescribed and followed by the Director and Deputy Director of the respondent, giving attention first to those in the greatest need, and leaving the very top echelon until last. We can only assume that all employees of the department were given raises in accordance with the spirit and letter of House Bill No. 1187, and it certainly was not intended that the claimant be the only person excluded from the benefits of the Act. Therefore, we hold that the sum of $1,020.00 was due and owing from the respondent to the claimant at the end of the 1973-74 fiscal year and was properly payable to him at any time during the first thirty days of the month of July, 1974, pursuant to Code 12-3-12.

Accordingly, an award in the amount of $1,020.00 is hereby made to the claimant, James R. Clowser.

Award of $1,020.00.

Opinion issued October 7, 1975

HELEN CREMEANS

VS.

DEPARTMENT OF HIGHWAYS

(No. D-980)

PER CURIAM:

Pursuant to stipulation, Helen Cremeans is substituted as claimant in place of her husband, Troy E. Cremeans, an employee of the respondent, Department of Highways, and the claimant is awarded the sum of $391.45 for damages to her truck by a fire negligently caused by respondent's employees at the Barboursville Maintenance Garage.

Award of $391.45.

Opinion issued October 7, 1975

DANIEL CROCKETT

VS.

DEPARTMENT OF HIGHWAYS

(No. D-790)

Claimant appeared in person.

Gregory W. Evers, Attorney at Law, for the respondent.

JONES, JUDGE:

On July 18, 1974, at about 8:00 a.m., the claimant, Daniel Crockett, was driving his 1971 Gremlin automobile west on Charles Avenue, near the City of Dunbar. A stretch of the road, approximately 60 feet in length, was in very bad condition, having been subjected to heavy truck traffic. The State-maintained old concrete road had been covered by layers of asphalt, and both the concrete and asphalt were broken and intermingled. The claimant was aware of the rough condition of the road, as he had travelled it on numerous occasions. He testified that he "had to bob and weave to avoid the major holes", but said he was used to driving on bad roads and anticipated no difficulty as he proceeded at a slow rate of speed. Suddenly the claimant's car was impaled on a concrete slab and he was thrown against the windshield. The car would not move forward and claimant, having suffered only minor bruises, left the car and telephoned the State Police. Trooper David L. Adkins came promptly to the scene, and made an investigation.

As a witness called by the claimant, Trooper Adkins testified that he found the claimant's car in the westbound lane and that it could not be moved forward, but was backed off of the obstruction and moved out of the way of traffic. He examined the slab of concrete on which the car had stuck and found that "it did stick up approximately five, six, possibly eight inches", that it was loose, and that when he placed his weight on one end of the slab, the other end would rise, giving credence to his estimate that the weight of the claimant's car upon one end of the slab would cause the other end to rise as much as 10 to 12 inches.

While there is no evidence that the respondent had specific notice of the dangerous condition, the road had been breaking up and deteriorating for a considerable period of time and the condition had been worsening rapidly in the weeks prior to the

collision, due to extremely heavy loads carried by trucks over this stretch of road. The Court is not unmindful of its repeated adherence to the holding that the State is not an insurer of the safety of travellers on its roads and that its only duty is reasonable care and diligence under all the circumstances. However, we feel that the circumstances of this case are unusual, that the condition which developed should have been anticipated by the respondent, and that its failure to investigate the breakup of the concrete base and the dislodgment of portions thereof constitutes negligence. On the other hand, in view of the hidden nature of the dangerous condition, we find that the claimant could not reasonably be expected to have anticipated or to have recognized the danger and was not guilty of contributory negligence as charged by the respondent.

Accordingly, the Court holds that the claimant is entitled to recover, and as the damages to the windshield and undercarriage of the car are not contested, we hereby award the claimant, Daniel Crockett, the sum of $257.96, the amount sought by the claimant and supported by the evidence.

Award of $257.96.

Opinion issued October 7, 1975

LARRY W. LOHAN & PAMELA LOHAN

VS.

DEPARTMENT OF HIGHWAYS

(No. D-910)

Claimants appeared in person.

Emerson Salisbury, Attorney at Law, for respondent.

GARDEN, JUDGE:

At about 10:30 P.M. on the evening of December 28, 1974, the claimant, Larry W. Lohan, was operating his 1973 Lemans Sport Coupe in a westerly direction on U.S. Route 60 just east of Charleston in the vicinity of the Daniel Boone Roadside Park. Route 60, in this area, was a four-lane highway, two lanes being reserved for westbound vehicles. The claimant testified that the weather was clear and that he was travelling at a speed of about 35 miles per hour when his left front wheel suddenly struck a hole in

the asphalt highway. Claimant further testified that this hole was near the dividing line between the two westbound lanes and was approximately three feet long, six inches wide and seven to nine inches deep.

The claimant was accompanied by his wife and two children, and they were returning to their home in Charleston after visiting his parents. He testified that he was very familiar with this area of the highway, and although he had been over this road about one week previously, he had not observed this hole. The impact damaged his left front wheel beyond repair, and he submitted competitive estimates of $38.37 and $54.48 for its replacement.

Nothing is more exasperating to an operator of a motor vehicle than to suddenly strike an unobserved hole in a highway, particularly when its presence is entirely unanticipated. Occurences such as described in the evidence, must repeat themselves thousands of times during the winter and spring months in the State of West Virginia. On the other hand, it must be realized that it is not humanly possible for the respondent to insure the motoring public of highways free from holes or other defects, when you consider the thousands of miles of roads in this State that they are charged with the duty of maintaining.

While the respondent is not an insurer of those using its highways, it does owe a duty of exercising reasonable care and diligence in the maintenance of the highways. We further believe that if the respondent knows or should have known of a defect in the highway that it must take the necessary steps within a reasonable period of time to repair the defect.

This accident took place at night, and the claimant had no prior knowledge of its existence. U.S. Route 60 just east of Charleston is one of the most heavily travelled highways in this State, and we believe deserves more attention from a maintenance standpoint than possibly some secondary roads in more remote areas. Obviously a hole three feet long, six inches wide and seven to nine inches deep did not develop over night and must have been in existence for some time prior to claimant's accident.

Believing the respondent should have discovered this hole and made the necessary repairs, and further believing that the claimant was free from contributory negligence, we are of opinion to award claimant the amount of his low estimate of repairs.

Award of $38.37.

Opinion issued October 7, 1975

PFIZER, INC.

vs.

DEPARTMENT OF MENTAL HEALTH

(No. D-956)

PER CURIAM:

Upon consideration of the petition and answer filed in this case, it appears that the goods described in the Notice of Claim were ordered by and delivered to Weston State Hospital; that the charge therefor in the amount of $473.23 is reasonable and proper; that the respondent had sufficient funds on hand at the close of the fiscal year from which said account could have been paid, but through inadvertence it was not paid and funds for the fiscal year expired.

Accordingly, the Court awards the sum of $473.23 to the claimant, Pfizer, Inc.

Award of $473.23.

Opinion issued October 9, 1975

DRS. BUTLER, ACETO & ASSOC., INC.

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-969)

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, et al v. Department of Mental Health*, 8 Ct. Cl. 180, the factual situations and the law applicable thereto being the same as that involved in the foregoing decision of this Court.

Claim disallowed.

Opinion issued October 22, 1975

ARCHIE DAY, SHERIFF, MCDOWELL COUNTY

vs.

JOHN M. GATES, STATE AUDITOR

(No. D-944)

D. A. WRIGHT, SHERIFF, PUTNAM COUNTY

vs.

JOHN M. GATES, STATE AUDITOR

(No. D-963)

D. Michael Fewell, Assistant Prosecuting Attorney, Putnam County for the claimant.

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

DUCKER, JUDGE:

The Circuit Courts of Putnam and McDowell Counties, West Virginia, respectively paid jury fees in the amounts of $18.00 in McDowell County and $762.00, including one witness fee in Putnam County, in their April and March 1973 terms of court respectively, and, according to custom, submitted in October 1973 to the respondent, vouchers or checks for said amounts requesting reimbursement for said expenditures. The respondent refused to make reimbursement because all funds budgeted for that purpose in the 1972-73 budget had been exhausted. Claimants here seek awards in the amounts of $18.00 and $762.00 respectively.

The testimony taken disclosed that as of the close of the fiscal year ending June 30, 1973 the amount of $43,000 remained available to pay claims of this kind, but that by the time the claimants submitted their vouchers to the respondent for reimbursement, namely, October 1973, all of the said funds had been used to pay similar claims from other counties.

The respondent cited, as justification for his refusal to pay these claims, Section 17, Article 3, Chapter 12 (12-3-17) of the Code of West Virginia, which is in the following words:

> "Except as provided in this section, it shall be unlawful for any state board, commission, officer or employee: (1) to incur any liability during any fiscal year which cannot be paid out of the

then current appropriation for such year, or out of funds received from an emergency appropriation; or (2) to authorize or to pay any account or bill incurred during any fiscal year out of the appropriation for the following year, unless a sufficient amount of the appropriation for the fiscal year during which the liability was incurred was cancelled by expiration or a sufficient amount of the appropriation remained unexpended at the end of the year."

From the evidence it would appear that efforts to seek a deficiency appropriation from the Legislature to satisfy these claims were unsuccessful.

This Court in the case of *Airkem Sales and Service et al v. Department of Mental Health,* 8 Ct. Cl. 180, held that when an agency of the State purchased supplies in excess of the budgetary amount specified and appropriated for that fiscal year, there could be no recovery on such claims because of the illegality thereof as being in violation of the statutory law applicable thereto. However, this case is distinguishable from the *Airkem* case in that there was no illegality in the incurring of the obligations, because there was an apparently adequate appropriation in 1972-73 budget when the obligations were incurred in the spring of 1973. The question in this case is whether the delay in presenting the vouchers for reimbursement until the appropriated funds were expired cancelled the right of the claimants. The expiration of the funds, in our opinion, simply deprived the claimants of their immediate satisfaction or remedy of recovery, not the legality of the claims. The claims having been legally incurred should be paid, and, accordingly we hereby make the following awards:

Award of $18.00 to Archie Day, Sheriff, and Award of $762.00 to D. A. Wright, Sheriff.

Opinion issued October 22, 1975

TABITHA V. PARTLOW
AND
INLAND MUTUAL INSURANCE COMPANY

vs.

DEPARTMENT OF MENTAL HEALTH

(No. D-981)

James D. McQueen, Jr., Attorney at Law, for the claimant.

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

DUCKER, JUDGE:

Claimant, Tabitha V. Partlow, and her insurer, Inland Mutual Insurance Company, as assignee and subrogee of said Partlow, allege damages in the amount of $400.51 to the automobile of said Partlow resulting from a falling limb from a tree in the parking lot of the Huntington State Hospital, where said Partlow had lawfully parked her car on March 1, 1974.

The factual situation, as stipulated by the parties, is that an employee of the respondent was operating a chain saw in removing a poplar tree on the grounds of the respondent and in doing so he negligently caused a limb from the tree to fall against the automobile of said Partlow and damaged the automobile necessitating repairs in the amount of $342.83 and the cost of car rental during the repair period in the amount of $57.68. These damages were paid by the claimants respectively by the Insurance Company in the first amount and by Tabitha Partlow in the second amount.

Pursuant to the stipulation of liability and reasonableness of the charges, we hereby make an award of $57.68 to Tabitha Partlow and an award of $342.83 to Inland Mutual Insurance Company.

Award of $57.68 to Tabitha Partlow and award of $342.83 to Inland Mutual Insurance Company.

Award of $57.68 to Tabitha Partlow.
Award of $342.83 to Inland Mutual Insurance Company.

Opinion issued October 22, 1975

ROCKFORD A. SHORTRIDGE

VS.

DEPARTMENT OF HIGHWAYS

(No. D-984)

Claimant appeared in person.

Gregory W. Evers, Attorney at Law, for the respondent.

DUCKER, JUDGE:

Claimant at about 7:30 o'clock p.m. on June 26, 1973 parked his automobile in the driveway to the State owned recreational area on old U.S. Route No. 50 east of Lamberton, Ritchie County, West Virginia, for the purpose of having in the area a family cook-out, and shortly after parking, taking his food from the car and putting it on the grills, a storm came up and the wind of the storm broke two limbs from a tree extending across the fence of the park area, which limbs struck claimant's car damaging the same and necessitating repair costs in the amount of $748.40, the amount for which the claimant here seeks an award.

The evidence is that the two broken limbs extended about 20 or 25 lineal feet across the road completely blocking the road, and they appeared to have "just snapped off" with no "splitting". There was no visible evidence that the tree was rotten. The limbs measured, one larger than the other, from "a foot in diameter" to "maybe 16 inches" and were live with the leaves on them. Claimant said they, meaning himself and his family, were "all sort of shook up" in the storm and never looked to examine the tree to see if it was rotten on the outside.

Respondent's witness, Ralph McClead, County Superintendent of the respondent for Ritchie County, testified that he had the responsibility for the roadside park here involved and he had one maintenance man who had the responsibility to notice hazards of any type including rotten or dangerous trees and tree limbs, and that he reported to McClead each morning, that no report of any hazard to visitors had been made prior to the claimant's visit to the park, that he saw the tree after the accident and cut the limbs with a power saw, and that he saw no rottenness in the tree or the limbs.

The evidence is convincing that the storm consisting of a high wind and later rain, blew severely enough to break the tree limbs, which were not rotten and that the accident was not the result of any negligence on the part of the respondent. The storm amounted to what in legal parlance is known as an "Act of God" for which the respondent cannot be held responsible or liable even though it occurred on the premises of the respondent.

As we are of the opinion that there has been no showing of any negligence on the part of the respondent, we make no award to the claimant herein.

Claim disallowed.

Opinion issued October 22, 1975

SHEN K. WANG

VS.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-370a)

Hershel Rose, Attorney at Law, for the claimant.

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

DUCKER, JUDGE:

Claimant, Shen K. Wang, an orthopedic surgeon of Fairmont, West Virginia, seeks compensation in the total sum of $15,300.00 for professional services rendered to State patients at the Fairmont Emergency Hospital between March 3, 1969 and March 10, 1970.

The evidence shows that the claimant was requested by Dr. Jack C. Morgan, Superintendent of the hospital to render professional orthopedic services to the State patients in the hospital according to their needs and that it was agreed by Morgan and Lawrence Shingleton, the Administrator of the hospital, that the claimant would be paid for his services on the basis of each case.

The evidence that the claimant performed all the services for which he claims compensation is not in any respect disputed or contradicted. The claim was fully supported by the testimony of Dr. Jack Morgan as well as by the detailed transcript of the record of the rendering of services. That the charges made for the services were fair and reasonable are fully supported by the evidence. The

only difficulty in the employment was the lack of proper procedure in the payment of the bills rendered from time to time by the claimant to the Department, with no fault appearing on the part of the claimant in that respect, as he was assured by Dr. Morgan and by Mr. Shingleton that he would be paid. Nor was there ever evidence of lack of budgetary appropriation for the employment.

As the State accepted the services of claimant and received the benefit of the same, we find the situation similar to that involved and decided by this Court in the case of Harold E. Bondy, M.D., v. Department of Public Institutions, 9 Ct. Cl. 123, and likewise we are of the opinion to and do award the claimant the sum of $15,300.00.

Award of $15,300.00.

Opinion issued October 22, 1975

JAMES E. WHITE

VS.

DEPARTMENT OF HIGHWAYS

(No. D-1004)

PER CURIAM:

Pursuant to written stipulation, the claim of James E. White against the Department of Highways for damage to claimant's automobile in the amount of $43.26 as a result of a fire is hereby allowed.

Award of $43.26.

Opinion issued October 31, 1975

ROBERT DOUGLAS BAKER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-933)

Claimant appeared in person.

Nancy Norman, Attorney at Law, for respondent.

JONES, JUDGE:

On January 27, 1975, at about 10:45 p.m. the claimant, Robert Douglas Baker, was driving his automobile in a westerly direction on Route 33 and 119, about eleven miles west of Weston in Lewis County. The claimant testified that it was slightly foggy and that he was proceeding cautiously at a speed of approximately 35 miles per hour towards his home at Alum Bridge. He further testified that as he came out of an "S" curve he suddenly ran into a 12-inch deep hole extending about halfway across the road, that there was no way to miss the hole in his lane of traffic, and that there was not time to turn completely into the left or east bound lane, which would have been necessary to avoid the hole. On cross-examination he said that he had been over the road about one and one-half weeks before and had observed no hazardous condition. As a result of the collision a tire and rim of his car were damaged beyond repair.

The claimant filed his Notice of Claim on March 18, 1975, and the hearing thereon was had on October 6, 1975. The respondent called no witnesses and apparently had made no investigation. There being no contradiction, the testimony of the claimant must be given full credence.

Route 33 and 119 is a heavily traveled primary road, the claimant was traveling at night, the hole in the road was unusually deep and wide, and the Court believes that the reasoning expressed by Judge Garden in the recent opinion in the case of *Lohan vs. Department of Highways (No. D-910)* applies to the facts of this case. Accordingly, we find that the claimant, Robert Douglas Baker, is entitled to recover his damages in the amount of $35.00.

Award of $35.00.

Opinion issued October 31, 1975

ATHEL BUTCHER

VS.

DEPARTMENT OF HIGHWAYS

(No. D-967)

Claimant appeared in person.

Nancy Norman, Attorney at Law, for the respondent.

JONES, JUDGE:

The claimant in this case, Athel Butcher, seeks recovery from the respondent, Department of Highways, for damages to the right rear wheel of his 1975 Chrysler New Yorker automobile while he was driving the vehicle south on Route 10 at Henlawson in Logan County.

The claimant testified substantially as follows: The time of the accident was about 4:00 o'clock in the afternoon on May 26, 1975; the two-lane asphalt road was level, straight and dry, and the day was clear; cars were approaching, being driven on or near but not over the center line, and the claimant was paying particular attention to them; the claimant's speed was approximately 35 miles per hour; his right rear wheel dropped off the edge of the road, straight down a foot or more to the berm, the force of the drop causing the damage complained of; prior to the accident the claimant had driven over this road at least once a week for a long time and had observed no hazard; and the claimant charged that the respondent was negligent in allowing a hazardous condition to exist.

Perhaps the respondent knew or should have known that a hazardous condition existed along this road, but we cannot avoid the conclusion that in the exercise of due care the claimant should have observed the edge of the blacktop surface of the road and having sufficient room on his side of the road to operate his vehicle in safety, he should have stayed in his lane of traffic and thereby avoided the accident. We, therefore, hold that the contributory negligence of the claimant bars recovery, and this claim is disallowed.

Claim disallowed.

Opinion issued October 31, 1975

MAUDE CALDWELL

VS.

DEPARTMENT OF HIGHWAYS

(No. D-690)

FLORENCE N. EARLY

VS.

DEPARTMENT OF HIGHWAYS

(No. D-691)

ARZA EDDY

VS.

DEPARTMENT OF HIGHWAYS

(No. D-692)

DANIEL A. POSTLETHWAIT and BETTY D. POSTLETHWAIT

VS.

DEPARTMENT OF HIGHWAYS

(No. D-693)

ROGER H. SMITH and RAMONA C. SMITH

VS.

DEPARTMENT OF HIGHWAYS

(No. D-694)

ROBERT G. CUNNINGHAM and BARBARA L. CUNNINGHAM

VS.

DEPARTMENT OF HIGHWAYS

(No. D-725a)

HARRY E. JOY, JR. and NELDA L. JOY

VS.

DEPARTMENT OF HIGHWAYS

(No. D-725b)

ILENE FRICKER and HAROLD FRICKER,
and
PEARL G. CYPHERS and EUGENE CYPHERS

vs.

DEPARTMENT OF HIGHWAYS

(No. D-725c)

ILENE FRICKER and HAROLD A. FRICKER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-725d)

ORA J. CARROLL and GWENDOLYN Y. CARROLL

vs.

DEPARTMENT OF HIGHWAYS

(No. D-725e)

TOWN OF PADEN CITY,
a municipal corporation

vs.

DEPARTMENT OF HIGHWAYS

(No. D-767)

JOHN G. WHITTINGTON and MERLENE M. WHITTINGTON

vs.

DEPARTMENT OF HIGHWAYS

(No. D-937)

Robert E. Wright and *James M. Powell,* Attorneys at Law, for the claimants.

Gregory W. Evers, Attorney at Law, for the respondent.

DUCKER, JUDGE:

The claimants in these twelve claims have alleged various amounts of damage to their homes and properties situate in Paden City, West Virginia, north of and below State Route 26 and south of

and above 8th, 9th and 10th Avenues, as a result of the respondent's alleged negligent maintenance of the road and collecting surface water and diverting and channeling it through culverts and casting said surface water upon their lands.

The parties agreed that the question of liability of the respondent is the same as to all of the claimants, but that the amounts of damage, if any, are to be determined separately as to the respective claimants, and accordingly the evidence upon the question of liability is made applicable to all of the claims.

A careful and detailed view of the subject properties was taken by the Court at the inception of the hearing. Both claimants and respondent introduced extensive testimony of experts concerning the question of water drainage over and upon the area involved, and all of the expert testimony was to the same effect that continuous saturation of the soil by water from the hillside was the direct cause of the seepage and slides of earth in, under and about the homes and properties of the claimants, including waterlines of the municipal claimant. The experts differed as to whether or not the respondent had so carelessly maintained its road as to prevent the proper drainage from the road and the upper land and had diverted water from natural channels and into artificial channels to the detriment of the claimants.

State Route 26 was formerly a County road running along a ridge south of Paden City before any of the claimants' homes were built. It is shown on a 1906 topographical map. A picture taken in 1911 shows the road and only the Caldwell and Eddy houses. The road was relocated with a gravel surface in 1929-30, and was blacktopped by the respondent in 1963. When the State took over County roads, including this one, the road and its drainage were substantially the same as they are today, except for the culvert above the Fricker property which was plugged at Mrs. Fricker's request about 1970 or 1971. At about the same time a drain pipe was put under Kendall Road, which connects with State Route 26 from the southwest, to drain into the ditch along the south side of Route 26. This took care of part of the water that previously had passed through the Fricker culvert, but during hard rains, substantial quantities of water ran across the road and onto the Fricker land.

The several claimants were unanimous and firm in their testimony that water running over the road and through its culverts had soaked into the slope above their homes and properties, and they vividly described the saturation of their lands,

causing, in their certain opinion, the downward movement of the hillside and ultimate damage to their homes and properties. George Kapnicky, a geologist, supported the claimants' views, testifying that surface water running over the road and onto the slope was diffused and not channeled into natural drains. He made specific reference to the Fricker farm, where the culvert had been plugged, but it is apparent from all the testimony that the landslide had commenced long before this culvert was abandoned.

George Sovick, an engineer employed by the respondent, testified that the drainage area above the road directly behind the Fricker farm contained only 1.4 acres, while the Fricker farm itself is a 14.75 acre tract on the slope abutting the road. The entire drainage area above the road is approximately 18 to 20 acres, and about the same acreage owned by the claimants lies below the road and is part of the watershed. Dr. Robert E. Behling, a professor at West Virginia University, with outstanding qualifications as an expert in geology and soils, and William Roth, a soils scientist, both testified that all of the homes were built upon colluvial material, originally unstable and highly susceptible to water saturation and resultant slippage. Roth called the material Vandalia soil and termed it subject to severe limitations for home sites, including slip hazard and high shrink-swell potential. Test holes drilled by the respondent upon the claimants' lands show conclusively that all of the homes were built on soil which is characterized by both Roth and Dr. Behling as unstable, and these witnesses substantially testified that in their opinions, in view of the natural drainage area above, all of these home sites were unsafe from the beginning, and it was only a question of time until natural forces would produce the results in these cases. As a contributing factor, both Roth and Dr. Behling found natural springs on the hillside which added underground waters to the surface rainfall.

The damage to the Whittington home, which was so severe that the building was demolished and removed from the premises, is an example of water saturation and slippage which cannot be attributed to water from the State road. Dr. Behling testified that the slope above this property was the most severely disturbed by downslope movement, trees were pushed over and it was a very chaotic slope. Further in his testimony, Dr. Behling described the road and adjacent lands as sloping away from the Whittington property and he was emphatic in his opinion that no water flowed from Route 26 or its culverts towards or upon that property. Dr. Behling also noted foundation damage to another home east of the

Whittington property, similarly situated on the hillside but even farther removed from Route 26.

Turning our attention from the Whittington property, being the most easterly of the claimants' several parcels of land, to the most westerly parcel, the Caldwell property, we have a difference of opinion in the testimony of Mr. Kapnicky and Dr. Behling. Mr. Kapnicky attributed damage to this property from waters passing through "Culvert No. 5", but Dr. Behling testified that the water from this culvert was following a natural channel, and at least one-half of that water would not reach the Caldwell property. Dr. Behling further stated that in his opinion this house was built on a slump block and that renewed activity of the slump block created the tension cracks he found in the back of the house and the bulging out in front. In his opinion the Eddy house also was built upon a slump block.

To some extent at least it would have been possible for these claimants to have protected their properties by pilings, cribbing or by well engineered drainage. While efforts were made, some of them apparently did more harm than good. For example, the Fricker backyard was excavated to slope towards the hillside, holding water instead of releasing it. House gutters and downspouts collected and discharged water upon the already unstable soil near some of the residences, causing more water saturation and instability. In practically every case, when these homes were built a cut was made into the slope to make level ground for the building, thereby lessening support of the hillside.

The law applicable to this case is well stated by Judge Petroplus in *Whiting v. State Board of Education, et al.*, 8 Ct. Cl. 45, as follows:

> "It is well established law that land at lower levels is subject to the servitude of receiving waters that flow naturally upon it from adjoining higher land levels, and that unless a property owner diverts the natural flow of surface water in such a manner as to damage the property of another, there is no liability on the owner of the higher property. Unless a landowner collects surface water into an artificial channel, and precipitates it with greatly increase- or unnatural quantities upon his neighbor's land, causing damage, the law affords no redress. If no more water is collected on the property than would naturally have flowed upon it in a diffused manner, the dominant tenement cannot be held liable for damage to land

subject to the servitude of flowing waters. The evidence in this case does not reveal that the flow was increased in volume or changed in its character to the substantial damage of the Petitioner. Nor was it shown by evidence that the flow accelerated or was artificially channeled so as to increase the servitude upon Petitioner's lot as was shown in *Manley v. Brown,* 90 W. Va. 564, 111 S.E. 505, cited by Petitioner.

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

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

Culverts are required for the protection of our highways and an extraordinary number of culverts necessarily are provided in the building and maintenance of highways in West Virginia. It stands to reason that these culverts discharge into natural drains wherever possible as engineering and simple logic require a culvert where a road is to pass over and through a natural drain. While the claimants contend that waters were allowed to spread over practically all of the hillside, we do not believe they have proved by a preponderance of the evidence that the respondent did anything to substantially change the course of the flow of waters down the hillside from the time the culverts were installed, prior to the State's ownership. If there were no culverts at all, it appears that the properties lying to the east would receive much less water and as you go down the highway to the west the properties would receive more water. as the road without culverts would itself

become a drain and the waters running down the highway would eventually flow onto the more westerly properties. As a matter of fact, however, the greatest damage was done to the most easterly property, being the Whittington residence, which we believe was not affected by water from Route 26, and one of the least damaged homes was Mrs. Caldwell's, which is the most westerly of all the properties. Every road, as well as every house, roof, driveway or other hard surface, is bound to collect water and accelerate its flow, so some acceleration and accumulation of run-off is an unavoidable consequence of the construction of roads.

The expert witnesses for both sides in this case agree that the continuous saturation by water of the hillside above the claimants' properties over a period of many years was the direct cause of the downslope movement of the land. The difference of opinion is whether or not the State road was a substantial contributing factor, and whether the respondent diverted waters from natural channels and into artificial channels to the detriment of landowners over whose lands the waters flowed. Considering all of the facts and circumstances developed at the hearing of these cases, and the legal principles applicable thereto, the Court is of opinion that there is not sufficient proof that acts or omissions of the respondent were the direct, proximate cause of the damages sustained by the claimants.

The Court is not unmindful of the disaster which has overtaken these claimants. According to the respondent's own witness, a qualified real estate appraiser, the total damages sustained by the claimants stands at $63,078.00. The claimants' witness fixed damages at $107,078.00. Several of these claimants purchased their properties after 1967, when the hazardous condition of the hillside was well-known by many people but was not disclosed to the purchasers. However, our duty is plain, and reluctantly we hold that while many contributing factors brought about the damages complained of, nothing that the respondent has done or failed to do is sufficient to support awards in any of these cases.

For the foregoing reasons the Court is of opinion to and does hereby disallow these claims.

Claims disallowed.

Opinion issued October 31, 1975

MARK A. MELROSE, Executor of the Estate of
J. J. Melrose, Deceased, and FRANK R. MELROSE

VS.

DEPARTMENT OF HIGHWAYS

(No. D-629)

Claimant, *Mark A. Melrose,* appeared in person in his fiduciary capacity and as agent for *Frank R. Melrose.*

Gregory W. Evers, Attorney at Law, and *Henry C. Bias, Jr.,* Deputy Attorney General, for the respondent.

JONES, JUDGE:

J. J. Melrose filed this claim on May 9, 1973. Thereafter he died and Mark A. Melrose qualified as Executor of his estate on September 4, 1974. At the hearing had on July 30, 1975, the claim was revived in the names of Mark A. Melrose, Executor of the Estate of J. J. Melrose, deceased, and Frank R. Melrose, successor in title to the real estate involved by devise from his father.

Damages are claimed to a barn located on a 300 acre farm near Mineral Wells in Wood County. The barn, 40 feet x 70 feet in size, built in 1969 with a concrete block first floor set on a concrete footer and haymow of wooden construction, was moved to its present location in 1964 or 1965. It was set on solid ground approximately four to five feet south of the toe of a slope extending 120 feet, more or less, from Sycamore Road, a gravel road serving about twenty families. At a low place in the road back of the barn a culvert had been plugged and out of use for several years and water was permitted to stand in the ditchlines. A slip became apparent in 1971 and during that year the road dropped about a foot, at which time the claimants notified the respondent, Department of Highways, of the impending hazardous condition. Each time the road subsided the respondent would dump in rock and fill material, adding weight to the already unstable area. Since 1971 the center-line of the road has moved southward about 15 feet, indicating the extent of the slide which developed to a width of about 150 feet at its base. The slide finally reached and pushed in the rear wall and lowered the northeast portion of the barn about 18 inches. Subsequent to the damage complained of the respondent

installed a new culvert, but it discharges water upon the slide area which may induce further movement. The claimants have dug an open ditch in an attempt to divert water from the barn.

The respondent produced no witnesses at the hearing and from the testimony of witnesses for the claimants we can only conclude that the respondent has not exercised reasonable care and diligence in the maintenance of this road, and thereby has created and permitted to continue a landslide of sufficient size to cause the damages described by the claimants.

A witness for the claimants, a civil engineer with many years of experience in construction, testified that the difference in fair market value of the barn before and after the damage was the sum of $3,000.00. We consider this a reasonable figure and, therefore, an award in the amount of $3,000.00 hereby is made to Mark A. Melrose, Executor of the estate of J. J. Melrose, deceased, and Frank R. Melrose, as their respective interests may appear.

Award of $3,000.00.

Opinion issued October 31, 1975

MONONGAHELA POWER COMPANY

VS.

DEPARTMENT OF HIGHWAYS

(No. D-957)

PER CURIAM:

By stipulation filed in this claim, it appeared that respondent on or about July 26, 1974, while clearing its right of way in Randolph County, West Virginia, negligently permitted a tree which it had cut to damage a power line owned and maintained by the claimant. Being of the opinion, and as confirmed by the aforesaid stipulation, that damages in the amount of $106.85 are fair and reasonable, we thus make an award in that amount.

Award of $106.85.

Opinion issued October 31, 1975

PHYSICIANS FEE OFFICE

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-816e)

PER CURIAM:

On March 21, 1973, professional services were rendered to Jesse W. White, an inmate of the West Virginia State Penitentiary at Moundsville, West Virginia, by Doctors Evans and Tercan, members of claimant's organization. Respondent's Amended Answer acknowledges that the claim in the amount of $111.92 is a valid obligation of the respondent, and an award in that amount is thus allowed.

Award of $111.92.

Opinion issued October 31, 1975

CARMIE RIDDLE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-947)

PER CURIAM:

Pursuant to written stipulation, the claimant, Carmie Riddle, is awarded the sum of $87.55 for damages to her automobile caused by a fire negligently started by respondent's employees at respondent's garage.

Award of $87.55.

Opinion issued October 31, 1975

BOBBY SHAFER

V.

DEPARTMENT OF HIGHWAYS

(No. D-898)

Claimant appeared in person.

Emerson Salisbury, Attorney at Law, for the respondent.

DUCKER, JUDGE:

Claimant, Bobby Shafer, a resident of Route 1, Clendenin, West Virginia, alleges damages in the amount of $305.85 to his 1967 Ford Fairlane automobile, by reason of an accident during the latter part of December, 1974 when his car struck rocks and was flooded with water in a creek through which a temporary roadway passage was permitted and authorized by the respondent.

The testimony was to the effect that a bridge, located about four miles south of Clendenin over a tributary creek of Elk River, was in such a dangerous condition that the respondent had placed signs on it closing the road over the bridge. The road to and from the bridge had no other passage way than by fording the creek. The bridge and the road were as to maintenance and supervision within the jurisdiction of the respondent, and the respondent at least acquiesced in the fording of the creek by automobiles traveling the road. Claimant in attempting to ford the creek on this occasion encountered large rocks and high water, which damaged and flooded his car, costing him in repair bills the amount alleged. The water in the creek was much higher than it usually was for fording the creek but there were no warning or other signs there to prohibit the regular use of that part of the road for fording it.

We are of the opinion that it was the duty of respondent, which knew of the possible hazardous condition and the reasonable foreseeable probability of damage to users of the highway, to either prohibit the traffic or to provide reasonable measures of safety to the public at that place, and we conclude that as there does not appear to be any contributory negligence on the part of the claimant, the respondent's failure under the circumstances of this case rendered it guilty of actionable negligence.

Accordingly, we award the claimant the sum of $305.85.

Award of $305.85.

Opinion issued October 31, 1975

J. WILBUR SWISHER and ALICE V. SWISHER
d/b/a SWISHER'S FEED AND SUPPLY COMPANY

VS.

DEPARTMENT OF MENTAL HEALTH

(Nos. D-881a and D-881b)

John R. Haller and *Joseph W. Wagoner*, Attorneys at Law, for the claimants.

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

JONES, JUDGE:

These consolidated claims are for damages to a building, equipment and merchandise, owned and operated by the claimants, J. Wilbur Swisher and Alice V. Swisher, d/b/a Swisher's Feed and Supply Company at Weston, in Lewis County, caused by acts committed by two patients of Weston State Hospital, who allegedly were negligently allowed to leave the hospital grounds. The incidents occurred on February 28, 1974, and March 2, 1974, respectively, and in each case the patient appears to have been bent on violence and destruction. The front door and a plate glass window were smashed, shelving torn out, business machines and office supplies damaged or destroyed, floors damaged, and substantial quantities of merchandise were placed under embargo and destroyed by order of the West Virginia Department of Agriculture.

Counsel for the parties have filed a Stipulation wherein the respondent admits the negligence of its employees and the damages in the total amount of $2,580.76. The damages are further substantiated by exhibits.

Upon consideration of the Notice of Claim and its exhibits, and the Stipulation of facts and liability, together with the exhibits filed therewith, the Court is of opinion to approve the Stipulation and allow the claims. Accordingly, an award is made to the claimants, J. Wilbur Swisher and Alice V. Swisher, d/b/a Swisher's Feed and Supply Company, in the amount of $2,580.76.

Award of $2,580.76.

Opinion issued October 31, 1975

XEROX CORPORATION

VS.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-948 a&b)

No appearance for the claimant.

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

PER CURIAM:

This claim is for copies run and services rendered on equipment furnished by the claimant, Xerox Corporation, to the respondent, Department of Public Institutions, at the West Virginia State Penitentiary during the fiscal year 1973-74 in the amount of $798.46 and during the fiscal year 1974-75 in the amount of $1,166.18, and the issues are submitted for decision upon the Notice of Claim and Amended Answer.

Upon consideration of the pleadings the Court is of opinion that the decision in *Airkem Sales and Service, et al, vs. Department of Mental Health*, 8 Ct. Cl. 180, applies to the invoices covering the period from March 1, 1974, to May 31, 1974, in the total amount of $798.46, and therefore, that portion of the claim is disallowed. However, the Amended Answer of the respondent asserts no defense to the items of claim invoiced in the fiscal year 1974-75 in the total amount of $1,166.18, and it appearing to the Court that said claim is valid and unpaid and the Court perceiving no reason to deny the same, an award hereby is made to the claimant, Xerox Corporation, in the amount of $1,166.18.

Claim No. D-948a is disallowed.

Award of $1,166.18 in Claim No. D-948b.

Opinion issued November 13, 1975

RUSSELL E. DUVERNOY &
HENRY TODD DUVERNOY

VS.

JOHN M. GATES, AUDITOR &
JOHN H. KELLY, TREASURER

(No. D-905)

Leo Catsonis, Attorney at Law, for claimants.

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

GARDEN, JUDGE:

In January of 1971, the claimant, Henry Todd Duvernoy, was indicted by the Grand Jury of Roane County for possession of marijuana. Thereafter, he was tried, convicted and sentenced on March 26, 1971 to an indeterminate term in the West Virginia Penitentiary and fined $1,000.00. The confinement portion of the sentence was suspended and young Duvernoy was placed on probation. For reasons not apparent on the face of the record before us, a motion for a stay of execution was denied by the Circuit Court of Roane County pending an appeal to the Supreme Court of Appeals, and the fine was ordered to be paid.

On November 1, 1971, the Supreme Court of Appeals granted a writ of error and supersedeas, but by this time, the claimant, Russell E. Duvernoy, the father of Henry Todd Duvernoy, had paid $775.00 of the fine imposed by the Circuit Court. On April 3, 1973, the Supreme Court of Appeals reversed the conviction and awarded a new trial on the ground that the arresting officer had committed an unlawful search and seizure. *State v. Duvernoy*, W. Va., 195 S.E. 2d 631, the case was not re-tried. By order of the Circuit Court entered the 4th day of June, 1973, the indictment was dismissed and the portion of the fine that had been paid was directed to be returned.

Thereafter, counsel for the claimant, through correspondence directed to the State Auditor and to the office of Governor Moore, attempted to secure a refund of the $775.00 through administrative means but was advised that there was no statutory vehicle by which the fine could be refunded. With this conclusion, we agree. Code 5-1-17 authorizes the Governor to remit fines but only in instances where the fine has not been paid.

Counsel for claimant has cited several federal decisions where fines paid as a result of invalid convictions were ordered refunded: *DeCecco v. United States,* 485 F.2d 372 (1st Cir. 1973); *United States v. Bluso,* 519 F.2d 473 (4th Cir. 1975). These cases both involved convictions under the Wagering Tax Law, 26 U.S.C. §7203. They are distinguishable from the present factual situation in that the Federal Courts relied on the Tucker Act, 28 U.S.C. §1346, which specifically authorizes the refund of a penalty collected without authority under the internal revenue laws.

Although we are aware of no statutory procedure in this State authorizing refund of a paid fine, we are of opinion that we have jurisdiction to effect a refund. Code 14-2-13 authorizes this Court to make awards in claims against the State which the State, as a sovereign commonwealth, should in equity and good conscience pay. This claim in our opinion comes within this jurisdictional framework. Any other result would constitute unjust enrichment to the State.

Award of $775.00.

Opinion issued November 13, 1975

JORDON, McGETTIGAN & YULE

VS.

DEPARTMENT OF MENTAL HEALTH

(No. D-680)

Albert J. Bader, Attorney at Law, for the claimant.

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

JONES, JUDGE:

Early in May, 1967, the claimant, Jordon, McGettigan & Yule, a partnership, was employed by the respondent, Department of Mental Health, to perform architectural-engineering services for the construction of a Mental Retardation & Rehabilitation Center at Roneys Point in Ohio County. After a conference between the principals in Charleston, a letter was written by the respondent to the claimant under date of May 10, 1967, confirming that a previously employed architect was unable to meet time requirements and had withdrawn from the project, expressing the respondent's intent to enter into a contract with the claimant, and

pointing out that a contract could not be processed until federal funds were encumbered, meaning that the respondent must have substantially complete working drawings and estimates of cost to meet a deadline set by Hill-Burton Authorities for the encumbrance of lapsing federal funds. The deadline was the week beginning June 19, 1967, allowing approximately 45 days for completion of the work. While it appears that the usual and customary fee for such services would have been 6 percent, it was agreed between the parties that due to the urgency of the project and the consequential extra overhead and overtime costs an 8 percent fee would be paid, and this was carried into the formal contract dated and executed on October 1, 1967, as "a fee of 8 per cent of the construction cost of the project." The contract specifically provided that the claimant should not furnish cost estimates, in view of a federal requirement that two such estimates be given by local contractors. The contract further provided that payment for services at the completion of each phase of work should be divided as follows:

"Schematic Design Phase	15%
Design Development Phase	35%
Construction Documents Phase	75%
Receipt of Bids	80%
Construction Phase	100%"

A purchase order for this project dated May 23, 1968, constituting acceptance of the contract entered into by the parties and approved by the Attorney General and Department of Finance and Administration, recited the following:

"Estimated cost of construction	$604,000.00
Fee based on 8 percent of construction cost	$ 48,320.00"

The deadline was met by the claimant, two estimates were obtained from local contractors based on the claimant's plans and specifications, both within $10,000.00 of the $604,000.00 allocation for the project. While the federal requirements for the encumbering of funds had been met, the State Department of Health did not approve the drawings which showed sewage from the building to be connected to the nearest manhole. The change required the sewage to be connected with an abandoned sewage treatment plant, necessitating plans for renovating the plant and constructing a 1,500 foot access road, the cost of which was not eligible for federal participation. For no apparent reason, but

perhaps taking time to acquire additional funds, the project did not move from July, 1967, to June, 1968, when the claimant was authorized to prepare plans and specifications for rehabilitation of the sewage plant. The revisions were made and approved and the project was let to bids on March 3, 1970. The low bid was $861,000.00, two higher bids being in amounts of $884,724.00 and $1,389,930.84. The project was not let to contract as the low bid exceeded the available funds.

A meeting was held on April 10, 1970, and the agreements arrived at were set out in a letter directed to the respondent by the claimant under date of April 13, 1970. Plans and specifications were to be revised for re-bidding, including the deletion of one wing of the building and other substantial changes, contemplating savings of approximately $200,000.00 to $250,000.00. The respondent's letter further stated that it would keep accurate records and bill for the revisions "on the basis of 2.5 x Technical Payroll." Contrary to the quoted language, the contract between the parties provided that for additional services the respondent would be paid "two (2) x the Direct Personnel Expense ***." Shortly thereafter the respondent revised its previous billing to conform to 8 percent of the low bid of $861,000.00.

On May 15, 1970, the claimant was advised by the respondent that it should proceed with changes in the plans and specifications necessary to reduce the cost of the project of the amount of funds available. Under date of November 24, 1970, the claimant billed the respondent in the amount of $13,959.20, based on 8 percent of the low bid, which was paid by the respondent, and in the same letter listed items to be included in the revised documents, including elimination of all sewage treatment plant work. By letter dated August 10, 1971, the respondent presented its bill for additional work in the total amount of $8,320.95, and replying under date of August 16, 1971, the Director of the respondent department informed the claimant that funds were not available to pay the invoice, reminded the claimant that the bid price was not acceptable because it exceeded the cost estimate of the project, and further stated that the respondent was attempting to obtain additional funds out of which the invoice would be paid. On November 15, 1972, the respondent informed the claimant that additional funds had been received. The respondent's letter to claimant dated February 2, 1973, advised that the respondent planned to place the project out for bids as soon as possible and that further payments would be withheld until the construction

contract was awarded. From this point the project wound down in a hurry. Four letters, two of which apparently crossed in the mail, tell the story. The respondent wrote the claimant on February 20, 1973, that the project had been placed out for bids again since additional State money was available and the bid opening was set for March 21, 1973. This letter further set out a rather extensive list of changes to be made in the plans and specifications. By letter dated February 26, 1973, the claimant informed the respondent that its file and records pertaining to the project had been turned over to counsel for consideration and advice concerning the respondent's failure to pay outstanding invoices and added that it would be impossible for any firm of architects-engineers to prepare the required contract documents in time for bids on March 21, 1973. A letter dated February 27, 1973, from the respondent to the claimant advised that the bid opening date had been changed to April 4, 1973, and another such letter dated March 1, 1973, advised the claimant that the requisition for the Roneys Point project had been cancelled. The project was thereupon abandoned and was never re-activated.

The respondent claims a balance due under the original contract, based on the low bid with 80 percent of the work completed, in the amount of $6,895.20. Two invoices for additional work in respective amounts of $1,425.75 and $2,541.00 were submitted to the respondent, making a total claim of $10,861.95. The respondent contends that under the original contract it only should be required to pay for services at the rate of 8 percent based on the estimated $604,000.00 cost of construction, 80 percent completed, which the Court calculates to be $38,656.00. The respondent has paid to the claimant $48,266.40, which would put the respondent in the rather awkward position of having overpaid the account in the sum of $10,610.40.

While the State may not be estopped from denying liability on the ground that an employee of the respondent has accepted and acted in accord with the claimant's interpretation of the agreement, we think the statements and actions of the respondent throughout the period involved are indicative of the fact that there was a meeting of the minds and no major misunderstanding except of the Monday morning quarterback variety. The claimant presented plans and specifications to the respondent in June, 1967, which were satisfactory to the respondent, but a revision was necessary and promptly made to meet requirements of the Department of Health. For reasons that are not apparent but which we cannot

attribute to any fault on the part of the claimant, letting the project to bids was delayed until March 3, 1970. The Court will take judicial notice of the inflationary conditions in our country during this period of delay. The inflationary situation also must have been obvious to the respondent and we doubt if anyone was much surprised that the low bid exceeded the estimates of the local contractors, made some 32 months before. As before stated the claimant's fees were to be based on the construction cost of the project and that cost is further defined in the contract as the lowest acceptable bona fide contractor's proposal received. In the circumstances, we deem the low bid of $861,000.00 to have been "acceptable" and we find no indication in the record that the bid would have been declined if sufficient funds had been available. The fee set out in the purchase ordered dated May 23, 1968, was an estimate and nothing more. Considerable hope and some expectation of receiving additional funds appears from the record from the early days of the project to its dismal end. The failure of the project lies in a financial deficiency for which we cannot penalize the claimant.

Considering first the $6,895.20 claim under the original contract, we conclude that the claimant should be paid for the services represented by this charge, but with a limitation based on the Court's right to invoke equity and good conscience. It appears that the 8 percent fee written into the employment contract would have been 6 percent except for the accelerated schedule required to meet the deadline for federal funds. It further appears that the decrease in cost from the time the claimant's work was practically completed to the date of the bid letting was $257,900.00, substantially due to inflation, which a partner of the claimant's firm described as spiraling upwards at the rate of 1½ percent per month. To put it plainly, the Court feels it would be inequitable to allow the additional 2 percent fee on the inflated cost of the project, where the certain intention was that the additional fee was to be for additional work. Therefore, the Court will allow this portion of the fee based on 8 percent of $604,000.00 and 6 percent of $257,900.00, with the work 80 percent completed, or the sum of $51,035.20, of which $48,266.40 has been paid, leaving a balance of $2,768.80.

We further find that the contract in this case provides for payment for additional services at a rate of 2 x the Direct Personnel Expense, which we cannot satisfactorily differentiate from Technical Payroll Expense, and accordingly the two invoices for

$1,425.75 and $2,541.00 are reduced by 20 percent to $1,040.60 and $2,032.80, respectively.

Upon consideration of the foregoing the Court is of opinion to and does hereby award to the claimant, Jordon, McGettigan & Yule, the sum of $5,942.20.

Judge Ducker participated in the hearing and decision of this case prior to his retirement from the Court.

Award of $5,942.20.

Order issued November 13, 1975

RYAN INCORPORATED OF WISCONSIN

vs.

DEPARTMENT OF HIGHWAYS

(No. D-570

ORDER AND STIPULATION

This day came Ryan Incorporated of Wisconsin, the claimant, by Mark L. Korb its attorney and came the West Virginia Department of Highways and the State of West Virginia, respondents, by Dewey B. Jones their attorney, and jointly represented to the Court that the parties in the above styled claim have compromised and settled all items of claim, issues and matters involved in said claim and jointly move the Court to accept the following stipulation and make an award in this action based upon the pleadings filed herein and this stipulation.

It is hereby stipulated and agreed by and between Ryan Incorporated of Wisconsin, claimant, and the West Virginia Department of Highways and the State of West Virginia, respondents, that the claimant is entitled to recover from the respondent the West Virginia Department of Highways the following sums of money on the following items alleged in its complaint on page 2, thereof, under Roman Numeral I, Unclassified Excavation, A. Differences in Measurement, 6,773 cubic yards, at 88 cents per cubic yard, $5,960.24; D. Unsuitable Excavation, 15,165-6/11 cubic yards, at 88 cents per cubic yard, $13,345.68; E. Fill Benches, 23,516 cubic yards, at 88 cents per cubic yard, $20,694.08; Total 45,454-6/11 cubic yards, at 88 cents per cubic yard, $40,000.00.

It is further stipulated and agreed by and between the claimant and the respondents hereto that all other items of claim and the parts of the above set out and described items of claim not agreed to be paid in this stipulation, as set out and alleged in claimant's notice of claim filed in this action, are to be disallowed and not considered by the Court for any award and are to be dismissed.

Upon consideration of the claimant and the respondents representations, motion and stipulation set out aforesaid the Court is of the opinion to and does sustain the same and the same are hereby received, filed, and accepted; and it is hereby further ordered that the claimant be and it is hereby granted an award against the respondents the following sums on the following items of claim alleged in its complaint.

I Unclassified Excavation	
A. Differences in Measurement	$ 5,960.24
D. Unsuitable Excavation	$13,345.68
E. Fill Benches	$20,694.08
TOTAL AWARD	$40,000.00

It is hereby further ordered that all other items of claim and the parts of claims set out and alleged in claimant's notice of claim, which were not allowed in the above award, are hereby disallowed.

ENTER:

W. Lyle Jones
JUDGE

APPROVED BY:

RYAN INCORPORATED OF WISCONSIN,
Claimant

By Mark L. Korb
Its Counsel

WEST VIRGINIA DEPARTMENT OF HIGHWAYS
and the STATE OF WEST VIRGINIA,
Respondents

By Dewey B. Jones
Its Counsel

By Henry C. Bias, Jr.
Deputy Attorney General

Opinion issued November 20, 1975

INTERNATIONAL BUSINESS MACHINES CORPORATION

vs.

SINKING FUND COMMISSION

(No. D-1013)

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 Services, et al v. Department of Mental Health,* 8 Ct. Cl. 180, the factual situations and the law applicable thereto being the same as that involved in the foregoing decision of this Court.

Claim disallowed.

Opinion issued November 20, 1975

MELLON-STUART COMPANY

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-772)

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, et al v. Department of Mental Health,* 8 Ct. Cl. 180, the factual situations and the law applicable thereto being the same as that involved in the foregoing decision of this Court.

Claim disallowed.

Opinion issued December 10, 1975

SHARON L. DICKINSON

vs.

DEPARTMENT OF HIGHWAYS

(No. D-938)

The claimant appeared in person.

Emerson Salisbury, Attorney at Law, for the respondent.

JONES, JUDGE:

Sharon L. Dickinson has filed a claim for damages to her 1969 Chevrolet Impala automobile sustained at about 12:00 p.m. on March 14, 1975, when she drove her vehicle into a large rock on the highway about 1½ to 2 miles from her home in Elkins. The claimant testified that as she drove along the Tygart River westerly on Route 33, it was foggy and her vision was somewhat limited. In claimant's own words, "Well, I could see something in the road but I wasn't sure. I can't say how far. I can't really say how far back I was but I could see something and I waited just a few minutes to make sure that there was something there, pulled out, saw the traffic coming around the curve and then I looked back and saw the ambulance and had to pull back in my lane." She further testified that there were two cars coming out of the curve towards her; that the ambulance following her had its red lights flashing; and that the objects in her lane of traffic were a large rock, approximately 12 inches thick, and other smaller rocks. It appears that the claimant was faced with an emergency judgment and she chose to pull back in her lane and strike the large rock, thereby avoiding possible injuries to the approaching cars and the ambulance behind her. The claimant's automobile was severely damaged. Two estimates of damage were in amounts of $416.02 and $445.72.

The claimant complains of the absence of a "Falling Rocks" sign, and the presence in the highway of the large rock which her automobile struck. However, there is nothing in the record to show that the failure to erect and maintain such sign had any causal connection with the accident. The road was straight and the claimant says she was travelling at a moderate rate of speed. There is no evidence as to how long the rock had laid on the highway, or whether the respondent had any notice or reason to know that it

was there. Neither is there sufficient evidence to show that a dangerous condition had existed at the place of the accident prior to its occurrence.

While the Court believes the claimant was not without fault in the exercise of her duty to keep her vehicle more completely under control after she saw "something" in the highway a substantial distance in front of her, we are of the opinion that this case falls within the purview of many prior holdings of this Court which are exemplified by a quotation from *Parsons v. State Road Commission*, 8 Ct. Cl. 35, 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."

In consideration of the foregoing, this claim is disallowed.

Judge Ducker participated in the decision of this case, but his resignation from the Court was effective before this opinion was prepared and approved.

Claim disallowed.

Opinion issued December 10, 1975

THE F. & M. SCHAEFER BREWING CO.

vs.

NONINTOXICATING BEER COMMISSION

(No. D-904)

Louie A. Paterno, Jr., Attorney at Law, for the claimant.

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

JONES, JUDGE:

The claimant, the F. & M. Schaefer Brewing Co., was engaged in the distribution of beer in the State of West Virginia from August,

1973, until June 30, 1974, when it discontinued business for economic reasons. During 1973 in compliance with Chapter 11, Article 16 of the Code of West Virginia and regulations promulgated pursuant thereto, the claimant purchased tax paid crowns and lids from the respondent, Nonintoxicating Beer Commission, in the total sum of $32,160.00. At the time of withdrawal from the State, the claimant had on hand unused, prepaid tax crowns and lids in the sum of $24,474.67. There being no statutory remedy for the recovery of such prepaid taxes, the claimant seeks redress in this Court.

Under pertinent regulations the claimant had no choice but to estimate how much its taxes would be for an arbitrary period, and prepaid crowns and lids were purchased accordingly. However, sales were far below estimates, and financial losses dictated the claimant's withdrawal. The respondent has joined in a stipulation that tax paid beer closures, representing West Virginia Beer Tax paid by the claimant in the amount of $24,474.67, have been destroyed, and that the respondent does not deny the validity of any part of this claim.

Cases heretofore decided by this Court have held that the retention of similarly prepaid taxes constituted unjust enrichment and reimbursement was required after destruction of the unused tax tokens. *General Foods Corporation v. State Tax Commission,* 9 Ct. Cl. 193, and *Central Investment Corporation v. Nonintoxicating Beer Commission,* Ct. Cl. (D-740). The Court considers the amount claimed to be an overpayment of tax which the respondent is not entitled to withhold on the ground that such retention would constitute unjust enrichment.

Accordingly, the Court hereby awards the claimant, The F. & M. Schaefer Brewing Co., the sum of $24,474.67.

Judge Ducker participated in the decision of this case, but his resignation from the Court was effective before this opinion was prepared and approved.

Award of $24,474.67.

Opinion issued December 10, 1975

PAUL W. HOLDREN, Committee for
Franklin T. Fleming, incompetent

vs.

DEPARTMENT OF HIGHWAYS

(No. D-607)

William Talbott, Attorney at Law, for the claimant.

Gregory W. Evers, Attorney at Law, for the respondent.

JONES, JUDGE:

This claim was filed by Paul W. Holdren, as Committee for Franklin T. Fleming, an incompetent, for damages to the Fleming resident situate about 1,000 feet below State Route 20 on Miller Mountain near Webster Springs. This is one of several homes fronting on the Elk River Road in a community known as Doortown. It was built by Franklin Fleming's father in 1947, and after his death Franklin and his mother continued to live there until August, 1972, when the home was abandoned because of water damage which rendered it uninhabitable. The Franklins had dug a drainage ditch, about 2 feet wide and 3 feet deep, part of the way up the mountain, and it was connected with a rock culvert near the southeast, rear corner of the residence, leading to an 8 inch pipe laid underground along the side of the residence and extending through the front yard retaining wall. Mr. Holdren, Cashier of the Webster Springs National Bank for many years, was appointed Committee for Franklin Fleming in 1964 and from that time looked after necessary repairs to the residence. He testified that between April 1967, and May 1972, he expended $4,116.70 for repairs, including a new wall in front of the house in March 1972. As a result of accumulation of water and the effects of freezing and thawing, the old concrete block wall had cracked and broken and was beyond repair. Except for structural defects which occasioned these repairs, witnesses for the claimant testified that there was no apparent damage to the home until May 1972, when cracks appeared in the foundation and walls and total deterioration set in.

During the period beginning in March 1972, and ending in August 1972, the respondent, Department of Highways, was engaged in a repair and improvement project on State Route 20 involving widening the highway approximately 6 feet on the upper

side, replacing old culvert pipes, installing new concrete drop-inlets, installing curbing designed to channel surface water to the culverts, and blacktopping. The respondent's inspector on the project testified that the replaced drainpipes were old and bordering on collapse, and that each one was taken up and replaced during the same day. He also testified that after the curbing was completed it did not catch all of the water and some of it did run across the highway and over the lower side due to the imperfect crown of the road grade.

Mrs. Fleming testified that during the night of April 13-14, 1972, heavy rains caused the yard to flood, water oozed through basement walls and parts of the new retaining wall collapsed. A neighbor, Maxine Coakley, viewed the property on the morning of April 14 and saw the broken wall and flooded yard, and she said it looked to her like the water "was coming through under the house and was coming up out of the ground just like one of these artesian wells. I mean it was just bubbling up out of the ground." Vivian Bennett, who was living with her grandmother and uncle, testified that during the night she heard strange, rumbling sounds under the house like water running. She had experienced several other rains as hard as this one without any apparent damage. The United States Department of Commerce record of rainfall for Webster Springs shows .10 of an inch for April 13, 1972, and 1.98 inches for April 14, 1972. Other heavy rainfalls for the area were recorded as 1.24 inches on February 26 and 1.14 inches on April 8 of the same year.

The claimant's contentions of liability are concentrated upon this one flooding incident. He alleges that the highway improvement project of the respondent was so carried on that the course of drainage was changed and excessive quantities of water were gathered and thrown upon the claimant's property. The respondent says that the project was conducted in a workmanlike and reasonable manner, that the culvert above the Fleming property was replaced by a pipe of equal size, that the location of the new pipe remained the same, and that the drainage was not changed in any appreciable degree. The culvert in question has discharged into the same natural drain for many years, and from the testimony of the respondent's witnesses it appears that all of the water running through this culvert does not stay in the beginning drain but branches out and a substantial part flows away from the claimant's property.

It appears from the evidence that the claimant's property was at least 1,000 feet from State Route No. 20. The residence was located at the foot of a mountain at a point where it has been obvious to the owners that surface water from the mountain must be diverted from the ground at the rear of and underlying the dwelling. Many years ago the ditch was dug which terminated at a point only a few feet from the house, where it entered the rock culvert which witnesses described as a big, dark hole in the ground. No witness could see the end of the pipe known to be near the hole, and it could only be measured where it discharged through the front yard retaining wall. John Sefton, a State geologist, testified that in his opinion both the ditch and the pipe were inadequate to contain the flow of surface water from the area between the highway and the house.

The Court can find little, if anything, that the respondent has done that in any way could have contributed to this calamity. Conversely, based on all the evidence, direct and circumstantial, the Court believes that the claimant did not provide adequate protection against the ever-present water hazard, as he was required by law to do if his property was to be kept safe from injury. It appears to the Court that one storm did not cause the destruction of the claimant's home, but that over the years the supporting ground had become so saturated that it approached a condition which Franklin Fleming's niece described as sounding like a spring. The saturated soil had become so unstable that it could not support the structure and the heavy rain on the night in question was only a contributing factor.

The case of *Osborne v. Department of Highways*, 10 Ct. Cl. 83, (D-579 and D-634), cited by the claimant and involving the same highway project, is clearly distinguishable. In fact, there is no valid comparison that can be made of the causes and conditions contributing to the damages sustained in the two cases, *Wotring v. Department of Highways*, 9 Ct. Cl. 138, also cited by the claimant, involved new road construction, the abandonment of an old road, the stopping-up of two culverts adjacent to the claimant's land, and notice to the State that a hazardous condition existed. None of these circumstances is present in this case.

The State can only be held to the duty of exercising reasonable care and diligence in the maintenance of its highways. Under the law of this State surface water is considered a common enemy which each landowner must fight off as best he can, provided that

an owner of higher ground may not inflict injury to the owner of lower ground beyond what is reasonably necessary. The evidence in this case shows that the respondent did conduct its highway improvement project in a reasonably prudent manner; that the respondent did nothing appreciably to increase the flow of water or change the character of the established drainage to the damage of the claimant; and in the Court's opinion, no act or omission of the respondent proximately caused the damages sustained by the claimant. Accordingly, the claim is disallowed.

Judge Ducker participated in the decision of this case, but his resignation from the Court was effective before this opinion was prepared and approved.

Claim disallowed.

Opinion issued December 16, 1975

KENNETH E. PLANTS

VS.

DEPARTMENT OF HIGHWAYS

(No. D-672)

Robert Lee White, Attorney at Law, for claimant.

Gregory W. Evers, Attorney at Law, for respondent.

GARDEN, JUDGE:

Around 5 o'clock P.M., on the evening of February 17, 1972, the claimant was proceeding in his car from his place of employment in Charleston to his home in Winfield, West Virginia. He was travelling in a westerly direction on Seventh Avenue in Charleston near its intersection with 35th Street. Seventh Avenue, at this point, is a two-lane roadway for westbound traffic and was of concrete construction. The weather conditions were poor in that it was raining and the roads were wet. Apparently, some work in the nature of grading had been done along the north berm of Seventh Avenue for there was a considerable amount of mud along the north side of the street.

The claimant was traveling at a speed of about 35 miles per hour in the left-hand lane, and when just west of the intersection, he observed traffic ahead of him slowing down. Looking into his

rear-view mirror, he was able to determine that the right-hand lane was free of traffic, and he, thus, turned to the right and into the right-hand lane. As this movement was being made, his left-front wheel struck a large hole in the highway which was located in the right-hand lane. As a result, the left-front tire of claimant's car ruptured causing claimant to lose control of his automobile. Out of control, he continued about 150 feet west in the right-hand lane of Seventh Avenue where his car left the highway and struck the guardrail erected on the north side of the highway.

On cross-examination, the claimant testified that he was an accountant and worked in an office in downtown Charleston, and that Seventh Avenue was his usual route home from the office. He indicated, however, that his work took him to, at least, ten counties in central West Virginia, and he, thus, did not use Seventh Avenue too frequently. He did admit that he had observed the hole three or four days prior to the accident and that it was about three feet by three feet and maybe two feet deep. On this prior observation, the hole was not filled with water. He explained his failure to observe the hole on the date of the accident by reason of it being covered with water.

Officer D. W. Vaughan of the Charleston Police Department testified that he, together with Officer Arthur E. Collier, investigated the accident. He stated that while he wasn't sure of the dimensions of the hole, he was of the opinion that it was a large hole and between 8 to 10 inches in depth. While he did not remember the hole being covered completely with water, he did state that it had some water in it. According to Officer Vaughan, Seventh Avenue at and near the accident scene was of concrete construction; that it was poured in blocks with expansion joints between the blocks; and that the hole was located at a corner of one of the blocks. He was of the opinion that the hole had been worn over a period of months and had not resulted from a sudden breaking.

Officer Collier, whose testimony was introduced through his deposition, testified that when he arrived at the accident scene, the right-hand westbound lane was partially covered by water and that he also observed a big hole in the right-hand lane which was covered with water. He indicated that prior to the date of claimant's accident, he had struck the hole and had almost lost control of his car; that the hole was 12 inches long, 2 feet wide and 8 to 10 inches deep; that he had reported the existence of the hole

two or three times to police headquarters within one to two weeks prior to the claimant's accident, and that while he didn't know if headquarters had reported the same to respondent, standard procedure required headquarters to report the same to respondent or to the Charleston Street Department, depending on which agency had the responsibility of a particular street.

The respondent called as its only witness, its claims investigator, Edward Goodwin. Through Mr. Goodwin there was introduced into evidence a foreman's report reflecting that on February 3, 1972, a work crew had requisitioned two tons of "cold patch" and had used the same to patch Seventh Avenue, a street of one and three quarter miles length. He was unable to state whether the subject hole was in existence on February 3, 1972, and if so, whether it had been patched. He stated that he had made an investigation as to whether the respondent had received notice of the hole prior to claimant's accident and could find none. He admitted, however, that respondent did not follow any set procedure in respect to logging or recording complaints concerning highway conditions.

In passing, it should be noted that both Officers Vaughan and Collier testified that upon examination of the hole, they were unable to detect any evidence of recent patching. They further testified that after the claimant and his car had been removed from the accident scene, and as they were leaving the accident scene, another car proceeding west of Seventh Avenue struck the same hole, spun completely around but managed to avoid striking the guardrail.

Addressing ourselves first to the question of claimant's alleged contributory negligence, we are of opinion that the evidence does not sustain this affirmative defense. It is true that the claimant quite candidly admitted that he had observed this hole three or four days prior to the accident, but as he testified, and as corroborated by Officer Collier, its presence was completely obscured by water. In addition, we are of opinion that claimant had the right to assume that respondent would have discharged its legal duty and repaired this hole within the three or four day interval. We also do not believe that claimant violated any statutory prohibition in attempting to pass the slower moving left lane of traffic on the right.

On the other hand, and while we recognize that the respondent is not an insurer of those using its highways, we believe the evidence

clearly indicates that respondent failed to discharge its duty of exercising reasonable care in maintaining Seventh Avenue in a reasonably safe condition for the traveling public, and, in particular, this claimant. While there was no proof that the respondent received direct notice of the existence of this dangerous condition, it is clear from the testimony of Officer Collier that this defect was in existence for, at least, one and possibly two weeks prior to the accident. This Court recently made an award in *Lohan v. Department of Highways*, 11 Ct. Cl. 39, (D-910), partially on the basis that the highway defect was on U. S. 60 east of Charleston, a heavily traveled highway. This accident took place on Secondary State Route 28 which, in 1972, was a principal artery leading from downtown Charleston to Dunbar and other points west. As indicated before, while the evidence fails to establish that respondent knew of the defect, we feel that a preponderance of the evidence clearly demonstrates that it should have known of the same.

As a result of striking the guardrail, the claimant suffered a mid-shaft fracture of the femur of his left leg and a large scalp wound. He was removed from the accident scene by ambulance and was taken to the Charleston General Hospital where he was placed under the care of Dr. Carl J. Roncaglione, an orthopedic surgeon. He remained in the hospital until March 16, 1972. While confined, he was first placed in skeletal traction in order to reduce the fracture, and thereafter, the traction was removed and an internal medullary pin was inserted in the left femur. On March 17, 1974, the claimant was again admitted to the hospital at which time Dr. Roncaglione removed the medullary pin, and he was discharged on March 20, 1974.

He was followed by the doctor on three occasions in his office, the last visit being on April 25, 1974. According to Dr. Roncaglione's report dated December 17, 1974, which was introduced into evidence, the claimant suffered a severe fracture of his femur, much soft tissue damage and great pain; that as a result of the injury, a good bit of scar tissue will develop which will, in the future, cause early fatigue and some limitation of motion in the left leg, but the doctor doubted that the injury would precipitate any arthritic development. The respondent obtained an independent examination of the claimant by Dr. Robert L. Ghiz, also an orthopedic surgeon. Dr. Ghiz's report dated November 13, 1974, was also introduced into evidence and it reflected that the

claimant's prognosis was quite good, but that the claimant would suffer intermittent soreness and pain in his left hip and left thigh for some time to come.

In respect to damages, the claimant testified that he was employed as an accountant and lost wages of $1,937.50 in 1972, and $825.00 in 1974, or a total of $2,762.50. While his testimony was not corroborated by his employer, we are of opinion that he sufficiently established this item of loss. He further testified that his clothing, which was ruined as a result of the accident, was worth $100.00, and copies of bills from the Charleston General Hospital covering the charges for claimant's two confinements in a total amount of $2,647.63 were introduced into evidence. These last two items of special damage will also be considered in fixing the amount of the award.

On the other hand, the only proof offered in respect to Dr. Roncaglione's bill was the claimant's testimony that it was about $678.00. No further evidence was introduced in support of this charge, nor was any testimony offered that the doctor's charge was reasonable or necessary. In respect to the claimant's 1970 Datsun, which claimant testified was damaged beyond repair, the only testimony offered as to fair market value was that of claimant who testified at one point that it was worth $1,400.00 and at another point $1,510.00. While this Court has been liberal in the past in respect to proper proof of damages, we are of opinion that unless items of special damages can be stipulated, we must require some semblance of proper evidence to support items of special damage. Consequently, the doctor bill and the automobile property damage claim will not be considered.

As heretofore indicated, being of opinion that the accident and resulting injuries to claimant proximately resulted from the negligence of respondent, and further believing that the claimant was free of contributory negligence, and that his injuries were serious, painful and to some extent permanent, we hereby make an award of $14,500.00.

Judge Ducker participated in the hearing and the decision of this case prior to his retirement.

Award of $14,500.00.

Opinion issued January 8, 1976

AMERICAN CAN COMPANY

vs.

DEPARTMENT OF MENTAL HEALTH

(No. D-965)

PER CURIAM:

This claim was submitted upon the notice of claim and respondent's amended answer, from which it appears that the goods described in the notice were ordered by and delivered to Weston State Hospital in fiscal year 1972; that the charge therefor in the amount of $1,125.85 is fair and reasonable; and that the respondent had sufficient funds on hand at the close of the fiscal year from which said account could have been paid, but inadvertently the account was not paid and funds for the fiscal year expired.

In consideration of the foregoing, the Court awards the sum of $1,125.85 to the claimant, American Can Company.

Award of $1,125.85.

Opinion issued January 8, 1976

JAY H. CADLE, D/B/A CADLE SANITARY SERVICE

vs.

OFFICE OF EMERGENCY SERVICES

(No. D-1006)

Bobbie Ann Cadle, Secretary, appeared for the claimant.

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

JONES, JUDGE:

Shortly after the Buffalo Creek disaster in late February, 1972, the claimant entered into an agreement with the Office of Emergency Planning, a State agency, to furnish portable toilet facilities to the disaster area in Logan County. The first units were delivered on February 29, 1972, and during the term of the agreement, which was terminated by the respondent in September, 1975, a total of 97 units were delivered to the area. The

agreement provided for a $10.00 delivery and installation charge and $37.50 per month for serving and maintaining each of the units, which latter charge was increased to $45.00 per month beginning July 1, 1975. In another emergency and under a similar agreement, 6 such portable facilities were delivered by the claimant to the Meadow Bridge area in Fayette County in April, 1974.

As of July 1, 1973, the Office of Emergency Planning and the Office of Civil and Defense Mobilization were abolished by the Legislature and all of their respective functions and responsibilities were transferred to the respondent, Office of Emergency Services. Payment of the monthly rentals for the Buffalo Creek units continued through April 30, 1974, but further rental payments were not received although the claimant continued to service and maintain from 14 to 19 units until September 26, 1975, when the remaining units were picked up upon notice of the respondent to do so. On December 13, 1974, the respondent paid to the claimant $513.50 as a final rental payment for the units delivered to Meadow Bridge, $4.00 less than the amount due. When the claimant was requested by the respondent to pick up the remaining units, two were missing at Buffalo Creek and one at Meadow Bridge. A diligent search was made for these units but they were never found.

The claimant introduced records showing Buffalo Creek rentals unpaid in the amount of $9,678.50 and the cost price of two missing units in the amount of $540.00, a total of $10,218.50. The Meadow Bridge claim is for the $4.00 balance of rentals due and the cost of one missing unit in the amount of $270.00, a total of $274.00. The aggregate claim is $10,492.50.

Richard Lee Weekly, Director of the Office of Emergency Services, testified that to the best of his knowledge and belief toilet facilities were furnished, serviced and maintained as shown by the claimant, that all services were satisfactory and the charges made appeared to him to be reasonable and proper. He was not able to give a satisfactory explanation as to why payments were withheld, but it appears that the merging of Emergency Services in 1974 may have resulted in some confusion contributing to the inadvertent failure to pay rentals as they came due.

The Court perceives no defense to this claim and finds that the claimant is entitled to recover for the facilities and services furnished in the amount claimed. Therefore, an award hereby is

made to the claimant, Jay H. Cadle, d/b/a Cadle Sanitary Service, in the amount of $10,492.50.

Award of $10,492.50.

Opinion issued January 8, 1976

INTERNATIONAL BUSINESS MACHINES CORPORATION

vs.

WEST VIRGINIA SECRETARY OF STATE

(No. D-1026)

PER CURIAM:

During the month of June 1975 the claimant's copier, installed in respondent's office was used by the respondent's employees, but the claimant did not invoice for these copies until August of 1975, after the close of fiscal 1974-75. At the hearing, a letter from the respondent was filed as an exhibit which admitted the validity of the claim in the amount of $70.23 and further set forth the fact that sufficient funds were on hand at the close of the fiscal year from which the bill could have been paid.

In consideration of the foregoing, the Court awards the sum of $70.23 to the claimant.

Award of $70.23.

Opinion issued January 8, 1976

PARKE, DAVIS & COMPANY

vs.

DEPARTMENT OF MENTAL HEALTH

(No. D-1028)

PER CURIAM:

The claimant in its Notice of Claim alleges that between July 14, 1972 and November 7, 1973 it shipped certain medical merchandise to respondent's Weston State Hospital, and that during the above-mentioned period invoices totalling $586.80 were not paid. Respondent in its answer admits that the merchandise was

received, but that the correct total amount of the unpaid invoices is $545.96. At the hearing the Court was advised that claimant was willing to accept the sum of $545.96 in full statisfaction of its claim.

In consideration of the foregoing, the Court awards the sum of $545.96 to the claimant.

Award of $545.96.

Opinion issued January 8, 1976

FRANK A. ROCCHIO,
SHERIFF OF HANCOCK COUNTY

VS.

JOHN M. GATES, STATE AUDITOR

(No. D-1022)

PER CURIAM:

This claim was submitted for decision on the facts as set forth in the Notice of Claim and the Answer. These pleadings reveal that during the September 1972 Term of the Circuit Court of Hancock County an individual served on a petit jury and was paid the sum of $16.00; however, reimbursement by the respondent was not requested until May 20, 1974, well after the close of fiscal year 1972-73. The pleadings further reflect that at the close of fiscal year 1972-73, there were sufficient funds on hand from which reimbursement could have been made, had the request been submitted timely.

In 1975 this Court in the claims of *Archie Day, Sheriff of Putnam County v. John M. Gates, State Auditor,* (D-944), and *D. A. Wright, Sheriff of McDowell County v. John M. Gates, State Auditor,* (D-963), made awards in similar factual situations. The awards were made in those claims mainly on the basis that sufficient funds were on hand at the close of the fiscal year in question to pay the claims, had the requests been submitted timely. The foregoing being true in this claim, we therefore make an award of $16.00 to Frank A. Rocchio, Sheriff of Hancock County.

Award of $16.00.

Opinion issued January 8, 1976

GERALD E. TINSLEY

VS.

DEPARTMENT OF HIGHWAYS

(No. D-979)

The claimant appeared in person.

Nancy Norman, Attorney at Law, for the respondent.

JONES, JUDGE:

The only witnesses in this case were the claimant, Gerald E. Tinsley, and his father, Paul E. Tinsley, and following is a summary of their testimony. On or about May 6, 1975, a storm drain became clogged on a State maintained highway known as 40th Street in the City of Nitro. Paul E. Tinsley, who lives nearby, called the North Charleston Maintenance Office of the respondent, Department of Highways, and reported the flooded condition of the street. He was assured that the water would be taken care of promptly. During the ensuing period of approximately five weeks before the claimant's accident, Edward Tinsley called the respondent's employees five or six times, but nothing was done to remove the hazard. On or about June 12, 1975, at 6:30 a.m. the claimant was driving to work along 40th Street when he came out of a curve at about 20-25 miles per hour within a short distance of the culvert. It had rained earlier and suddenly the claimant was confronted with an approaching car in the claimant's lane of traffic. The oncoming driver had swerved into his left lane to avoid the deepest part of the water which extended completely across the street. There was not sufficient space to drive his car off the street on his right side so the claimant swerved to the left into the water and into the culvert, blowing out the left front tire and damaging the left front wheel and fender and front panel of his automobile. The other driver did not stop. When the accident was reported to the respondent, immediate action was taken to repair the drain and the flooding hazard was eliminated. The claimant has proved damages to his automobile in the amount of $163.10.

The Court concludes that the respondent was negligent in its failure to correct a dangerous condition within a reasonable time after receiving notice thereof; and further that in view of the sudden emergency which confronted the claimant, he acted as a

reasonable, prudent person in the circumstances, and is entitled to recover.

Accordingly, the Court awards the claimant, Gerald E. Tinsley, the sum of $163.10.

Award of $163.10.

Opinion issued January 16, 1976

W.VA. STATE INDUSTRIES

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-811b)

Claimant appeared through its business manager, *Kenny Hinds*.

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

GARDEN, JUDGE:

In an opinion recently rendered in the consolidated claims of *W. Va. State Industries vs. Department of Mental Health,* Claims D-876a and D-876b, were pointed out that the claimant is an entity established pursuant to Chapter 28, Article 5B, of the Official Code of West Virginia of 1931, as amended, the "Prison-Made Goods Act of 1939." For the purpose of providing prisoners at the state prison in Moundsville with a means of occupying their time, it produces a varied line of products for sale to other state agencies. The consolidated claims mentioned above were treated as requests for advisory determinations pursuant to Code 14-2-18 because they involved disputes between state agencies, and this claim likewise will be so treated.

This claim involves a total of $20,005.20 represented by invoices for paper products, mattresses, smoking and chewing tobacco, soap and bleach products and clothing items sold by claimant to respondent in fiscal year 1968-69 and during the following three fiscal years. Broken down, the following total dollar amount of invoices were unpaid during the four fiscal years: fiscal 1968-69, $15,482.71; fiscal 1969-70, $4,391.40; fiscal 1970-71, $124.89; and fiscal 1971-72, $6.20. No explanation was offered at the hearing for the non-payment of these invoices.

Under the provisions of Code 14-2-21, this Court is prohibited from taking jurisdiction of any claim that is not filed with the Clerk within the applicable period of limitation, as prescribed by law. The claimant here seeks an award for a total of various separate invoices. These invoices constitute open accounts, and we are thus of the opinion that the five year statute of limitation is applicable. The claim was filed on August 30, 1974, and consequently the unpaid invoices rendered during fiscal 1968-69 in the total amount of $15,482.71 cannot be considered. Of the total unpaid invoices in fiscal 1969-70, a total of $89.35 were rendered prior to August 30, 1969, and they also cannot be considered, thus reducing the claim in fiscal 1969-70 to $4,302.05.

Mrs. Hazel Kinder, Chief of Business Management for Public Institutions, testified that during the years under consideration, certain funds in the current expense account were expired as follows: fiscal 1969-70, $444.21; fiscal 1970-71, $1,837.02; and fiscal 1971-72, $112.00. Payments to claimant to the extent of the expired funds in the respective years would have been legal, but to the extent that the total of the invoices exceeded the expired funds in the respective years, payments would have been illegal. We are thus of the opinion that the claimant should recover the following amounts for the following fiscal years:

fiscal year 1969-70	$444.21
fiscal year 1970-71	$124.89
fiscal year 1971-72	$ 6.20
TOTAL	$575.30

The $3,857.84 difference between the total amount of the invoices dated within the five year period prior to August 30, 1974, namely $4,433.14, and the $575.30 which we feel claimant should be awarded, accrued in fiscal 1969-70, and payment of this difference cannot be sanctioned under our holding in *Airkem Sales and Service, et al v. Department of Mental Health,* 8 Ct. Cl. 180.

This being a request for an advisory determination, no award will be made, but the Clerk of this Court is requested to forward copies of this opinion to the claimant and the Commissioner of Public Institutions.

Opinion issued January 19, 1976

ROBERT L. JEFFERSON

VS.

DEPARTMENT OF HIGHWAYS

(No. D-1023)

PER CURIAM:

Pursuant to a written stipulation by the parties hereto, an award hereby is made to the claimant, Robert L. Jefferson, in the amount of $100.00, for the cutting of trees growing upon the claimant's property adjacent to the respondent's right of way known as Country Club Road in Harrison County.

Award of $100.00.

Opinion issued January 19, 1976

MID-MOUNTAIN MACK, INC.

VS.

DEPARTMENT OF MOTOR VEHICLES

(No. D-962)

Larry Whitt, Comptroller, represented the claimant.

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

JONES, JUDGE:

The claimant, Mid-Mountain Mack, Inc., sold a truck to Marcus Coal Company and took the company's check for $2,334.27, including $2,088.02 for the State of West Virginia privilege tax. Thereupon the claimant mailed its own check in the amount of $2,334.27 to the respondent, Department of Motor Vehicles, in payment of the privilege tax and other charges. Marcus Coal Company then asserted that the truck was not what it had ordered and stopped payment on its check. The claimant contacted the respondent and was advised to return all documentation for cancellation. The license plate was returned unused and with the original package unopened, but the Certificate of Title, issued in the name of Marcus Coal Company, already had been sent to Mack Financial Corporation in Atlanta, Georgia, for financing purposes.

Almost immediately, the truck was sold to Melvin Cox and the privilege tax again was required to be paid to the respondent in order to obtain a license in Mr. Cox's name. Before the first title could be recovered, assigned by Marcus Coal Company and returned to the respondent, such a period of time had elapsed that there was nothing that could be done within the authority of the respondent to correct the anomalous procedure.

The respondent says that if all the transaction documents had been returned promptly, the Department could have "backed it out of the computer and out of the files", and the claimant's check would have been returned. The respondent recognizes and admits that there was only one completed transaction and that the State is only entitled to one tax. However, two licenses were applied for and, technically, two privilege taxes were required by law to be paid. The Court is satisfied that only one sale transaction actually was consummated, and believes that to permit the respondent to retain the duplicate tax payment would constitute unjust enrichment. Therefore, the Court is of opinion that the claimant, Mid-Mountain Mack, Inc., is entitled to reimbursement and does hereby make an award in its favor in the sum of $2,088.02.

Award of $2,088.02.

Opinion issued January 27, 1976

SYLVESTER BIRD and STATE FARM
MUTUAL AUTOMOBILE INSURANCE COMPANY

VS.

DEPARTMENT OF HIGHWAYS

(No. D-934 A & B)

Richard Bush for the claimants.

Gregory W. Evers, for the respondent.

JONES, JUDGE:

The claimants, Sylvester Bird and State Farm Mutual Automobile Insurance Company, seek recovery for damages to a 1969 2-door Pontiac Catalina automobile, owned by Bird and insured for $50.00 deductible collision coverage by the insurance company, alleging that the corner of the blade of a snow plow or grader, operated by the respondent's employee, collided with and

caused the damage to the automobile. The amount of damages, estimated and claimed as $565.39, is not contested.

During a heavy snowfall, on March 17, 1973, at approximately 5:30 p.m., claimant Bird was forced by hazardous road conditions to park his vehicle along the side of State Route 33, about 5 miles east of Spencer in Roane County. He testified that he left his car about 3 feet from the edge of the pavement, locked the doors, and then returned to his home in Spencer with a friend who had been with him on a fishing trip and had chains on his tires.

At about 10:00 o'clock the following morning, claimant Bird returned to his vehicle and found a cut along the left side from the rear bumber to the center of the door, obviously inflicted by a sharp object. Claimant Bird testified that the snow had been stacked along side the highway to a depth of about 12 inches, and that it "was pushed up and rolled back in approximately four inches from the gash where the car was cut open and there was snow under it." Claimant Bird went to the District Office of the respondent, where he was told that the highway had been plowed but that the respondent's employees had reported no accidents.

Eugene Rhodes, a grader operater for the respondent, testified that he had plowed Route 33 from about 6:00 p.m. to 10:30 p.m. on March 17; that the grader was equipped with a 12-foot blade, about 18 inches high and not extending outside the tractor wheels; that the operating speed of the tractor was 5 to 8 miles per hour; that he saw an automobile parked along the road in front of the office of Joe Cann, a veterinarian, where claimant Bird said he left his car; that he passed the car with the wheels and blade of the tractor on the highway; and that he made no contact with the parked vehicle.

It appears to the Court that the speculative, circumstantial evidence of the claimants may not be deemed to approach the preponderance required for a recovery in this case, particularly in view of the direct, adverse testimony of the respondent's operator, who was the only person having certain knowledge of the snow plowing operation.

Accordingly, it is the opinion of the Court that the claimants have not proved the allegations of their complaint, and their claim is disallowed.

Claim disallowed.

Opinion issued January 29, 1976

THOMAS EDISON HALE

VS.

DEPARTMENT OF HIGHWAYS

(No. D-842)

LARRY LEE WINGATE

VS.

DEPARTMENT OF HIGHWAYS

(No. D-843)

Norris Kantor and *Ralph Masinter* Attorneys at Law, for the claimants.

Gregory W. Evers, Attorney at Law, for the respondent.

JONES, JUDGE:

Pursuant to agreement of counsel these claims were consolidated for purposes of hearing and decision. The claims are for personal injuries sustained in separate accidents occurring a few hours apart on March 8, 1974, at the location of a Department of Highways construction project on State Route No. 35 near Winfield in Putnam County.

Claimant Thomas Edison Hale, 44 years of age, was employed by Hennis Freight Lines of Roanoke, Virginia, and was driving a tractor-trailer in a northerly direction on a dry road and in good weather. Hale had operated tractor-trailers for more than 18 years and his vehicle was approximately 57 feet long and had a gross weight of approximately 40,000 pounds. He had driven this road as many as three to six times a week over a period of 15 years. According to his testimony, at about 1:00 a.m. on said day he was driving at approximately 20 to 30 miles per hour when he reached the top of a gradual grade where the road leveled out and his headlights revealed a ditch, 18 inches to 2 feet deep, completely across the road, 20 to 30 feet in front of him. The entire length of his vehicle struck and passed over the ditch, coming to a stop about the length of the vehicle beyond. He was thrown against the steering wheel and the top of the cab. Hale drove his vehicle about 10 miles to Pliney Truck Stop, where he called his employer and then called an ambulance. It was later determined that the

tractor-trailer had to be towed back to the owner because the frame was bent, the motor mounts broken and the engine cracked. An ambulance arrived and on the way back along the road Hale had traveled, he saw the claimant Wingate falling to the ground from the cab of his tractor-trailer, which had just struck the same ditch and had come to a stop. Wingate was placed in the ambulance and both claimants were taken to Thomas Memorial Hospital in South Charleston. Hale remained in the hospital for 2 ½ to 3 hours.

On the same night, at about 3:00 a.m., at the same place and under the same conditions, except for a possible variance in the depth of the ditch, claimant Larry Lee Wingate, 38 years of age, was driving a tractor-trailer owned by his employer, Superior Motor Express, of Gold Hill, North Carolina. He had driven tractor-trailers for approximately 15 years and over this road for about 7 years. His vehicle was approximately 55 feet long and was loaded with lumber, all with a gross weight of about 69,000 pounds. According to his testimony, Wingate had slowed to about 25 to 30 miles per hour upon approaching a sign warning of a dip or rough road which he had known of for several years. He was within 15 to 20 feet of the ditch when he first saw it, he struck the ditch, about 18 inches deep by his estimate, and was thrown about and against the top of the cab. He was able to bring the tractor-trailer to a stop, got out of the cab, fell to the ground and crawled to the front of the truck. There, almost immediately, he was picked up by the aforementioned ambulance driver and was taken, along with Hale, to the Thomas Memorial Hospital. He was discharged and returned to his home 8 days later. Upon cross-examination, Wingate admitted that he had answered a pre-trial interrogatory that he was traveling approximately 40 to 50 miles per hour as he approached the ditch; and then he asserted that he had no way of knowing how fast he was traveling at the time.

Both claimants testified that the only signs they saw were ones that had been along the highway for several years. They did not recall a blinker light or road construction signs. They both testified that they slowed down, knowing that they were approaching a rough place and dip in the road, which had long been marked by a warning sign. All witnesses agreed that Route 35 was a heavily traveled road with a large amount of truck traffic. Evidence regarding speed limits was conflicting and inconclusive.

Donald Wright, Sheriff of Putnam County, testified that he had driven south along the highway between 4:00 and 5:00 p.m. on March 7, 1974, while the ditch was being dug, and that he returned

at about 9:00 p.m. when the work had stopped and the workmen had left the job. It looked to him like the ditch had been filled with gravel or similar material and he said it had been thrown out by traffic until the ditch was approximately 12 inches deep. He observed the blinker light about one-fourth mile from the ditch, but did not recall seeing road construction signs, and said there were no flares or "men working" signs near the project. Knowing the ditch was there, he struck it at about 15 miles per hour and said that was "too fast". He returned to his office in Winfield where two or three telephone calls were received, reporting a "bad situation", and notice thereof was given by his office to the Department of Highways.

The respondent's general foreman on the project testified substantially as follows: A blinker "construction ahead" sign was placed about one mile away on either side of the ditch, and on the south side there was a reflector-type road construction sign at 1,000 feet and one at 500 feet, "men working" signs near the ditch, two flagmen until quitting time and flares at night, which he could not say were burning at the time of the accidents; that he had asked his superiors for flagmen around the clock until the work was finished but that no flagman was on duty at the times of the accidents; that the "men working" signs were laid down at night; that the ditch was not entirely across the road, but about 26 feet long overall and about 8 feet into the claimants' right-hand lane; that the blacktop had been ripped up with a bulldozer over a strip about 8 feet wide and the ditch in which the drainpipe was laid was about 6½ feet deep; that they used two truck loads of slag in filling the ditch, which was not enough, so the workmen finished the fill with pea gravel and sand; that the ditch was packed and leveled with a bulldozer; that when he arrived at work the following morning, a flagman, who had been dispatched to the scene during the night, was on duty, and the ditch was about 18 inches deep; and that the County office of the respondent had sent the flagman to the job during the night because of the hazardous situation.

While the filling of the ditch by the respondent's employees may have appeared to them to be sufficient for the duration of the night, it obviously was a temporary job and was not stable enough to withstand the heavy traffic to which it was subjected. The inherent danger was such, in our opinion, that only the stationing of flagmen would have been a sufficient safeguard under the circumstances. The fact that the respondent's employees ran out of slag and substituted less stable material, pea gravel and sand, to

finish the fill, should have alerted them to the apparently inevitable result. Sheriff Wright's testimony establishes that much of the fill had been knocked out of the ditch by traffic not long after work was finished, and the respondent's general foreman admitted that the ditch was 18 inches deep before 7:00 o'clock the next morning. Assuming that the "road construction" signs were properly in place, the claimants came upon this hazardous condition suddenly and, we believe, without sufficient warning. There is nothing to show that either of them was driving at an unreasonable speed, or that they failed to take any proper precaution or defensive measure. We find that the respondent was negligent; and we cannot say that the claimants were guilty of such conduct as would bar their recovery.

With regard to damages, we have considered the testimony of the claimants relating to their injuries, all medical evidence and the claimants' loss of earnings as shown in the record. Both claimants were in good health at the time of the accidents. While both claim limitations of their activities, they have resumed their former employment.

Claimant Hale sustained injury to his cervical spine, with continuing residual strain of the muscles and ligaments of his neck, not of a permanent nature, and his physician confirms that he is still suffering from tinnitus (hearing noises) in the left ear, which may not be reversible, and that some loss of hearing has resulted. He missed five weeks' work and his loss of wages was $2,082.13. Medical and hospital charges amounted to $679.70. The Court assesses his damages at $8,250.00.

Claimant Wingate sustained a fracture of the second lumbar vertebrae of his spine, and while the prognosis is unclear, he is not expected to attain final recovery for several years. He was confined to the hospital for eight days and was unable to return to work for about eight months. His loss of wages was approximately $3,750.00, and his medical and hospital bills totalled $794.30. We have assessed his damages at $11,000.00.

In consideration of the foregoing, the Court hereby awards the claimant, Thomas Edison Hale, the sum of $8,250.00, and the claimant, Larry Lee Wingate, the sum of $11,000.00.

Awards: Thomas Edison Hale—$8,250.00.

Larry Lee Wingate—$11,000.00.

Opinion issued February 20, 1976

ASHLAND CHEMICAL COMPANY

VS.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-928)

PER CURIAM:

The claimant during fiscal year 1972-73 delivered certain material to the West Virginia Penitentiary and invoiced the respondent for a net amount of $249.65. Likewise, during fiscal year 1973-74 material was delivered to respondent, and it was invoiced in the net amount of $51.80.

The record clearly reflects that the respondent expired sufficient funds in its current expense appropriation in fiscal year 1972-73 from which the net amount of $249.65 could have been paid. This is not true for fiscal year 1973-74, and consequently we must deny the claim for the year in the amount of $51.80 on the basis of our decision in *Airkem Sales and Service, et al v. Department of Mental Health,* 8 Ct. Cl. 180.

Award of $249.65.

Disallowed—$51.80.

Opinion issued February 20, 1976

VALLEY WELDING SUPPLY COMPANY

VS.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-820b)

PER CURIAM:

The respondent in May of 1973 ordered certain welding rods from the claimant, and these welding rods were shipped to the West Virginia Penitentiary on May 25, 1973 and were accepted by the respondent. The claimant submitted an invoice dated May 25, 1973 for these rods, but for some unexplainable reason the invoice in the amount of $25.70 was not paid. The record reflects that sufficient funds in the respondent's current expense appropriation

for fiscal year 1972-73 were expired from which this invoice could have been paid, and the Court accordingly makes an award in favor of the claimant in the amount of $25.70.

Award of $25.70.

Opinion issued March 4, 1976

FRED H. GREGORY

VS.

DEPARTMENT OF HIGHWAYS

(No. D-972)

PER CURIAM:

A stipulation was filed in this claim which revealed that during the month of February, 1975, the claimant, while operating his automobile in a prudent and reasonable manner, was involved in an accident on State Route 4 in Cross Lanes, West Virginia, approximately one-half mile from the route's intersection with West Virginia State Route 62. The stipulation further revealed that the claimant's vehicle struck a hole or sunken area in the highway which was at least 8 inches deep and that the area was not marked in any manner to give warning of its existence, although the respondent was aware of the condition. Damages in the amount of $35.63 were also stipulated, and being of the opinion that the facts set forth in the stipulation create liability and that the damages are reasonable, we thus make an award in favor of the claimant in the amount of $35.63.

Award of $35.63.

Opinion issued March 4, 1976

MOTORS INSURANCE CORPORATION,
SUBROGEE OF QUINCY E. HOLSTEIN

VS.

DEPARTMENT OF HIGHWAYS

(No. D-1009)

PER CURIAM:

The stipulation filed in this claim reveals that the claimant's insured, Quincy E. Holstein, sustained damage to his automobile

on June 12, 1975, on State Route 3 in Boone County, West Virginia, when the same was struck by certain rocks and other debris resulting from dynamiting being performed by the respondent. The stipulation further reveals that the claimant, pursuant to its policy with Holstein, paid him the sum of $228.00 to reimburse him for his loss. Being of the opinion that the stipulation reflects liability against the respondent and being of the opinion that the damages are reasonable, an award is accordingly made.

Award of $228.00.

Opinion issued March 4, 1976

MOUNTAINEER MOTEL, INC.

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. CC-76-15)

PER CURIAM:

From May 22, 1974 until June 9, 1974, a period of 19 days, one Jerry Daff, a Correctional Officer employed by the respondent, was required to stay at the Mountaineer Motel in Morgantown, West Virginia, in connection with his custodial duties relating to Eugene Venerable, an inmate of the West Virginia Penitentiary, but, who during the above mentioned dates, was confined to the University Hospital at Morgantown, West Virginia.

The claimant billed the respondent for $250.79 covering its charges for the lodging of Daff. The record reflects that the respondent did not expire any funds for this purpose at the close of fiscal year 1973-74, and consequently, any payment of this claim would be illegal, and we must deny the same pursuant to our decision in *Airkem Sales and Service, et al v. Department of Mental Health*, 8 Ct. Cl. 180.

Claim disallowed.

Opinion issued March 4, 1976

THE QUEEN CITY BREWING COMPANY

VS.

NONINTOXICATING BEER COMMISSION

(No. D-923)

E. W. Hiserman, Attorney at Law, for the claimant.

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

GARDEN, JUDGE:

On December 20, 1974, the claimant, The Queen City Brewing Company of Cumberland, Maryland, ceased its brewing operations. Earlier in 1974 it had paid to the respondent, in advance, the tax on a certain amount of crowns and lids and had purchased a certain amount of tax stamps for affixing to its barreled beer products. As a consequence of having purchased these items in advance, a considerable number were still on hand and unused when its operations ceased. An affidavit of two representatives of respondent's office was introduced which reflected the destruction of certain crowns, lids and barrel tax stamps representing a total prepaid tax of $8,974.82. Claimant now seeks a refund of this amount.

The issue in the present claim has been before this Court in the claims of *General Foods Corporation v. State Tax Commissioner,* 9 Ct. Cl. 193, *Central Investment Corporation v. Nonintoxicating Beer Commissioner,* (D-740), and *The F. & M. Schaefer Brewing Co. v. Nonintoxicating Beer Commissioner,* (D-904), and we have consistently held that to permit the retention of prepaid taxes, in situations such as this, would constitute the sanctioning of unjust enrichment. Believing that in equity and good conscience that this claim should be paid, we make an award in favor of claimant in the amount of $8,974.82.

Award of $8,974.82.

Opinion issued March 4, 1976

STONEWALL CASUALTY COMPANY

vs.

THE ADJUTANT GENERAL

(No. D-1037)

PER CURIAM:

On December 28, 1973, in Summers County, West Virginia, Hubert D. Adkins and Steven P. Rollyson in their capacity as members of the West Virginia National Guard commandeered an automobile owned by one Lloyd Fox. As a result of their carelessness and negligence, the automobile was destroyed. Lloyd Fox's automobile was insured by claimant, and as a result, the claimant paid Fox $1,200.00. A $306.00 salvage was later realized, leaving claimant with a net loss of $894.00. These facts appear from a written stipulation entered into between the parties, and believing that liability does exist, an award of $894.00 is accordingly made to the claimant.

Award of $894.00.

Opinion issued April 2, 1976

CHARLESTON AREA MEDICAL CENTER, INC.

vs.

DIVISION OF VOCATIONAL REHABILITATION

(No. D-1014)

John Krivonyak, Attorney at Law, for the claimant.

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

JONES, JUDGE:

Prior to March 31, 1975, the respondent, Division of Vocational Rehabilitation, referred eligible clients for inpatient hospitalization to the claimant, Charleston Area Medical Center, Inc., at a fixed charge on a per diem basis. The arrangement became unsatisfactory to the claimant, and negotiation of a new contract had been underway for several months. On March 31, 1975, a contract was executed and by its express terms was made

retroactive to October 1, 1974. The contract established a schedule of charges at 97% of the regularly billed charges for each individual patient sponsored by the respondent.

There appears to have been an oral understanding between the parties that billings for the difference between the old per diem rate, which the respondent had continued to pay during the period of negotiation, and the new percentage rate provided by the written contract, would be submitted not later than March 31, 1975, and by letter dated February 14, 1975, directed to "Hospital Administrators of West Virginia", the claimant was so advised. This so-called deadline later was extended to April 14, 1975.

The claimant says that all billings were submitted on time and that nine remaining separate accounts totalling $2,972.37 are owing and unpaid. The respondent says that ten accounts totalling $3,156.77 were not received until August, 1975, after budgeted funds had expired. By letter to the claimant dated August 29, 1975, the respondent expressed "regret" that it could not pay the claims "direct" but that a claim could be filed in this Court.

Contrary to the import of the letter last referred to, its writer and the respondent's witness at the hearing of this case, invoked a contract provision as follows: "This agreement may be modified with the mutual consent of both parties." The witness contended that the contract was modified by "agreement" of the parties to conform to deadlines for the submission of bills. The record indicates that this was largely a unilateral proposition, but whether it was or not, the contract is silent as to when billings should be submitted, so there was nothing in the contract in that regard that could be modified. The contract is clear that all proper bills from October 1, 1974, were included and should be paid under its terms. There is no question that the services were rendered and full value was received.

There is some confusion as to whether or not the unpaid invoices were submitted by the claimant prior to the close of the 1974-75 fiscal year, but in any event, the Court is of opinion that the billings constitute just claims, there were expired funds sufficient to pay them, and in good conscience they should be paid.

Accordingly, the Court awards the claimant, Charleston Area Medical Center, Inc., the sum of $2,972.37.

Award of $2,972.37.

Opinion issued April 2, 1976

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., SUBROGEE OF MONROE HAMON

VS.

DEPARTMENT OF HIGHWAYS

(No. D-1040)

PER CURIAM:

The written Stipulation filed in this claim reveals that on September 18, 1975, Monroe Hamon, after being so directed by an employee of respondent, attempted to drive his automobile across Fenwick Bridge, a part of W. Va. Route 39, in Fenwick, West Virginia, and upon which respondent's employees were working; and that while crossing the bridge, employees of respondent dropped hot metal on the automobile causing damages in the amount of $289.69. Being of opinion that liability does exist, and that the damages are reasonable, an award in that amount is hereby made.

Award of $289.69.

Opinion issued May 5, 1976

EDNA BEAUCHAM

VS.

DEPARTMENT OF HIGHWAYS

(No. D-1024)

Claimant appeared in person.

Nancy J. Norman, Attorney at Law, of the Department of Highways, for the respondent.

GARDEN, JUDGE:

At about 5:30 P.M. on October 26, 1975, the claimant was operating her 1967 Oldsmobile Cutlass on W. Va. Route 119 between Blair, W. Va. and Sharples, W. Va. when she struck a large pothole which extended across the entire width of Route 119. As a result, her entire exhaust system, including the muffler, was damaged and had to be removed from the car before the car could be extricated from the hole. In addition, her gas tank was ruptured

and had to be replaced. The automobile was repaired at a cost of $174.95.

Mrs. Beaucham and her daughter had left Charleston earlier that day to attend to some personal matters in Logan County, and it was during their return trip when the accident occurred. She quite candidly admitted during her testimony that she was well aware of the existence of this hole. She stated that on the way down earlier in the day, she avoided the hole by driving onto the berm to her right and off of the paved portion of the highway. She accounts for her failure to observe the hole on her return trip by reason of it being obscured by a small knoll in the road over which she had passed just prior to striking the hole. The hole must have been quite large for she testified that school bus drivers were in the habit of discharging their children, having them walk on the berm, and then re-enter the bus after it had traversed the hole in the highway.

We have no difficulty under these circumstances in finding respondent guilty of negligence, but we cannot at the same time overlook the lack of due care on the part of the claimant. She testified that she was traveling around 45 to 50 miles per hour when she struck this hole. We doubt that her speed was that high but certainly, whatever her speed, it was too great for the conditions then and there existing, conditions of which she was fully aware. Reluctantly, we must conclude that the claimant was guilty of contributory negligence which was the proximate cause of the accident and damages to claimant's automobile.

Claim disallowed.

Opinion issued May 5, 1976

WANDA M. GANNON

VS.

DEPARTMENT OF HIGHWAYS

(No. D-675)

Claimant appeared in person.

Nancy Norman, Attorney at Law, for respondent.

GARDEN, JUDGE:

In 1972 the claimant was the owner of certain real estate adjacent to Route 52 in Mingo County between the Towns of Gilbert and

Justice, the same having been devised to her in 1966 by her aunt, Josie I. Pratt. This real estate consisted of two separate and distinct tracts, one on each side of Route 52 which, near these properties, runs in an easterly-westerly direction. On the south side of Route 52, the claimant owned four lots upon two of which were constructed small five-room residences. These lots will be hereinafter described as Parcel 1. Just east of Parcel 1 and on the north side of Route 52, the claimant owned about eight acres upon which was constructed a much larger residence and several out-buildings. This property will be hereinafter referred to as Parcel 2.

The testimony disclosed that when the respondent constructed Route 52 in 1925, a culvert was constructed under Route 52 which carried surface water from Parcel 1 and the mountain area behind Parcel 1, and then through a drain to the Guyandotte River, located some 300 feet north of and running parallel to Route 52. The respondent in 1925, also constructed an additional culvert under Route 52 to the east of the above-mentioned culvert and which discharged surface water upon Parcel 2. Apparently, the volume of water through this culvert was minimal, and the water so flowing through this culvert meandered through Parcel 2 in a small ditch to the Guyandotte River.

Early in 1972 this area experienced a rather severe rainfall and resultant flood. Apparently, the culvert and drain constructed in the area of Parcel 1 caused considerable flooding in the building then owned by the Bailey Lumber Company which was located north of Route 52 and directly across Route 52 from Parcel 1. As a result of this flooding, either the Bailey Lumber Company or the respondent concreted the culvert near the north side of Route 52. As a result, the surface water which ordinarily would have flowed through this culvert was backed up and into the basements of the two residences on Parcel 1. Additionally, the water then flowed on the southerly side of Route 52 in an easterly direction to the culvert near Parcel 2. Because of the resultant large flow of water through this culvert, waters inundated Parcel 2 owned by claimant on each occasion of a heavy rainfall. Claimant called this condition to the attention of respondent by letter, but respondent took no action to remedy the problem.

While there was no direct evidence presented that the respondent concreted the culvert at its end near the Bailey Lumber Company and even assuming that respondent did not do the

concreting, we are of opinion that liability for the damage to claimant's properties must rest with respondent. This Court has held where an open ditch which has served as adequate drainage for a road was removed in widening the road and caused flooding, the inadequate drainage provisions were the proximate cause of damages to claimant's property. *Osborne v. Department of Highways,* 10 Ct. Cl. 83. Even if respondent did not do the concreting, having been notified of the fact and failing to take appropriate remedial action, we feel liability must be cast upon respondent.

Claimant testified that she sold Parcel 1 in November of 1973, one month after she filed this claim, for $8,500.00. She was of opinion that before the flooding, the property had a fair market value of $12,500.00, and thus she had sustained a loss of $4,000.00 by reason of the continual flooding. In respect to Parcel 2, she was of the opinion that this property had depreciated $2,000.00 in value. Mrs. Gannon testified that while she has resided in Greenville, South Carolina, for the past six years, that for a period of seventeen (17) years, she sold real estate in the Charleston area for the Fred W. Smith Company, and we are of opinion that she was qualified to express an opinion as to valuation in respect to her property.

The respondent's only witness, Gary Tokarcik, testified in respect to damages. Mr. Tokarcik, a graduate of Fairmont State College and a former staff appraiser of respondent for over five years, testified that he had examined the subject properties and had made an examination of sales of comparable properties in Mingo County, and that he was of opinion that each parcel had suffered damage in diminution of market value as a result of flooding since the improper concreting of the culvert. In his opinion, Parcel 1 and Parcel 2 suffered diminutions in market value of $2,000.00 and $1,450.00 respectively.

We are of opinion to accord greater weight to respondent's witness as to damages, because we feel his qualifications in this area are higher than those of claimant's. We conclude that Parcel 1 and Parcel 2 have been damaged as a result of respondent's negligence in the amounts of $2,000.00 and $1,450.00 respectively.

Award of $3,450.00.

Opinion issued May 5, 1976

GROVER A. HARMON

vs.

DEPARTMENT OF HIGHWAYS

(No. D-1016)

Lawrence W. Burdette, Jr., Attorney at Law, for the claimant.

Nancy Norman, Attorney at Law, for the respondent.

WALLACE, JUDGE:

On October 26, 1973, at approximately 10:45 p.m. the claimant herein, Grover A. Harmon, was driving his 1968 Ford F250 pickup truck in a southerly direction in Kanawha County, West Virginia on West Virginia State Secondary Road Route 5/6, also known as Woodrum's Lane. The night was dark and cloudy, the road was dry.

The claimant testified he was traveling at approximately 25 to 30 miles per hour; that he did not travel the road often, the last time being before it was paved.

At a point approximately 4/10 of a mile south of the intersection of West Virginia State Route 5 and West Virginia Secondary Road Route 5/6 or Woodrum's Lane, the southbound traffic proceeds up a hill turning to the left and then down the hill.

As the claimant made the turn to the left and then proceededthe hill, he suddenly came upon a slip in the road approximately 50 to 100 feet from the turn where a portion of the road reserved for the southbound traffic had fallen away.

When the claimant's truck struck the slip, he lost control, veered across the road striking the bank on the other side of the road and the truck turned over on its right side.

Trooper J. R. Smith of the West Virginia Department of Public Safety testified that he came upon the accident while answering another call. He found the claimant in his overturned truck and assisted him in getting out. The claimant appeared to be bruised and limping.

The trooper further testified that he had seen the slip prior to the accident but the paved portion of the road was not broken the first time he saw it. He testified that he notified the District Office of the Department of Highways in Charleston, West Virginia, of the accident and that signs were needed right away.

At the time of the accident there were no traffic control signs warning of the slip, broken pavement or one way traffic.

Residents who lived in the area of the slip testified that the slip started developing sometime after the road was paved in 1972; that it continued to become worse; that the slip eventually became one to three feet into the lane of traffic and was approximately ten to fifteen feet long. Several residents testified that they had notified the North Charleston Office of the Department of Highways of the condition prior to the accident but nothing was done to correct the condition nor to erect signs warning of the danger.

No testimony was introduced by the respondent to refute the claimant or the claimant's witnesses as to liability.

The claimant left the accident in the wrecker that removed his truck. He did not seek medical attention until the Monday following the accident at which time he was treated by Dr. Carl J. Roncaglione for injury to the inside of his left knee. It later became necessary to operate on the knee in January, 1974.

The claimant returned to work in June, 1974.

The claimant's left knee had previously been operated on in September, 1972, and it was again injured in July, 1974. It is difficult to ascertain from the testimony and the evidence the extent of the injury caused by the accident.

The certificate of Dr. Carl J. Roncaglione introduced by the claimant shows no permanent disability anticipated. The respondent had the claimant examined by Dr. H. A. Swart. The written statement of Dr. Swart, introduced without objection, stated there was some disability due to the various injuries and operations on the left knee but how much was due to each one was unascertainable.

From the testimony and evidence presented, this Court finds that the claimant was driving at a lawful rate of speed without knowledge or warning of the danger of the slip and is entitled to recover.

The Court further finds that the claimant is entitled to recover $12,039.52 for loss of compensation from his employment, medical expenses, personal property loss, pain and suffering.

Testimony pertaining to damages without supporting proof has not been considered by the Court.

Award of $12,039.52.

Opinion issued May 5, 1976

KARL HOOVER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-769)

Claimant appeared in person.

Gregory W. Evers, Attorney at Law, for the respondent.

GARDEN, JUDGE:

An abbreviated hearing was held in this claim on November 11, 1975. At that time, we suggested to the claimant, who was not represented by counsel, that he should employ an attorney, and we continued the hearing generally to afford him time to do so. He apparently has elected not to do so, and the claim has been submitted to us for decision on the pleadings.

The Notice of Claim filed by the claimant does not clearly express the basis of the claim, but reading between the lines, it would appear that the claimant owned certain real estate in Nicholas County, a portion of which was earlier condemned by respondent for highway purposes. Claimant is now seeking recovery in this Court for certain surveying expenses incurred during the condemnation proceeding, certain rental expenses, relocation expenses, and the difference between the value of a home on the subject property and a mobile home which he was required to purchase. Clearly, all of these items of damage arose directly or indirectly from the condemnation proceeding.

The respondent has filed an Answer denying liability and, in addition, a Motion to Dismiss. A certified copy of an agreed Final Order entered by the Circuit Court of Nicholas County on May 18, 1973 in the then pending condemnation action was filed as an exhibit with the Motion to Dismiss. This Final Order, approved and signed by the claimant and his wife, clearly reflects the acceptance of $3,400.00 by the claimant as full and complete payment for the take or acquisition and damages, including damage to the residue.

Code 14-2-14 excludes from the jurisdiction of this Court a proceeding which could be maintained against the State in state court. Had the respondent simply taken claimant's property without resort to condemnation, claimant through a mandamus

action instituted in the Circuit Court of Nicholas County could have forced respondent to institute a condemnation action. We are, for that reason, of the opinion that we have no jurisdiction to entertain this claim. We are of further opinion that the Final Order of the Circuit Court of Nicholas County reflects on its face that claimant has released respondent from the various items of damage sought to be recovered in this claim.

For the foregoing reasons, the Motion to Dismiss is sustained, and this claim is dismissed.

Claim dismissed.

Opinion issued May 28, 1976

MARGARET MAE CANTRELL,
Administratrix of the Estate of
Melvin Aaron Cantrell, deceased

VS.

DEPARTMENT OF HIGHWAYS,
(formerly State Road Commission)

(No. D-240)

WILLIAM FREDERICK WHITE,
Administrator of the Estate of
James A. White, deceased

VS.

DEPARTMENT OF HIGHWAYS,
(formerly State Road Commission)

(No. D-268o)

Chester Lovett, Stephen P. Meyer, Harry A. Sherman, John S. Haight, Perry S. Poffenbarger, James T. Cooper, and *L. D. Egnor,* Attorneys at Law for claimants.

Chauncey H. Browning, Jr., Attorney General, *Edgar E. Bibb, III,* Assistant Attorney General, *Anthony G. Halkias,* Director-Legal Division, Department of Highways, counsel for respondent.

GARDEN, JUDGE:

On December 15, 1967, at approximately 5:00 p.m., the Silver Bridge, which spanned the Ohio River from Point Pleasant, West

Virginia, to a point on the Ohio shore a few miles north of Gallipolis, Ohio, collapsed, constituting one of the worst disasters, if not the worst, in the history of the State of West Virginia. At the time of collapse, there were 37 vehicles on the bridge, 29 vehicles in the westbound lane and the remaining 8 vehicles (six cars and two heavily laden gravel trucks) in the eastbound lane. Six vehicles were on the approach span and not affected by the collapse. Seven vehicles fell to the ground below the Ohio side span and the remaining vehicles, 24 in number, fell into the river. Of the 64 persons in the 31 vehicles that fell with the bridge, 46 died and 9 of the 18 survivors were injured.

As a result of this disaster, 56 claims for wrongful death, personal injury and property damage were filed in this Court, and two additional wrongful death claims were filed just prior to December 15, 1974, seeking recovery for the wrongful death of two persons whose bodies were never recovered from the Ohio River. At the initial stages of this litigation, it was stipulated that in Claim Nos. D-240 and D-268o, Margaret Mae Cantrell, Administratrix, and William Frederick White, Executor, were the legal representatives of two of the persons who died as a result of this tragedy. It was further stipulated that a determination of respondent's liability in the above-mentioned claims would be dispositive of all other claims pending in this court as a result of the bridge collapse. It was further understood that only the issue of liability would be decided at this time, and that should it be determined that liability rested with respondent, additional testimony would be presented for the purpose of determining the proper amount of awards in each case.

On May 13, 1926, Congress authorized the construction of the Silver Bridge by the Gallia County Ohio River Bridge Company, an Ohio corporation, which had been formed prior thereto for the purpose of constructing a toll bridge across the Ohio River between Gallipolis, Ohio, and Point Pleasant, West Virginia. Initial plans for the bridge were submitted to the United States Engineers' office in December of 1926. In May of 1927, J. E. Greiner Company, as consulting engineer, prepared plans and specifications for the new bridge using parallel wire cables with two alternative methods of suspension, including eyebars. The contract for the construction of the bridge was awarded to the General Contracting Company of Pittsburgh, Pa., and American Bridge Company (a division of United States Steel Corporation) was awarded the sub-contract for the construction of the

superstructure. On July 1, 1927, American Bridge Company entered into a contract with General Contracting Company to build the superstructure using eyebars as the suspension method in lieu of parallel wire cables. The consulting engineer, J. E. Greiner Company, approved these plans in June of 1927. The bridge was completed in late June of 1928, and on June 29, 1928, the United States District Engineer reported that the conditions of the permit issued to the owner of the bridge, "had been fully complied with and the work completed in substantial accordance" with the approved plans. The total cost of the bridge was $898,096.44, of which $862,341.44 was attributed to construction. After construction, the bridge was operated as a toll bridge by its owner until December 24, 1941, when it was sold to the State of West Virginia.

As constructed, the Silver Bridge was a heat-treated eyebar chain suspension bridge. It had a total of seven spans or sections, two 75' 3" spans (one on each end); two 75-foot spans (one on each side); two 380-foot spans (one on each side); and a center span of 700 feet. The two 380-foot spans and the 700-foot span were in suspension, and the eyebar chain also operated as a portion of the upper chord of the stiffening truss in the 700-foot and the two 380-foot spans. The bridge and approaches were supported by six concrete piers (number 1 through 6, west to east), and the chain was affixed to two rocker towers (located on piers 3 and 4) each of which towers was 130' 10¼" high, extending approximately 95 feet above the deck or roadway. The roadway was 21 feet wide, and there was a 5' 6" wide sidewalk inside the stiffening truss on the upstream or north side of the bridge. Although the roadway, as originally designed, was to accommodate three lanes of traffic, it was ultimately constructed with only two lanes for moving traffic. The chain suspension system was anchored on each side of the river by almost identical anchorage chambers each of which was 44 feet across the front, 34 feet across the back and 200 feet long. The anchorages were filled with steel reinforced concrete and earth, each of which weighed approximately 10,000,000 pounds, and under each was embedded 405 steel reinforced concrete piles 15 feet long.

The chain suspension system contained a total of 148 eyebars, varying in length from 34' 8½" to 65' ¼", the lightest weighing 2,560 pounds and the heaviest 5,306 pounds. Eyebar 330 (the origin of the ultimate collapse) was 63' 11" in length and weighed 5,053 pounds. The head of the eyebar was 28 inches in diameter, 1 and 15/16 inches thick and 12 inches wide. It was connected to other eyebars

at what will later be referred to as joint C-13 by a pin which was 11½ inches in diameter, 13 inches in length and weighing in excess of 300 pounds.

As earlier mentioned, the bridge was constructed on six concrete piers. Piers 3, 4 and 5, as constructed, were erected in the river, resting on steel reinforced concrete caissons which in turn were resting on bedrock. Piers 1 and 6, so-called land piers and being the most westerly and easterly piers of the bridge, supported only the approaches and were completely independent of any support for the spans in suspension. Pier 2, on the Ohio side, was also constructed on land. For vehicular traffic, the roadway of the bridge had a vertical clearance of 16 feet, and the height of the roadway above the water at normal pool stage was in excess of 100 feet.

Two other events took place after the bridge was completed in 1928, both of which the claimants vigorously contended led to or contributed to the ultimate collapse of the bridge. In 1937, the Gallipolis Lock and Dam was completed some 14 miles down-stream from the Silver Bridge. This dam raised the elevation of the river 18½ feet above the normal pool stage at the Silver Bridge. Then again between 1949 and 1952, a floodwall was constructed on the West Virginia side of the Ohio River at Point Pleasant. It was so constructed that the base of the floodwall was 26½ vertical feet and 100 feet horizontally from the normal pool stage and the edge of the river.

Respondent's first concern immediately after the collapse was to rescue any survivors who might have been trapped in submerged vehicles. Thereafter, its attention was directed to the recovery of the bodies of the victims, and then to the removal from the water, those portions of the bridge which had collapsed in the river with the ultimate purpose of opening the channel for river traffic.

Prior to the collapse, the U. S. Corps of Engineers had contractors working upstream on one of their projects and within hours after the collapse, they were able to move very heavy barge-mounted cranes onto the site. These contractors obtained a crew of divers who came in and assisted in the salvage operation. The respondent assigned engineers on a round-the-clock basis to superintend the salvage operation and instituted a system of marking each structural member of the bridge as it was removed from the river so that it could later be identified during the re-assembly process, hereinafter described. This was a most

difficult procedure for many of the structural members were buried under concrete from the roadbed of the bridge and had to be cut before they could be removed from the river. Most of this material was initially deposited on the Ohio shoreline. The salvage operation was largely completed in March of 1968 but not fully completed until July of the same year. At the end, it was estimated that at least 80% of the metal members of the bridge had been recovered.

When the news of the collapse reached Washington, the Federal Highway Administration dispatched Charles F. Scheffey to Point Pleasant. Mr. Scheffey, who was then with the research division of the Bureau of Roads, arrived in Point Pleasant on the afternoon of December 16, 1967, and worked closely with local federal highway people and representatives of the respondent in the supervision of the salvage operation.

In the middle of the following week, and at the request of the Federal Highway Administration, the National Transportation Safety Board was directed to assume the investigation and determine the cause of the bridge collapse. The National Transportation Safety Board was relatively new at the time, having been in existence less than a year. It had been formed when the Federal Department of Transportation was created, but it is not a part of that department. It is an independent board consisting of five members appointed by the President with the specific mission to act as a watchdog on transportation safety. Prior to its creation, the only comparable group was an aircraft disaster investigating group within the Civil Aeronautics Board, but after its creation, the National Transportation Safety Board was given the responsibility of investigating all transportation-related disasters, including aircraft disasters.

The National Transportation Safety Board designated Admiral Louis M. Thayer, a member of the Board, to officially head the investigation. Three separate committees or working groups were appointed. There was a bridge design review and bridge history group, a witness interrogation group and finally, a structural analysis and test group, which was chaired by Charles F. Scheffey. In addition to its own technicians, the structural analysis and test group were supplemented by technical representatives from all parties in interest. Consequently, the test group included representatives from the State of West Virginia, the State of Ohio, J. E. Greiner Co. of Baltimore, Maryland, the designers of the

bridge, and United States Steel Corporation, the parent corporation of American Bridge Company, the contractor for the erection of the superstructure. Also named were representatives of the consulting firm of Modjeski & Masters that had been retained by respondent to conduct an independent investigation into the cause of the collapse, and representatives of the consulting firm of Hardesty & Hanover that had also been retained by respondent to assist in making a determination concerning the future of the Silver Bridge's twin bridge which spanned the Ohio River at St. Marys, West Virginia. The official working group was further supplemented at the meetings by consultants and people from the laboratories that conducted metallurgical tests on structural members from the bridge.

Returning again to the salvage operation, sometime during the third night following the collapse, eyebar 330 was recovered from the river. The people in charge of the salvage operation had been instructed to be on the lookout for any eyebar that appeared to be fractured. Upon being notified that an eyebar had been recovered with a fractured eye, Mr. Scheffey went to the Ohio shore where the eyebar had been taken and examined it. The mud was washed from the fracture site, and to preserve the fracture site, a coating of hair spray lacquer was applied. The outboard portion of the eye which had been fractured was not found at this time. In order to locate the outboard portion of the eye, dredging operations were conducted and the dredged material was sifted. In this manner, several weeks later, the missing portion of eyebar 330 was located.

Respondent soon after the collapse leased a large pastureland area south of Point Pleasant and on the east bank of the Ohio River. As earlier indicated, the salvaged material, after being marked, was initially deposited on the Ohio bank of the river, but after patterns of the bridge trusses were staked out on the pastureland, the recovered structural members were transported to the reconstruction site where the bridge was reconstructed with the north and south sides of the trusses and their suspension chains laid out on horizontal planes. Detailed inspections were conducted at the reconstruction site, and thereafter various structural members, including eyebar 330, were transported to various laboratories where extensive and detailed metallurgical tests were conducted. Critical tests were conducted on eyebar 330 by the National Bureau of Standards, and corroborative tests were performed by United States Steel Corporation and Battelle Memorial Institute of Columbus, Ohio.

On December 16, 1970, and after the submission of several drafts by the three working groups, the National Transportation Safety Board issued its report concerning the collapse of the Silver Bridge. This report was introduced into evidence in these claims in its entirety as Claimants' Exhibit 7. On page 126 of the report under the caption *VI. Cause,* the following language was set forth:

> "The Safety Board finds that the cause of the bridge collapse was the cleavage fracture in the lower limb of the eye of eyebar 330 at joint C13N of the north eyebar suspension chain in the Ohio side span. The fracture was caused by the development of a critical size flaw over the 40-year life of the structure as the result of the joint action of stress corrosion and corrosion fatigue.
>
> Contributing causes are:
>
> 1. In 1927, when the bridge was designed, the phenomena of stress corrosion and corrosion fatigue were not known to occur in the classes of bridge material used under conditions of exposure normally encountered in rural areas.
>
> 2. The location of the flaw was inaccessible to visual inspection.
>
> 3. The flaw could not have been detected by any inspection method known in the state of the art today without disassembly of the eyebar joint."

Prior to taking any testimony, counsel for claimants and the respondent entered a stipulation designating the issues. They were designated as follows:

1. (a) Negligence in original and/or revised design of the bridge as built in 1927.

(b) Negligence on the part of the State of West Virginia in 1941 in accepting the bridge based on inadequate design.

(c) Negligence on the part of the State of West Virginia in not reviewing the design of the bridge from 1941 to 1967.

2. Negligence in construction of the bridge and in the materials used in the bridge.

3. Failure on the part of the State of West Virginia to adequately inspect the bridge.

4. Failure on the part of the State of West Virginia to adequately maintain the bridge.

5. Negligence on the part of the State of West Virginia in failing to warn the general public of the potential, discoverable or known dangers of the bridge and/or failing to close the bridge or take other safety precautions.

6. Failure on the part of the State of West Virginia to adequately consider the effect on the bridge of riverbed activities.

7. Negligence of the State of West Virginia in accepting and in maintaining the bridge in its condition in violation of the Bridge Act of 1906, as constituting a public nuisance.

8. Liability of the State of West Virginia in violation of an implied warranty or representation of fitness for use by the general public.

9. Whether or not the collapse of the Silver Bridge was an unavoidable accident.

10. Whether or not any of the acts or failures to act by the State of West Virginia proximately caused or contributed to the collapse of the Silver Bridge.

11. Whether the applicable West Virginia or applicable Ohio death statute applied to each claim.

This Court commenced taking testimony on July 15, 1974, and on fourteen additional days thereafter, completing the same on April 22, 1975. During that period of time, a record consisting of 2,339 pages was compiled. Claimants introduced into evidence 50 exhibits, respondent introduced 29, and 51 additional exhibits were introduced on the joint motion of claimants and respondent.

We believe that the designated issues as set out above have been unduly fragmented, and that a proper resolution of these claims requires us to resolve the following three basic issues:

(1) Was the Silver Bridge negligently designed, and if so, was the State of West Virginia negligent in purchasing the bridge in 1941?

(2) Was the State of West Virginia negligent in failing to consider the effect on the bridge, if any, of the construction of the Gallipolis Dam in 1937, the construction of the Point Pleasant floodwall between 1949 and 1952, and the alleged striking of the

(3) Was the State of West Virginia negligent in failing to properly maintain and inspect the Silver Bridge?

With the exception of Eugene Lloyd Gwinn, Edward L. Cundiff and Bill S. Hanshew, Jr., all of the remaining witnesses testified as experts in their respective fields. Eugene Lloyd Gwinn, a supervisory civil engineer with the U.S. Army Engineers in Huntington, was called as a witness by the claimants and through him, many of the documents in the possession of the U.S. Army Engineers were identified and later introduced into evidence. Edward L. Cundiff, a bridge inspector for respondent in District No. 1 during 1963, 1964 and 1965, testified concerning his inspections of the Silver Bridge during those years, the manner of making the inspections, the report form used to record the results of such inspections, and generally, what his inspections during those years revealed.

Bill S. Hanshew, Jr., the assistant district engineer in District No. 1 at the time of the collapse, testified as to the training and instructions given to bridge inspectors by respondent, the manual followed by bridge inspectors in conducting investigations, and the results of various inspections that he personally made. It should be noted that Mr. Hanshew was a 1958 civil engineering graduate of West Virginia University. Because the testimony of the expert witnesses will be referred to with frequency in the remainder of this opinion, we deem it appropriate to briefly relate their respective qualifications.

Dr. Istvan Stephen Tuba of Pittsburgh, Pennsylvania, testified on behalf of the claimants. Dr. Tuba received a technology degree in 1952 from an institute in his native country of Hungary. He thereafter obtained a degree from the Technical University of Budapest which is the equivalent of a Bachelor of Science degree in mechanical engineering in this country. He came to this country in 1956 and continued to further his education. In 1960, he received his Masters degree in mechanical engineering from Carnegie Institute of Technology in Pittsburgh, and in 1964, his Doctorate from the University of Pittsburgh. Currently he is the President of Basic Technology, a Pittsburgh based consulting firm. He has been a lecturer at various universities in this country and at technical society meetings all over the world. He is currently, on a part time basis, a professor of mechanical engineering at the University of Pittsburgh.

Dr. Charles A. Schacht of Pittsburgh, Pennsylvania, also testified on behalf of the claimants. Dr. Schacht was graduated from Ohio State University in 1960 with a Bachelor's degree in civil engineering. He continued his education at Carnegie Institute of Technology and Massachusetts Institute of Technology, and ultimately obtained his Masters and Doctorate in civil engineering from Carnegie Institute, the latter having been awarded in 1972. He was the Executive Vice President of Basic Technology, but in October of 1974, was employed by the United States Steel Corporation as its senior research engineer at the company's research laboratories near Pittsburgh, Pennsylvania.

Abba G. Lichtenstein of Leonia, New Jersey, was the remaining expert witness called by the claimants. Mr. Lichtenstein was the top man in his graduating class at Ohio State University where he received a civil engineering degree in 1948. Following his graduation, he worked for various companies as a bridge engineer, including the designing of railroad bridges and highway bridges. In 1963, he formed his own company, A. G. Lichtenstein & Associates. His company employs some 30 individuals, and 90% of the company's activities are bridge related. This includes bridge evaluation for cities, counties and states, the recommending of repairs for immediate maintenance, the design of replacements and the study of locations for new bridges. He has been engaged continuously since 1948 in civil structural engineering. Of all of the witnesses who testified in these proceedings, Mr. Lichtenstein undoubtedly was the most experienced in the design of bridges.

Respondent in its case called Joseph S. Jones as its first witness. Mr. Jones, presently State Highway Engineer-Construction, was graduated from North Carolina State University with a Bachelor of Science degree in civil engineering in 1948. He immediately upon his graduation went to work for the respondent, and with the exception of an eight-year period between 1954 and 1962, he has been with the respondent in one capacity or another. During his eight-year absence, he was the Assistant Chief Engineer of the West Virginia Public Service Commission for three years. The other five years were spent with the consulting engineering firm of Michael Baker Company, acting as its Assistant Project Engineer in its Charleston office. During that period, the Michael Baker Company had a consulting contract with the respondent for the design and details for roadways and bridges for a large portion of Interstate 64 between Huntington and Charleston, and as a result, Mr. Jones actively participated in the design of approximately 40

bridges in West Virginia and approximately 10 in the State of Kentucky. During his many years with the Department of Highways, Mr. Jones has served as a junior bridge design engineer, a senior bridge design engineer, assistant chief engineer, chief engineer of operations (the position he held at the time of the collapse), state highway engineer, and his present position of state highway engineer-construction. During his years with respondent, he has actively designed or assisted in the design of some 120 bridges.

Chester F. Comstock of Camp Hill, Pennsylvania, next testified on behalf of respondent. Mr. Comstock received his civil engineering degree from Drexel University in 1953, and while he did take some graduate courses, he does not hold a Masters degree. After graduation in 1953, he joined the firm of Modjeski & Masters of Harrisburg, Pennsylvania, and has worked continuously for them with the exception of several years spent in the Army. The firm of Modjeski & Masters is engaged basically in bridge and highway design. Mr. Comstock indicated that he had no experience in design work but that his experience was limited to bridge inspecting. He has inspected during his years with the firm some 400 to 500 bridges, including suspension bridges, in all parts of the country.

Charles F. Scheffey, the Chairman of the Structural Analysis and Test Group of the National Transportation Safety Board, was the concluding expert witness called by respondent. Mr. Scheffey received a Bachelor of Science degree in civil engineering from Drexel University in 1943. He thereafter spent 3 years in the service, principally in Korea. Following his return to this country, he began graduate work at the University of California at Berkeley. He became a part-time and later a full-time lecturer in the area of structural analysis and design. He continued to teach at Berkeley for a period of 15 years. His principal teaching assignments were senior engineering courses in bridge analysis and design and graduate courses in bridge analysis. During this period he did consulting work and conducted research projects for the California Division of Highways. Some of his research projects for the Division of Highways included problems associated with long-span bridges, including at least one suspension bridge, the San Francisco-Oakland Bay Bridge, where he studied the most appropriate loadings for such a long-span suspension bridge. He received his Masters degree from the University of California in 1951. During 1957-1958 he studied toward his Doctorate at the

Technical University of Darmstadt, Germany, but lacking his dissertation, the Doctorate was never received. In 1964 he went to Washington, D.C. on a leave of absence for the purpose of organizing and launching a program of research for the Structures and Applied Mechanics Division of the Bureau of Public Roads. He was doing that work when he became involved in the collapse of the Silver Bridge.

In order to discuss the design of the eyebar suspension system of the Silver Bridge, a more detailed description of the same is necessary and in particular, at the precise point of failure. Two separate eyebars made up each link of the suspension chain on the north side of the bridge as well as in the suspension chain on the south side. Eyebar 330 was the upstream bar in the second panel west of Pier 3. It was 63' 11" in length and weighed 5,053 pounds. Next and adjacent to eyebar 330 and making up the second panel was eyebar 33. The diameter of the heads of these two eyebars was 28", and through the heads there were drilled holes, the holes being eliptical in shape (12" vertically and 11-1/2" horizontally). At each joint, and in particular, at joint C-13, a steel pin weighing about 300 pounds and being 11-1/2" in diameter was inserted through the holes of the eyebars. Actually, this pin passed through the heads of four eyebars. At joint C-13 it ran through the heads of eyebars 330 and 33 and the heads of the two eyebars making up the adjoining panel. In addition, and between the eyebars, the pin ran through holes in two hanger plates. These hanger plates were connected to the stiffening trusses which gave support to the main body of the bridge. Consequently, at each joint, the steel pin went through and pressure was exerted thereon by four eyebars and two hanger plates.

Through each of the pins, a 4" hole was drilled, through which a steel rod, 1-1/4" in diameter, was inserted. On each end of the rod, and consequently, on each side of the complete joint, a retaining cap held by a double lock nut was inserted. These retaining caps were 12-1/2" in diameter. The obvious purpose of these caps was to keep the elements from the interior of the joint and in particular, those areas within the joint where the pin went through the heads of the eyebars and the hanger plates. They also effectively obscured from vision any portion of the pin within the joint itself.

In order to determine whether the Silver Bridge was negligently designed, it must be first ascertained the nature of the legal duty owed by the designer to the bridge owner. We are of opinion that

the designers of the Silver Bridge, or of any bridge, are under a duty to exercise reasonable care in the preparation of the plans and specifications to the end that the bridge constructed pursuant thereto would be in a reasonably safe condition for travel. We liken the duty of a bridge designer to that of an architect, and we would refer to the language contained in 5 Am Jur 2d, Architects § 23, where the following is contained.

> ". . . . . However, in the absence of any special agreement in that regard, an architect's undertaking does not imply or guarantee a perfect plan or satisfactory result, and there is no assurance that miscalculations will not occur. Liability rests only on unskilfulness or negligence, and not upon mere errors of judgment, and the question of the architect's negligence in the preparation of plans is one of fact and within the province of the jury . . . . . "

By implication the claimants contended that the mere use of eyebars in the suspension chain constituted an improper design, and they suggested that the fact that eyebars are no longer used in bridge construction constituted evidence of their impropriety. On the other hand, we believe the evidence clearly reflected that their current lack of use in bridge construction is due entirely to economic considerations and not to safety considerations.

Respondent's witness Scheffey testified that currently some 17,000 heat-treated eyebars are being used as members in various bridges in this country, and that there were a substantial number of eyebar suspension bridges built between 1900 and 1930. Respondent's witnesses Jones and Comstock testified that eyebars were used in the chain suspension system of several European bridges, were used in the Dresden Bridge over the Muskinghum River which was constructed in 1915, were used in the Florianopolis Bridge which was built in Brazil in 1925, in the Sixth, Seventh and Ninth Street Bridges constructed in Pittsburgh between 1925 and 1928, and in the St. Marys Bridge at St. Marys, West Virginia, constructed in 1929. Testimony further established that eyebars, while not used in the suspension system, are today present in such large bridges as the Greater New Orleans and Huey Long Bridges in Louisiana, the Rip Van Winkle Bridge over the Hudson River, the Walt Whitman Bridge in Philadelphia, and the Bluewater Bridge at Port Huron, Michigan.

Mr. Lichtenstein was of the definite opinion that the Silver Bridge was improperly designed. His contention was bottomed on

the fact that the design of the Silver Bridge differed in various ways from the design of the Florianopolis Bridge located in Brazil. The Florianopolis Bridge had been constructed by United States Steel Corporation a year or two before the Silver Bridge, but it had been designed by Dr. David B. Steinman, who at that time was one of the world's most respected bridge designers. The J. E. Greiner Company, as indicated before, originally designed the Silver Bridge with the use of cables in the suspension system. They also submitted two alternatives, one of which substituted eyebars in the suspension system instead of cables. The design was modified by United States Steel Corporation in various particulars, the most important of which was the use of heat-treated eyebars in the suspension system. Mr. Lichtenstein testified that the two side spans on the Florianopolis Bridge were not connected to the suspension chain, whereas they were so connected in the design of the Silver Bridge. He pointed out that this difference caused less vibration and less movement in the Florianopolis Bridge and that to him, as a bridge designer, it constituted an important difference. Secondly, he testified that Dr. Steinman reduced the working load on the Florianopolis Bridge to 46,500 pounds per square inch (p.s.i.), whereas the Silver Bridge's working load or stress was designed at 50,000 p.s.i. Thirdly, Mr. Lichtenstein testified that Dr. Steinman thickened the eyebar heads on the Florianopolis Bridge 1/16th of an inch on each side, or a total of 1/8th of an inch, thus increasing their strength. Most importantly, Mr. Lichtenstein was of the opinion that the use of four eyebars in each panel as used in the Florianopolis Bridge instead of the two eyebars in each panel as used in the Silver Bridge, greatly increased the safety of the Florianopolis Bridge. He was of the opinion that if one bar broke on the Florianopolis Bridge, the whole joint would shift, and that while the bridge would tilt, traffic would have sufficient time to reach safety, whereas in the Silver Bridge with one of only two eyebars breaking, an immediate collapse occurred. His testimony in respect to this was sharply contradicted by witnesses Jones and Scheffey, they being of the opinion that a fracture of one of four eyebars in the Florianopolis Bridge would result in an immediate collapse.

Considerable testimony was introduced relating to factor of safety. In order to understand this term, it is necessary to understand the terms working stress and yield stress. Working stress is a figure adopted by a designer, and it represents the amount of stress on a bridge member when it is under its heaviest

loaded condition. Yield stress is a much higher figure and represents the amount of stress necessary to cause bridge members to yield or give to a point where they will not return to their original shape or position when the stress is released. The factor of safety is determined by dividing the yield stress by the working stress. Needless to say, the higher the factor of safety, the better.

Mr. Lichtenstein pointed out that the Greiner Company in its original design of the Silver Bridge called for a yield stress of 140,000 p.s.i. and a working stress of 80,000 p.s.i., or a factor of safety of 1.75. He indicated that this was a reasonable design but that in his opinion a factor of safety should always exceed 1.75. On the other hand, after United States Steel Corporation re-designed the bridge using eyebars, the design called for a yield stress of 75,000 p.s.i. and a working stress of 50,000 p.s.i., which resulted in a factor of safety of 1.5, which he felt was improper design.

Mr. Lichtenstein did admit on cross-examination that after the bridge collapsed, tests were run on the recovered eyebar, and the average yield stress was 81,000 p.s.i., and he further admitted that this yield stress thus produced a 1.62 factor of safety. Mr. Jones testified that according to his calculations a factor of safety of 1.77 at eyebar 330 existed at the time of collapse. He was of the further opinion that there is no magic in a 1.75 safety factor, and that it is simply a judgement factor used by a designer in commencing the design of a bridge structure. Mr. Scheffey was of the opinion that the factor of safety in the Silver Bridge had nothing to do with its collapse. We note with interest Mr. Jones' testimony that it had been established through calculations that the stress on eyebar 330 at the time of the collapse was 42,500 p.s.i., or less than the working stress of 50,000 p.s.i. assigned to it by the designer. We must, therefore, conclude that the factor of safety, be it 1.5 or 1.75 or more, had nothing to do with the collapse of the Silver Bridge.

In discussing the design of the Silver Bridge, the National Transportation Safety Board used the following language on page 15 of its report adopted December 16, 1970:

> *"The computation performed by the Bridge Design Review and History Group (Reference 3 and Reference 5, Exhibit No. 3-E) indicated that the original design had been executed in accordance with normal engineering practice in use at the time of the original design, and that it was without mistakes or significant errors in the original stress computations,* although

there was a minor error in the computed dead load stress in member L13-L15 of the Ohio side span and corresponding members of the center span and West Virginia side span. That group also established the fact that the stresses in critical members of the eyebar chain and trusses produced by the loading on the structure at the time of collapse were well below the specified maximum stresses provided for in the original design. Computations were carried out by the American Bridge Division of U.S. Steel using a digital computer, and were independently checked by the firm of Modjeski and Masters." (Emphasis added.)

After the collapse it was widely reported that the collapse was due to the bridge being overloaded and due to the fact that the useful life of the bridge had expired. The expert testimony clearly established that neither of these reports was true. As part of the investigation and by acquiring copies of bills of lading reflecting the weight of the loads carried by the trucks, the exact amount of the live load on the bridge at the time of collapse was determined to be 486,000 pounds. Live load is the weight superimposed on a bridge by vehicles as contrasted with dead load which represents the weight of the bridge itself. Mr. Jones testified that the live load of 486,000 pounds was actually only 40% of the designed live load. Also the useful life of the bridge had not expired at the time of collapse, Mr. Scheffey being of opinion that only one-sixth of the useful life of the bridge had expired on the date of collapse.

We conclude on the basis of all of the foregoing that the design of the Silver Bridge was prepared in accordance with good engineering practice as it existed in 1926, and that the respondent was not negligent in purchasing the bridge, so designed, in 1941.

Claimants through their witnesses, Dr. Tuba and Dr. Schacht attempted to predicate liability on respondent as a result of the construction of the Gallipolis Dam in 1937 and the construction of the floodwall at Point Pleasant, West Virginia, between 1949 and 1952. It was their position that these activities caused additional waters to be cast upon the piers and on the Ohio shore causing a weakening of the bridge structure and anchorages, and that no steps were taken by respondent to rectify the situation. They also contended that the bridge piers were damaged when they were struck by run-away barges in April of 1966, and that no steps were taken to remedy that damage.

Dr. Tuba testified that whenever water level is increased, the moisture content in the surrounding area is also increased and that this has a weakening effect on the basic strength and basic behavior of the soil. He stated that this will tend to soften the soil and that there can be a sinking of any structures on the soil. He was of further opinion that because the soil was softened, it could cause distortion patterns to be transmitted to the bridge structure itself in terms of additional stresses and strains which would in the end effect the weakest link in the bridge. Dr. Schacht was of the opinion that the raising of the water level possibly caused a scouring effect on the Ohio shore resulting from water flowing into the pier areas on the Ohio shore; that it would change the permeability of the soil, or how it accepted water, and thus reduce the strength characteristics of the same.

It developed during the testimony of Dr. Tuba and Dr. Schacht that both of these gentlemen were basing their testimony on 36 source references connected directly or indirectly with the collapse of the Silver Bridge, these references having been furnished them by counsel for the claimants. It should be added that in addition to these source references, their testimony was, of course, also based on their training and experience in the fields of civil and mechanical engineering. Counsel for the claimants attempted to elicit their opinions through hypothetical questions, all of which were objected to vigorously by counsel for the respondent. These objections were all based on the fact that the hypothetical questions did not contain all of the material facts and, in addition, included facts not in evidence or facts unsupported by the evidence. At the conclusion of both Dr. Tuba's and Dr. Schacht's testimony, counsel for respondent moved to strike their respective testimony, and thereafter supported the motions with persuasive briefs. This Court, when the motions were orally presented, took the motions under advisement and indicated that rulings would be made after the Court had an opportunity to read the transcript of their testimony.

Having reviewed their testimony, it is apparent that Dr. Tuba and Dr. Schacht had no personal knowledge of the design of the Silver Bridge, the construction of the Silver Bridge, the supporting structures of the Silver Bridge, the materials used in its construction, the soils upon which the supporting structures of the bridge rested, the details of the collapse of the Silver Bridge, and the methods, accuracy or completeness of the investigation and the results of the investigation conducted by the National

Transportation Safety Board. Neither of these witnesses had ever visited the site of the collapse, nor had they had an opportunity to inspect any of the structural members of the collapsed bridge. Although Dr. Tuba was testifying as to the effect of the construction of the Gallipolis Dam on the Silver Bridge, he was of the opinion that it was constructed in 1933, although, in fact, it was completed in 1937. He did not know the year in which the Point Pleasant floodwall was constructed. He did not know the number of piers supporting the bridge, testifying that there were five, when, in fact, there were six. He testified that prior to the construction of the dam, there were two piers in the water and that after the construction, there were three, or maybe four, piers in the water, when, in fact, the record clearly reflects that before and after the dam was constructed, there were three piers in the river and three piers on dry land. Dr. Tuba was of the opinion that the run-away barges striking the piers of the Silver Bridge contributed to its lack of structural integrity. He formed the opinion that the piers had been so struck from one of the source materials furnished him which set forth a Coast Guard report of run-away barges striking bridge piers at Point Pleasant, West Virginia. He was unaware of the existence of the railroad bridge immediately north of the Silver Bridge whose piers could have been struck. He was unable to state how many barges struck what piers, the weight of the barges and other facts which in the opinion of this Court would be necessary to form an opinion as to whether the structural integrity of the Silver Bridge had been damaged. As a matter of fact, respondent's witness, Mr. Jones, who at the time of the alleged barge incident, was in a position with the Department of Highways where he would have been advised of such an incident, testified that he never in his official capacity received any notice of such incident.

The above are simply a few illustrations which in this Court's opinion militates against our giving much weight to their testimony as experts, and we conclude that the claimants have failed to establish by a preponderance of the evidence that the construction of the Gallipolis Dam, the construction of the Point Pleasant floodwall, or the run-away barge incident contributed in any way to the ultimate collapse of the Silver Bridge.

The most serious issue and the one most difficult for this Court to resolve involves the adequacy of the maintenance and inspection of the Silver Bridge by respondent. In respect to the maintenance, there was evidence that, at least, in January of 1963, when the

witness, Edward L. Cundiff, inspected the bridge, he noted on his report that the bridge was rusted and in need of paint. The records of respondent as to repairs were poorly documented, but there was testimony that all recommended repairs during the years were made with the exception of some pier concrete patching work. In this respect, witness Jones stated that in his opinion, the minor deterioration in the piers had no effect on the eyebars in the bridge structure. There was some testimony to the effect that there was corrosion and rusting in secondary members, but it was agreed that such corrosion and rusting in secondary members had absolutely no effect on the structural integrity of the bridge itself nor in the structural integrity of the eyebars.

Extensive corrosion studies of all recovered structural members of the bridge were conducted by the firm of Modjeski & Masters, and in respect to Eyebar 330, it was determined that the loss of section due to corrosion was less than 5%, and witness Scheffey testified that any loss of section below 5% was insignificant. Witness Jones was of the opinion that the loss of section in Eyebar 330 was no greater than 1%. It should be pointed out that loss of section is a measure of the present load-carrying capability of a member as compared to its original load-carrying capacity.

In respect to the painting of the Silver Bridge, an inspection of Eyebar 330 after the collapse revealed an adequate coat of paint, at least, on the outboard side. The evidence reflected that the Silver Bridge had not been painted prior to its collapse since 1963, but in the opinion of witness Jones, the failure to paint between 1963 and December of 1967, did not cause or contribute to the fracture in Eyebar 330 which led to the collapse of the bridge.

During the hearings, the question was frequently asked as to why respondent ultimately tore down the Silver Bridge's sister bridge located in St. Marys, West Virginia. Immediately after the collapse of the Silver Bridge, respondent closed the St. Marys Bridge until a determination could be made as to the cause of the collapse of the Silver Bridge. As indicated earlier, the firm of Hardesty & Hanover was employed by respondent to make an extensive investigation as to the integrity of the St. Marys Bridge. Witness Scheffey testified that the examination was made with the best equipment which was then available, but that no defects were found in the St. Marys Bridge. He further indicated that they then took the same equipment and tested eyebars from the Silver Bridge, but were also again unable to detect any cracks which they

knew were present and were critical, and, consequently, they concluded that the examination of the St. Marys Bridge did not establish one way or the other whether the structure was safe. They were aware of the fact that in the St. Marys Bridge, the eyebars, because of the identity of design, were susceptible to stress-corrosion and, consequently, respondent upon the recommendation of the National Transportation Safety Board permanently closed the bridge and ultimately dismantled it.

In the area of inspection, this Court is highly critical of the procedure, or lack thereof, followed by respondent from its acquisition of the bridge in 1941 to the date of its collapse in December of 1967. The respondent maintained that during the period of its ownership its records reflected official inspections on at least 15 occasions, but yet, only 3 record cards reflecting inspections in 1959, 1963 and 1964 were introduced as exhibits. It appeared that these inspections were conducted on a rather hit and miss procedure and were not conducted generally by personnel with any specialized training in the art of bridge inspecting. For example, on January 11, 1963, witness Cundiff, who prior to his employment by respondent was a welder, inspected the Silver Bridge with C. W. Morris, who Cundiff described as being a blacktop inspector and who only accompanied him on this inspection as a safety factor. The evidence further revealed that when these inspections were made, they were only cursory in nature in respect to many areas of the bridge. This was particularly true in respect to the inspection of the superstructure in spite of the fact that the inspectors were following the instructions of a 1945 Maintenance Manual which read in part as follows:

> "The corrosion of the top cords of high trusses is not visible from the roadway, but its inspection should not be slighted due to its inaccessability. . . . ."

In spite of the instructions contained in the manual, not one of respondent's witnesses testified that on any occasion was the superstructure inspected by physically climbing the same. As far as inspecting the eyebars, including the retainer caps which concealed the junctions of the eyebars and hanger plates, respondent contented itself by inspecting the same through the use of binoculars. This visual inspection through binoculars would take place either by standing on the shore lines or by leaning out over the railing along the sidewalk on the north side of the bridge. Respondent's witnesses indicated that on these occasions, they

would be looking for the presence of rust stain running from the bottom of the retainer caps, and that if this rust stain was not observed, they would conclude that no corrosion was taking place within the eyebars or on the pin running through them.

Contrast that procedure with the procedure followed by the firm of Modjeski & Masters as testified to by witness Comstock. Mr. Comstock testified that prior to 1967, his firm was employed by many bridge authorities and railroad companies for the purpose of making bridge inspections. He indicated that when his company was employed to inspect a bridge initially, a team of men whould be dispatched not only for the purpose of making an in-depth inspection, but also for the purpose of making a rating analysis, and that after these initial inspections were made, less formal inspections would be made on an annual basis, and that ordinarily an in-depth inspection would be made every three years. He testified that in conducting their inspections, the inspecting personnel would always climb every part of a bridge superstructure and while they would not remove all of the retaining caps on bridges similar to the Silver Bridge, they would remove some on a spot-check basis in order to determine the existence of any corrosion on the areas of the eyebars and pins that could be visualized.

We feel that the inspection procedures followed by respondent prior to December of 1967, fell alarmingly short of good inspecting procedure.

On the other hand, we believe that the testimony overwhelmingly established that the collapse of the Silver Bridge resulted from the phenomenon of stress-corrosion which occurred in the inside of the eye in Eyebar 330 at Joint 13. Mr. Lichtenstein testified that the collapse was due to a combination of two elements, that of extremely high stresses and some corrosion. Mr. Jones testified that stress-corrosion was a combination of highly localized unit stress with a mildly corrosive environment over a long period of time resulting in the development of small cracks. Mr. Scheffey was of the opinion that the phenomenon should be defined as stress-corrosion cracking, and he further defined it as a cracking of a metal portion of a structure or machine across an area of tensile stress by the combined action of a corrosive agent and that sustained tensile stress. He further testified that in his opinion there would have been no failure nor collapse of the Silver Bridge, absent the phenomenon known as stress-corrosion cracking.

It was also definitely established by the evidence that the phonemenon of stress-corrosion or stress-corrosion cracking was either unknown in 1967 or was unknown in moderate tensile strength steels used in bridge structures. Mr. Lichtenstein stated that prior to the collapse of the Silver Bridge in 1967, he was unaware of any instance in which stress-corrosion had been found to be the cause of a fracture in an eyebar. Mr. Jones testified that prior to the collapse of the Silver Bridge, he was not familiar with stress-corrosion nor had he ever had any experience in stress-corrosion and he, like Mr. Lichtenstein, had never heard of a bridge collapsing as a result of stress-corrosion. Mr. Comstock, an experienced civil engineer and bridge inspector, stated that he was unaware of the term stress-corrosion until after the collapse of the Silver Bridge. Mr. Scheffey, on the other hand, testified that while he had not studied the phenomenon in engineering school, he had later become familiar with it and had lectured about it at the University of California, but he indicated that he had never, prior to the collapse of the Silver Bridge, experienced the phenomenon in moderate tensile strength steels used in bridge structures, and he was of the opinion that the best bridge designers in the engineering profession in 1967 would not have known that moderate tensile strength steels were susceptible to stress-corrosion cracking.

In addition to the apparent lack of knowledge of this phenomenon, the evidence vividly demonstrated that even if knowledge of this phenomenon did exist prior to the collapse of the Silver Bridge, its presence inside of the eye of Eyebar 330 could not have been detected through the most careful and sophisticated inspection by reason of its location within the eye which was tightly compressed against the steel pin. Mr. Lichtenstein testified that the only way the pin and the inside of the eye of Eyebar 330 could have been inspected would have been by taking the pin out of the joint, and that, of course, would cause a collapse. He did indicate that a system could have been constructed with cables to support the bridge on a temporary basis while such an inspection could take place, but that the cost of performing this operation would be between $2,000,000.00 and $2,500,000.00. Mr. Jones agreed that it would have been impossible to detect the flaw through inspection, and even if the inside of the eye of the eyebar could have been visualized, the minute crack could not have been detected except with microscopic instruments. Mr. Comstock and Mr. Scheffey as well as the report of the National Transportation

Safety Board agreed that the location of the flaw was inaccessible to visual inspection.

While this Court is of the opinion that the respondent was guilty of negligence in the inspection procedure which it followed through the years, this negligence to be actionable, must have been the proximate cause of the collapse of the Silver Bridge, and to constitute the proximate cause, the stress-corrosion or stress-corrosion cracking within the eye of Eyebar 330 must have been forseeable. *State ex rel. Cox v. Sims,* 138 W.Va. 482, 77 S.E. 2d 151 (1953); *Puffer v. Hub Cigar Store,* 140 W.Va. 327, 84 S.E. 2d 145 (1954); *Hartley v. Crede,* 140 W.Va. 133, 82 S.E. 2d 672 (1954) and *McCoy v. Cohen,* 149 W.Va. 197, 140 S.E. 2d 427 (1965).

In *Cox* the Supreme Court of Appeals reversed an award of the Court of Claims arising out of a claim against the State Road Commission. The claim was the result of a fire caused by sparks from the defendant's employee's creeper while the employee was repairing the leaking gas tank of a truck. The Court, in refusing to issue a writ of mandamus against the Auditor compelling him to issue the warrant, addressed itself to the issue of proximate cause and foreseeability as an element of proximate cause, and stated as follows at page 496 of the West Virginia Reports, the following:

> "Actionable negligence necessarily includes the element of reasonable anticipation that some injury might result from the act. *Koehler, Admr. v. Waukesha Milk Company,* 190 Wis. 52, 208 N.W. 901. In *Gerdes v. Booth and Flinn,* 300 Pa. 586, 150 Atl. 483, the court used this language: '* * * * *B2/3generally a person cannot be charged with negligence because he failed to anticipate unforeseen or unusual circumstances or occurrences.' Failure to take precautionary measures to prevent an injury which if taken would have prevented the injury is not negligence if the injury could not reasonably have been anticipated and would not have happened if unusual circumstances had not occurred. Dennis v. Odend'Hal-Monks Corporation,* 182 Va. 77, 28 S.E. 2d 4; *Virginia Iron Coal and Coke Company v. Hughes' Adm'r.,* 118 Va. 731, 88 S.E. 88. 'Where a course of conduct is not prescribed by mandate of law, foreseeability of injury to one to whom duty is owed is of the very essence of negligence. If injurious consequences are not foreseen as a result of the conduct, then that conduct is not negligence.' 13 M.J., Negligence, Section 22. See also *Cleveland v. Danville Traction and Power Company,* 179 Va. 256, 18 S.E.

2d 913. A person is not liable for damages which result from an event which was not expected and could not have been anticipated by an ordinarily prudent person. *Consumers' Brewing Company v. Doyle's Adm'x.*, 102 Va. 399, 46 S.E. 390; *Fowlks v. Southern Railway Company*, 96 Va. 742, 32 S.E. 464; *Southern Railway Company v. Bell*, 4 Cir., 114 F. 2d 341. * * *

"* * * One requisite of proximate cause is the doing or the failure to do an act which a person of ordinary prudence could foresee might naturally or probably produce an injury, and the other requisite is that such act or omission did produce the injury. *Washington and Old Dominion Railway v. Weakley*, 140 Va. 796, 125 S.E. 672; *Virginia Iron Coal and Coke Company v. Hughes' Adm'r.*, 118 Va. 731, 88 S.E. 88. In *Donald v. Long Branch Coal Company*, 86 W.Va. 249, 103 S.E. 55, this Court held in point 1 of the syllabus that negligence to be actionable must be the proximate cause of the injury complained of and must be such as might have been reasonably expected to produce an injury. See also *Anderson v. Baltimore and Ohio Railroad Company*, 74 W.Va. 17, 81 S.E. 579, 51 L. R. A., N. S., 888."

Although the facts in *Puffer* bear no resemblance to the present factual situation, we feel the law as expressed in that decision is fully applicable here. In *Puffer*, the plaintiff had entered the defendant's eating establishment in Charleston and while standing at the counter awaiting his food order, he was assaulted and injured by an intoxicated third party. The Court in reversing a lower Court judgment in favor of the plaintiff found that the defendant could not have reasonably anticipated or foreseen that the intoxicated third party would molest or injure the plaintiff, and the Court in discussing foreseeability used the following language appearing at page 336 of the West Virginia Reports:

"* * * A person is not liable for damages which result from an event which was not expected and could not have been anticipated by an ordinarily prudent person. *Barbee v. Amory*, 106 W.Va. 507, 146 S.E. 59; *Consumers' Brewing Company v. Doyle's Adm'x.*, 102 Va. 399, 46 S.E. 390; *Fowlks v. Southern Railway Company*, 96 Va. 742, 32 S.E. 464; *Southern Railway Company v. Bell*, 4 Cir., 114 F. 2d 341. 'If an occurrence is one that could not reasonably have been expected the defendant is not liable. Foreseeableness or reasonable anticipation of the consequences of an act is determinative of defendant's

negligence.' *Dennis v. Odend'Hal-Monks Corporation*, 182 Va. 77, 28 S.E. 2d 4. * * *"

We could cite a legion of cases expressing the identical principles of negligence law, but to us, string-citing additional authority would serve no useful purpose. We are of the firm opinion that the collapse of the Silver Bridge on the evening of December 15, 1967, could not have been anticipated or foreseen by the respondent in the exercise of reasonable care. The ultimate collapse was caused by a fracture of Eyebar 330 resulting from a phenomenon unknown to bridge engineers when the Silver Bridge was constructed in 1926 and unknown to bridge engineers on the date of its collapse.

The statute which created this Court authorized us to make awards in claims that the State of West Virginia in equity and good conscience should discharge and pay. If that was our only guideline, this Court, possessing the normal attributes of sympathy and compassion, would not hesitate to make awards. However, we have always interpreted this grant of jurisdiction to include the necessity of finding legal liability upon the State, before the test of equity and good conscience can be applied. We believe that in deciding claims, we must be bound by sound legal principles, and being of opinion that sound legal principles do not authorize recoveries, we hereby deny the claims arising out of the collapse of the Silver Bridge.

The opinion expressed herein renders moot the issue of the statute of limitations pending in the more recently instituted claims of *George Byus, Administrator of the Estate of Catherine Byus, deceased,* and *Helen Foster, Administratrix of the Estate of May Maxine Jarrell a.k.a. May Maxine Turner, deceased v. Department of Highways,* Claim Numbers D-891 and D-892.

Judge H. Lakin Ducker, who is no longer a member of this Court, fully participated in the hearing and this decision.

Claims disallowed.

Opinion issued June 1, 1976

VERLA R. ANDERSON

vs.

DEPARTMENT OF HIGHWAYS

(No. D-1018)

PER CURIAM:

Due to the negligence of respondent's employees, the automobile of claimant was splashed with tar on September 15, 1975, on Turkey Foot Road in Hancock County, and as a result, damages in the amount of $15.45 were sustained. The facts of the incident and the amount of damages being stipulated by claimant and respondent, the claimant is hereby awarded the sum of $15.45.

Award of $15.45.

Opinion issued June 1, 1976

DOROTHA JEAN CATLETT

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-964)

The claimant appeared in person.

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

JONES, JUDGE:

The claimant, Dorotha Jean Catlett, seeks to recover damages to her 1970 American Motors Hornet automobile in the amount of $1,500.00, which she alleges were the result of negligent conduct of the respondent, Department of Public Institutions. The claimant's husband, Ronald E. Catlett, is now and was at the time this claim arose, a State trooper employed by the Department of Public Safety and stationed at Welch, West Virginia. Prior to October 14, 1974, Trooper Catlett had been at the Welch barracks for more than a year; and Daniel Duskey, a convict transferred from the Huttonsville Medium Security Prison to the Welch barracks as a trusty for housekeeping duties, had lived and worked in the barracks for several months. His wife desiring to sell her automobile, Trooper Catlett placed the vehicle on the police headquarters parking lot with a "For Sale" sign in the window. The

parking lot was along Route 52, a main thoroughfare through McDowell County, where the automobile would get more exposure for purposes of sale than in the trailer park where the Catletts lived. According to Trooper Catlett, the keys to the automobile were left in a pigeonhole-type mailbox in the front office so the vehicle could be moved if in the way or if a prospective customer wanted the car started. Duskey had his separate sleeping room, and he and at least one officer were at the barracks on a twenty-four hour basis. On the night this claim arose two troopers were in the barracks.

At about 5:30 a.m. on October 14, 1974, Trooper D. R. Moore, who testified at the hearing, was awakened and informed that Duskey had wrecked the claimant's automobile. He promptly proceeded to the scene of the accident at Big Sandy and transported Duskey back to Welch where he was charged with "joy riding" and placed in the county jail. It appears that Duskey had obtained the car keys from the mailbox, where they were easily available to him, locked himself in his room, then climed out a window and drove the claimant's vehicle away, presumably to visit a girl friend. While our decision in this case will eliminate the need for adjudication of market value of the claimant's vehicle, there is no question that it was a total loss.

The only suggestion of negligence on the part of the respondent was the testimony of Trooper Catlett that the Warden of the Medium Security Prison had recommended a convict to serve the State Police Detachment as a trusty who turned out not to be trustworthy. Obviously, a state penitentiary is not the best place to look for someone to guard your property, but it has long been the policy of penal institutions to assign rehabilitative and productive tasks to prisoners who show a degree of trustworthiness above the average among their fellow prisoners. This trusty had been convicted of writing bad checks. He was interviewed by an officer from the Welch detachment and selected as many other trustys had been previously selected to clean and maintain this and other State Police barracks throughout the State. In his testimony Trooper Catlett admitted that when he used the word trustworthy as applied to trustys, he meant "relatively trustworthy". Trooper Catlett and Moore testified that they had not known of any misconduct on the part of the trusty until after he was caught in his "joy riding" adventure. Apparently, he had attended to his chores in a satisfactory manner, and there was no reason to anticipate that he might injure the climant's property through a criminal act.

State Farm Mutual Automobile Insurance Company vs. Department of Public Institutions, 7 Ct. Cl. 146, decided by this Court in 1968, was a "joy riding" case similar to this claim, although the evidence in that case probably was more favorable to the claimant. That claim was disallowed for failure to prove negligence, and the Court is of opinion that this claim also is not supported by proof of negligence, and, therefore, the same is disallowed.

Claim disallowed.

Opinion issued June 1, 1976

EVERETT L. DUNBRACK

VS.

DEPARTMENT OF HIGHWAYS

(No. D-1015)

The claimant appeared in person.

Gregory Evers, Attorney at Law, for the respondent.

JONES, JUDGE:

On or about August 25, 1975, the claimant, Everett L. Dunbrack, an employee of the respondent, Department of Highways, reported for work and parked his 1975 Monte Carlo Chevrolet automobile in the parking lot of the District Headquarters garage at Marlinton. During that day, other employees of the respondent engaged in spray-painting road equipment located on the parking lot. The respondent admits that the claimant's automobile sustained some damage from the paint spray, but denies that the claimant's estimate of damages in the amount of $412.00 is fair and reasonable. The estimate to "Refinish Complete" in that amount was obtained from a Marlinton body shop.

There being such a wide difference of oiinion as to the amount of damages, the Court granted the respondent's motion for an inspection of the vehicle. Based on the testimony of the claimant, argument of counsel for the respondent and the Court's own inspection, it is the opinion of the Court that the claimant is entitled to recover in the amount of $200.00, and an award in that amount is hereby made.

Award of $200.00.

Opinion issued June 1, 1976

LUCY WHITE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-758)

J. P. McMullen, Jr., Attorney at Law, for the claimant.

Nancy Norman, Attorney at Law, for the respondent.

WALLACE, JUDGE:

Claimant, Lucy White, alleges that shortly after 11:00 p.m. on July 14, 1973, she suffered injuries to her right foot and ankle when she stepped in a hole and fell on Commerce Street, also West Virginia Route 2 in Wellsburg, West Virginia, almost in front of the Glass residence where she was employed as a registered nurse from April 14, 1973 to the night of her fall. The hole was alleged to be approximately two feet from the curb on the west side of the street.

On the night of her fall, she was going off duty and was proceeding across the street to her parked automobile where she had parked on other occasions during her employment.

It is well established that the State of West Virginia is not an insurer of the safety of a traveler on the highway nor a person crossing the highway. Anyone injured or who sustained damages must prove that the negligence of the State caused the injury or damage in order for the State to be liable.

The Court is of the opinion and so finds that the evidence does not establish actionable negligence on the part of the respondent. The Court further finds that the claimant was familiar with the surroundings of her employment and had crossed the street at this point to and from her car on previous occasions in daylight and after dark and with the exercise of reasonable care could have avoided her injury.

Accordingly, the claim is denied.

Claim disallowed.

Opinion issued June 1, 1976

RALPH WILSON

vs.

DEPARTMENT OF HIGHWAYS

(No. D-885)

Charles D. Bell, Attorney at Law, for the claimant.

Nancy Norman, Attorney at Law, for the respondent.

WALLACE, JUDGE:

The claimant, Ralph Wilson, was a driver-salesman for the United Ohio Valley Dairy. On November 24, 1972 he was proceeding southerly on Brady's Ridge Road in Brooke County, West Virginia about a mile south of the Washington Pike. It was early morning, the weather was clear. Claimant testified that he travelled this road twice a week in his milk truck; that the road was approximately twelve to fourteen feet wide; that the truck was eight feet wide.

On the morning of the accident, the left hand berm, of three to four feet proceeding southerly, had been scraped and cleaned and was muddy. The right hand berm of approximately two feet appeared firm and smooth.

Claimant pulled his truck over on the right hand berm to allow an oncoming vehicle to pass. When his right front wheels and right rear wheels were on the berm, it gave way and the truck, with the claimant inside, rolled over and down the hill.

The claimant suffered injuries for which he was hospitalized for five days and was unable to return to work for six weeks.

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 should have known a dangerous condition existed. The berm of the road gave way through no fault of the claimant and the Court finds the respondent negligent and is of the opinion that the claimant is entitled to recover on the complaint.

The Court hereby awards the claimant $3,000.00.

Award of $3,000.00.

Opinion issued June 16, 1976

ACE DORAN HAULING & RIGGING CO.

VS.

PUBLIC SERVICE COMMISSION

(No. D-1000)

Claimant appeared through its operations manager, *Norbert John Doran*.

Thomas N. Hanna, Attorney at Law, Legal Division, Public Service Commission, for respondent.

GARDEN, JUDGE:

In December of 1974, the claimant filed its application for 1,000 identification stamps for the registration and identification of vehicles that it intended to operate within West Virginia during the period from February 1, 1975 through January 31, 1976. It also filed a list identifying each vehicle it intended to operate within the borders of the State during the above-mentioned period. All of this was done pursuant to Code 24A-6A-4. This section further requires a motor carrier to obtain from the National Association of Regulatory Utility Commissioners (NARUC) a supply of uniform identification cab cards, commonly referred to as "bingo" cards for the registration and identification of each vehicle it intends to operate in West Virginia for the ensuing year.

The carrier is required to fill in the front of the cab card so as to identify itself and the vehicle, and the card is then kept in the cab of the vehicle. If it is determined that a particular vehicle will be operated in this State, one of the identification stamps is affixed to the back of the cab card in the square bearing the name of this State. There are, of course, other squares on the back of the cab card to accommodate stamps from other states in which the particular vehicle will operate.

With its application, the claimant forwarded its check in the amount of $3,000.00 covering the statutory fee of $3.00 per identification stamp. In May of 1975, the claimant determined that it had purchased 200 stamps in excess of the amount it would need and offered to return these stamps to respondent and requested a refund of $600.00. The respondent, having no statutory authority to make such a refund, refused. Claimant is thus in this Court seeking an award of $600.00.

In the somewhat similar claims of *Central Investment Corporation v. Nonintoxicating Beer Commissioner*, 10 Ct. Cl. 182, *The F. & M. Schaefer Brewing Co. v. Nonintoxicating Beer Commissioner*, D-904, and *Queen City Brewing Co. v. Nonintoxicating Beer Commissioner*, D-923, we made awards for unused stamps, crowns and lids for which taxes had been pre-paid. In those claims, the breweries had either sold their business to another concern or had completely gone out of business, and we were of the opinion that to allow the State to retain the pre-paid tax would constitute unjust enrichment.

The claimant in this case is a going concern and will probably continue to conduct its operations in this State for many years. To allow this claim would result in every motor carrier doing business in this State filing a claim in this Court every year for the cost of any unused identification stamps. This result would not be desirable and certainly not one intended by the Legislature in enacting Article 6A of Chapter 24A. We would point out that Article 6A gives the motor carriers the right to file one or more supplemental applications for additional stamps during the year if the need arises or is anticipated. We can only suggest that motor carriers be conservative in submitting their original applications and resort to supplemental applications if additional stamps are needed or anticipated.

Claim disallowed.

Opinion issued June 16, 1976

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA

VS.

DEPARTMENT OF HIGHWAYS

(No. D-900)

PER CURIAM:

The claimant and respondent have filed a written stipulation that the respondent was engaged in a construction project to widen and improve Route 5/6 in Berkeley County, West Virginia from November, 1972 to March, 1973; that from December 14, 1972, to March, 1973 the respondent removed by explosives certain rock

outcroppings adjacent to the highway. Claimant owned and maintained an aerial telephone cable along the highway. The respondent did not notify claimant of the planned blasting operation nor did respondent request removal of the cable to avoid damage to the cable. Respondent was requested to stop blasting to allow removal of cable but such request was refused. That as a result of the blasting claimant's cable was damaged on numerous occasions, requiring repairs and subsequent replacement of the cable; that $10,731.08 is a fair and equitable estimate of the damages sustained by the claimant. Believing that liability exists on the part of the respondent and that the damages are reasonable, an award of $10,731.08 is directed in favor of the claimant.

Award of $10,731.08.

Opinion issued June 16, 1976

JAMES D. LINVILLE

VS.

DEPARTMENT OF HIGHWAYS

(No. CC-76-14)

PER CURIAM:

The claimant and respondent have filed a written stipulation reflecting that the respondent was engaged in blasting activities on November 11, 1975, near West Hamlin in Lincoln County; that as a result of the blasting, five panels of claimant's house trailer were damaged, and that $306.00 is a fair and equitable estimate of the damage sustained by the claimant. Believing that liability exists on the part of respondent and the damages are reasonable, an award of $306.00 is directed in favor of the claimant.

Award of $306.00.

Opinion issued June 16, 1976

LARRY McCONAHA

VS.

DEPARTMENT OF HIGHWAYS

(No. D-1027)

PER CURIAM:

The claimant and respondent have filed a written stipulation indicating that on or about October 27, 1975, the respondent by and through its employees, was marking with yellow paint, Route 114 near the Town of Pinch, Kanawha County, West Virginia, for eventual yellow striping of the middle of the highway. Respondent's employees directed traffic and the claimant from one lane of the highway to the other; that the tires of claimant's vehicle splattered paint on the body of claimant's vehicle. That as a result claimant's vehicle was damaged, and $31.93 is a fair and equitable estimate of the damage sustained by claimant. Believing that liability exists on the part of respondent and the damages are reasonable, an award of $31.93 is directed in favor of the claimant.

Award of $31.93.

Opinion issued June 16, 1976

NATIONAL ENGINEERING & CONTRACTING CO.

VS.

DEPARTMENT OF HIGHWAYS

(No. D-753a)

Gordon T. Kinder, Attorney at Law, for the claimant.

Dewey B. Jones, Attorney at Law, for the respondent.

JONES, JUDGE:

The claimant, National Engineering & Contracting Co., filed this claim against the respondent, Department of Highways, seeking payment of the sum of $5,059.01 which was deducted from the final settlement under a paving contract in Ohio County upon a determination by the respondent that concrete poured by the claimant during the period August 19 to October 28, 1970, did not

reach a maximum strength of 3,000 pounds per square inch as required by the contract.

Upon the hearing of this claim, counsel for the parties stipulated in writing the following:

> "It is hereby stipulated by and between National Engineering & Contracting Co., claimant, and the Department of Highways and the State of West Virginia, respondents, that the preponderating evidence in this claim is that the samples of concrete taken from the concrete placed by the contractor between August 19, 1970, and October 28, 1970, for purposes of testing the strength of said concrete, were not properly screened to remove a representative quantity of the larger particles from said samples of concrete, therefore, the testing results during the aforesaid referred to period of time by the West Virginia Department of Highways were not a true representation of the strength and value of the concrete that was placed during said period of time and this contention is further supported by the fact that the same kind of concrete made and mixed in accordance with the same specifications as the concrete referred to aforesaid and placed by the contractor, after the aforesaid concrete was placed, but sampled and tested under a method whereby the larger aggregate particles were screened off and these test results showed in every test but one that the concrete was of adequate strength and not defective.
>
> Therefore, in view of said facts the preponderating evidence there should not have been a reduction in the value of the concrete described and referred to in this claim by the Department of Highways."

The claim having been submitted upon the record, and the Court having considered the Notice of Claim, Answer, Stipulation and the recommendation of the respondent that the claim should be paid, the Court accepts and approves the Stipulation of the parties, and pursuant thereto hereby awards the sum of $5,059.01 to the claimant, National Engineering & Contracting Co. Concurrently with the submission of this case for the Court's consideration, a companion claim, D-753b, in the amount of $5,508.56 was dismissed upon agreement of counsel.

Judge Garden did not participate in the hearing and decision of this claim by reason of a conflict of interest.

Award of $5,059.01.

Opinion issued June 16, 1976

PECK BROGAN BUILDING & REMODELING

VS.

WORKMEN'S COMPENSATION FUND

(No. D-1012)

Boyce Griffith, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

In February of 1975, the Director of the Purchasing Division, Department of Finance and Administration, pursuant to Code 5A-3-12, solicited bids for certain remodeling work to be performed on the second floor of the Workmen's Compensation Building located at 112 California Avenue in Charleston. In general, the contemplated work required the removal of 380 feet of existing partitioning and the re-installation of 69 feet of partitioning in new areas. The successful bidder was also required to clean up and deliver any unused partitioning to State Surplus Properties in Dunbar.

Bids, which were opened on May 8, 1975, were received from Robert E. Agsten, Inc. in an amount of $4,540.00, from Leonard D. Brogan, d/b/a Peck Brogan Building & Remodeling, hereinafter referred to as Brogan, in an amount of $14,695.00, and from Charleston Acoustics in an amount of $16,831.47. Brogan attended the bid opening but upon learning that a bid lower than his had been submitted, he thought no further about the job until a few days later when he received a letter dated May 9, 1975, from the Purchasing Division advising him that he was the successful bidder. The letter further directed him to deliver certain documentation such as a performance bond, labor and material bond, etc. to the Purchasing Division on or before May 23, 1975. Brogan testified that he then went to the office of Thomas Mathewson, a buyer for the Purchasing Division, and Mr. Mathewson confirmed that he, Brogan, was the successful bidder. Brogan then went to the office of Ray E. Lane, Director of Operations for the Workmen's Compensation Fund, and advised Mr. Lane that he was the successful bidder. Lane then directed Brogan to get started so that the work could be completed by June 30th, before the close of the fiscal year. Brogan started work on the

project on May 22, 1975, and completed the same in a satisfactory manner. The evidence disclosed that while a purchase order had been prepared, it was never signed and delivered to Brogan. Obviously, the provisions of Article 3 of Chapter 5A of the Code were not followed, and the agreement or contract with Brogan was void and of no effect (see Code 5A-3-19).

The evidence clearly demonstrated the existence of an inter-agency foul-up, but it is not clear to this Court which agency, the Workmen's Compensation Fund or the Department of Finance and Administration, was responsibile. Mathewson testified that he was present at the bid opening on May 8, 1975, and that the low bid was received from Agsten; however, and as a result of a short note that he received from Lane, he wrote the letter of May 9, 1975, to Brogan advising him that he was the successful bidder. In his later testimony, he stated that he could not recall who authorized him to write the May 9, 1975, letter to Brogan. Lane, on the other hand, testified that he had written a three sentence letter to Mathewson in the middle of June in an attempt to justify the execution of a purchase order to Brogan. He stated that this was done at the request of Finance and Administration, but he denied having any contact with Mathewson prior to Mathewson writing his letter of May 9, 1975.

It appeared that prior to the submission of bids, Lane orally advised each bidder that the contract would not include any electrical work and the touch-up painting and the removal of a certain Dutch door would be eliminated from the work to be performed. Consequently, when Agsten submitted his bid, these items were specifically excluded by him but were not so excluded by Brogan. Finance and Administration, having not been advised by Lane that items were to be excluded believed that Agsten obviously had not submitted a bid for all of the work to be performed, and that this accounted for the large difference between the Agsten bid and the Brogan bid, and without checking the matter further, advised Brogan that he was the successful bidder.

Brogan testified that he had done work for the Workmen's Compensation Fund before and had also done some work on one occasion for the Department of Welfare, and on one of these jobs, the work was almost completed before he received a purchase order. With this prior experience in mind, he said he had no hesitancy in proceeding with the subject work without a purchase

order. The respondent, in an attempt to limit any award to a quantum meruit recovery, introduced testimony from Robert E. Agsten to the effect that he could have done the work for the amount of his bid and could have made a reasonable profit. Respondent also called Robert Estep, Vice President of Asbestos Insulating Company of South Charleston, a reputable concern, and he opined that his company could also have done the work and could have made a reasonable profit for the figure of $4,540.00.

While we are of opinion that the Borgan bid was high and the work could have been accomplished for a lower figure, we feel that equity and good conscience compel a different result. Brogan submitted his bid in good faith. Through no fault of his own, an inter-agency dispute followed. He received written and oral notification from Mathewson that he was the successful bidder and was instructed by Lane to proceed with the work. The wheels that set this unfortunate situation in motion were turned by either respondent or Finance and Administration, or by both parties. Any result other than to award Brogan the full amount of his bid or $14,695.00 would, in our opinion, be unconscionable.

Award of $14,695.00.

Opinion issued June 16, 1976

STATE FARM FIRE & CASUALTY COMPANY AND EDGAR AND BESSIE DAMEWOOD

VS.

DEPARTMENT OF HIGHWAYS

(No. D-1035)

PER CURIAM:

By written stipulation of the parties it appeared that respondent in conducting blasting operations near the home of Edgar Damewood and Bessie Damewood inflicted damage to the home in the amount of $1,200.00. Believing liability exists and that the damages are reasonable, an award is hereby made in the amount of $1,200.00.

Award of $1,200.00.

Opinion issued June 16, 1976

ERNEST L. WHITE and FLORENCE WHITE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-751)

Eugene R. White, Attorney at Law, for the claimants.

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

JONES, JUDGE:

This claim is for damages in the amount of $5,000.00 to property owned by the claimants, Ernest L. White and Florence White, situate on the west side of State Route No. 2, approximately one and one-half miles south of New Martinsville, in Wetzel County. The subject property lies between lands now or formerly owned by William C. McIver and Wilma L. McIver, and Earnest R. White and Jo Ann White, respectively, who had similar claims against the respondent founded upon the same failure to prevent or correct the slippage of a landfill negligently constructed and maintained by the respondent adjacent to these properties. The McIver and White cases were decided by the Court in October 1973, the claims being allowed and awards made to the claimants. *William C. McIver et al. vs. Department of Highways* and *Earnest R. White et al. vs. Department of Highways,* 10 Ct. Cl. 23. Pilings were installed in the summer of 1971 in an effort to stop the slide, and the primary issue in this case is whether the slippage continued after that time.

A written Stipulation has been filed wherein it is stipulated and agreed by and between the claimants and the respondent that the slippage has persisted and that beginning in 1971 and continuing thereafter the claimants' land has been damaged thereby. The parties further stipulated that the sum of $2,500.00 is a fair and reasonable valuation of the damages sustained by the claimants. Based on statements of counsel and the Court's own knowledge of the background and basis of this claim, the Court accepts and approves the Stipulation, and hereby awards the claimants, Ernest L. White and Florence White, the sum of $2,500.00.

Award of $2,500.00.

Opinion issued June 16, 1976

MARILYN WIDLAN

VS.

DEPARTMENT OF HIGHWAYS

(No. CC-76-1)

Judith A. Herndon, Attorney at Law, for the claimant.

Nancy Norman, Attorney at Law, for the respondent.

JONES, JUDGE:

At 10:00 a.m. on November 7, 1975, the claimant, Marilyn Widlan, was driving her 1975 Oldsmobile station wagon in a southerly direction on State Route No. 88N in Ohio County when she was suddenly confronted by a broken tree limb hanging out into her lane of traffic. The claimant was unable to avoid striking the limb, due to the location of the limb in a curve at the top of a hill where there is a "blind spot", and the presence of oncoming traffic. It had stormed during the night and the skies were threatening further turbulence. The claimant was traveling in a thirty mile per hour speed zone; and she testified that the limb extended about one foot over the paved surface of the highway. The claimant found a place to drive off of the highway, where she examined the vehicle and found considerable damage to its right side, repairs to which were later estimated to cost $312.79. About a half mile further on the claimant saw a Department of Highways truck and was able to report the broken limb and accident to Edward Leach Wheeler, an employee of the respondent. Mr. Wheeler immediately went to the accident scene and quickly removed the broken limb. It was later determined that the damaged tree was growing on the State right of way.

This was a live tree and there is nothing in the record to show that the respondent had knowledge of the hazardous condition, or should have known or foreseen that it might occur. Neither was there any notice to the respondent that the limb was broken until that information was furnished by the claimant. While the respondent in such a case may not unreasonably delay the removal of a hazardous obstruction upon a State highway, neither will liability arise until the respondent knows or should know that such a hazard exists. The law in West Virginia is well established that the State is not an insurer of its highways, and if there is not

preponderant proof of negligence on the part of the State's employees, the user of the highway travels at his own risk.

The Court finds the respondent free of negligence in this case, and, therefore, the claim of Marilyn Widlan is disallowed.

Claim disallowed.

Opinion issued July 19, 1976

WILLIAM L. DAVIS

VS.

DEPARTMENT OF HIGHWAYS

(No. CC-76-18)

The claimant appeared in person.

Nancy Norman, Attorney at Law, for the respondent.

JONES, JUDGE:

On February 14, 1976, at about 11:30 p.m. the claimant, William L. Davis, drove his Ford station wagon up the ramp entering State Route No. 119 at Big Chimney in Kanawha County. According to his testimony he was travelling at about 25 miles per hour when his left front and left rear tires struck a hole in the pavement, causing them to blow out. He alleged damages in the amount of $66.00. The claimant says that he did not see the hole, and while he estimated its depth at eight inches, no measurements were made, no pictures taken, nor any corroboration had by any other witness. The claimant's home is at Clendenin and he is well-acquainted with Route No. 119 and its approaches, although he said he had not travelled this ramp for about two months, at which time he saw no defect at the point of the accident.

There is no evidence that the respondent had notice of any extraordinary hazard, although the claimant said there was no way to avoid the hole and it is well known that hundreds of vehicles traverse this ramp every day. While the claimant says he did not see the hole, the Court is constrained to believe that if he was travelling at the modest rate of 25 miles per hour and had adequate headlights, he should have seen a hole of the size complained of, and that if the claimant had been operating his vehicle with proper care, he would not have struck the hole with such force as to blow out two tires.

This Court consistently has followed the decisions of our Supreme Court of Appeals in holding that the State is not an insurer of its highways and its duty to travellers is a qualified one, namely, reasonable care and diligence in the maintenance of its highways under all the circumstances. In view of the foregoing principles, the Court finds that there is no satisfactory proof of actionable negligence on the part of the respondent, and, to the contrary, we find a lack of care by the claimant contributing to his injury.

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

Claim disallowed.

Opinion issued July 19, 1976

ROBERT B. DORSEY

VS.

DEPARTMENT OF HIGHWAYS

(No. D-1029)

PER CURIAM:

The claimant and respondent have filed a written stipulation indicating that on or about October 9, 1975, the respondent by and through its employees, was engaged in certain construction work on Eli Road, a State highway in Sumerco, Lincoln County, West Virginia. That respondent's employees detonated explosive charges in the construction area causing rock and debris to be thrown against claimant's trailer. That as a result claimant's trailer was damaged and $89.55 is a fair and equitable estimate of the damage sustained by the claimant. Believing that liability exists on the part of the respondent and the damages are reasonable, an award of $89.55 is directed in favor of the claimant.

Award of $89.55.

Opinion issued July 19, 1976

PANSY HEFLIN

VS.

DEPARTMENT OF HIGHWAYS

(No. D-988)

The claimant appeared in person.

Gregory W. Evers, Attorney at Law, for the respondent.

JONES, JUDGE:

The claimant, Pansy Heflin, has filed her Notice of Claim against the respondent, Department of Highways, in the amount of $4,000.00 for damages to a culvert and bridge affording access from a secondary State road near West Union, in Doddridge County to the claimant's residence and land owned and operated by her as a trailer court.

When she started her trailer court in 1970 the claimant installed the culvert in a small stream running along the front of her property, utilizing two steel cylinders cut from gasoline storage tanks and filling dirt and gravel around and over the tanks. She also constructed tiers of crossties along both sides of the stream to support its banks.

During the year 1971 a flashflood caused the culvert to clog and the stream's waters overflowed and flooded the State road. The respondent dispatched employees to the scene who waded into the stream and did what was necessary to clear the culvert, thereby accomplishing the draining of water from the State road and opening it to traffic. The banks of the stream in the area of the culvert were considerably eroded and damaged by the flood and the roadway over the culvert was rendered impassable.

There is evidence that sometime after the flood other employees of the respondent, in an effort to deepen the channel of the stream and build up its banks, caused an endloader or other piece of state equipment to collide with one of the culvert tanks, bending and damaging it. However, no claim was made by the claimant for damage to the pipe and she set about building a bridge across the stream. The bridge was constructed of steel pipes and has served its purpose since that time, except that now the banks of the stream have again eroded and have become so unstable as not to

afford safe support for the terminal portions of the bridge. It appears that it will be necessary to construct buttress and wingwalls under the bridge to eliminate dependence upon support of the stream banks and the claimant contends that the respondent should pay the cost thereof.

There is no satisfactory showing by the claimant that the respondent is responsible in any way for the upkeep of her bridge or the maintenance of the banks of the stream. The respondent is only interested in maintenance of its highway and its only concern has been to remove flood waters and to maintain traffic thereon. The claimant testified that she owned land on both sides of the stream, the bridge is her property and was built by her to serve both her personal and commercial purposes.

Any possible fault of the respondent referred to by the claimant is entirely too conjectural and speculative to form the basis of an award by this Court, and accordingly, this claim is disallowed.

Claim disallowed.

Opinion issued July 19, 1976

KAREN HUTCHENS

VS.

DEPARTMENT OF HIGHWAYS

(No. CC-76-5)

Claimant appeared in person.

Nancy Norman, Attorney at Law, for the respondent.

WALLACE, JUDGE:

On November 11, 1975 the claimant, Karen Hutchens, was driving her automobile on Pennsylvania Avenue in the City of Charleston, West Virginia near the city garage. It was approximately 7:00 p.m., the street lights were on.

She testified it was the period of day between dusk and dark; that her lights were on and she was driving about 40 mph talking with her passengers. There was no oncoming traffic. The claimant was traveling in the left lane of the two lane avenue when she suddenly came upon an object in the road. She swerved to the right

in an effort to miss it, but it struck the left rear wheel bending the rim out of shape and damaging the tire.

One of the passengers took over the driving and proceeded to find a gas station to fix the tire. They stopped at the city garage for help but tools there were not small enough to fit an automobile. The incident was reported to the city garage dispatcher. Neither the claimant nor her passengers knew what was struck until a maintenance man from the garage came in and reported that he had replaced a manhole cover.

There is no evidence in the record to show that the respondent had knowledge that the manhole cover was in the street. The city employees were notified and they corrected the situation. The well established law in West Virginia is that the State is not an insurer of its highways and the user thereof travels at his own risk. In order for the respondent to be liable in this case there must be proof that the negligence of the State caused the damage. There was no such proof.

The Court finds the respondent free of negligence and disallows the claim.

Claim disallowed.

Opinion issued July 19, 1976

NANCY C. JETER

VS.

DEPARTMENT OF HIGHWAYS

(No. CC-76-20)

Claimant appeared in person.

Nancy Norman, Attorney at Law, for the respondent.

WALLACE, JUDGE:

The claimant testified that her fiance was driving her automobile west on MacCorkle Avenue in the City of Charleston, West Virginia about 10:00 p.m. on January 30, 1976; that he had slowed down to approximately 20 mph preparatory to making a left hand turn. She further testified that the driver swerved to miss a hole in the pavement but failed and the impact knocked off a hubcap which in turn damaged the fender. She stated that they went back to the

scene of the accident a week later to take a picture of the hole but it had been filled. The claimant did not see the hole but testified to what the driver had told her. The driver did not testify.

The claims investigator for the Department of Highways, Jerry Walker, testified that there was no physical evidence of the patching of holes at the alleged scene of the accident.

The law is well established in West Virginia that the State is not an insurer of the safety of a traveler on the highway. Anyone who sustains damages must prove that the negligence of the State caused the damage complained of in order for the State to be liable. There is nothing in the record to show that the respondent had notice of any dangerous condition in the highway nor was there any proof of negligence on the part of the respondent. In the absence of this, the user of the highway travels at his own risk.

The Court is of the opinion that the evidence does not establish actionable negligence on the part of the respondent and therefore disallows the claim.

Claim disallowed.

Opinion issued July 19, 1976

CHLOE THOMPSON

VS.

DEPARTMENT OF HIGHWAYS

(No. CC-76-10)

PER CURIAM:

The written Stipulation filed in this claim reflects that on September 8, 1975, the claimant attempted to drive across a wooden bridge on Route 78 in Logan County, West Virginia, and while so doing, the bridge collapsed causing damage to claimant's 1974 Maverick automobile, said damages amounting to $174.10. Being of opinion that the written Stipulation demonstrates liability upon the respondent and being of the further opinion that the damages are reasonable, an award of $174.10 in favor of the claimant is hereby made.

Award of $174.10.

Opinion issued July 19, 1976

SPENCER TOPPINGS

VS.

DEPARTMENT OF HIGHWAYS

(No. D-987)

PER CURIAM:

The claimant and respondent have filed a written Stipulation which reveals that in June of 1975, the respondent was upgrading Local Service Route 52/5 in Lincoln County, West Virginia, and in performing the upgrading adjacent to the property of the claimant, respondent's machinery uprooted and destroyed certain trees on claimant's property. As a result four (4) fruit trees and twenty-two (22) locust trees belonging to the claimant were destroyed, and that the fair market value of these trees was $710.00. Believing that liability rests with respondent and that the claimant's damages are reasonable, we hereby award the claimant $710.00.

Award of $710.00.

Opinion issued August 9, 1976

ELIZABETH ANN HEDGES, EXECUTRIX OF THE ESTATE OF A. BRUCE HEDGES, DECEASED

VS.

BOARD OF REGENTS

(No. D-831)

Roderick Devison, Attorney at Law, for the claimant.

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

WALLACE, JUDGE:

This claim was brought by Elizabeth Ann Hedges as Executrix of the Estate of A. Bruce Hedges, deceased, for compensation claimed due the decedent on a repair job at Fairmont State College, Fairmont, West Virginia. The claimant's decedent was a plastering contractor who over a period of time had done certain work for the college.

On or about April 19, 1973, the ceiling in the building of the college that housed the swimming pool fell, the plaster falling into the pool. A. Bruce Hedges and Robert E. Schmidt of L. D. Schmidt & Son, Architects, were called to the school to discuss with the officials repairs to be made to the ceiling.

The testimony shows that it was determined between the then college president, Dr. E. K. Feaster and Dean Yost, Dean of Administrative Affairs, that in order to have the pool ready for use for the next term of school the repair work should be done on an emergency basis rather than follow normal bidding procedures.

Mr. Robert E. Schmidt, the architect, testified that there were three different proposals discussed, "one was for lathe, one was for just painting the structural system, and the final one that was agreed upon was the elimination of the glue on the ceiling and installing a plaster coat over a weld-crete coat.

Mr. Hedges, by his letter of May 10, 1973, addressed to Dr. Feaster, President of the College, agreed to do the work. His letter states that it was a preliminary estimate of approximately $4,000.00. As a result of the letter, the State Purchasing Director issued an emergency work authorization directed to Mr. Hedges, which authorization stated the cost shall not exceed $4,000.00. During the course of the work, Mr. Hedges was paid $4,000.00 and upon completion of the job he billed the college for an additional $8,756.00.

Harold B. Lawson, Director of Physical Facilities at Fairmont State College, testified that the decedent did most of the plastering repair work at the college for a number of years; that he understood the organizational structure very intimately, and that he was the architect's prime contractor to do the job.

Lawson further testified that the decedent installed the ceiling which fell and for that reason did not intend to take the normal contractor's profit. He stated that Hedges operated under very difficult conditions and that the school had an obligation to pay him the difference.

Lawson stated that "it was a very honorable job done" and that he believed Hedges incurred the costs in the performance of the job; that his bill was valid and was within the acceptable allowances for a job of that nature. The total cost figure compared with the number of square feet was allowable and acceptable for

the trade. Mr. Lawson, by letter to Homer Cox, the business manager of the college, recommended payment to the decedent.

Robert E. Schmidt, the architect employed by the college, testified that the college was extremely anxious to get the job done and that Hedges intended to do the job at his cost when he learned the wire system on the prior job was inadequate.

Schmidt further testified that the decedent did a good job and his bill was very reasonable and within the realm of industry standards.

The testimony developed that Mr. James Blackwood an architect with L. D. Schmidt & Son, approved the payment of the decedent's bill. On cross examination, Mr. Schmidt was asked why his organization approved the bill for payment. Schmidt testified that his company was representing the school and all bills had to be approved. He testified that they knew Hedges did more work than was anticipated requiring more labor and more time. In a meeting with Schmidt, Dean Yost and Dr. Feaster, Hedges advised that his bid was too low and he could not complete the job. The school officials insisted that he finish the job and they would find a way to pay him out of repairs and alterations money. As a result, the architects as the owner's agent, approved the bill for payment. Schmidt stated that the school officials felt they did not have time to get a change order for the job.

The administration of the college changed and the new officials knowing nothing of the situation apparently took the position that they had no legal basis for the payment of the cost over-run. None of the college officials testified except Mr. Lawson. The only witness for the respondent was Ben E. Rubrecht, the Director of Purchasing for the State of West Virginia, who knew only of the $4,000.00 purchase order which was paid. He testified that his investigation revealed that there was no request for an additional payment.

However, it was the school officials that determined the work should be done on an emergency basis. It was the school officials that, when learning of the cost over-run, represented to the decedent that he would be paid. The close relationship between the decedent and Fairmont State College established over the years was such that the decedent acted on those representations and completed the job expecting to be paid by the college.

Nowhere in the testimony is there any evidence that the job was not done properly, but on the contrary, the testimony reveals the decedent was well respected in his trade and always did a good acceptable job as was done in the instant case.

The law provides for awards of claims which in equity and good conscience the State should pay. This is such a claim. There is no question that the work was well done and the costs incurred were reasonable. The State received the benefit of the work done and to deny recovery would be unjust enrichment to the State.

Accordingly, the Court is of the opinion that the claimant has established an equitable and just claim and awards the claimant the sum of $8,756.00.

Award of $8,756.00.

Opinion issued August 9, 1976

LASHLEY TRACTOR SALES

VS.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. CC-76-27)

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, et al v. Department of Mental Health,* 8 Ct. Cl. 180, the factual situations and the law applicable thereto being the same as that involved in the foregoing decision of this Court.

Claim disallowed.

Opinion issued August 9, 1976

MONTGOMERY GENERAL HOSPITAL

VS.

DEPARTMENT OF PUBLIC SAFETY

(No. D-1001)

T. E. Myles, Attorney at Law, for the claimant.

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

GARDEN, JUDGE:

This claim was submitted for decision on the Notice of Claim, Answer and Affidavits of J. R. Lewis, a former member of the Department of Public Safety, Kenneth R. Fultz, the administrator of the Montgomery General Hospital, and J. Zane Summerfield, the Prosecuting Attorney of Fayette County.

The pleadings and affidavits establish that on August 17, 1972, one William Lowell Samples was arrested by members of respondent as a result of breaking and entering, and as an incident to his arrest he was shot by one of the arresting officers. He was thereupon taken by a member of the Department of Public Safety to claimant's hospital for treatment where he was admitted and thereafter discharged on August 29, 1972. While in the hospital he was guarded by members of respondent on an around the clock basis. Upon his discharge, members of respondent took Samples before a Justice of the Peace and upon waiving a preliminary hearing, Samples was then taken by members of respondent to the Fayette County Jail where he was turned over to the jailer. Samples was later indicted, plead guilty and was sentenced to the West Virginia Penitentiary. The affidavits clearly establish that the Sheriff of Fayette County had no contact with the case until Samples was delivered to his jailer on August 29, 1972.

The claimant billed the County Court of Fayette County for its charges in the amount of $2,898.59, which the affidavits establish to be a reasonable charge. The County Court refused to pay the bill, and an attempt was then made to tax the hospital bill as part of the court cost by an Order of the Circuit Court of Fayette County entered in February of 1973. The State Auditor however refused to approve the same, and the claimant having no other course to follow has thus filed its claim in this Court.

The refusal of the Fayette County Court to pay claimant's bill was based on a 1965 Attorney General's opinion, 51 Ops. Att'y. Gen. 348 (1964-1966). The facts underlying that opinion stated briefly were as follows: one Pack was seriously wounded by gunfire by members of the Department of Public Safety during the breaking and entering of a store in Logan County and was thereafter taken to the hospital by members of the Department of Public Safety. While the Sheriff of Logan County was in an automobile outside of the store and participated in watching for the suspects to appear, he took no part in the actual arrest, nor did he, directly or indirectly, authorize the taking of Pack to the hospital or authorize or direct the hospital to render treatment.

The Attorney General was of the opinion that the County Court of Logan County was not legally responsible for the bill, stating as follows:

> "Where a member of the State's Department of Public Safety wounds and arrests a prisoner and delivers such prisoner to a hospital for necessary treatment, without authorization from a county sheriff, the county sheriff has neither actual or constructive custody of the prisoner; such prisoner is considered to be a State prisoner, and the liability for paying his medical and hospital expenses rests not with the county court, but with the State."

In reaching his opinion the Attorney General relied principally upon the provisions of Code 7-8-2 which reads partly as follows:

> ". . . When any prisoner is sick the jailer shall see that he has adequate medical and dental attention and nursing, and so far as possible keep him separate from other prisoners. Any such medical care and nursing as the jailer may be required to furnish shall be paid for by the county court. . ."

We agree with the opinion of the Attorney General, and we further agree that the County Court of Fayette County was justified in refusing to pay claimant's bill. The factual situation in the present case is much stronger for such a refusal than it was in Logan County. In the Logan County matter the Sheriff of Logan County did partially participate in the arrest of the prisoner, but here there is no evidence that the Sheriff of Fayette County even knew of the arrest and subsequent hospitalization.

We can find no statutory mandate casting an obligation on the State to pay a hospital bill in cases such as this, but we are of the

opinion that a moral obligation to pay such a claim exists, and we therefore award the claimant the sum of $2,898.59.

Award of $2,898.59.

Opinion issued September 2, 1976

JAMES P. FOSTER,
dba WESTERN VIRGINIA DEMOLITION COMPANY

vs.

DEPARTMENT OF HIGHWAYS*

(No. CC-76-8)

The claimant appeared in person.

Gregory W. Evers, Attorney at Law, for the respondent.

JONES, JUDGE:

The claimant, James P. Foster, doing business as Western Virginia Domolition Company, seeks payment for part of his charges for the demolition and removal of a two-story frame building situate at 1001-14th Street, in the City of Parkersburg. He testified that he entered into an oral agreement with the City of Parkersburg and A. James Manchin, Director of the Rehabilitation Environmental Action Program, commonly known as REAP, a section of the respondent, Department of Highways, to demolish and remove said building for the total sum of $1,497.00, based on estimates of $499.00 for tearing down the house, $499.00 for removing trees and $499.00 for hauling dirt and leveling the work area. According to the claimant the City and REAP were to pay one-half of the bill or $748.50 each. REAP also furnished a loader which the claimant brought to the site from the State Penitentiary at Moundsville. After the work was finished the City of Parkersburg paid $499.00 for the dirt and $499.00 for the trees, a total of $998.00, leaving a balance due of $499.00. However, the claim filed is in the amount of $687.00, including non-allowable telephone charges and collection costs.

There is some indication in the testimony that the building and land were delinquent for the non-payment of taxes, but we find nothing to show that the State had any legal title to the property, that there was any obstruction to a state highway, or any other reason why the State should join in the demolition project, except as the removal of an eyesore might promote the public welfare.

The claimant was the only witness in this case, and the Court is of opinion that a valid, enforceable contract with the respondent has not been proved. No witness was called by the claimant to establish any right or authority of the Director of REAP to commit the respondent to pay the claimant the sums sought to be recovered. While the Director was quoted as recommending payment of the claim, he was not subpoenaed as a witness. Counsel for the respondent admitted that the work was done in a satisfactory manner, and that presumably he was entitled to be paid for it. However, the State's attorney was not able to enlighten the Court on the questions pertaining to the contract or any statutory authority for REAP's participation therein, and could not point out any benefit or enrichment inuring to the State.

The claimant was not represented by counsel, and the Court is apprehensive that there may be valid grounds for an award in this case which have not been properly developed. Therefore, while the Court will not make an award in the present posture of this case, we would be constrained to leniency in the granting of a rehearing upon a proper showing of cause.

Claim disallowed.

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*See also *James P. Foster, ada Western Virginia Demolition Company vs. Department of Highways,* 11 Ct. Cl. 199 wherein this decision is reversed on rehearing.

Opinion issued September 2, 1976

J. E. LOVEJOY and EDITH LOVEJOY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-853)

Robert G. Wolpert, Attorney at Law, for the claimants.

Nancy Norman, Attorney at Law, for the respondent.

JONES, JUDGE:

The claimants, J. E. Lovejoy and Edith Lovejoy, are the owners of property fronting one hundred feet on Campbell's Creek Road near Malden in Kanawha County, with improvements consisting of two small frame cottage houses. The lot is steep, running up the

hillside for twenty-five to thirty feet from the road to a level bench where the buildings are located, and thence up another steep slope through a wooded area. The notice of claim alleges that in the year 1973 the respondent, Department of Highways, encroached upon and damaged the claimant's property by digging a deep ditch outside the State's right of way and along the toe of the slope of their land. The claimant, J. E. Lovejoy, testified that he tried to stop the respondent's employees, but they continued their digging operation and threatened to have him arrested if he interfered. According to the claimants, as a result of the weakening of the slope by the removal of earth by the respondent's workmen, a slide occurred about a month later and portions of the claimants' front yard slid into the ditch and out into the road. The respondent's employees promptly removed the slide from the road and cleaned out the ditch. It is the claimants' contention that the slide was the direct result of the respondent's digging a deep ditch on their property and that as a consequence thereof the front porch pulled loose from the main house, the cribbing theretofore constructed by the claimants in front of their residence moved down the hill, and the front walk and steps and certain trees were damaged. The parties produced qualified appraisers who testified regarding the value of the property before and after the slide occurred, the claimants' witness placing the damages at $3,400.00 and the State's witness at $2,500.00.

George P. Sovick, for many years a maintenance engineer for the respondent, testified that the claimants' residence was built on a gob pile left by a coal mining operation in the 1920's, and that the area upon which the damaged house was built was very unstable. He further testified that the road was built about 1927 or 1928 and that it had never received anything more than normal maintenance by the respondent. The claimants bought the property about 1946 and built their house the following year. At some time the claimants constructed the wood cribbing in front of the house, apparently to stabilize the area, and Mr. Sovick's testimony indicates that the movement of the house was precipitated by the deterioration and giving-away of the cribbing and the natural settling of the unstable ground.

A plat introduced in evidence by the respondent shows a thirty-foot right of way with the ditch entirely within its boundaries. A sixteen-inch stump thirteen and one-half feet from the centerline of the road and outside the ditchline appears significant in view of the claimant's contention that the ditch was

dug approximately six feet deep and into the slope on their property. Another exhibit offered by the respondent and admitted in evidence was a letter written by an attorney representing the claimants under date of December 10, 1972, directed to the respondent and advising in part that "when the State grades along the road and cleans out the ditch in front of his property that the high bank is continually crumbling away and that this has caused a slip near his front porch and Mr. Lovejoy is very concerned about and tells me that if this condition continues to exist his house will slide over the embankment".

It is well known that in West Virginia homes are built on hills along all of our roads and highways, frequently with the hillside extending down to the ditchline and, as in this case, allowing for limited shoulders from the edge of the hard surface of the road to the toe of the slope. Along all but our most sophisticated highways, there are ordinary ditches which, for the protection of the roads and for the benefit of the area residents and the travelling public in general periodically must be cleared of the dirt, rock and debris that in the normal course of things moves down the slopes and clogs the drains. During the year before the slide complained of, the claimants through their attorney, protested the respondent's actions in cleaning the subject ditch with a grader, averring that if such maintenance continued, the claimant's house would slide over the embankment.

The evidence in this case was conflicting, confusing and in many important details imcomplete, and as a result a clear understanding of the issues has been difficult. A slide did occur and over a period of years there has been a deterioration and settling of the earth supporting the claimants' residence. However, upon consideration of the whole, the Court has concluded that the claimants have not proved by a preponderance of the evidence that there was such misconduct on the part of the respondent that any of its acts could be considered the direct proximate cause of injury to the claimants.

Accordingly, this claim is disallowed.

Claim disallowed.

Opinion issued September 2, 1976

IRA D. SNYDER

VS.

DEPARTMENT OF HIGHWAYS

(No. D-908)

Guy R. Bucci, Attorney at Law, for the claimant.

Nancy Norman, Attorney at Law, for the respondent.

JONES, JUDGE:

On January 12, 1973, at about 6:00 to 6:30 p.m. the claimant, Ira D. Snyder, was travelling along a narrow road leading from State Route No. 3 to Garrison in Boone County, where he had an appointment with a prospective customer. The claimant resides in Belle, Kanawha County, and is a salesman and installer of fire alarms. He had not travelled the road before, and as he went along he encountered snowy spots and patches of ice. The claimant testified that he drove through an "S" curve as he came to a one-way bridge over Seng Creek in Boone County, at a speed of not more than twenty miles per hour; that he saw ice on the bridge from lights in the yard of Mr. and Mrs. Harold Dean Thompson, and presumably by his own headlights; that he applied his brakes, started sliding, lost control and went over the side of the bridge into the water about six feet below. He further testified that there were no signs warning of the existence of the bridge or that it might freeze before the road surface; that the ice on the bridge was approximately ten inches thick; and that he did not see any guardrails. The front end of the claimant's car came to a stop in the stream, setting at a rather sharp angle. The claimant climbed out of the water, up the bank and walked to the Thompson house across the road. Mr. Thompson drove the claimant back to his home at Belle. On February 16, 1973, the claimant went to Dr. R. A. Lewis of Charleston for a physical examination and x-rays, which revealed cervical strain and a fractured rib. The claimant's 1971 Comet automobile was damaged to the extent of $988.39, and his total claim, including medical bills and loss of earnings is for damages in the amount of $10,000.00.

Harold Dean Thompson, who described the bridge as being in front of his house, where he had lived for nine or ten years, testified as a witness for the claimant, substantially as follows: The bridge is about twenty feet in length and at the time of the accident had two

angle iron guardrails, about three feet high and one and one-half feet apart, on each side; other accidents had occurred at the site of this bridge but no specific details were given nor was there any reference to the condition of the weather or the drivers; referring to the guardrails he testified that "you'd have to knock it off to get into the creek" and "there's several pieces of fender sticking on them. I guess they did stop somthing."; the witness's designation of the point where the claimant's car left the road makes it difficult to determine whether the vehicle actually reached the bridge or perhaps just the righthand corner of the bridge as he approached (this being in conflict with the claimant's testimony that the front of his car had reached the center of the bridge); and he did not corroborate the claimant's contention that ice on the bridge was ten inches thick or that such a layer of ice would render the guardrails useless.

The claimant was travelling after dark over a strange, narrow, country-type road, with occasional patches of snow and ice. He said he was proceeding cautiously because the road was so narrow and because there was ice on the road. He came out of the "S" curve in sight of the bridge at a speed of about twenty miles per hour and he could see the ice on the bridge. It is unclear whether he applied his brakes before or after reaching the bridge, but when he did so, his rear wheels started to slide and he lost control of his vehicle.

It is well settled law that a user of our highways travels thereon at his own risk and the State does not insure him a safe journey. The West Virginia Supreme Court of Appeals further has held that the placement of warning signs and guardrails is within the discretion of the Department of Highways. *Adkins v. Sims,* 130 W. Va. 645, 46 S.E. 2d 81. It is a matter of common knowledge that places of danger exist at innumerable points upon our state roads, particularly on our lesser secondary roads. A sign indicating the existence of the bridge in this case would have served no purpose, as the claimant says he already was proceeding cautiously because of the ice on the road. A sign warning that the bridge might freeze before the surface of the road would have told the claimant little or nothing as ice already was frozen on the surface of the road. The respondent had provided guardrails for this bridge. Obviously they were not of the type nor as resistant as guardrails found on interstate highways, primary roads or even most secondary roads, but the Court will assume that the respondent in its discretion considered the angle iron guardrails adequate in the

circumstances. The claimant's own witness testified that it was necessary to knock the guardrail off before anyone could go over the side of the bridge, and there is no evidence in the record that any guardrail was either bent or broken.

Travelling on an icy road is always a hazardous undertaking, and considering the weather conditions and the kind of road the claimant was travelling, he must have recognized that certain risks were involved, and particularly in attempting to approach and cross this narrow, little-used bridge, he must have foreseen some danger. However, we will not further examine the respondent's contention that the claimant's damages were the result of his own negligence as that will not be necessary.

In full consideration of all of the facts and circumstances developed in this case, the Court is of opinion to and does hereby hold that the claimant has not proved such a positive neglect of duty by the respondent as would constitute negligence and create a moral obligation on the part of the State to award him damages.

Claim disallowed.

Opinion issued September 9, 1976

CURTIS L. ERVIN

VS.

DEPARTMENT OF HIGHWAYS

(No. D-955)

Claimant appeared in person.

Gregory W. Evers, Attorney at Law, for the respondent.

WALLACE, JUDGE:

The claimant, Curtis L. Ervin, filed his claim for $1,600.00 against the respondent for damages to his automobile caused by falling rocks. He testified that he was driving on U.S. Route 52 from Welch, West Virginia to North Fork, West Virginia in McDowell County in the month of May, 1975. The respondent's witness, Herman L. Roberts, testified it was March 22, 1975. When questioned about the discrepancy in dates, the claimant stated that it was possible that March 22 could be correct. The weather was clear, the surface of the highway dry. It was about 1:30 a.m. He

stated he was traveling at about 40 mph and his headlights were on high beam. At a point near Vivian, West Virginia he reduced his speed when he saw rocks falling on the road. When he was about 15 feet to 20 feet from a big rock, he attempted to stop his vehicle to avoid being hit. The rocks struck his car on the left front or driver's side damaging the front grill, radiator, fender and door. The automobile, a 1969 Mercury Marquis, had been purchased secondhand for $700.00 two months previously. The claimant introduced no evidence as to the amount of his damages but testified that the driver of the wrecker, that towed the car to the garage, had stated that it would cost more to fix it then it was worth. He further testified that he drove the road every day and knew that rocks fell in the area. He stated there were signs along the highway warning of falling rocks but not at the place of the accident. He also stated a sign was erected later at the scene.

Herman L. Roberts, employed by the respondent as the county maintenance supervisor for McDowell County, testified that the rocks that caused the accident fell at a point between Vivian, West Virginia and Landgraff, West Virginia. He further testified there was no work of any type being conducted by the respondent at the accident point which would have loosened or caused rocks and other material to fall on the highway. He stated that there were signs along the highway warning of falling rocks and that no additional signs were erected after the accident.

The law of West Virginia is well established that the State is not an insurer of its highways and the user travels at his own risk. There is no evidence in the record of this case to show that the negligence of the respondent caused the accident without which there can be no liability. Therefore, it is the judgment of the Court to disallow the claim.

Claim disallowed.

Opinion issued September 9, 1976

JANICE M. NEAL

VS.

DEPARTMENT OF MENTAL HEALTH

(No. CC-76-7)

PER CURIAM:

The claimant, Janice M. Neal, an employee of the West Virginia Department of Mental Health, filed a claim in the amount of $52.48 against the respondent for travel and motel expenses incurred at a meeting in Huntington, West Virginia. The respondent filed its amended answer admitting liability and requesting the claim be paid. A letter from Dr. M. Mitchell-Bateman, respondent's director, filed as an exhibit states that the claimant was an employee of the respondent; that she was on approved official business in Huntington; that the expense account was timely submitted but was lost by the respondent due to no fault of the claimant and should be paid.

Therefore, it is the Opinion of the Court on the basis of the pleadings and exhibit that the claim in the amount of $52.48 be allowed. Pursuant to West Virginia Code 14-2-12, no interest can be allowed.

Award of $52.48.

Opinion issued September 9, 1976

RAYMOND PEAK

VS.

DEPARTMENT OF HIGHWAYS

(No. D-973)

PER CURIAM:

The claimant and respondent have filed a written stipulation indicating that, commencing with the summer months of 1973 and continuing until July, 1975, the claimant experienced excessive water buildup and inadequate drainage around the foundation of his home located at 405 Midland Trail in Hurricane, Putnam

County, West Virginia which caused damage to the foundation, heating system, walls and ceilings of the house.

In the completion of the widening of West Virginia State Route 34 in front of claimant's home, respondent's employees had failed to connect claimant's drainage system into a nearby installed 18-inch drainpipe. Respondent has now connected the drainage system and corrected the water buildup.

Two appraisals were filed with the stipulations, one on behalf of the claimant made by Home Construction Corporation of Hurricane, West Virginia, the other, made by West Virginia Appraisal Company, Inc. of Charleston, West Virginia for the respondent. Both appraisals list the market value of the house before the damage as $35,000.00 and $21,000.00 and $20,000.00 respectively as the value after the damage.

It was stipulated that the fair and equitable estimate of the damages sustained by the claimant is $9,000.00. The Court believing that liability exists on the part of the respondent and the damages are reasonable, an award of $9,000.00 is directed in favor of the claimant.

Award of $9,000.00.

Opinion issued September 16, 1976

LIBERTY MUTUAL INSURANCE COMPANY,
SUBROGEE OF CHARLES C. SIMPSON

VS.

DEPARTMENT OF HIGHWAYS

(No. D-912)

PER CURIAM:

The written stipulation filed in this claim establishes that on June 7, 1974, one Margaret Simpson was driving her husband's 1971 Chevrolet Kingswood Estate Station Wagon to a picnic area in the Kanawha State Forest in Kanawha County, West Virginia. Her husband, Charles C. Simpson, was also the named insured in an automobile insurance policy issued by claimant, which policy extended collision coverage with a $100.00 deductible feature.

Mrs. Simpson was driving on a road maintained by respondent and was approaching a point in the road where a bridge had been formerly erected to provide access across a waterway located some 10 to 12 feet below the level of the road. This bridge had apparently been removed some time prior to the subject incident, and its absence could not easily be detected by an approaching motorist because of the unusual elevation of the road. The stipulation further reveals that motorists had earlier been warned of this condition by respondent's employees through the use of barricades which, unfortunately, had been removed on the day of Mrs. Simpson's accident. The former bridge had been, like the road itself, maintained by the respondent.

By reason of the foregoing, Mrs. Simpson drove off of the road, and the car fell the 10 to 12 feet into the waterway below. As a result, the station wagon was greatly damaged. Thereafter, claimant paid Charles C. Simpson the sum of $1,775.00 under the terms of the collision coverage and received a written assignment of his claim against the party responsible for the accident and resultant damage.

This Court believes that the respondent failed to exercise ordinary care in the maintenance of this bridge and to warn the public of its lack of existence, and that it was thus guilty of negligence. Being of the further opinion that the amount of damages is reasonable, an award in the amount of $1,775.00 is directed.

Award of $1,775.00.

Opinion issued September 16, 1976

CHARLES C. SIMPSON

VS.

DEPARTMENT OF HIGHWAYS

(No. CC-76-60)

PER CURIAM:

This claim arises out of the same incident which was the subject of the claim of Liberty Mutual Insurance Company, subrogee of Charles C. Simpson, D-912*, that opinion also having been issued on this date, and reference is hereby made to that opinion for a description of the facts.

Claimant in this claim seeks recovery of his uninsured $100.00 property damage loss and for reimbursement of a $25.00 charge he incurred for medical treatment for his wife, Margaret Simpson.

Again being of opinion that liability exists and that the claimed damages are reasonable, we award the claimant the sum of $125.00.

Award of $125.00.

* See p in this volume.

Opinion issued October 5, 1976

AETNA CASUALTY & SURETY CO.,
SUBROGEE FOR JIMMY L. MCKINNEY

VS.

DEPARTMENT OF HIGHWAYS

(No. D-1036)

PER CURIAM:

The claimant and respondent have filed a written stipulation indicating that on or about February 25, 1975, the respondent by and through its employees was engaged in certain construction work on Widen Ridge or Route 52 in Clay County, West Virginia; and that respondent's employees in the course of their work detonated explosive charges in the construction area causing rock, mud and other debris to strike a 1973 Mazda 4-door automobile owned by claimant's subrogee, Jimmy L. McKinney, which was lawfully and properly parked off the paved portion of the highway in the area of respondent's work.

Neither the individual who parked the automobile nor the claimant's subrogee had notice of the blasting operations being conducted by the respondent.

As a result of the blasting operation, the automobile was damaged and it was stipulated that the fair and equitable estimate of the damages sustained by the claimant is $989.55. The Court believing that liability exists on the part of the respondent and the damages are reasonable, an award of $989.55 is directed in favor of the claimant.

Award of $989.55.

Opinion issued October 5, 1976

LOUIS TABIT, father and next friend
of MARY JANET TABIT, and LOUIS TABIT

VS.

ADJUTANT GENERAL

(No. D-795)

John R. Mitchell, Attorney at Law, for the claimants.

James A. Swart, Assistant Attorney General, for the respondent.

JONES, JUDGE:

On Sunday, August 20, 1972, at about 1:00 p.m. Mary Janet Tabit, then eight years of age, sustained injuries while upon the premises of the respondent, the Adjutant General, at the National Guard Armory at Falls View in Fayette County, and this claim was instituted in her behalf by Louis Tabit, as her father and next friend, as well as in his own right.

A surplus Army tank was placed by the respondent on the lawn in front of the Armory, within a few feet of United States Route No. 60, sometime during the year 1968. The tank was of World War II and Korean War vintage and was displayed by the Guard as a war memorial or monument for public viewing. "Keep Off" signs were placed on the tank, but after about three months they were removed as they were largely disregarded by the public and particularly by children, and several of the signs were torn down. As a precautionary measure, the respondent's employees put sand in the paint used on the tank to prevent its surface from becoming slippery. No fence or other device was employed to keep the public away from the tank. Two of the employees of the respondent were on duty until 4:30 p.m. from Monday through Friday of each week, but the grounds were unattended on Saturdays and Sundays except for special events. None of the respondent's employees was present on the day of the accident.

On the Sunday in question the Tabits had visitors from Roanoke, Virginia, and Janet asked her father's permission to take three of the visiting children, ages eight to twelve or thirteen, to the Armory, a short distance from their home, to show them the tank "because they never had seen an Army tank before". Permission was given with the admonition that they must not climb on the tank. However, the attraction apparently was too appealing to the

visiting children, who climbed on the tank, and Janet, also disobeying her father, followed them. She described her fall as follows:

> "And there's a back part of the tank we always used as a slickey slide and I was getting ready to go down the slickey slide and my foot caught on this bolt sticking up and I fell and I fell on my elbow."

Janet was back at her home holding her injured left arm fifteen to twenty minutes after she had left for the Armory. Her father immediately took her to the Montgomery General Hospital where Janet's arm was x-rayed, but no orthopedic surgeon being available there, she was then taken to the Charleston General Hospital where she was attended by Dr. Jack Pushkin.

Dr. Puskin testified that Janet was admitted to the hospital on August 20, 1972, with a displaced supracondylar fracture of the left elbow. He described the fracture as involving the bone of the upper arm and explained that "the lower end of that bone just above the elbow was broken into (sic) and displaced and required general anesthetic and had to be set and put in traction," with a pin through the elbow. On September 15, 1972, she was placed in a cast and was discharged from the hospital the next day. Dr. Pushkin continued to attend Janet as an outpatient approximately every four weeks until February 9, 1973, and he again examined her on the day of the hearing. Dr. Pushkin stated that Janet had healed well but she had some unevenness in the growth plate in her elbow causing her arm to turn in slightly, the elbow turning out from her body. He further noted that if both arms were held together and compared one with the other, the deformity was obvious, and this was demonstrated to the Court at the hearing. The doctor termed the injury as permanent but would not predict whether the condition might worsen. He said Janet should be watched until she had finished her growth at approximately fifteen years of age at which time the efficacy of a further surgical operation should be determined.

Another orthopedic surgeon, Dr. Sitaram Nayak, examined Janet on three occasions, the first time on October 12, 1974, and last on September 23, 1975. In his opinion Janet's deformity will increase and another operation at age fifteen or sixteen is indicated as probable. Special damages were proved in the amount of $2,204.89, and Dr. Nayak estimated the cost of future surgical and hospital services at $2,150.00.

A pertinent and leading case in West Virginia is that of *Sutton v. Monongahela Power Co.*, 151 W.Va. 961, 158 S.E. 2d 98 (1967) from which we quote the following:

> "Although the Attractive Nuisance Doctrine is not recognized in this State, this Court has adopted a rule quite similar to that Doctrine and has held that where a dangerous instrumentality or condition exists at a place frequented by children who thereby suffer injury, the parties responsible for such dangerous condition may be held liable for such injury if they knew, or should have known, of the dangerous condition and that children frequented the dangerous premises either for pleasure or out of curiosity. *Love v. Virginian Power Co.*, 86 W.Va. 393, 103 S.E. 352, *Waddell v. New River Co.*, 141 W. Va. 880, 93 S.E. 2d 473; *Hatten v. Realty Co.*, 148 W. Va. 380, 135 S.E. 2d 236. Under this doctrine where the defendants know or should know of such dangerous instrumentality and the repeated presence of children, the mere fact that they are trespassers does not bar recovery. 38 Am. Jur., Negligence, §118; *Parsons v. Applachian Electric Power Co.*, 115 W. Va. 450, 176 S.E. 862; *Waddell v. New River Co.*, supra."

With respect to Janet's status as a trespasser, as respondent's counsel stoutly contends she was, we point out that this was not private property, but was open to the public, including small children, without any limit or restraint. See *Rine v. Morris, et al.*, 99 W. Va. 52, 127 S.E. 908.

The respondent further contends that the Army tank was no more a "dangerous instrumentality" than a statue on a Courthouse lawn. However, this instrument of war, known even to children as a fighting machine for killing and destruction, certainly would be more exciting and inviting to danger than a statue of Senator J. Phineas Foghorn.

We also believe that the defense of contributory negligence does not apply in this case because the presumption that an eight year old may not be guilty of contributory negligence has not been rebutted by the respondent.

Normally, we would be inclined to agree with the respondent's position that a stationary object which appears to be reasonably safe for its intended purpose and free of structural or design defect, would not be held to be a dangerous instrumentality under the definitions laid down by our Supreme Court of Appeals. However,

we feel that this case is unique and based on evidence and reasoning hereinafter outlined does come within the rule.

We cite excerpts from the testimony of Sgt. Charles L. Hardy, custodian of the National Guard Armory from 1966 to the date of the hearing of this case and a witness for the respondent, as follows:

"A As I stated before, during the weekly hours, if there's any children out there at all we go out there and if they're on the tank we explain the dangers of the tank and we politely ask them would they mind getting off. I have went out there many times and have assisted people who have stopped by to take pictures and assist in putting the children on the track and standing there watching for their safety."

"A Because as I stated, sir, before we wasn't quite sure exactly how to go about mounting this piece of equipment on the lawn, what could be done, you know, as far as protection to the children. So we took it upon ourselves to put signs up until we got notice from the Adjutant General's office of the proper procedures."

"A I explained the articles that's on the track that they can get their clothing on, the dangers of slipping and could injure themselves."

"Q Okay, in other words you sand anything that somebody might climb on whether it be an active truck or a monument set out there somewhere?"

"A Right."

"Q So then by that you anticipated people would be climbing on it, didn't you?"

"A Right."

"Q And by your own explanation it can be dangerous to climb on that tank, can it?"

"A Yes, sir."

"Q And in fact it was dangerous to little Janet Tabit, wasn't it?"

"A Yes, sir."

The following statement with reference to knowledge of danger appears in Section 72, 57 Am. Jur. 2d, Negligence:

"As hereinbefore stated, the duty to use care is based upon actual or imputed knowledge of danger. It is also true that the care which must be exercised in any particular situation is in proportion to the actor's knowledge, actual or imputed, of the danger to another in the act to be performed. The degree of care necessary to constitute the ordinary care required of a person upon any particular occasion is measured by reference to the circumstances of danger and risk known to such person at the time. Conduct which will be considered extremely careful under one condition of knowledge, and one state of circumstances, may be grossly negligent with different knowledge and in changed circumstances. The consequence likely to be the result of an act or omission is a fact to be taken into consideration in determining the kind and amount of caution to be exercised. The degree of care required to be used in any given case to avoid the imputation of negligence must be according to the circumstances or in proportion to the danger reasonably to be anticipated—such care as is ordinarily sufficient under similar circumstances to avoid danger and secure safety. *Where a danger actually is foreseen, the duty is imposed to adopt every possible precaution to avoid an injury therefrom.*" (Emphasis supplied.)

The respondent in this case has admitted knowledge of the frequent presence of children on and about the Army tank, and its employees gratuitously undertook to provide for their safety by mixing sand in the paint, providing "Keep Off" signs which after a time were determined to be ineffectual, and verbally warning children of the dangers of the admittedly fascinating machine. While the tank may not have been dangerous in the abstract, there was an obvious subjective appreciation of danger on the part of the respondent, and the Court finds that the respondent assumed the duty of providing for the safety of children known to frequent and climb on the tank which in so many ways it acknowledged to be dangerous. The mere removal of the "Keep Off" signs indicates acquiescence in the children's playful conduct, and adds support to the conclusion that respondent's efforts to protect the children from falling were insufficient. The respondent having assumed the duty of providing for children's safety and having committed acts to that end, the Court believes that the claimants are entitled to rely on such assumption of duty. In the circumstances, an attractive and relatively inexpensive fence would have solved the problem.

13 M.J., Negligence, Section 10, states that the standard of care

under a gratuitous duty is less than that required under a legally required duty; but here we are dealing with children who generally are entitled to a greater degree of care. In this case we believe the standard of ordinary care applies. Under a duty of ordinary care involving the danger of a fall, we hold that the respondent breached that duty by employing inadequate means to prevent the fall which injured Janet Tabit.

Considering all the facts and circumstances, the Court is of opinion that the respondent's acts and omissions proved in this case constitute such negligence as entitles the claimants to recover, and awards are hereby made to Mary Janet Tabit in the amount of $12,150.00, and to Louis Tabit in the amount of $2,204.89, which includes $2,150.00 for future surgical and hospital services which the Court believes will be necessary.

Awards: Mary Janet Tabit—$12,150.00.

Louis Tabit—$2,204.89.

Opinion issued October 6, 1976

JOHN J. BODO

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-28)

Claimant appeared in person.

Gregory W. Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

In this case the claimant, John J. Bodo, seeks an award of property damage in the sum of $863.71 allegedly sustained by his 1973 model Chevrolet four door sedan automobile in a two vehicle accident which happened at 8:40 A.M. on Monday, February 23, 1976.

The evidence in the case is as follows. The accident occurred at the point where W. Va. Route 65, which runs generally east and west at the place where the accident happened, is joined on its south side by Whitman Creek Road, Secondary Route 9/1. Immediately to the south of the junction, Whitman Creek Road runs over a slightly elevated bridge. The bridge has a steel frame

and is approximately twenty feet long and fifteen feet wide. The surface of both highways including the portion of Whitman Creek Road which crosses the bridge is blacktop. The claimant had departed from his home and had driven on his way to work about 2.8 miles in a general northerly direction over Whitman Creek Road to the place where the accident happened. He had been driving over the same route regularly since November, 1975. On the day the accident happened, as he travelled over that distance, he observed what appeared to him to be a mixture of snow and frost in the woods and along the berms of the road but its paved surface was clear and dry. The temperature was approximately thirty degrees. He testified that he slowed the speed of his automobile as he entered the bridge to about five miles per hour but, encountering ice upon its surface, was caused thereby to slide across the bridge and into W. Va. Route 65 where the left front portion of his automobile collided with the right front portion of an eastbound automobile.

The mere presence of ice upon a bridge in the wintertime, causing a traveler to slide or skid thereon, does not constitute negligence on the part of the respondent. 39 Am. Jur. 2d Highways, Streets and Bridges §506. In addition, it is common knowledge that precipitation may accumulate and freeze on bridge surfaces when it melts and runs off or evaporates on other portions of a roadway. This Court has held several times that the State is not a guarantor or insurer of the safety of persons who travel on its roads and bridges. Illustratively, see *Lowe v. Department of Highways,* 8 Ct. Cl. 210. See also *Adkins v. Sims,* 130 W. Va. 645, 46 S.E. 2d 81. For these reasons, this claim must be, and it is hereby, disallowed.

Claim disallowed.

Opinion issued October 6, 1976

BETTY H. DUNLAP

VS.

DEPARTMENT OF HIGHWAYS

(No. CC-76-6)

Houston Smith, Attorney at Law, for the claimant.

Gregory W. Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

This case involves a claim for damages for personal injuries which the claimant sustained when, while as a pedestrian walking across a one lane bridge, she stepped in a hole in the bridge floor. At the time and place of the accident, it was dark and raining.

Other facts of the case are as follows. The accident happened at about 7:00 P.M. on Sunday, November 30, 1975. At the time of the accident, the claimant was on her way from her home to church. The bridge in question is part of a secondary route and crosses Cobb's Creek in McCorkle, Lincoln County. It is a steel frame bridge about thirty-five feet long and fifteen feet wide with a wood floor. Although the bridge was commonly used by both vehicular and pedestrian traffic, there was no artificial lighting on the bridge. The claimant was walking across her right side of the bridge. Ronald D. Holstein, Jr., a young man or boy who was some distance in front of the claimant cautioned her to watch out for the hole and, with her next step after that admonition, her right foot and leg went through the hole striking some unidentified object about eight inches below the surface as it descended until her right foot struck a beam upon which it stopped. The evidence warrants the inference that the hole had existed for a substantial time, perhaps as much as a month. The claimant had not traveled across the bridge since the month of October and was not previously aware that the hole existed.

From the foregoing facts, it is apparent that the respondent was guilty of negligence which was a proximate cause of the claimant's injury and that the claimant was not guilty of any contributory negligence. The case falls within the purview of and is similar to *Harrah v. Department of Highways,* 9 Ct. Cl. 242. Accordingly, this claim should be allowed.

Turning to the issue of damages, the evidence shows that the claimant was 41 at the time of the accident. Her principal injury was a puncture wound in the lower tibial area of her right leg which required little medical treatment and which healed uneventfully with the only residual being a scar. She incurred medical expense in the sum of $68.15 and lost one week's wages in the sum of $194.00 from her employment at the Hamlin Office of the U.S. Department of Agriculture. In view of these facts, the Court is of the opinion that the sum of $750.00 will be a fair and just compensation for the injuries sustained by the claimant and does hereby make an award in that sum.

Award of $750.00.

Opinion issued October 6, 1976

DEWEY ROBINETTE & SHIRLEY ROBINETTE

VS.

DEPARTMENT OF HIGHWAYS

(No. D-982)

Claimants present in person.

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

WALLACE, JUDGE:

The claimants, Dewey Robinette and Shirley Robinette, his wife, filed their claim before this Court for damages in the amount of $10,000.00 to the property of the claimant, Dewey Robinette, allegedly caused by the grading of a roadway by the respondent. The claimant, Dewey Robinette, offered all the testimony on his behalf. He stated that his wife's would be substantially the same as his and therefore she did not testify.

The claimant has lived continuously on the property since he purchased it in July, 1955. It is located in Mercer County on State Route 19/21 two and a half miles north of Princeton, West Virginia.

The road, which is the subject of this complaint, runs up and out from State Route 19/21 through the claimant's property between his house and garage. It serves ten or eleven families and terminates near a cemetery.

The claimant maintains the road is private and that the other

families using the road have acquired prescriptive rights in its use. He stated the State did not maintain the road but that the people he bought the property from indicated they had made a deed to the State. The testimony in this regard is not clear.

The record shows that a grader operated by an employee of the respondent graded the road in August, 1974. Respondent's witness testified it was on August 2, 1974. The claimant attempted to stop the operator but stated he continued to work.

The claimant maintained that the road was leveled and widened; that a drainage ditch that he had dug to divert spring water from the road was destroyed. The result being that all water drainage flows off the mountain down the road washing out the dirt leaving rocks which have broken his windows when they are thrown against his house by spinning wheels of automobiles using the road. No water or debris flows onto the claimant's property.

Garfield Hazelwood, Mercer County Superintendent for the Department of Highways, testified that the road was graded at the request of the residents using the road. He testified that he had been on the road before the grading was done because of complaints; that the road was rocky both before and after the grading and had no drainage system whatsoever. The road was fairly steep and the only way the water can get down is through the road. The water drains down the road to the culvert at the foot of the mountain which is maintained by the respondent.

The claimant was questioned at length by the Court as to his damages but he had no damage figures. He stated, "there's no way I can put a dollar value on it". He further stated that he never complained to the respondent unless his former attorney had done so. There is no evidence in the record to indicate that the negligence of the respondent caused the water to flow down the road but instead the testimony and exhibits show that the road is and always has been a natural rocky drain down the mountain. Upon the testimony and the lack of evidence in respect to damage, the Court is of the opinion to deny the claim of claimant.

Claim disallowed.

Opinion issued October 6, 1976

ROY G. SHAWVER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-42)

Claimant appeared in person.

Gregory W. Evers, Attorney at Law, for the respondent.

WALLACE, JUDGE:

The claimant, Roy G. Shawver, instituted this claim in the amount of $183.91 for damages to his automobile occasioned by an accident on Big Tyler Road west of Charleston, West Virginia.

The claimant was driving his 1973 green Mercury Montego automobile in an easterly direction up Tyler Mountain toward Charleston, West Virginia about daybreak on a February morning in 1976. The exact time and date were not clear. The claimant testified he did not remember the exact date, but that the time of the accident was about 7:45 a.m. Upon cross examination he stated it was probably before 7:00 a.m. due to the fact that he had an appointment at 7:00 a.m. or shortly thereafter. He was travelling at approximately 20 to 25 miles per hour. His parking lights were on.

Although it was not snowing at the time of the accident, the road was covered with ice and there was an accumulation of light snow on the berm of the road.

The claimant lived about 280 yards from the place of the accident and had lived there about 28 years. He travelled the road almost daily. The testimony of the claimant was that a KRT bus was proceeding down the mountain, the bus skidded across the road, and the claimant in order to avoid hitting the bus, drove to the right, at which time his right front wheel struck the first of two holes. When the car struck the first hole it continued to the second hole where it stopped. The car had to be jacked up in order to move it out of the hole. The testimony reveals that the holes were three or four inches from the edge of the highway about nine inches apart and about one to two feet deep.

The claimant contends that there had been many holes in the road and that the respondent had patched them from time to time. After the accident, the claimant reported it to employees of the

respondent who furnished him with the necessary forms to file this claim. Although not substantiated by the testimony, the claimant stated that other persons had reported the condition of the road to the respondent.

Although the claim filed herein alleged that the claimant hit an eight-inch drop-off on the right side of the road as he passed a bus, the claimant testified that the accident was caused when he hit two holes three to five inches from the edge of the paved portion of the road.

Respondent's witness, Claude C. Blake, a claims investigator, testified that the claimant advised him that a KRT bus coming down the hill forced him off the road into a ditch beside the road. He also testified there was an eight-inch ditch at the edge of the road and that the entire edge of the curb had been patched.

Every day in all parts of this State the travelling public contends with holes in the roadway and drops, frayed edges and ruts along the borders of our highways. In the event there was a defect in the highway, the question is, whether the holes in the highway or a break in the pavement was such a defect as would support a claim of negligence and a consequent moral obligation of the State to compensate the claimant. This State is not an insurer of the travelers on the highways. They travel at their own risk. In the instant case, the preponderance of the evidence does not establish that the accident was caused by the negligence of the respondent, but instead the claimant was damaged in an effort to avoid an accident with a bus.

Anyone who sustains damages must prove that the negligence of the State was the proximate cause of the injury complained of in order to render the claim and the State liable.

Claim disallowed.

Opinion issued October 26, 1976

THE AMERICAN ROAD INSURANCE COMPANY,
SUBROGEE OF SHELLIE MORGAN, JR.

VS.

DEPARTMENT OF HIGHWAYS

(No. CC-76-101)

PER CURIAM:

The claimant and respondent have filed a written stipulation indicating that on or about June 1, 1976, the respondent by and through its employees was engaged in certain repair work on Bridge #888 on U.S. Route 52 located in Mingo County, West Virginia. One of respondent's employees dropped a welding shield while working on the bridge, which shield struck the windshield of a vehicle owned and operated by Shellie Morgan, Jr., the subrogee of the claimant; that as a result, the windshield was damaged and $199.26 is a fair and equitable estimate of the damages sustained by the claimant. Believing that liability exists on the part of the respondent and that the damages are reasonable, an award of $199.26 is directed in favor of the claimant.

Award of $199.26.

Opinion issued November 19, 1976

WILLIAM F. BARKER and ELFA MAE BARKER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-966a)

and

JOYCE ELAINE BARKER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-966b)

John Troelstrup, Attorney at Law, for the claimants.

Nancy Norman, Attorney at Law, for the respondent.

RULEY, JUDGE:

These consolidated cases grow out of a single vehicle accident which happened on Nellis Road between Ashford and W.Va.-U.S. Route 119 about one-half mile from the top of Len's Creek Mountain in Boone County, West Virginia, at about 7:30 A.M. on Saturday, June 16, 1973. At that time and place, the claimant, Elfa Mae Barker, was driving a 1965 model Chevrolet owned by her husband, William F. Barker, on her way from their home to Ashford to a bus station in Charleston. Their daughter, the claimant, Joyce Elaine Barker, then 18, was riding as a passenger in the right front seat. Elfa Mae Barker and Joyce Elaine Barker assert claims for damages for personal injuries and William F. Barker asserts a claim for property damage to the vehicle and loss of the "*society and comfort*" of his wife.

In the vicinity of the place where the accident happened, the respondent had been engaged in construction consisting of widening the berm along Nellis Road for a substantial time, perhaps as much as two or three months, before the accident happened. This work involved excavation into the hillside or embankment (which contained a seam or vein of rock) along the road, loading the excavated material by an endloader into dump trucks and hauling it away to various dumping sites. The travelled portion of Nellis Road was paved with a blacktop surface and accommodated two traffic lanes. As it ascended the mountain from

Ashford, it contained several curves but it was substantially straight for several hundred feet in the vicinity of the place where the accident happened. As she approached that place and in proximity to it, Mrs. Barker passed successively highway signs which she testified that she saw and read which warned "*Slippery When Wet*" and "*Road Under Construction*". She was traveling upgrade, on a grade estimated to be about five percent, at a speed of about forty miles per hour. The surface of the pavement was dry until she reached the place where the accident happened. Mrs. Barker testified that, as she approached that place, she saw a substance which looked to her like water "*across the road*" at a distance of about 100 feet and that she then "*let up on the gas*". After the vehicle entered that substance, it slid and spun around, leaving the pavement and traveling across the berm and into collision with the seam of rock, causing both Mrs. Barker and her daughter to be thrown into its windshield. At the time and place of the accident, there was no other vehicular traffic in sight on Nellis Road.

There is no doubt that the accident happened and that the injuries and damages claimed resulted from it but the cause of the accident, upon the evidence before the Court, is left to conjecture and speculation. And, of course, in making such a determination of fact this Court has no more right to speculate or guess than does a jury. Apparently there was some substance on the pavement which caused the vehicle to slide, although the evidence is in conflict on that point ranging in its extremes from the testimony of one witness for the claimants, who arrived at the scene of the accident shortly after it happened, to the effect that there was mud from one to two inches thick covering both sides of the pavement for a distance of about 1,000 feet to the testimony of two witnesses for the respondent, who arrived at the scene about one hour after the accident, that there then was no mud or any other substance on the pavement. The claimants made an effort to prove through one witness, Larry Kenneth Garretson, that the respondent had put calcium chloride on the road surface and that it had caused it to become slippery but that effort collapsed when he testified, on cross examination:

> "Q Now, when you testified previously I thought you said you thought the slick substance looked like mud; is that correct?
>
> A Well, it had rained that morning and it was wet and yellow clay mud on the road. It was muddy.

Q So it was not calcium?

A Well, it was mud. That's all I can say. I don't know what all was in it then. The calcium had been used on it to settle the dust. I say that.

Q Could those bags have contained anything else besides calcium?

A Yes, they could."

And this conclusion is inevitable particularly in view of the testimony of the witnesses for the respondent to the effect no calcium chloride or any other chemical compound had been used by the respondent. The respondent's witnesses also testified—and it was undisputed—that the pavement in the vicinity of the construction was cleaned at the end of every day's work. In sum, while it may be apparent that there was some substance on the pavement which caused the Barker vehicle to slide, there is no evidence that its presence there was caused by negligence on the part of the respondent. That ultimate conclusion could be reached only by speculation and conjecture and, accordingly, this Court has no alternative but to deny these claims.

Claims disallowed.

Opinion issued November 19, 1976

BLACK ROCK CONTRACTING, INC.

vs.

DEPARTMENT OF HIGHWAYS

(No. D-597)

Stephen A. Weber & Thomas V. Flaherty, Attorneys at Law, for the claimant.

Dewey B. Jones & Stuart Reed Waters, Jr., Attorneys at Law, for the respondent.

WALLACE, JUDGE:

The claimant, Black Rock Contracting, Inc., sometimes hereinafter referred to as Black Rock, filed its claim in the amount of $141,644.18 against the respondent Department of Highways for damages allegedly caused by:

1. A verbal shut-down order issued by respondent's employees.

2. Damages for equipment time lost due to interference with its field of operations caused by the failure of American Telephone and Telegraph Company to remove an overhead cable within the time prescribed by the contract.

The claimant was the successful bidder on a certain project of the respondent in Doddridge County, West Virginia, known as Project APD 282 (61).

In preparation for the making and presentation of the bid proposal to the respondent, the claimant relied on information contained in plans prepared by the respondent and also the requirements of the 1960 Standard Specifications and Supplemental Specifications of October, 1965.

There were certain utilities existing on the job site which had to be removed before the project could be completed. On page two of the contract there was an attached sheet entitled "Status of Utilities". The first paragraph of this sheet is entitled "The following dates for completion of utility relocations are estimated dates and actual completion may vary as much as thirty days."

One of the utilities, American Telephone and Telegraph Company, hereinafter referred to as AT&T, had a relocation date of September 30, 1969 and in accordance with information furnished the claimant it was considered that the AT&T lines would be removed by that date or not more than thirty days thereafter.

Black Rock relied on this information in making its bid and claims the increased costs incurred were caused by the failure of AT&T to remove its lines.

The claimant started work on the project in October, 1969. On October 30 a representative of AT&T requested the claimant to suspend its operations for fear that blasting would damage its lines. This request was refused but a verbal shut-down order was issued by the respondent at the request of AT&T. The job was suspended from October 30, 1969 through November 3, 1969 when it was determined that the respondent had no authority to shut down the operation. As a result the claimant and the respondent stipulated this portion of the claim for $6,884.50.

Since the matter of the verbal shut-down order was settled by the parties, this opinion will concern itself with the alleged claim for damages for equipment time lost.

There were two cables involved in this construction, one an AP overhead cable, the other a coaxial underground cable. Both cables were for interstate use and of great importance in the operations of AT&T.

The underground cable was never moved. After the contract was let it was determined that the excavations and fills were not going to be such as would require its removal.

The contractor continued to work and claimed that its work was limited due to the cables not being removed. This restricted the size of shot to be used for its blasting operations, thus limiting the amount of material that could be loosened and removed. The contractor had to work over the underground cable and under the overhead cable.

In order to complete the project, the claimant had to remove rock and fill material from each end of the job site. A rock blanket had to be laid in the fill areas and then be covered by dirt and fill material. The claimant maintains that it was not able to move sufficient material at any one time, thus limiting its operation.

The overhead cable was located at a point where fill material was to be dumped if they had been able to form a base. To continue at this spot without removal of the cable would result in the burial of the cable. After complaint by the contractor, the respondent paid extra compensation to AT&T to set a higher pole in the area. Two small poles were replaced by a fifty-foot pole so the claimant could haul under the cable. This however was not sufficient to allow full operation by the claimant.

The claimant maintains that the delay resulting in the failure of AT&T to remove the lines caused a large quantity of expensive equipment to set idle day after day accumulating rental costs and costs normally accruing to claimant's own equipment when idle. This continued until February 22, 1970 when the cable was relocated.

The respondent maintains that this case should be governed by the decision in the *Tri-State Stone Corporation vs. State Road Commission,* 9 Ct. Cl. 90 (1972), wherein this Court held that the contractor in making a bid must take into consideration the removal of utilities and assume the risk. The claimant's position is that this case differs from the Tri-State Stone case in that Page two of the contract document lists the approximate removal dates for certain utilities, among them AT&T, and states the removal date

will not vary more than 30 days. The claimant alleges that in making its bid it relied on these dates and bid accordingly. Counsel for the respondent argued that there was no difference between the two cases. Upon inquiry it was stated that Page two in the contract document was there to satisfy a Federal Highway Administration requirement pertaining to the removal of utilities. This Court in its pre-trial order entered on March 31, 1976 held that at that time this claim could be distinguished from the factual situation presented in the Tri-State Stone case. After hearing the testimony, the Court is of opinion that this case is distinguishable from the Tri-State Stone case for the reason that the removal dates for utilities are made certain by the contract provisions and that the contractor was led to rely upon them.

The respondent maintains that this claim has no merit before the Court because it is governed by the Rules and Regulations of the respondent and by the 1960 Standard Specifications which are a part of the contract. The specifications provide that in the event any misunderstanding arises as to the intent or meaning of the provisions of the contract, then it is the duty of the Commissioner of Highways to make a determination and decision, which decision shall be final and conclusive. The Commissioner, in this case, made the decision that the claimant was not entitled to additional compensation. However, in the payment to the claimant of the final estimate on this contract, it was made subject to the right of the claimant to file its claim before this Court.

During the course of the hearing of this case there were several motions made by the respondent which were not disposed of but taken under advisement. There were two motions to strike Exhibit 1 and one to strike the testimony of the witness Jarvis and Exhibit 7. After reviewing all of the testimony and evidence, these three motions are hereby overruled.

At the close of the claimant's testimony the Court took under advisement the respondent's motion to strike all of claimant's testimony and disallow this claim. The motion renewed previous motions and cited further grounds which were that the case was not proved by a preponderance of the evidence and that the Commissioner of Highways has under the provisions of the Standard Specifications already determined there is no claim. This motion was renewed at the end of the hearing. The Court feels that there is sufficient evidence to warrant a finding on the merits and overrules the motions to strike.

Although the Court has ruled on the motions, it feels that some comment should be made in this decision pertaining to the theory that the Highway Commissioner's ruling in this case is final.

This Court was created for the express purpose to hear and determine cases which but for the constitutional immunity of the State from suit could be maintained in the regular courts of the State and in which there is a moral obligation of the State to pay any such claim. Granted the 1960 Standard Specifications provide that the finding of the Commissioner is final, this Court does not agree that the provisions prohibits a proceeding in this Court to determine what in equity and good conscience is a moral obligation of the State.

The claimant bases the amount of its claim on its daily equipment records which show the days on which equipment is worked, when idle, and the cost attributed to each particular piece of equipment. However, the Court is not satisfied that the claimant has proved by a preponderance of the evidence that each piece of equipment was idled each day claimed by AT&T's failure to remove its line. There is no doubt that the AT&T line hampered and delayed the work and the claimant should be compensated but not to the extent claimed.

The claimant continued to increase the amount of equipment on the job site and at the same time complained that the work was being impeded by the failure of AT&T to remove its cable. Claimant's witness testified that it was necessary to bring more equipment on the job site even though it was not to be used immediately because they had to get it when available.

The stockpiling of equipment is a matter of judgment and not the responsibility of the respondent. Claimant's testimony reveals that it had no other job pending and yet claimed compensation for its own idle equipment stored on the job site when it had no immediate use for it elsewhere.

The job was actually completed ahead of schedule but not as soon as expected. It was stipulated in the record that no activity was anticipated by the claimant between January 1, 1970 and April 30, 1970, yet the claimant claims extra compensation through January 30, 1970.

In the course of the hearing it was brought out that the equipment records did not take into account certain days that the

job was shut down due to weather conditions. The claimant conceded this and accordingly reduced the amount of its claim.

The Court is of the opinion that the claimant in submitting its bid relied on the removal dates for the utilities in the contract and that the claimant is entitled to extra compensation caused by the delay in the removal of the AT&T cable, and therefore an award is made to the claimant in the amount of $23,874.59 in addition to the stipulated amount of $6,884.50 agreed to by the parties.

Award of $30,759.09.

Opinion issued January 13, 1977

RANDY R. ADAMS, ET AL

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. CC-76-128 A,C-T)

No appearances on behalf of the claimants.

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

PER CURIAM:

All of the claimants in these consolidated claims were employed as farmers on State owned farms by the Department of Public Institutions for varying periods of time prior to June 30, 1976. Senate Bill #143 created the Farm Management Commission to control all State owned farms, effective July 1, 1976. None of these claimants were re-employed by the Farm Management Commission pursuant to Code 19-12A-8, and they are now before this Court seeking payment of their respective accrued annual leaves, the amounts of their claims varying depending on their length of service prior to June 30, 1976.

Respondent in its answer and in open court admitted the validity of these claims. No funds were appropriated for fiscal year 1976-77 to pay these claims, although sufficient funds were expired at the end of fiscal 1975-76 from which these claims could have been paid. Certainly these are claims which the State in equity and good conscience should discharge and pay. We therefore make awards to the claimants as follows:

CC-76-128 A	Randy R. Adams	$ 73.15
CC-76-128 C	Louis E. Gilbert	375.63
CC-76-128 D	John Gough	982.70
CC-76-128 E	Lacy Gwinn	477.27
CC-76-128 F	Beecher D. Hamons	135.85
CC-76-128 G	William E. Hefner	252.06
CC-76-128 H	Edward L. Hill	125.40
CC-76-128 I	Robert L. Hill	39.54
CC-76-128 J	Carl Mitchell	828.72
CC-76-128 K	Clyde Moats	227.35
CC-76-128 L	William Mullins	621.36
CC-76-128 M	Fred Poling, Sr.	391.34
CC-76-128 N	Charles Reynolds	212.52
CC-76-128 O	Homer Reynolds	291.60
CC-76-128 P	Ronald Robinson	271.70
CC-76-128 Q	Harold Sypolt	33.00
CC-76-128 R	Charles Wilson	222.41
CC-76-128 S	Melvin Stemple	683.36
CC-76-128 T	Robert Miller	296.55

Opinion issued January 13, 1977

K. L. BLOCK & PATRICIA A. BLOCK

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-4)

Richard K. Swartling, Ronald R. Hassig, and *Logan Hassig,* Attorneys at Law, for the claimants.

Gregory W. Evers, Attorney at Law, for the respondent.

WALLACE, JUDGE:

The claimants and the respondent have filed a written stipulation indicating that in 1958 the West Virginia Department of Highways, formerly the West Virginia State Road Commission, in the construction of the West Virginia approach to the New Martinsville, West Virginia Bridge to the State of Ohio made substantial cuts and excavations into the hillside above and east of the approach, which hillside is adjacent to the property of the claimants. This activity by the respondent initiated a landslide which continued and extended into the area of the property of the claimants. The excavations by the respondent caused movement beneath and around the dwelling of the claimants causing considerable damage to their home and property.

The claimants experienced cracking and movement in the foundation of their home and surrounding earth. Attempts to repair the damages failed. In 1971 the claimants purchased other land and removed their house to the new location.

On January 16, 1976 the claimants filed their claim with this Court for damages to their house and lot.

The respondent in defense of this claim contended that so much of the claim that represented damages sustained more then two years prior to the filing of the claim is barred by the statute of limitations. Chapter 55, Article 2, Section 12 of the Official Code of West Virginia, 1931, as amended provides in part as follows:

> "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; . . ."

The Court is of the opinion that the statute of limitations does not run where there is a continuing and intermittent trespass to real estate, but under the provisions of the statute there can be no recovery for damages sustained more than two years prior to the filing of the claim. Damages to the home of the claimants were sustained more than two years prior to this action and are thus not recoverable.

While, as indicated above, the home of the claimants was moved to a new lot, the claimants still retain ownership to the subject lot which was and still is being damaged. This damage is continuing and the statute of limitations does not bar claimants from recovering this damage.

Appraisals were filed with the stipulation on behalf of the claimants and the respondent in respect to this damage. It was stipulated that the fair and equitable estimate of the damages sustai ed to the claimants' lot is $2,500.00. The Court, believing that liability exists on the part of the respondent and the damages are reasonable, an award of $2,500.00 is directed in favor of the claimants.

Award of $2,500.00.

Opinion issued January 13, 1977

LANE S. BOHRER & BARBARA S. BOHRER

(No. D-684a)

RICHARD L. MASON & JEANNE MASON

(No. D-684b)

W. E. DURIG & MINNIE DURIG

(No. D-684c)

VS.

DEPARTMENT OF HIGHWAYS

Richard K. Swartling, Ronald R. Hassig, and *Logan Hassig,* Attorneys at Law, for the claimants.

Gregory W. Evers, Attorney at Law, for the respondent.

WALLACE, JUDGE:

For the purpose of submission the above claims were consolidated.

The claimants and the respondent have filed a written stipulation indicating that in 1958 the Department of Highways, formerly the West Virginia State Road Commission, in the construction of the West Virginia approach to the New Martinsville, West Virginia Bridge to the State of Ohio made substantial cuts and excavations into the hillside above and east of the approach, which hillside is adjacent to the property of the claimants. This activity by the respondent initiated a landslide which continued and extended into the area of the property of the claimants. The excavations by the respondent caused movement beneath and around the dwellings of the claimants causing considerable damage to their homes and property.

During the years 1971, 1972 and 1973, the claimants experienced cracking and movement in the foundations of their homes and surrounding earth. Attempts to repair the damages failed. The claimants, Bohrer and Mason, purchased other land and removed their homes to new locations. Damage to the home of the claimants, W. E. Durig and Minnie Durig, was so extensive that the house could not be relocated. Filed with the stipulation were appraisals obtained by the claimant and the respondent for each of the properties involved. Thomas E. Blum of New Martinsville,

West Virginia made the appraisals for the claimants and John W. Campbell, Jr. of the West Virginia Appraisal Company, Inc. made the appraisals for the respondent. The Court made an extensive personal examination of the premises and observed the damages to the respective properties.

It was stipulated that the fair and equitable estimate of damages sustained by the claimants were: the Bohrers, $9,750.00; the Masons, $9,750.00; and the Durigs, $28,000.00. After viewing the premises and in reviewing appraisals filed with the stipulation, the Court finds that liability exists on the part of the respondent and that the amounts are reasonable. The Court makes the following awards to the claimants: Lane S. Bohrer & Barbara S. Bohrer, $9,750.00; Richard L. Mason & Jeanne Mason, $9,750.00; and W. E. Durig & Minnie Durig, $28,000.00.

Awards of: $9,750.00 to Lane S. Bohrer & Barbara S. Bohrer

$9,750.00 to Richard L. Mason & Jeanne Mason

$28,000.00 to W. E. Durig & Minnie Durig

Opinion issued January 13, 1977

COLUMBIA GAS OF WEST VIRGINIA, INC.

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. CC-76-110b)

John C. Lobert, Attorney at Law, for the claimant.

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

PER CURIAM:

This claim when filed sought an award of $9,073.04. At the hearing a stipulation was filed setting forth the fact that the amount claimed was only $4,325.90. This reduction came about as a result of a decision of the West Virginia Public Service Commission which reduced claimant's rate increase which had been in effect under bond, the decision having been rendered during the interim between the filing of the claim and the date of the hearing.

After this claim was submitted for decision, counsel for the claimant directed a letter to this Court advising that the true

amount claimed should be further reduced to $156.72. We treat the letter as an amendment to the pleadings and thus treat the claim as being for the latter amount.

The claim is for gas furnished the West Virginia Penitentiary during fiscal year 1975-76, and it further appears that there were insufficient funds on hand at the close of the fiscal year from which this claim could have been paid. Again we must apply the law as set forth in the claims of *Airkem Sales and Service, et al v. Department of Mental Health*, 8 Ct. Cl. 180 (1971) to which reference is hereby made.

Claim disallowed.

Opinion issued January 13, 1977

JAMES P. FOSTER,
D/B/A WESTERN VIRGINIA DEMOLITION COMPANY

vs.

DEPARTMENT OF HIGHWAYS*

(No. CC-76-8)

The claimant appeared in person.

Gregory W. Evers, Attorney at Law, for the respondent.

GARDEN, JUDGE:

In an opinion issued on September 2, 1976, this claim was disallowed for the reasons expressed therein. The claimant thereafter on October 25, 1976, moved this Court to grant a rehearing pursuant to Rule 15 of the Rules of Practice and Procedure of the Court of Claims. This Court, being of opinion that good cause had been shown for the granting of a rehearing, even though the motion was made in excess of the thirty (30) day period required by Rule 15, granted a rehearing which was held on November 17, 1976.

The facts which were developed at the prior hearing are fully set forth in the opinion issued on September 2, 1976, and reference to that opinion is hereby made for a recitation of such facts. At the rehearing, in addition to the claimant, A. James Manchin, former

*See *James P. Foster, dba Western Virginia Demolition Company vs. Department of Highways*, Claim No. CC-76-8, 11 Ct. Cl. 162.

State Director of REAP, and William P. A. Nicely, Mayor of the City of Parkersburg, testified on behalf of the claimant.

Mr. Manchin testified that on March 14, 1975, he together with one George Uller, the Director of Public Works of the City of Parkersburg, met with the claimant and that an agreement was entered into between the claimant and Mr. Uller on behalf of the City of Parkersburg and Mr. Manchin on behalf of the Department of Highways, whereby the claimant would raze a certain building situated at 14th and Latrobe Streets in the City of Parkersburg for a stated consideration. The existence of the contract was corroborated by Mayor Nicely.

Exhibits were introduced at the hearing which clearly demonstrated that this property in March of 1975 was owned by the State, having been earlier sold to the State for the non-payment of the 1969 taxes on the real estate. During the course of the work Mr. Manchin secured the use of respondent's equipment for use by claimant in the demolition.

REAP, a former quasi federal agency, but, as admitted by counsel for respondent at the rehearing, had prior to March 14, 1976, been absorbed by the Department of Highways. Respondent resists payment of the claim on the ground that the subject property was not within a Department of Highways right of way and that no benefit was received as a result of the demolition of this building. Respondent further contends that Mr. Manchin had no authority to enter into the contract with the claimant and had exceeded his authority in so doing. While it may be true that Mr. Manchin did not have the authority to bind respondent to the contract with the claimant, we are of the opinion that respondent is bound under the doctrine of apparent authority. This doctrine was thoroughly discussed by our Supreme Court of Appeals in the case of *General Electric Credit Corp. v. Fields,* 148 W.Va. 176, 133 S.E. 2d 780, (1963) where quoting from 3 Am. Jur. 2d, Agency, Section 73, page 475, it is stated:

> "Apparent authority, or ostensible authority, as it is also called, is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing. In effect, therefore, an agent's apparent authority is, as to third persons dealing in good faith with the subject of his agency and entitled to rely upon such appearance, his real authority, and it may apply to a single transaction, or to a series of transations."

For the foregoing reasons we believe equity and good conscience compel us to make an award in favor of claimant in the amount of $499.00.

Award of $499.00.

Opinion issued January 13, 1977

LOIS MULLINS AND FLORENCE I. STEPHY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-954)

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

Gregory W. Evers, Attorney at Law, for respondent.

GARDEN, JUDGE:

On January 8, 1975, at about 5:15 p.m., the claimant, Lois Mullins, was driving south on State Route 10 near Harts Creek, Lincoln County, when she was involved in an accident with a northbound pickup truck owned and operated by Julius Dingus. She was operating a 1973 Vega automobile which was owned by her mother, the claimant Florence I. Stephy. She was en route from Napoleon, Ohio, to Harts, West Virginia where she intended to visit her mother-in-law. As a result of the collision, extensive damage resulted to the left front of the Stephy Vega and to the left rear side of the Dingus pickup. A repair estimate from Minton Chevrolet Co. of Logan, W.Va. was introduced by stipulation into evidence which reflected that the repairs to the Vega would cost $1,281.53. In addition, Lois Mullins claimed that she received injuries to her head and one of her legs as a result of striking these parts of her body against the interior of the car.

Lois Mullins testified that she was travelling south at a speed of about 30 miles per hour on State Route 10 which is a comparatively straight, slightly downhill, asphalt, two-lane road of some 18 to 20 feet in total width. While it was dusk and approaching darkness, it was not sufficiently dark for the use of her headlights. She testified that she observed the northbound Dingus pickup truck and that as

they neared each other, "... all of a sudden something took the wheel away from me. It was unknown force, and then I heard my back tire blow out as the wheel was taken away from me, and the next thing I knew, I was wrecked with Mr. Dingus' vehicle." As a result of losing control of the car, it went left of center and struck the left rear of the pickup truck.

After regaining her composure and after the investigating officer arrived at the accident scene, the claimant Mullins walked north on the road in her former lane of travel to determine what, if any, obstruction she had struck and caused her to lose control of her vehicle. She discovered, not a pothole, but an area in the paved portion of the road along the west side where the asphalt had completely disappeared, leaving a hole some 6 to 8 inches deep, about 15 feet in length and which extended from the edge of the road an average of 5 to 6 inches into the travelled portion of the southbound lane. She testified that while she had travelled over this road some eight months earlier that she had not seen this condition nor had she seen it immediately before the accident.

Donald Mullins, a Deputy Sheriff of Lincoln County, testified on behalf of the claimants. He first testified that he was not related to claimant Mullins nor had he ever met her prior to the evening of the accident. He also testified as to the existence of the defect in the highway and in fact had noted the same on his report as a contributing cause of the accident. He estimated, having not actually taken measurements, that it was 8 to 10 feet in length, 5 to 6 inches in depth and extended into the paved portion of the road, and further that it was 60 to 70 feet north of the impact site of the two involved vehicles.

Deputy Mullins also testified that he had been aware of the condition of the road and that it had been in existence for about 8 months prior to the accident. Photographs of the road taken in April of 1976 were stipulated into evidence and although the defective area had been patched and its former depth could not be observed, the length and width of the defective area was clearly discernible. The deputy further testified that Robert Vance was the supervisor of respondent's operations in Lincoln County prior to and on the date of the accident, and that he, Mullins, had seen Vance travelling the subject area of the road during the period when the defect was in existence.

While we have consistently held that the Department of Highways is not an insurer of those using the highways in this

State and is only required to exercise ordinary care to maintain roads and highways in a reasonably safe condition, we believe that the facts in this case justify a departure from the general rule. The testimony clearly established that respondent's supervisor in Lincoln County knew or should have known of the dangerous condition of this portion of State Route 10, and we believe that the failure of respondent to repair this condition constituted negligence which was the proximate cause of the accident. We further find no evidence of contributory negligence on the part of the claimant, Lois Mullins.

We therefore conclude that the claimant, Florence I. Stephy, is entitled to recover the cost of repairs to her 1973 Vega automobile in the amount of $1,281.53, and that the claimant, Lois Mullins, is entitled to an award of $300.00 to compensate her for her pain and suffering resulting from the accident.

Awards of: $1,281.53 to Florence I. Stephy

$300.00 to Lois Mullins.

Opinion issued January 13, 1977

CHESTER MURPHY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-133)

John McCuskey, Attorney at Law, for the claimant.

Nancy Norman, Attorney at Law, for the respondent.

PER CURIAM:

The agreed stipulation reflects that on September 28, 1976, employees of respondent were removing gravel from the surface of a bridge over United States Route 50 in Doddridge County, West Virginia, and that the gravel struck the claimant's vehicle which was travelling on a highway running beneath the bridge. Damages in the amount of $350.00 were stipulated, and being of the opinion that liability exists, an award in the amount of $350.00 is hereby made.

Award of $350.00.

Opinion issued January 13, 1977

HAROLD L. PITTSENBARGER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-83)

No appearance by the claimant.

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

PER CURIAM:

It appeared from a written stipulation filed by the parties hereto that on or about the 13th day of July, 1976, the claimant was operating his automobile on and along Route 29 in Raleigh County, West Virginia, and that he had been stopped in a line of traffic by employees of the respondent; that while he was stopped, employees of the respondent, who were engaged in a tree trimming operation, dropped a brush hook on claimant's car damaging the hood, right fender and antenna, causing damage to the extent of $149.35.

Being of the opinion that a clear case of liability is presented and that the damages claimed are reasonable, an award of $149.35 in favor of the claimant is thus made.

Award of $149.35.

Opinion issued January 13, 1977

THE POTOMAC EDISON CO.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-135)

PER CURIAM:

The claimant and respondent have filed a written stipulation indicating that in September, 1976, the respondent by and through its employees was engaged in cutting brush along Local Service Route 3/1 in Berkeley County, West Virginia. In the course of the work, respondent's employees cut down a tree which fell against the service wires of the claimant causing damage to the wires. It

was stipulated that $93.41 is a fair and equitable estimate of the damage sustained by the claimant. Believing that liability exists on the part of the respondent and that the damages are reasonable, an award of $93.41 is directed in favor of the claimant.

Award of $93.41.

Opinion issued January 20, 1977

EXXON COMPANY, U.S.A.

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. CC-76-91a&b)

Claimant did not appear.

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

PER CURIAM:

During fiscal year 1975-76, employees of the West Virginia Penitentiary made credit card purchases from claimant, and at the end of the fiscal year a balance of $514.75 was due and owing the claimant. The amount due and owing is not disputed by respondent, but they assert that there were not sufficient funds on hand at the close of the fiscal year from which this claim could have been paid.

Under this factual situation we are compelled to disallow the claim for the reason set forth in the opinion of this Court heretofore filed in deciding the claims of *Airkem Sales and Service, et al v. Department of Mental Health*, 8 Ct. Cl. 180 (1971) to which reference is hereby made.

This decision is also applicable to the pending claims of *Reynolds Memorial Hospital vs. Department of Public Institutions*, Claim No. CC-76-94; *Standard Exterminating Company vs. Department of Public Institutions*, Claim No. CC-76-96; *Ohio Valley Drug Company vs. Department of Public Institutions*, Claim No. CC-76-98; *Wheeling Electric Company vs. Department of Public Institutions*, Claim No. CC-76-103; and *C & P Telephone Company of W.Va. vs. Department of Public Institutions*, Claim No. CC-76-105, and the claims are disallowed in those claims as is the claim in the subject case.

Claims disallowed.

Opinion issued February 4, 1977

LARRY G. CONLEY & BONITA E. CONLEY

VS.

DEPARTMENT OF HIGHWAYS

(No. CC-76-93)

The claimants appeared in person.

Nancy Loar, Attorney at Law, for the respondent.

WALLACE, JUDGE:

The claimant filed their claim in the amount of $278.52 for damages to a 1974 Chevrolet pickup truck belonging to the claimant, Larry G. Conley.

On August 3, 1976, the claimant, Bonita E. Conley, was driving the truck registered in the name of her husband, Larry G. Conley, on a secondary road on Hewetts Creek or Meadow Fork in Boone County, West Virginia. It was approximately 2:30 p.m., the weather was clear, the road dry. She was proceeding alone from Chapmanville, West Virginia to the home of her mother. At a point along the road, employees of the respondent were installing new drainpipes. As the claimant approached the work scene, she observed a Department of Highways vehicle on the right hand side of the road partially in the creek. The respondent's employees were waiting for a wrecker to pull the vehicle back onto the road. On the left hand side of the road there were two large steel drainpipes. The road was a one-lane dirt road approximately 12 ro 15 feet wide. The claimant, Bonita E. Conley, stopied the truck believing that she could not get between the respondent's vehicle and the drainpipes. An employee of the respondent directed her to proceed between the respondent's vehicle and the pipes. At his instructions, she proceeded, but there was not sufficient room for the truck to pass. The right front fender was damaged when it struck the Highway Department vehicle, and the left front of the truck hit the drainpipes. The claimant stopped as the truck became lodged between the pipes and the vehicle. In order to free the truck, James Bell, one of the witnesses to the accident, climbed through the left window of the truck and drove it between the pipes and the vehicle.

The witnesses, James Bell and Ricky Backus, testified thay they saw the respondent's employee direct the claimant between the

vehicle and the pipes. No testimony was presented by the respondent.

It is the opinion of the Court that the truck was damaged by the failure of the respondent's employee to exercise proper care under the circumstances and the driver being free from fault, the Court makes an award of $278.52.

Award of $278.52.

Advisory Opinion issued February 4, 1977

DEPARTMENT OF HIGHWAYS

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. CC-76-138)

Hershel R. Hark, Attorney at Law, for the claimant.

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

GARDEN, JUDGE:

These two State agencies have requested this Court to issue an advisory opinion pursuant to Code 14-2-18. The facts from which this claim arise are stated briefly as follows: during the last quarter of fiscal year 1975-76, the claimant sold gasoline, other automotive supplies and two used 1966 model Ford dump trucks to the respondent. The amount of $1673.19 represents the total sum due claimant from respondent for these various items at the close of the above-mentioned fiscal year.

Respondent in its answer admits the validity of the claim but further alleges that there were not sufficient funds remaining within respondent's appropriations in fiscal year 1975-76 from which this claim could have been made. If this was a claim being heard under our regular procedure, rather than a request for an advisory opinion, we would not make an award on the basis of this Court's decision in *Airkem Sales and Service, et al v. Department of Mental Health,* 8 Ct. Cl. 180 (1971).

The Clerk of this Court is requested to forward copies of this advisory opinion to the heads of the two agencies involved herein.

Opinion issued February 4, 1977

WARNER P. SIMPSON CO.

vs.

DEPARTMENT OF COMMERCE

(No. CC-76-137)

PER CURIAM:

The claimant, Warner P. Simpson Co., filed its claim in the amount of $406.18 against the respondent for payment of Purchase Order No. 169 for 10,000 Economic Profiles. The respondent filed its answer admitting the validity of the claim and that there were funds available at the end of the fiscal year out of which the claim could have been paid. Attached to the answer was a letter to the claimant from Robert B. Moran, Administrative Assistant of the Department of Commerce, admitting liability and stating that there was no explanation as to what had happened to the original invoice. The letter admits that the respondent expired sufficient funds at the end of the fiscal year to pay the invoice. The letter further states that the invoice cannot now be legally processed because the fiscal year had ended and recommended that a claim be filed before this Court.

On the basis of the pleadings and exhibit, the Court is of the opinion that the claim in the amount of $406.18 should be allowed.

Award of $406.18.

Opinion issued February 18, 1977

FRED POLING, SR.

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. CC-76-128 M)

GARDEN, JUDGE:

Subsequent to the issuance of the opinion in the above-styled claim, this Court has been advised by Stewart Werner, Commissioner of the Department of Public Institutions, that the claimant, Fred Poling, Sr., was employed by the Farm Management Commission after June 30, 1976 and that his annual

leave of 19½ days was transferred to the Farm Management Commission. Consequently, the award made by this Court to him in the amount of $391.34 was improper, and our opinion, to the extent of making an award in his favor and in the above-stated amount is set aside and held for naught.

Claim disallowed.

Opinion issued February 18, 1977

ST. JOSEPH'S HOSPITAL

vs.

DEPARTMENT OF MENTAL HEALTH

(No. CC-76-114a-f)

GARDEN, JUDGE:

The answer filed by the respondent in these claims allege that the Department of Mental Health in the close of fiscal year 1975-76 had sufficient funds on hand from which these claims could have been paid, and the Court consequently made awards to the claimant in each of the six (6) claims. This Court has now been advised that the allegations in the answer in respect to the existence of sufficient funds was incorrect and that in fact there were not sufficient funds on hand at the close of the subject fiscal year from which these claims could have been paid. In view of this factual change, this Court must deny these claims on the basis of our decision in *Airkem Sales and Service, et al v. Department of Mental Health,* 8 Ct. Cl. 180 (1971) and, consequently our former opinion is set aside and held for naught.

Claim disallowed.

Opinion issued March 21, 1977

THE C & P TELEPHONE COMPANY OF W.VA.

VS.

DEPARTMENT OF HIGHWAYS

(No. D-997)

John J. Cowen and *Robert D. Lynd,* Attorneys at Law, for the claimant.

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

PER CURIAM:

By written stipulation filed by the parties in this matter, it appears that on August 30, 1973, the respondent was engaged in ditching operations at the intersection of Lucas Drive and Christian Road in Beckley, Raleigh County, West Virginia, and that during the course of these activities a buried telephone cable of claimant was damaged and that claimant expended the sum of $308.61 for labor and material in order to effect the necessary repairs. This Court, being of opinion that the damage was caused by the negligence of respondent and that the amount of the repair bill is reasonable, an award in favor of the claimant in the amount of $308.61 is hereby made.

Award of $308.61.

Opinion issued March 21, 1977

ROBERT ENGLAND

VS.

DEPARTMENT OF HIGHWAYS

(No. CC-76-50)

William J. Oates, Jr., Attorney at Law, for the claimant.

Gregory W. Evers, Attorney at Law, for the respondent.

GARDEN, JUDGE:

On July 20, 1975, the claimant contacted the REAP Section of the Department of Highways and requested them to remove and dispose of his 1964 Ford which was parked on his property in the

Town of Montrose, Randolph County, West Virginia. Several weeks later, representatives of REAP arrived at claimant's property but instead of removing the 1964 Ford, they removed claimant's 1967 Pontiac Catalina.

The Pontiac was later returned to claimant, but while it had been in REAP's possession, the car had been damaged by vandals and the considerable number of personal items, which claimant stored in his car, had been stolen. These personal items consisted of clothing, tools, sheet music, etc. The parties, by counsel, have filed a written stipulation setting forth the above-mentioned facts, and in addition a statement that the claimant had sustained damages in the amount of $1,000.00. Based on the foregoing, we are of opinion that respondent is liable and that the damages are reasonable, and we hereby make an award of $1,000.00 in favor of claimant.

Award of $1,000.00.

Opinion issued March 21, 1977

GAMBRO, INC.

vs.

BOARD OF VOCATIONAL EDUCATION,
DIVISION OF VOCATIONAL REHABILITATION

(No. CC-76-9)

Martin Becker, Attorney at Law, for claimant.

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

PER CURIAM:

The claimant, Gambro, Inc., filed its claim in the amount of $536.40 against the respondent for the balance due on equipment furnished the respondent. The respondent filed its answer admitting the validity of the claim and that there were funds available at the end of the fiscal year out of which the claim could have been paid. Attached to the answer was a letter to the claimant from Joseph W. Thompson, Assistant Director, Fiscal Affairs, of the Division of Vocational Rehabilitation, admitting liability and stating that because of delays in determining the amount to be paid by the Division of Vocational Rehabilitation in excess of what was paid by Medicare and by the client's insurance company, the

Division did not receive invoices in time to process them within the fiscal year in which the services were provided.

On the basis of the pleadings and exhibit, the Court is of the opinion that the claim in the amount of $536.40 should be allowed.

Award of $536.40.

Opinion issued March 21, 1977

TWILA JEAN GILES

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-43)

Claimant appeared in person.

Gregory W. Evers, Attorney at Law, for respondent.

GARDEN, JUDGE:

The claimant, Twila Jean Giles, a nurse and student from Gallagher in Kanawha County, testified that on April 7, 1976, she was proceeding in a northerly direction on Paint Creek Road, which is a hard-surface, two lane road—one lane for southbound traffic and one lane for northbound traffic—in her 1976 Chevette automobile. Her mother-in-law was accompanying her and was seated in the right front seat. She was proceeding to her home in Gallagher after a shopping trip to a grocery store in Montgomery. The weather was good, and although it had rained earlier, the road was dry around noon when the accident occurred.

The claimant testified that she was following a car and another car was following her; that she was travelling at a speed between 25 and 30 miles per hour, although the posted speed in the immediate area was 45 miles per hour. She further testified that as she neared the scene of the ultimate accident a southbound van was approaching her, and that although she was aware of the existence of the pothole which she later struck, she was unable to veer to the left because of the approaching van or to the right because of a narrow berm and a rock cliff. Both her right front and rear wheels hit the hole which was oblong in shape and 2 to 2½ feet wide and 3½ to 4 feet in length. The hole was located about 18 inches from the right hand edge of the travelled portion of the road, but because

the hole was partially filled with water, the claimant could not testify as to its depth. As a result of striking this hole both right wheels of the car were damaged and both tires were ruptured. To repair the damage, including the cost of two new tires, the claimant expended the sum of $107.84.

The claimant's mother, Blanche Gwin, testified that she lived in the Bluefield-Princeton area and had travelled to Charleston on business in November of 1975, and took that occasion to visit her daughter and had driven Paint Creek Road to reach her daughter's residence. She testified that she could only travel at the rate of 20 miles per hour because of the condition of the road, and that upon her return home on November 19, 1975, she telephoned respondent's maintenance department in Charleston and complained of the condition of the road and requested that it be checked and repaired. She further indicated that no repairs had been effected between the date of her telephone call and the date of her daughter's accident.

The respondent presented no testimony in defense of the claim asserted against it, but we do not believe that the record establishes any evidence of negligence on the part of the claimant which proximately caused or proximately contributed to causing this accident. We have held on numerous occasions that the respondent is not an insurer of the safety of those using the highways of this State, but we feel that the facts in this claim justify a departure from the general rule by reason of the notice received by the respondent some six months prior to claimant's accident, and its subsequent failure to effect repairs of any nature. We accordingly award the claimant the sum of $107.84.

Award of $107.84.

Opinion issued March 21, 1977

HELEN M. KELLY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-29)

Herbert H. Henderson, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

At approximately 9:00 p.m. on the evening of November 4, 1975, the claimant fell into a rather large hole on a bridge adjacent to U.S. Route 119 in Logan County, West Virginia. The hole was approximately two feet in diameter, and she fell into the hole up to the area of her hips. She was taken to the Logan General Hospital where whe was given emergency treatment and thereafter returned home, but later that evening she was forced to return to the hospital and was admitted by reason of hemorrhaging.

She remained in Logan General Hospital until November 11, 1975 where her injury was diagnosed as traumatic vaginal bleeding. She returned to the Logan Hospital on November 17, 1975 and remained there until November 19, 1975 when she was transferred by ambulance to the Charleston Area Medical Center where she was confined until November 26, 1975. She returned to the Charleston Area Medical Center on November 27, 1975 and was discharged on November 29, 1975. Again on January 8, 1976 she was admitted to the Charleston Area Medical Center and was subsequently discharged on January 18, 1976. During these five hospitalizations, she underwent at least three surgical procedures in an attempt to correct the vaginal bleeding.

Claimant and respondent, by counsel, in a written stipulation, stipulate that the respondent was aware of the deteriorating condition of the bridge but had effected no repairs to the bridge until after the claimant's accident. Consequently, we conclude that the respondent is liable for the injury sustained by the claimant. The stipulation further sets forth the fact that the claimant and respondent by counsel have agreed to settle this claim for an amount of $6,000.00.

While the Court file does not contain copies of all the medical expenses incurred by the claimant, it does reflect that the total

hospital expense for the five separate confinements amounted to $4,553.65. A bill from Dr. Ray M. Kessel of Logan in the amount of $165.00 and a bill for the ambulance for the trip from Logan to Charleston in the amount of $107.50 were both filed as exhibits in the case. It can thus be seen that the total specials exceed the sum of $4,800.00.

As indicated above, believing that liability exists and being of the further opinion that the proposed settlement is fair and equitable, an award is hereby made to the claimant in the amount of $6,000.00.

Award of $6,000.00.

Opinion issued March 21, 1977

DEBORAH ANN LANDES

vs.

BOARD OF REGENTS

(No. CC-76-31)

Richard L. Vital, Attorney at Law, for the claimant.

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

GARDEN, JUDGE:

On September 18, 1974, the claimant, Deborah Ann Landes, was participating in a supervised physical education class during her sophomore year at respondent's Potomac State College located at Keyser, West Virginia. The young female claimant, a resident of Keyser for some number of years and at that time a student at the College, was requested to participate in a doubles tennis match by her instructor, and the evidence revealed the following:

As requested by her instructor, the claimant was attempting to run from one end of the tennis court to the other in order to participate in the proposed doubles match, and upon nearing the area to the right of the net, she suddenly ran into a wire or metal cable which was strung from the side of the net to a steel pole, some 4 or 5 feet from the side of the net. Photographs of the subject side of the net, the supporting wire or cable and the steel pole were introduced, which plainly depicted a most unusual and certainly not a standard support system commonly adopted on most modern tennis courts under present day standards of construction.

The claimant testified that she struck the wire or metal cable at breast height which resulted in her being catapulted over the wire after which she landed on her head. The claimant, being a resident of Keyser, testified that she had played on this particular tennis court on many prior occasions and had never observed the presence of this particular wire. As a matter of fact, she testified that she had played on the subject court two days before and had passed through the subject area without incident and that the wire or metal cable was not installed at that time. She explained her inability to observe the wire or metal cable on the date of the accident was due to the dark color of the wire or steel cable which caused it to blend into the dark asphalt surface of the tennis court area. The testimony further revealed that the offending wire or metal cable was wrapped with a white tape after claimant's accident so that the same could be more readily visualized, and the photographs of the accident scene taken a month after the accident, fully support claimant's testimony in this regard. The respondent offered no testimony on its behalf to dispute the foregoing testimony of the claimant.

As a result of the accident the claimant was confined in the Potomac Valley Hospital from September 18, 1974, to September 26, 1974 where her injuries were diagnosed as a moderately severe cerebral concussion, a three-inch laceration on the vertex of her skull, traumatic cervical myositis and contusions of both breasts. After the hospital confinement, the claimant was required to rest at home for a period of one week after which she returned to her studies at a reduced schedule. As a result her ultimate graduation from Marshall University where she is presently enrolled has been lengthened by one semester.

As a result of the accident, the claimant incurred a hospital bill of $579.65 and an optometry bill of $65.00 for regular glasses to replace the contact lenses she was wearing at the time of the accident, which she was required to wear for several weeks prior to resuming the use of her regularly worn contact lenses. At the hearing the claimant testified that she no longer was experiencing severe headaches from which she suffered after the accident but was experiencing frequent discomfort in her breasts.

An interesting annotation on the subject of tort liability of public schools and institutions of higher learning for accidents occurring in physical education classes appears in 36 ALR 3rd 361, and while none of the cases carried within the annotation appear to be "on all

fours", we do feel from a study of the annotation that the respondent herein was under a duty to maintain its physical education facilities in a reasonably safe condition and that it breached its duty. Being of the further opinion that the claimant was not guilty of contributory negligence, we hereby make an award to the claimant in the sum of $3,144.65.

Award of $3,144.65.

Opinion issued March 21, 1977

LANG BROTHERS, INC.

vs.

DEPARTMENT OF HIGHWAYS

(No. D-685)

Roger J. Morgan, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

The claimant was the successful bidder to construct, for the respondent, a highway from U.S. Route 50 to an industrial park adjacent to Benedum Airport in Harrison County just east of Bridgeport, West Virginia, known as Project APL-91-45 (001).

The claimant filed its claim listing three parts, designated as Claim No. 1, Claim No. 2 and Claim No. 3 growing out of the construction.

Claim No. 1 in the amount of $1,542.76 was for compensation claimed for additional work performed excavating around a waterline owned by the City of Bridgeport, which line was not shown on the original plans and specifications and not considered in the bid for the project.

Claim No. 2 was for reimbursement of $1,274.20 paid by the claimant to the City of Bridgeport for repairing a break in the waterline.

Claim No. 3 was for payment of $25,915.40 for rock fill obtained and used from unclassified material within construction limits of job site.

Claim No. 1 and Claim No. 2

Claim No. 1 and Claim No. 2 will be considered together.

After the claimant commenced work on the project, it was determined there was a waterline within the construction limits belonging to the City of Bridgeport, which line was not shown in the plans and specifications and not considered in the bid. The pipe was located in an unstable area. The respondent instructed the claimant to remove the unstable material underneath the pipe and replace it with rock to prevent an impoundment of water. This would enable water to bleed out of the unstable area.

The claimant first excavated manually then changed to mechanical equipment. As the unstable material was excavated it kept falling in and the ditch became larger than the respondent had directed. One of the claimant's witnesses testified that, due to the expense, no shoring or sheeting was used. The claimant dug eight to ten feet under a ten foot section of pipe which was covered by a concrete truss. The weight of the concrete and the pipe caused it to break and spread water over the area. Claimant did not have the necessary equipment to repair the waterline so employees of the City of Bridgeport did the repair work, and the City billed the claimant for $1,274.20.

The Court is of the opinion and finds that the claimant should be compensated for the extra work not anticipated in the original bid price but not for the damages to the waterline caused by claimant's negligence in failing to provide proper shoring and sheeting to prevent a break in the waterline located in unstable material. Therefore, Claim No. 1 in the amount of $1,542.76 is allowed. Claim No. 2 is disallowed.

Claim No. 3

The project was located in a slip area. The plans required unstable material to be removed and to be replaced with rock to stabilize the rock base. 14,980 cubic yards of rock were to have been brought on the job from an outside site. The contract was considered to be a "waste job", that is, there was more material located within the area than necessary for completion, which had to be removed.

The claimant was in the process of wasting the material and encountered rock within the excavation boundaries of the project, which rock was approved by the respondent for use in the select

rock fill embankments. This eliminated the requirement to waste all excess material and bring in rock from an outside site. The rock used had to be shot, drilled and sized for its proper use while the unclassified material was essentially "pan or scraper" material and easier to remove.

The contract bid price provided for $1.73 per cubic yard for both the unclassified material and the select rock.

The claimant contends that it should be paid at both the unclassified rate and the rock borrow rate which it would have received if the rock had been brought in from an outside site.

The respondent contends that the claimant would be receiving payment twice for the same material.

Verbal request for payment was made prior to the completion of the contract and again in writing after the work was completed, which payment was refused by the respondent.

The claimant introduced evidence that the respondent had previously paid both items to S. J. Groves and Son Company on Project I-79-2 (24) 109-C-1, Harrison and Lewis Counties and also in conjunction with Project S-682 (4), in Lewis County.

For further support of its contention, the claimant cited Section 104.6 of the Standard Specifications of 1968 adopted by the respondent, which section provides in part:

> "The Contractor, with the approval of the Engineer, may use in the project such stone, gravel, sand, or other material determined suitable by the Engineer, as may be found in the excavation and *will be paid both for the excavation of such materials at the corresponding contract unit price and for the pay item for which the excavated material is used. . . .*"

We agree with the claimants contention. The contract provided that the claimant would be paid for the wasting of unclassified material and for rock obtained from a site outside of the construction limits. Instead, sufficient select rock was found within the construction limits which was approved by the respondent for use on the job. This material was removed, sized for proper use and utilized.

Contracts let by the respondent for road and bridge construction, in addition to the conditions contained in the respective contracts, are governed and controlled by the Standard Specifications

adopted by the respondent whether specifically set out in the contract or by reference thereto.

In the instant case, the 1968 Standard Specifications are to be considered in conjunction with and as a part of the contract.

It is the opinion of this Court that the respondent is bound by its own adopted specifications and that the claimant is entitled to be paid for the select rock fill. Accordingly, Claim No. 3 in the amount of $25,915.40 is allowed.

In conclusion, to summarize the findings herein, this Court allows Claim No. 1 in the amount of $1,542.76 and Claim No. 3 in the amount of $25,915.40 for a total award of $27,458.16.

Award of $27,458.16.

Opinion issued March 21, 1977

MIKE ROMEO

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-22)

No appearance by the claimant.

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

PER CURIAM:

A written stipulation was filed in this claim which was executed by the claimant and by counsel for respondent, and the stipulation reveals the following: On February 12, 1977 the claimant struck a hole in W.Va. Route 61 in Monongalia County, West Virginia; the hole was completely obscured by water and was over one foot in depth; that the hole had been in this condition for over one week preceding claimant's accident; that as a result of the accident the claimant sustained damages in the total amount of $190.00, and the stipulation further revealed that in the opinion of the claimant and counsel for the respondent that the damages in that amount were fair and equitable.

Pursuant to the aforementioned stipulation and because we believe that negligence has been established and that the damages are fair and equitable, we hereby make an award to the claimant in the amount of $190.00.

Award of $190.00.

Opinion issued March 21, 1977

CHRISTINE AMBROSONE SMITH AND
WILLIAM JOSEPH SMITH

vs.

DEPARTMENT OF HIGHWAYS

(No. D-946)

Michael F. Gibson, Attorney at Law, for the claimants.

Gregory W. Evers, Attorney at Law, for the respondent.

WALLACE, JUDGE:

On August 30, 1974 at approximately 6:12 a.m., the claimant, William Joseph Smith, was driving a 1969 Chevrolet van in a southerly direction along West Virginia Route 20 in Summers County, West Virginia between the Bluestone Dam and the Bluestone Bridge. He was accompanied by the claimant, Christine Ambrosone, now his wife, Christine Ambrosone Smith, who was asleep at the time of the accident. The van was registered in the name of Christine Ambrosone.

Both of the claimants were employed at Pipestem State Park. On the day of the accident they had left Nimitz, West Virginia at approximately 5:45 a.m. to go to work. The claimants had lived at Nimitz approximately two months. The claimant, William Joseph Smith, testified that he had travelled this road 20 to 25 times; that he had knowledge of rocks falling in the area and was aware of rock fall signs along the highway. Both claimants testified that the van had no apparent mechanical difficulties.

The claimant, William Joseph Smith, testified that they were proceeding along West Virginia Route 20 at 45 mph, maybe 50 mph. He stated he could see a car approaching from the opposite direction about 300 feet away. As he approached the oncoming vehicle, he dimmed his lights and the other car blinked its lights a few times. He dimmed again and the other car blinked several times more. Not understanding why the other car was blinking its lights, he became concerned. He checked his instrument panel to see if anything was wrong and looked back in his rear view mirror to observe if the other car was stopping or if anything was wrong with it. This consumed a few seconds time. When he looked back at the highway he saw a rock in the highway 30 to 40 feet away. He braked the van as hard as he could but hit the rock; the van veered

to the left across the highway and berm through wooden guard posts and over an embankment. There is no testimony that he reduced his speed.

The claimants seek damages in the amount of $150,000.00. The parties stipulated damages to the van in the amount of $1,375.00. There was ample medical evidence that both claimants sustained injuries.

The testimony pertaining to the weather was conflicting. The claimant, William Joseph Smith, testified that it was foggy when they left their home but there was not enough fog to prohibit him from seeing the lights of the oncoming car at the point of the accident. He further testified it was very wet, that a good bit of rain had fallen and that he remembered being soaked. Other witnesses, both for the claimants and respondent, testified that the road was dry.

Corporal G. B. Browning of the Department of Public Safety was notified of the accident at about 7:00 a.m. and arrived at the scene at approximately 7:20 a.m. He found no rocks in the road nor did he notice rocks in the ditch line on the cliff side of the road large enough to cause an accident. He stated that if the van struck a rock it probably pushed it over the embankment. Corporal Browning testified there were several gouge marks in the pavement which could have been caused by a rock. These marks were located two or three feet from the west side of the road. He found no skid marks leading up to the gouge marks. There were skid marks from the gouge marks to the edge of the pavement and in the dirt berm to the embankment for a distance of 135 feet.

Denzil Dare Lyons, in his post-trial deposition, testified that he removed falling rocks from the area. He further stated the road was not level but had "ups and downs" and that the road at the scene of the accident could be seen for a "couple of hundred feet".

The law of the State of West Virginia is well established that the State is not an insurer of the user of its highways, and this Court has so held on many occasions. *Parsons v. State Road Commission,* 8 Ct. Cl. 35, *Adkins V. Sims,* 130 W.Va. 645, 46 S.E. 2d 81.

The record in this case however discloses that for many years, in the area where the accident occurred, rocks were known to fall from the cliff side onto the road. The respondent had removed rocks many times that had fallen in this area. It is apparent that the

accident occurred in a falling rock area along which were located falling rock signs to warn those using the highway.

James Vincent Coste, a resident of Hinton, West Virginia, near the scene of the accident, testified that the rock fall condition had existed since the road was constructed either during or after World War II. He took pictures of rock slides prior to the accident involved in this claim and mailed them to the respondent. The Hinton Daily News had carried articles and pictures of rock slides prior to this accident.

A letter from William S. Ritchie in response to a complaint states:

> "Our district office at Lewisburg advises that the Summers County forces are aware of the potential hazards along this section of roadway and are constantly on the watch for fallen rocks. . . . We have further been advised that plans are being made to scale and shelve the slopes. . . ."

Other people of the community had complained to representatives of the respondent of the inherent dangers caused by the continued rock falls in the area of the accident. The testimony by witnesses for both the claimants and the respondent leave no doubt that the area in which the accident occurred was a rock fall area known to the respondent. In fact, one of the respondent's witnesses testified that it was part of his responsibilities to watch for slides during the summer months while driving along this particular road to and from work. The evidence did not establish that the respondent had knowledge of the particular rock or rock slide responsible for this accident, but for the respondent to do nothing more than to merely patrol the road, known for many years to be hazardouu, is not sufficient to remove a known danger.

This Court in finding the State Road Commission liable in the case of *Varner's Adm'n. v. State Road Comm'n.*, 8 Ct. Cl. 119 stated:

> ". . .When the State Road Commission knows or should know that an unusually dangerous condition exists, there is a duty to inspect and to correct the condition within the limits of funds appropriated by the Legislature for maintenance purposes. There is substantial evidence in this case of a dangerous condition and no showing that the respondent did anything beyond the routine cleaning of ditches and the removal of rocks which previously had fallen on the highway."

A careful review of the facts as established by the evidence indicates to the Court that the negligence of the claimant, William Joseph Smith, contributed to the cause of the accident. The record reveals that the driver knew that the scene of the accident was a falling rock area and that falling rock signs were posted along the highway. The driver further admitted that an oncoming car had blinked its lights apparently to warn of danger ahead; that he continued his speed at approximately 45 to 55 miles per hour while he checked his instrument panel and looked behind at the passing car to determine if anything was wrong. This period of time consumed several seconds. When the driver looked back at the road, he was confronted with a rock immediately in front of the van. If the driver had kept the van under proper control and speed, he could have seen the rock and could gone around it in the two lane highway with no other vehicles approaching. The negligence of the claimant, William Joseph Smith, was such as to bar him from recovery.

However, the negligence of the driver of a vehicle cannot be imputed to the passenger therein, when the passenger is free from personal negligence and has no control over the driver. *C. H. Gilmer v. C. C. Janutolo, Et al,* 116 W.Va. 501, 182 S.E. 572; *Pierce v. B & O R.R. Co.,* 99 W.Va. 333, 128 S.E. 832. The claimant, Christine Ambrosone Smith, was asleep at the time of the accident and free from negligence.

After considering all of the testimony and evidence, this Court finds the claimant, William Joseph Smith, is barred from recovery and his claim is disallowed. The Court further finds that the claimant, Christine Ambrosone Smith, is entitled to an award. As a result of the accident, she incurred expenses and property damage totalling $7,286.55, and in view of the pain and suffering and loss of wages she is entitled to a total award of $16,000.00.

Award of $16,000.00.

Opinion issued March 21, 1977

WILMER W. TEETS
AND SHARON J. TEETS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-3)

Claimant, *Wilmer W. Teets,* appeared in person.

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

GARDEN, JUDGE:

Claimants are the owners of a 20-acre tract of land situated on the south side of Route 10/1, about three miles from Sherman in Jackson County, West Virginia, purchased by them in December of 1972. In September and October of 1974, the respondent in order to correct a bad slide on the north side of Route 10/1 conducted blasting operations for a period in excess of six days. Respondent thereafter deposited the slide material and additional earth that they removed from the hillside where a bench was constructed on the property of the claimants. The material deposited on the claimants' property covered an area of over three acres. The respondent, after dumping this earth on claimants' property, graded the same but since that time, this fill has slid causing further damage to claimants' property and also destroying a number of trees.

While permission to dump this material had apparently been given by claimants, the respondent neither secured a written temporary construction easement nor has it ever paid claimants for the resulting damage to their property. Claimant, Wilmer W. Teets, testified that when respondent would perform the blasting, their home situated on their property would shake and that several days after the blasting operations were completed, he noticed that cracks were appearing above the door sills and that the floor and foundation were also cracked. Prior to the work performed by the respondent, the claimants had drilled a well on their property which was performing in a satisfactory manner. Two days after the blasting operations were completed this well went dry, and it was necessary for the claimants to have another well drilled to a deeper depth at a different location on their property.

Martin L. Bush, the survey crew chief for the maintenance division of District 3 in Parkersburg, Rossie Parsons, the foreman for respondent on this particular job, and Raymond I. Casto, a claims investigator for respondent, testified on behalf of respondent. All of these witnesses testified that in their opinion the blasting operations did not cause the alleged damage to the claimants' property. This was based principally on the fact that a residence within a much closer distance from the blasting operations received no damage, and that consequently, in their opinion, the Teets property which was located over 900 feet from the blasting operations could therefore not have suffered damage as a result of the blasting.

With this conclusion we disagree. Particularly in view of the fact that this Court has consistently followed the rule of law established by our Supreme Court in the case of *Whitney v. Ralph Myers Contracting Corporation,* 146 W.Va. 130, 118 S.E. 2d. 130 (1961), which held that a person conducting blasting operations will be liable for damage caused by such blasting even if the blasting operations were conducted without negligence on the part of the person performing the blasting. We are of opinion in view of the testimony of the claimant that the blasting operations did in fact cause this damage and that the claimants are entitled to an award. Because the well driller was committed to other drilling jobs, the claimants were required to have water hauled for a period of six months at a total cost of $194.40. The driller charged the claimants $2,474.00 for drilling the new well, and an expense of $47.64 was incurred in order to dig a trench to accomodate the electric conduit running from the home to the new well house. In respect to the damage to the real estate and to the home, the measure of damage of course is the difference between the fair market value of the property prior to the blasting operations and the fair market value of the property after the blasting operations have been conducted. *Konchesky v. S. J. Groves & Sons, Inc.*, 148 W.Va. 411, 135 S.E. 2d. 299 (1964). In order to support this portion of their damage claim, the claimants introduced a report from one Charles E. Keefer, an associate of Lee Mac Associates, Inc., in Ripley, West Virginia. Mr. Keefer's report reflected that he was of the opinion that approximately 11 acres of the claimants' property had been damaged, and that it was his opinion that this property, prior to the work performed by respondent, was worth $425.00 per acre. He thus multiplied this figure by the 11 acres and concluded that the damage amounted to $4,675.00. The problem with this report is that

it obviously eliminates any value whatsoever to the 11 acres, and even though damaged, this Court is of opinion that the same did have at least some value. A subsequent report was filed indicating that it would cost approximately $1,500.00 to repair the damage to the residence of the claimants. On the other hand the respondent had an appraisal of the property conducted by John W. Campbell, Jr., of Charleston, West Virginia. This report was most comprehensive, and Mr. Campbell reflected therein that it was his opinion that the difference between the fair market value of the property before the blasting and the fair market value of the property after the blasting was in an amount of $6,500.00. This report clearly reflects on its face that the damage to the residence was also taken into consideration in arriving at the $6,500.00 figure.

We are therefore of the opinion that the claimants are entitled to an award representing the $6,500.00 difference in value in respect to the real estate and residence, the expense of hauling water in the amount of $194.40, the expense of digging the conduit trench in the amount of $47.64 and the cost of drilling the new well in the amount of $2,474.47, or a total of $9,216.51, and we therefore make an award to the claimants in that amount.

Award of $9,216.51.

Opinion issued March 22, 1977

CLINTON ADAMS, ET AL.

vs.

DEPARTMENT OF HIGHWAYS

(No. D-1011)

Raymond H. Yackel, Attorney at Law, for the claimants.

Gregory W. Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

The claimants are residents of Delta Road No. 56, commonly known as the Cherry Hill Road, in Monongalia County. In this case they seek the recovery of damages in the sum of $3,800.00 for an alleged breach of an oral contract allegedly made in July, 1974, by and between them on the one hand and the Department of Highways on the other hand.

The contract allegedly was made on behalf of the respondent by Dan L. Shearer (who then was employed by the respondent at its

office in Monongalia County and was in the business of selling or brokering drainage pipe as a sideline) and by the respondent's Monongalia County Superintendent, J. Robert Chittum. The gist of the contract according to the allegations was that the respondent would install certain drainage pipe and stone upon and along the Cherry Hill Road, with the understanding that the drainage pipe would be delivered to that site by Mr. Shearer, to whom the claimants agreed to pay and did pay $3,800.00 for such pipe. A large part of the drainage pipe was delivered and installed, the breach charged being failure to deliver and install properly all of the materials. It is not contended by the claimants that any employee of the respondent had actual authority to make, in its behalf, the alleged contract. Rather, their theory of liability on the part of the respondent is bottomed on the doctrine of apparent agency. The problem with that theory as applied to this case is that the West Virginia decisions have declined uniformly to apply it to cases involving public officers and employees. Illustratively, in *Samsell v. State Line Dev. Co.*, 154 W.Va. 48, 174 S.E. 2d 318 (1970), it is stated in Syllabus 4:

> "4. Agent's Acts—Scope of Authority—
>
> 'Acts of a private agent may bind the principal where they are within the apparent scope of his authority; but not so with a public officer, as the State is bound only by authority actually vested in the officer, and his powers are limited and defined by its laws.' "

See also *Mountain State Consultants, Inc. v. State*, 7 W.Va. Ct. Cl. 213 (1969), at 216, where it is stated:

> "* * * Parties contracting with the State or any of its Agencies do so at their peril, and must inquire into the legal powers of the State representatives to incur liability on behalf of the State."

In view of the law applicable to this issue, it is not necessary for the Court to pass upon other issues in the case and this claim must be, and it is hereby, disallowed.

Claim disallowed.

Opinion issued March 22, 1977

GLADYS A. ANTON

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-45)

Chester Mynes, for the claimant.

Gregory W. Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

The claimant in this case seeks compensation for property taken by eminent domain by the respondent over and above a judgment of the Circuit Court of Kanawha County entered November 7, 1973, on the grounds that the verdict on which it was based was inadequate and that the respondent's appraisers were negligent in "failing to recognize the value" of her property. The respondent filed a motion to dismiss upon the ground that the proceeding in the circuit court constituted a full adjudication of the controversy (the judgment having been paid). That motion came on for hearing on July 13, 1976, at which time it was continued at the request of the claimant in order to afford her more time to consult and employ counsel. It was rescheduled for hearing on August 3, 1976, on which date there was no appearance by or on behalf of the claimant. It appears to the Court that the motion should be sustained for the reason assigned and also because it is excluded from the jurisdiction of this Court under the provisions of West Virginia Code, Chapter 14, Article 2, Section 14 (5). (Parenthetically, it is observed that the legal recourse available to the claimant would have been appeal from the judgment of the Circuit Court of Kanawha County.) Accordingly, it is ordered by the Court that this claim shall be, and it is hereby, dismissed.

Claim disallowed.

Opinion issued March 22, 1977

VIRGINIA F. ASBURY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-145)

Virginia F. Asbury, the claimant, in person.

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

PER CURIAM:

Upon the stipulation of the parties to the effect that on or about July 11, 1976, a sharp end of a one inch pipe protruding above a ditch which the respondent had dug across Local Service Route 60/33 in Cabell County struck the gasoline tank upon the automobile of the claimant causing damage to the claimant's automobile in the sum of $89.26, an award in that sum should be, and it is hereby, made.

Award of $89.26.

Opinion issued March 22, 1977

OLIE G. BASTIN & PRISCILLA BASTIN

vs.

DEPARTMENT OF HIGHWAYS*

(No. CC-76-24)

Charles G. Johnson, Attorney at Law, for claimants.

Gregory W. Evers, Attorney at Law, for respondent.

GARDEN, JUDGE:

This claim is an outgrowth of the construction of Interstate 79 in Harrison County, and more particularly described as Parcel No. 17 of Project I-79-3 (39) 126. The claim was submitted for decision on the basis of a written stipulation of facts. The stipulation reveals the following facts:

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*This decision was reversed on rehearing. See *Bastin v. Dept. of Highways*, Claim No. CC-76-24, February 10, 1978.

The claimants were the owners of a parcel of land fronting on State Route 20, south of Clarksburg, in Elk District, Harrison County, upon which they operated a business, which was subsequently relocated on other property. The claimants were entitled to $4500 as relocation assistance funds in lieu of actual moving expenses, the amount of which was determined by a formula set forth in the rules and regulations of respondent's Relocation Assistance Program, all of which is described in a brochure prepared by respondent, a copy of which had been given to the claimants. The brochure sets forth the requirement that a claim for relocation must be filed by claimants with respondent within 18 months of the date claimants were required to relocate. It is admitted that a formal claim was not filed within that time frame, and respondent contends that it therefore had no authority to pay such claim.

The stipulation further reveals that on October 8, 1974, a conference was held in Charleston and that the claimant, Olie G. Bastin, was in attendance, and at which the respondent's T. H. Holden offered to settle the then pending condemnation action for the amount of the original valuation offer, and in addition the sum of $1200 representing the value of the septic tank located in the right of way, and the sum of $4500 for relocation expense, even though the 18-month period had then expired. This offer was later confirmed by a letter dated February 8, 1975, to claimant, Olie G. Bastin, from Joseph S. Jones, respondent's then State Highway Engineer-Construction. This offer of compromise was refused by claimants, and the issue of just compensation, including damage to residue, was later resolved by jury trial in the Circuit Court of Harrison County, in July of 1975.

Claimants contend that respondent had actual notice of the relocation claim within the necessary 18-month period. The stipulation however does not so indicate. Claimants further contend that by making the offer to pay the relocation expense after the expiration of the 18-month period that the respondent has waived the requirement of notice.

This Court cannot agree with claimants' contention. Even if it is assumed that respondent had actual notice of the claim within the required time period, we believe that respondent's rules and regulations, as embodied in the brochure mentioned above, required the actual filing of a written claim for relocation assistance within the 18-month time period. It is admitted that this

was not done, and believing that respondent had no authority to waive this requirement, we must disallow the claim.

Claim disallowed.

Opinion issued March 22, 1977

MARVIN E. DEBOER

vs.

BOARD OF REGENTS

(No. CC-76-69)

Claimant appeared in person.

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

GARDEN, JUDGE:

The claimant, Marvin E. DeBoer, is seeking an award in this claim for 20 days of accumulated annual leave that were due him when his services at Concord College were terminated on June 30, 1975. The respondent, Board of Regents, contends that claimant was fully paid for his services through June 30, 1975, and that he is not entitled to payment for any unused accumulated leave.

Dr. DeBoer was initially employed on February 8, 1971 as Vice President for Academic Affairs and Dean of Faculty. During the academic year of July 1, 1973 to June 30, 1974, he earned an annual salary of $25,320.00 payable in 12 monthly installments of $2,110.00 each. On July 1, 1973, B. L. Coffindaffer became the President of the College, and apparently, problems arose between President Coffindaffer and the claimant. Although the testimony failed to disclose the nature of this conflict, Dr. Coffindaffer on May 23, 1974, wrote to the claimant and advised him that with the close of business on May 24, 1974, he was relieved of his administrative duties as Vice President for Academic Affairs and Dean of Faculty. The letter which was introduced as evidence as an exhibit, further advised that for the 12-month period from July 1, 1974 through June 30, 1975, he would be assigned to the College's professorial staff at a salary comparable to salaries of other members of the faculty with similar academic credentials. The letter further advised the claimant that his employment at Concord College would not extend beyond June 30, 1975.

As of June 30, 1974, it was undisputed that the claimant had accumulated 33 days of unused annual leave. During his final year at the College, Dr. DeBoer taught a full 12-hour semester at an annual salary of $19,260.00 or $1,605.00 per month. On May 12, 1975 through June 30, 1975 the claimant took, with the approval of President Coffindaffer, 35 days of annual leave. The respondent's policy relating to annual leave was set forth in respondent's Policy Bulletin No. 35, which had been adopted by respondent on January 15, 1974, and it was undisputed that claimant was subject to the provisions of this Bulletin. A copy of Policy Bulletin No. 35 was also introduced into evidence as an exhibit.

Policy Bulletin No. 35 provides that major administrators and faculty members with 12-month contracts shall be eligible for 22 days leave per year, and sub-paragraphs "H" and "I" of paragraph I of the Bulletin provides as follows:

> "H. Accumulated annual leave for continuing employees may be extended beyond that earned during a period of one year by written approval of the president but in no case shall it exceed twice the amount earned in any 12-month period.
>
> and
>
> I. An employee is entitled to accumulated leave at termination of service, but in no case may this exceed the limits set in "H" above. Leave time may not be earned during a term-of-leave period."

Sub-paragraph "H" permits the extention of accumulated annual leave beyond that earned during the period of one year by written approval of the President of the College. Jack Grose, Business Manager of Concord College, testified that it was not the policy of the College to enforce the provision relating to the obtaining of written approval from the President in respect to extending accumulated annual leave. It appears to us that had the claimant accumulated 44 days of annual leave as of June 30, 1974, all 44 of the days could have been extended into his final year at the College, and we therefore agree with claimant that when he entered his final year at the College, he had 33 days of annual leave due him and further that he earned an additional 22 days in his final year or a total of 55 days. Having taken 35 days in May and June of 1975, he was entitled to be paid for these remaining 20 days as of June 30, 1975. Sub-paragraph "I" quoted above certainly adds support to this conclusion.

Claimant contends that these 20 days should be computed on the basis of his salary as Vice President for Academic Affairs and Dean of Faculty, and that these 20 days entitle him to an award of $2,033.00. We do not agree with this contention and believe the so-called "first in—first out rule" should be applied. Under such rule these remaining 20 days were earned as a member of the professorial staff of the College at the reduced salary of $1,605.00 per month. As there were 20 working days in the month of June, 1975, the claimant is entitled to a full month's salary or $1,605.00, and we therefore make an award to the claimant in that amount.

Award of $1,605.00.

Opinion issued March 22, 1977

JOHN DEE HAMMOND

vs.

DEPARTMENT OF HIGHWAYS

(No. D-796)

Robert W. Lawson, III, Attorney at Law, for claimant.

Nancy Norman, Attorney at Law, for respondent.

GARDEN, JUDGE:

The accident which is the subject of this claim occurred at 6:20 a.m. on April 10, 1974, on U.S. 119 about 2½ miles south of Madison, West Virginia. The claimant was proceeding in a northerly direction on this road enroute from his home in Logan to his place of employment as an end loader operator with the Omar Mining Company, which is located at Pond Fork some seven or eight miles from Madison. U.S. 119 at the accident scene is a two-lane asphalt roadway, one lane for northbound travel and one lane for southbound travel. The road was wet, and it was a dark, foggy morning necessitating the claimant to operate his vehicle with its headlights burning. The claimant was operating his father-in-law's 1963 Volkswagon automobile and was travelling at a speed of about 40 miles per hour. According to the claimant, by reason of the foggy condition, his visibility was limited to a distance of 50 feet.

The claimant had just completed making a slight turn to the left when he observed a small rock in his lane of travel which he felt that he could straddle, but he also observed a larger rock 10 to 15

feet north of the smaller rock but also in his lane of travel. This latter rock was about two feet in height, and there being no approaching traffic in the southbound lane, the claimant started to swerve to his left to avoid the larger rock when he saw a large boulder rolling from his right, striking the right front side of his car. As a result the claimant lost control of his car and ultimately struck another large boulder in the road located further to the north.

As a result of the accident, the claimant's right ankle was fractured in two places. He also suffered a lacerated lip and gum, a lacerated left wrist and severe contusions to his chest, right shoulder and left elbow. He was confined in the Boone Memorial Hospital for a period of five days and was unable to resume work until June 1, 1974, as a result of his injuries. As an additional result, he incurred medical expenses and loss of earnings in excess of $2,300.00, and the car which he was operating, which he had previously agreed to purchase from his father-in-law for $400.00 was rendered a total loss.

The testimony established that at and near the accident scene, the terrain of U.S. 119 to its east, or to the right of the northbound claimant, consisted of a high rock cliff, customarily found in the mountainous areas of West Virginia, and it was established that the rocks hereinabove described, without doubt, had fallen from this rock cliff. This rock cliff extends for a distance of some 100 feet, and at the southern end of this rock cliff, there is a rather large abandoned stone quarry where stone had been quarried from the face of the hillside and back into the hillside for a distance of about 150 feet. The testimony further established that operations at this quarry had ceased around 1940.

The claimant testified that he had travelled U.S. 119 five days a week for a period of three months prior to the accident and had never observed any loose rocks in this particular area. Fred Conley, called as a witness by claimant, testified that he was also employed by Omar Mining Company and had been travelling U.S. 119 to and from work for a period of six years, and that while he had never seen any rocks fall from this cliff, he had from time to time observed small rocks on the berm of the road which he assumed had fallen from the cliff.

The respondent called as a witness, Danny Gunnoe, who testified that he was employed by respondent in April of 1974 and had been employed for a period of four years prior thereto; that he had

driven a truck for the first two years and had thereafter operated a high lift end loader; that he travelled the accident area at least once a week and that while one of his duties was to remove rocks from highways, he had never observed any rocks in the road or the berm in the accident area. James C. Chambers who in April of 1974 was a foreman for respondent, also testified for respondent. His testimony revealed that while he had travelled the accident area almost on a daily basis for some six years, he had never observed any fallen rocks near the quarry area nor had he ever recieved any report of loose rocks in the area.

This Court consistently has held in many similar cases that the State is not a guarantor of the safety of travelers on its highways and that its duty to travelers is one of reasonable care and diligence in the maintenance of a highway under all the circumstances. *Edgell v. Department of Highways,* 10 Ct. Cl. 161; *Walker v. Department of Highways,* 10 Ct. Cl. 32; *Mullins v. Department of Highways,* 9 Ct. Cl. 221; *Lowe v. Department of Highways,* 8 Ct. Cl. 210; and *State Farm Mutual Automobile Insurance Company v. State Road Commission,* 7 Ct. Cl. 54. The unexplained falling of a rock or boulder into a highway, without a positive showing that the Department of Highways knew or should have known of a dangerous condition and should have anticipated injury to person or property, is insufficient in our opinion to justify an award.

The claimant, who was most ably represented by counsel, attempted to distinguish this case from the factual situations in the above cited cases. The claimant called as an expert witness, William G. Whisnand, a consulting geologist with over 25 years experience in the field of geological engineering. Mr. Whisnand testified that he inspected the accident scene on November 10, 1975, and that he observed a large boulder located off of the highway and in the entrance to the quarry. He stated that it was as large as the front of a standard automobile and some 3½ to 4 feet high. Although there was some dispute in the evidence, we feel that the evidence did establish that the boulder which struck the claimant's car, subsequent to the accident, had been shoved into the quarry entrance. He further testified that about 75 feet north of the entrance to the quarry, he found a freshly exposed area on the face of the rock cliff, and that it was his opinion that the large boulder which struck the claimant's car had fallen from this area. Mr. Whisnand was of the further opinion that the blasting operations that had taken place in the quarry prior to 1940, and in particular the blasting on the north side of the quarry near U.S. 119,

had caused induced fractures in the rock behind the face of the rock cliff, and these induced fractures that started near the entrance to the quarry could extend as far north as 150 feet behind the face of the rock cliff.

Moisture within these fractures which thereafter froze would increase the size of the fracture and thus cause a general instability to the rock cliff formation, according to Mr. Whisnand. It was his opinion that this condition caused the boulder to break away the morning of April 10, 1974, and strike the claimant's car.

This testimony was introduced to demonstrate that respondent should have known of this condition and should have taken remedial measures to correct the condition. Mr. Whisnand did admit that the induced fracture immediately behind the boulder that fell could not have been visualized prior to the fall. While we are most sympathetic to the claimant who suffered painful and permanent injuries through no fault on his part, we do not feel that the testimony of Mr. Whisnand is sufficient to make this claim an exception to the general rule as hereinabove set forth, and we, therefore, disallow the claim.

Claim disallowed.

Opinion issued March 22, 1977

HORACE MANN INSURANCE COMPANY
SUBROGEE FOR AGNES STEWART BRADSHAW

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-61)

David L. Shuman, Attorney at Law, for the claimant.

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

WALLACE, JUDGE:

Horace Mann Insurance Company as Subrogee for Agnes Stewart Bradshaw filed its claim in the amount of $3,356.62 representing damages to her automobile.

On February 14, 1976, Agnes Stewart Bradshaw was driving her 1971 Corvette Stingray westerly on West Virginia Route 61 in Kanawha County, West Virginia proceeding from Pratt to

Charleston. She had started her trip at approximately noon. As she was leaving Crown Hill traveling on a straight stretch of road toward East Bank, her car hit a bump or dip in the road which threw her car into the oncoming lane of traffic. There were two cars coming from the other direction. She turned the steering wheel to her right to avoid hitting the oncoming cars and, in doing so, her car went out of control, crossed the highway and over the embankment on the right hand side of the road. She testified that she had previously driven the road in December just before Christmas. She further stated that she was proceeding at 30 to 35 miles per hour and did not see the bump or dip prior to hitting it. The speed limit was 55 miles per hour. There were no cars in front of her nor were there any signs warning of any defect in the road.

Counsel for both parties stipulated that the distance from the beginning of the straightaway to the dip was 982 feet and that the length of dip was 40 feet.

Jack C. Hutchinson, the operator of the wrecker service which towed the car in, testified on behalf the the claimant. He stated that he traveled the road every day and was familiar with the road and the dip. He testified that the dip could be seen when approaching it in an automobile but the depth was not ascertainable. The dip was in existence at Christmas time but became worse in January due to rains. He also stated that he drove the road at the maximum speed limit of 55 miles per hour but slowed down to 35 to 40 miles per hour when approaching oncoming cars.

This Court has held on many occasions that the State is not a guarantor of the safety of its travelers on its roads. The oft-cited case of *Adkins vs. Sims,* 130 W.Va. 645; 46 S.E. 2d 81 holds that the user of the highways travels at his own risk and that the State does not and cannot assure him a safe journey.

In the instant case the accident occurred in the daytime on a straight stretch of road. The claimant stated that she did not see the defect in the road but the witness who testified on her behalf stated that the dip could be seen and had existed since Christmas time. The claimant's insured's testimony indicates that when her car hit the dip she lost control of her automobile which caused it to go over the embankment.

To operate a motor vehicle in disregard of visible hazards, such as potholes or breaks in the pavement, of which a driver is aware or on the exercise of reasonable care should be aware, constitutes

assumption of a known risk which bars recovery. *Swartzmiller vs. Department of Highways,* 10 Ct. Cl. 29 (1973). On the basis of testimony and evidence presented in this case, the Court is of the opinion and finds that the claimant is barred from recovery and the claim is disallowed.

Claim disallowed.

Opinion issued March 22, 1977

EUGENE LAFFERTY
AND WANDA LAFFERTY

vs.

DEPARTMENT OF HIGHWAYS*

(No. CC-76-44)

Claimants appeared in person.

Gregory W. Evers, Attorney at Law, for the respondent.

GARDEN, JUDGE:

The evidence in this claim was presented by the claimants, Eugene Lafferty and Wanda Lafferty, and their son, William Lafferty, II, and on behalf of the respondent by Bill Hanshew, its District Engineer in District 9, which included Fayette County, wherein this claim arose. Certain photographs of the claimants' property and adjacent areas were also introduced by claimants as exhibits.

We believe the evidence established that in 1968 or 1969 the respondent completed the construction of new Route 19 which runs in a north-south direction from Oak Hill to Beckley. This new highway, in this particular area, was a four-lane interstate highway type in design. The claimants were the owners of certain real estate located immediately to the west of the new highway, and their property was located on the southwest side of a natural valley or hollow which ran in an east-west direction, both to the east and west of the new highway. In order to construct the new highway through this valley or hollow, it was necessary for the respondent to do a substantial amount of filling to accomodate the roadbed through this valley or hollow. To accomodate the natural drainage,

*This claim was revised on rehearing. See *Lafferty v. Dept. of Highways,* Claim No. CC-76-44, February 10, 1978.

the respondent constructed an eight foot culvert in the fill. They also constructed four open concrete drains on the fill, two on the north side and two on the south side. These drains were constructed to permit the discharge of surface water from the new highway, and these surface water drains emptied into a creek in the valley or hollow.

Ingress and egress to claimants' property was provided by a small private dirt road on the north side of their property. It ran in a westerly direction from the claimants' property to the old Scarbro Road, but before reaching that road, it ran through an underpass in a railroad tressel, the railroad running in a north-south direction and generally parallelling the newly constructed Route 19. Immediately to the north of and running parallel with the claimants' private road was the aforementioned creek. This creek also ran through the underpass. Apparently, an open culvert had been constructed for the creek in the underpass which was covered by railroad ties, thus permitting vehicular traffic to drive over the culvert in the underpass.

The claimants testified that prior to the construction of the new highway, the creek had very little water running in it and during the summer the creek would be dry, but after the construction of the new road, the volume of water increased tremendously, frequently overflowing after heavy rains and after the melting of a previous snow. They testified that the excess water would overflow their land depositing sand or silt on property previously used by them as a garden, making the land unusable for gardening purposes; that the excess water had washed out their roadbed and had washed away the railroad ties over the culvert in the railroad underpass and made the underpass unusable for the purpose of ingress or egress. During the winter months, according to claimants, their children were unable to use the underpass and were prevented from attending school. There is no question that the evidence established that the claimants and their property were damaged. The respondent, through its District Engineer, Bill Hanshew, contended that the construction of Route 19 did not cause this overflow of water; that the claimants' property was located at the low end of the valley or hollow and that the creek accomodated a drainage area of in excess of 50 acres. He was of the opinion that the creek was accomodating as much surface water before the construction of Route 19 as it did after the construction and that consequently the construction could not be the cause of

the claimants' problems. He further testified that while he had not inspected the claimants' property until sometime in 1970 and at the request of Commissioner Ritchie, his investigation disclosed that several years prior to the construction of Route 19, the White Oak Public Service District had constructed a 10 or 12-inch sewer line in the creekbed and through the underpass and that possibly at that time the railroad ties in the underpass had been removed or damaged.

With these contentions we disagree. A given amount of surface water following its given natural courses may not cause damage, but the same volume of water if diverted from its natural channels by artificial means, can in our opinion be turned into a destructive force, and we feel that this has occurred in this matter. We further do not feel that the construction of the sewer line caused this problem because the uncontradicted testimony of the claimants established that their problems did not begin until after the construction of the new road.

While we are disposed to make an award, the record before us fails to reveal what monetary damage the claimants sustained. Any attempt on our part to arrive at a figure would constitute speculative guessing. Claimants were not represented by counsel at the hearing and apparently were unaware of the necessity or the manner of properly proving damages to real estate, and we must reluctantly, on the basis of the record before us, disallow this claim.

However, this Court would be disposed to react favorably to a motion for rehearing filed within 30 days from the date this opinion is issued, and in accordance with Rule 15 of our Rules of Practice and Procedure. We therefore quite candidly suggest to claimants that they consider the employment of counsel so that at a later date this Court might make a proper determination of the damages sustained by the claimants.

Claim disallowed.

Opinion issued March 22, 1977

ROMEO G. PERKINS
AND SHELVA JEAN PERKINS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-57)

INA M. HAMRICK

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-58)

Ernest V. Morton, Jr., Attorney at Law, for the claimants.

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

RULEY, JUDGE:

Upon agreement of the parties, the above styled cases were consolidated for hearing.

The claimants are the owners of adjacent tracts of land located on West Virginia Route 20 in Webster County, West Virginia. According to the evidence, a three man crew of the Department of Highways was engaged in erecting signs along that highway on February 20, 1976. At about 2:00 P.M. at a point in proximity to the subject property, they inadvertently drove a steel signpost into a culvert head and then, since they could not remove it, used an acetylene torch to cut it off. While that was being done, a piece of hot steel struck one of the employees and then fell into nearby leaves resulting in the fire which is the basis of these claims. According to the evidence, the respondent's employees "*kicked the leaves around when we was digging the hole*" but "*didn't clear an area around the sign*". When the fire started, one of the three employees went to call the Webster Springs Volunteer Fire Department, which responded to the call, and the two remaining tried to extinguish the fire. The evidence demonstrates that the fire burned up a cliff near the highway and entered both the Perkins and Hamrick properties. On February 20, 1976, it burned along the common line between the Perkins and Hamrick properties and apparently did not burn more than one acre of each before it was extinguished. That evening there were stumps and logs in the burned area that were smouldering but apparently no one thought

they posed any hazard. However, on the morning of February 21, 1976, a wind arose and, at about 10:00 A.M. the fire apparently resumed resulting in a total of approximately 18 acres on the Hamrick property and approximately 35 acres on the Perkins property being burned. The acreage which was burned was covered by mixed timber. The sap had begun to rise in the trees and, when they were examined by Arden Cogar a week or two after the fire, it was running out through the bark which had cracked open in the heat of the fire. Mr. Cogar is an internationally known timber expert and woodcutter who resides in Webster Springs. His estimate of the damage done by the fire to the timber on both tracts was $100.00 per acre.

The only witness called by the respondent was John Tuttle, a forest ranger employed by the Department of Natural Resources in Webster and Braxton Counties who testified that he examined the burned acreage on both February 20 and 21. He ventured the opinion that the fire which occurred on February 21 was set intentionally but there was no evidence of facts providing a basis for that opinion. To the contrary, Mr. Tuttle conceded, on cross examination, that such secondary fires usually are attributable to "reawakening of the first fire", a conclusion that appeals both to logic and experience.

This case appears to be very similar to *Myers v. Department of Highways,* 9 W.Va. Ct. Cl. 268 (1973) and it is apparent that the respondent's employees were guilty of negligence in failing to take sufficient precautions to prevent the ignition of leaves near the signpost where they were working. The evidence on the issues of damages being uncontroverted, the Court is disposed to make awards in the sum of $1,800.00 to the claimant Hamrick and in the sum of $3,500.00 to the claimant Perkins.

Awards of $1,800.00 and $3,500.00, respectively.

Opinion issued March 22, 1977

HAROLD WILLIAM RIFFLE AND
VERNIA RIFFLE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-794)

George A. Daugherty, Attorney at Law, for the claimants.

Gregory W. Evers, Attorney at Law, for the respondent.

GARDEN, JUDGE:

On May 4, 1972, at about 6:00 p.m. the claimant, Harold William Riffle, was operating his 1969 Ford automobile in a northerly direction on secondary Route 12, commonly referred to as the "new Jackson's Mill Road" in Lewis County, West Virginia. He was apparently proceeding from his place of employment near Weston to his home in the Jane Lew area. It was still daylight but overcast, and the road was jry. Secondary Route 12 at and near the accident scene runs generally in a north-south direction. It is a two-lane asphalt road, one lane being reserved for northbound traffic and the other for southbound traffic. The road from the accident scene south for a distance of about 534 feet is relatively straight. Riffle's automobile, after traversing this straight stretch, left the travelled portion of the road and struck a large tree located to the right of an eight foot berm on the east side of the road. There were apparently no eyewitnesses to the actual accident.

The right side of the automobile struck the tree with such force that the car was literally wrapped around the tree. As a matter of fact the front half of the car, back to the bell housing, was severed or split from the rear of the car. Riffle suffered a basilar skull fracture, closed head injuries, lacerations of the right ear and right leg, a segmental fracture of the right tibia and a fracture of the fibula, He was taken to a Weston hospital but was transferred the following day to University Medical Center in Morgantown where he remained until May 23, 1972. He was released by his doctor on January 9, 1973, for light work but did not actually resume work until July 11, 1973.

As a result of the skull fracture, Riffle suffered retrograde amnesia, and as a result, at the hearing, could not testify as to any of the facts of the accident. As a matter of fact, he had no

recollection of any events for the week preceding May 4, 1972, and had no recollection of being in the hospital undergoing treatment for his injuries. He contended however that he lost control of his automobile as a result of striking potholes and the general condition of disrepair that existed in the road, and in particular, along the right hand side of the northbound lane and south of the tree which he later struck.

In support of this contention, the claimants called as a witness on their behalf Corporal Willard S. Crowe of the Weston detachment of the West Virginia Department of Public Safety. Officer Crowe made the official investigation of the accident, arriving at the scene some 15 minutes after it occurred. The officer testified that he observed potholes on the right hand side of the northbound lane over a length of 112 feet, but he did not recall the exact number of the holes or their dimensions. Near the north end of this 112-foot section, he observed skid marks 60 feet in length but admitted that he could not state that these marks were made by the Riffle automobile. From the most northerly end of the skid marks and where they run off the road on the right and to where the car was located was a distance of 156 feet, and the path of the car could be followed through marks left in the berm area. Officer Crowe also testified as to the existence of additional potholes over a length of 56 feet, the most northerly hole in this area being 72 feet south of the automobile. Physically these holes could not have been involved in the accident because the Riffle automobile had left the road before they were reached.

Edward James Blake, Eva Mae Burkhammer and Beverly Jo Lambert testified on behalf of claimants, the latter through an evidentiary deposition. Blake testified that he had worked with Riffle until 5:00 p.m. on the day of the accident, and that when they parted Riffle was in good physical condition and in no distress. Burkhammer, a waitress at the Holiday Haven located a few miles from the accident, testified that Riffle stopped at the Holiday Haven around 6:00 p.m. on the accident date, and while visiting with friends drank one can of beer; that he then departed and gave no evidence of being under the influence of alcohol. Lambert testified that a few days prior to the Riffle accident, she was driving over the same area and had struck two potholes and as a result nearly lost control of her car.

Various photographs taken the day after the accident were introduced into evidence, and these photographs reflected the

existence of the potholes and generally tended to support claimants' contention that this road was poorly maintained by respondent. However, even if we concede that the respondent was guilty of negligence in its maintenance of this road, there is not one scintilla of evidence which would prove that the Riffle automobile struck these potholes, or in other words that the existence of these potholes was the proximate cause of the accident and Riffle's resultant injuries. This accident could have occurred as a result of many other circumstances, not solely by reason of the existence of potholes.

On the basis of the record, we are of opinion that the claimants have failed to carry their burden of proof, and that we must disallow their claims.

Claims disallowed.

Opinion issued March 22, 1977

MAMIE M. RIFFLE

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-111)

Claimant appeared in person.

Gregory W. Evers, Attorney at Law, for the respondent.

GARDEN, JUDGE:

The respondent owns and maintains a roadside park on Route 60, east of Barboursville, commonly referred to as Kiwanivista State Park. The park consists of a parking area, and from the parking area visitors ascend a flight to steps to a level area where picnic tables and sanitary facilities are provided and maintained for the enjoyment and use of visitors. The respondent also provided three garbage cans in the picnic area, where visitors may dispose of their trash or garbage.

On Sunday, July 25, 1976, the claimant, after purchasing Colonel Sanders Kentucky Fried Chicken, stopped at the Park for a picnic lunch. She was accompanied by her husband and two children. She testified that they arrived at the Park around mid-afternoon, and that the weather conditions were beautiful. After completing

their picnic lunch, and departing from the Park, the claimant proceeded to the area where the garbage cans were located, and as she approached one of the garbage cans, she stepped into a hole with her left foot which she claims she had not seen because of the presence of high grass which obscured her vision of the hole. However, on cross-examination she testified that she was carrying her purse in one hand and a bag of garbage or trash in the other, and that she was not looking at the ground as she walked toward the garbage can area. The claimant opined that perhaps a rat had dug the subject hole.

The claimant testified that she suffered immediate pain and had to be assisted to the car by her husband. The following day she went to St. Mary's Hospital in Huntington where her ankle was examined and x-rayed in the emergency room. She was advised that no bones were fractured, but that she had sustained a sprained ankle. She was advised to stay off of her feet for a few days and to soak her ankle in a solution of Epsom salt and hot water. She did not seek further medical attention, and her total medical expenses at the emergency room amounted to $76.00. She had an uneventful recovery, but she testified that her left ankle still feels weak from time to time.

Russell Wilson testified on behalf of respondent that he was employed by respondent as a foreman in July of 1976 and worked out of the respondent's headquarters in Barboursville and during the summer months was charged with the responsibility of maintaining roadside parks, including the Kiwanivista State Park. He further testified that he, together with two additional employees, maintained this particular roadside park every Monday and Friday and would mow the grass so that it never exceeded a height of two or three inches. He further indicated that if any holes were discovered that they would fill them with dirt and fertilizer, and that he had never seen a hole as described by the claimant near the garbage cans.

Without passing on the issue of negligence on the part of the claimant, we are of opinion that the record fails to disclose any actionable negligence on the part of the respondent, but on the contrary, we feel that the record amply demonstrates that respondent exercised reasonable care in the maintenance of this roadside park. By reason of the foregoing, we do not feel that the claimant is entitled to an award.

Claim disallowed.

Opinion issued March 22, 1977

ALAN MACKENZIE ROBERTS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-126)

No appearance by the claimant.

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

PER CURIAM:

The claimant and respondent have filed a written stipulation indicating that on or about June 6, 1976, the flooring of a wooden bridge on local Service Route 16/6 in Wood County, West Virginia collapsed, and the claimant's vehicle was damaged while crossing the bridge. It was stipulated that a fair and equitable estimate of the damages sustained to the claimant's vehicle was $80.70. The Court believing that liability exists on the part of the respondent and that the damages are reasonable, an award of $80.70 is directed in favor of the claimant.

Award of $80.70.

Opinion issued March 22, 1977

ELOISE BALLARD SIMMS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-86)

Eloise Ballard Simms, the claimant, in person.

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

RULEY, JUDGE:

On November 14, 1975, the Department of Highways granted a five per cent wage increase effective retroactively to August 1, 1975, to all of its salaried employees who had been employed for six months or more since their last merit increase.

The claimant was employed by the State of West Virginia for thirty-six years and retired from the Department of Highways

effective October 31, 1975. She seeks an award equal to the amount of the wage increase upon her salary for August, September and October, 1975, viz., the sum of $110.22. The Court is sympathetic to this claimant but there is undisputed evidence: (1) that final approval to grant the wage increase was not received until November 14, 1975; (2) that in years prior to 1975 wage increases were applied only to persons on the payroll at the time approval was received; and (3) that, in this instance, the wage increase, although retroactive to August 1, 1975, was denied equally and uniformly to all employees including the claimant, numbering 111, whose services had terminated for whatever reason, retirement or otherwise, between August 1, 1975, and November 14, 1975. In view of the evidence, it is apparent that the claim must be, and it is hereby, disallowed.

Claim disallowed.

Opinion issued March 22, 1977

FRED E. SLOANE, JR. AND
MINNIE ARLENE SLOANE

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-121)

No appearance by the claimants.

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

PER CURIAM:

The claimants and respondent have filed a written stipulation indicating that on or about October 31, 1976, the respondent was engaged in certain work on a road maintained by it in South Charleston, West Virginia. Respondent's employee backed a gravel truck into the claimants' private driveway and as a result, their waterline was broken. It was stipulated that a fair and reasonable estimate of the damages sustained by the claimants was $194.22. The Court believing that liability exists on the part of the respondent and that the damages are reasonable, an award of $194.22 is directed in favor of claimants.

Award of $194.22.

Opinion issued March 22, 1977

SOUTHERN STATES
MORGANTOWN COOPERATIVE, INC.

(No. CC-76-140)

TRI/STATE BUILDERS HARDWARE, INC.

(No. CC-76-142)

RALSTON PURINA COMPANY

(No. CC-76-146)

NORTH-CENTRAL DAIRY HERD
IMPROVEMENT ASSOCIATION, INC.

(No. CC-77-5)

VS.

DEPARTMENT OF PUBLIC INSTITUTIONS

Claimants did not appear.

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

GARDEN, JUDGE:

The Southern States Morgantown claim is for animal feed sold and delivered by claimant to the West Virginia Industrial School for Boys during April, May and June of 1976. The Tri-State Builders Hardward claim is for Russwin Padlocks sold and delivered by claimant to the Huttonsville Correctional Center in April of 1976. The Ralston Purina claim is for goods sold and delivered to the Pinecrest Hospital in June of 1976. The North-Central Dairy Herd claim is for weighing and testing milk at Hopemont State Hospital in May of 1976.

The money to pay these various claims had been maintained in special Farm Accounts, but as of July 15, 1976, the funds were transferred to the newly created Farm Management Commission. As a result, when the invoices for these claims were received, there were no funds available from which payments could be made. The respondent has filed answers in each of these claims admitting the validity of the same, and further admitting that at the close of fiscal year 1975-76 there were sufficient funds on hand to pay each of the claims.

It is obvious that these claims are valid and that equity and good

conscience demand their payment. Accordingly, awards are made to the respective claimants as follows:

Awards of: $7,425.98 to Southern States Morgantown Cooperative, Inc.;

$131.40 to Tri-State Builders Hardware, Inc.;

$620.96 to Ralston Purina Company; and

$82.04 to North-Central Dairy Herd Improvement Association, Inc.

Opinion issued March 22, 1977

ST. JOSEPH'S HOSPITAL

vs.

DEPARTMENT OF MENTAL HEALTH

(No. CC-77-10)

H. F. Salsbery, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

From March 21, 1976 through April 13, 1976 one Joseph C. Stanley, an inmate in respondent's Spencer State Hospital, was confined in claimant's hospital for medical reasons. This claim is similar to the six claims that arose in Claim No. CC-76-114 a-f. In those claims we made awards on February 4, 1977, in view of the fact that the respective answers filed on behalf of the respondent indicated that there were sufficient funds on hand at the close of fiscal 1975-76 from which the claims could have been paid. We later, in a subsequent opinion issued on February 18, 1977, reversed our position in view of the fact that we were advised that there were not sufficient funds on hand from which these claims could have been paid, and we denied the claims on the basis of *Airkem Sales and Service, et al v. Department of Mental Health,* 8 Ct. Cl. 180 (1971).

In the answer filed in the present claim the respondent admits the validity of the claim, but again alleges that there were insufficient funds on hand from which this claim could have been paid at the close of fiscal 1975-76. In this case we again must apply *Airkem Sales and Service,* supra, and deny an award.

Claim disallowed.

Opinion issued March 22, 1977

ROBERT WOODLEY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-130)

James B. McIntyre, Attorney at Law, for the claimant.

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

PER CURIAM:

Upon the stipulation of the parties to the effect that on October 5, 1976, blasting by the respondent on W.Va.-U.S. Route 119 in Kanawha County caused the left rear window of the claimant's 1970 model Volvo automobile which was parked in his driveway to break resulting in damage in the sum of $55.00, an award in that sum should be, and it is hereby, made.

Award of $55.00.

Opinion issued March 22, 1977

JESSE WRAY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-87)

Jesse Wray, the claimant, in person.

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

RULEY, JUDGE:

This case involves a claim for damages to a water well upon the claimant's 103 acre farm located at Frazier's Bottom in Putnam County allegedly caused by the respondent's negligence incident to repair of a slip in Local Service Route 30/1, a secondary road with a gravel surface upon which the farm abuts.

The following facts appear from the evidence. The well was 14 feet deep, three feet in diameter and lined with rock walls. It was approximately 75 to 100 feet from the road and at a lower elevation or on the downhill side of the road. In 1975 a slip occurred in the

road above the well. The respondent filled the slip and incidentally caused mud to slip into and permeate the well reducing its depth to 18 to 20 inches and effectively ruining it. Attempts by the claimant to restore its operation were ineffective inasmuch as each time the mud was removed more mud slid into the well. Finally, the claimant was obliged to have a new well drilled. The new well was 67 feet deep and lined with steel casing. It required a pump and a pump house and was connected to plumbing located in the dwelling house on the farm. Previously, water had been hand carried in buckets from the old well to the dwelling. There were admitted in evidence on behalf of the claimant, without objection, bills reflecting costs incurred for the new well, pump and pump house in the total sum of $723.71.

No evidence was offered on behalf of the respondent.

In sum, it appears that the claimant's property sustained damage as the result of negligence on the part of the respondent incident to the repair of the slip in the road. The evidence on the issue of damages is imperfect and it must be recognized that the claimant wound up with a better means for supplying water to the dwelling house. But it also must be recognized that the claimant was not represented by counsel. In view of all of the circumstances, the Court is disposed to make an award to the claimant in the sum of $542.00, such sum, according to the evidence, being the actual cost of drilling the new well or replacing the source of water.

Award of $542.00.

Opinion issued March 22, 1977

MARIE YANASY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-76)

Marie Yanasy, the claimant, in person.

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

PER CURIAM:

Upon the stipulation of the parties to the effect that on June 8, 1976, a loose spike in a traffic counter which had been placed

across W.Va.-U.S. Route 250 in Randolph County by the respondent penetrated a front tire of the claimant's vehicle causing the cable to which it was attached to wrap around the wheel and resulting in damage in the sum of $79.25, an award in that sum should be, and it is hereby, made.

Award of $79.25.

Opinion issued April 18, 1977

RONALD L. BICKERSTAFF

vs.

DEPARTMENT OF HIGHWAYS

(No. D-746)

Ross Maruka, Attorney at Law, for the claimant.

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

GARDEN, JUDGE:

On March 16, 1973 around 4:00 a.m. the claimant, while driving east on the Old Monongah Road in Marion County, failed to negotiate a sharp turn to his left, went through a wire fence and rolled over. Claimant was thrown free from the car as it rolled over, the car finally coming to rest upside down in a small creek. Needless to say, the claimant suffered serious permanent injuries.

The claimant, a resident of the City of Fairmont, had worked the afternoon shift the day before the accident at the Owens-Illinois plant in Fairmont. When his shift was completed around 11:00 p.m., he then proceeded to a friend's home where a card game was being held. During the card party which continued until 3:30 a.m., the claimant testified that he consumed two, maybe three, beers. After the party was over the claimant drove a friend, who lived in Kingmount, home. It was on his return trip to his home in Fairmont that the accident occurred.

From photographs of the Old Monongah Road at and near the scene of the accident which were introduced in evidence, it appears that this is a typical hard surfaced, two-lane, secondary road situated in the open country area of Marion County. The claimant testified that he was traveling at a speed of 35 miles per hour and that there were no speed limit signs posted that he

observed. As the curve which the claimant failed to successfully negotiate is approached, the road is straight, slightly descending, to the point where the admittedly sharp curve to the left commences. The main thrust of the claimant's complaint was that respondent was negligent in failing to erect signs indicating to a motorist that he was approaching a sharp curve or in the alternative in failing to erect signs directing a motorist to travel at a reduced speed.

In support of this contention, testimony was introduced, without objection, that respondent shortly after the claimant's accident erected signs which warned approaching motorists of this sharp curve. The owner of the property upon which the claimant intruded, Ernest Melvin Chipps, Jr., testified that at least 7 or 8 accidents had occurred at this particular curve while he had owned the subject property and that he had called on at least one occasion, the respondent's headquarters in Fairmont and had complained of their failure to erect signs and was advised that the matter would be looked into. Mr. Chipps also testified that he was a member of the Kuhn's Run Improvement Association, a group interested in an area near the accident scene and that this group had also complained of the dangerous condition of the curve. On the other hand, Gary L. Warhoftig, Traffic Operations Engineer for respondent's Traffic Engineering Division, and Charles Edward Chuckery, respondent's Regional Traffic Supervisor for the region embracing the accident scene, both testified that neither of them in their official capacities had received any complaints concerning the condition of the subject curve prior to March 16, 1973.

The claimant had been in the military service from 1969 until October of 1972 when he returned to the Fairmont area and resumed work at his former place of employment, Owens-Illinois, on January 15, 1973. He indicated that he had not traveled the subject road between the time of his return from military service and the date of the accident, but he admitted on cross-examination that he did remember this particular curve from years past. However, before exploring any further the issue of claimant's contributory negligence in failing to keep his car under control or to maintain a proper lookout, etc., we believe that we should first address ourselves to the threshold issue as to whether negligence on the part of the respondent has been demonstrated.

This Court was faced with a similar issue in the claim of *Cassel v. Dept of Highways,* 8 Ct. Cl. 254, which also involved serious

personal injuries. In that case the claimant contended the respondent had been negligent in, among other things, failing to mark a curve with any signs or warning devices of any nature, and this Court held that the duty to erect guard rails, center lines or danger signals at a particular location was discretionary and that its failure to comply with such a limited duty did not constitute negligence. This Court in *Cassel* adopted the following language of our Supreme Court of Appeals as set forth in *Adkins v. Sims,* 130 W.Va. 645, 46 S.E. 2d 81 (1947) concerning this issue:

> "We do not think the failure of the state road commissioner to provide guardrails and roadmarkers, and to paint a center line on the highway, constitutes negligence of any character, and particularly no such negligence as would create a moral obligation on the part of the State to pay damages for injury or death, assumed to have occurred through such failure, and as the proximate cause thereof. The very nature of the obligation of the State, in respect to the construction and maintenance of its highways, precludes the idea that its failure to exercise discretion in favor of a particular location over another, or whether it should provide guardrails, center lines or danger signals at that point, is an act of negligence. Certainly, it must be known, as a matter of common information, that places of danger on our highways exist at innumerable points, particularly on our secondary roads, and in many instances on primary roads. This being a mountainous country, many of these roads are narrow, with steep grades and sharp curves. . . ."

We do not believe the evidence, in view of the prior law followed by this Court and for which we perceive no justification for a departure, supports any finding of negligence on the part of the respondent, and consequently we deny an award in this claim.

Claim disallowed.

Opinion issued April 18, 1977

LYNNE B. FOX

vs.

DEPARTMENT OF HIGHWAYS

(No. D-899)

Charles E. Heilman, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

On October 6, 1973, the claimant was riding her ten-speed bicycle on West Virginia Secondary Route 3/5 in Mingo County near Cabwaylingo State Park. She was accompanied by a young man, Mike Lucas, who was preceding her on his own bicycle. Apparently Route 3/5 in this general area was constructed on a former railroad right of way. The road also crosses about three converted railroad bridges, and it was while the claimant was crossing one of these bridges that the accident occurred.

The subject bridge is rather narrow, not being wide enough to accomodate more than one lane of traffic. Apparently the deck of the bridge was constructed by laying planks across the rails, perpendicular to the flow of traffic. On top of these planks, boards were secured which ran the length of the bridge and more or less formed two fairly wide tracks for the use of vehicular traffic. The sides of the bridge were constructed of steel siding, but there was an opening along each side of the bridge between the wooden deck and the steel siding. This opening was about two feet wide and, as indicated, ran along the side of the bridge deck and steel siding the entire length of the bridge and on each side thereof. Claimant testified that she lost control of her bicycle when it struck a crack in one of the boards that made up one of the tracks which ran the length of the bridge. As a result of losing control of her bicycle, the claimant fell through the opening to her right and between the bridge deck and the steel siding. She fell a distance of 30 feet on rocks with her bicycle landing on top of her.

As a result the claimant suffered serious personal injuries. She was taken to the Logan Medical Foundation where a closed reduction of her fractured right wrist was performed and a laceration on her head was reduced. She was then transferred to the Huntington Hospital where it was determined that she had also

sustained a compression fracture in her lumbar vertebra. She was fitted with a Taylor back brace and was discharged from the hospital on October 19, 1973. She was unable to return to work as a registered nurse until May of 1974. At that time she discovered that due to the continuing pain and weakness in her low back that she couldn't lift heavy patients, and as a result she was forced to resign as a nurse at the Huntington Hospital. She then started private duty nursing, accepting only those cases that did not involve the lifting of heavy patients.

Some twelve to thirteen months after the accident, the claimant noticed that her vision was blurred, and again she sought medical advice and was informed that she had developed cataracts on both of her eyes. Subsequently she was confined in a Morgantown hospital for one week in February of 1976 during which period the cataract on her right eye was surgically removed by Dr. Ralph Ryan. In September of 1976 she had the cataract on her left eye removed by Dr. M. C. Korstanje of Huntington. Dr. Korstanje was of the opinion to a reasonable degree of medical certainty that the cataracts were either aggravated or were the direct result of the traumatic injury sustained on October 6, 1973. On the other hand, Dr. Donald G. Hassig of Charleston, who examined the claimant on behalf of the respondent, was of the opinion that it was highly improbable that the head trauma could have been the antecedent cause of the cataracts.

Be that as it may, there is an abundance of evidence that the claimant sustained serious, painful and permanent injuries as a result of this accident. Her out-of-pocket expenses for hospital bills, doctor bills and other necessary expenses, when coupled with her claim for lost wages, results in a claim for special damages in excess of $16,000.00. The evidence of damages sustained by the claimant is clear and convincing, but our problem in this claim is in respect to the issue of liability. The only testimony adduced at the hearing in respect to liability was the testimony of the claimant that there was a crack in the board, and that her bike wheel got caught in the crack. Photographs of the bridge and the crack in the board were introduced into evidence, and while a small crack does seem to appear in one of the boards, it certainly is at best, minor in nature and size. This bridge was constructed and maintained by respondent primarily to accomodate automobiles, and we do not feel that the law requires respondent to be an insurer of the safety of pedestrians or bicyclists using the bridge. No evidence was presented indicating that respondent was aware of the crack in the

board, and we do not feel the evidence justifies a finding on our part that respondent should have been aware of the existence of the crack.

While we are most sympathetic toward the claimant, we do not believe that the claimant has established by a preponderance of the evidence that the respondent was guilty of any negligence which was the proximate cause of the accident and resultant serious injuries of the claimant.

Claim disallowed.

Judge Daniel A. Ruley, Jr. did not participate in this decision.

Opinion issued April 29, 1977

NELSON GILBERT CASTO
AND PATRICIA JOYCE CASTO

vs.

DEPARTMENT OF HIGHWAYS

(No. D-744)

Robert Lee White, Attorney at Law, for the claimants.

Gregory W. Evers, Attorney at Law, for the respondent.

WALLACE, JUDGE:

This claim was presented upon the written stipulation of the claimants and the respondent.

The claimants were the owners of a two-story frame dwelling location at 218 Cross Lanes Drive, Nitro, West Virginia fronting on W.Va. Route 62, a highway maintained by the respondent. The respondent also maintained the drainage area adjacent to and within the right of way of the road.

In April of 1973 the earth began to move underneath the dwelling causing damage to the floor and walls. An investigation by the respondent revealed that there was an embankment failure causing the earth underneath and dwelling to move. Two drainage structures in the immediate vicinity of the claimants' property were blocked with silt and sand and had been so blocked for some time.

On or about July 12, 1974, the claimants sold their dwelling for $7,500.00 and it was removed from the premises.

It was stipulated that the proximate cause of the earth movement was the improper drainage of the highway and the respondent's failure to maintain the existing drainage and that the claimants sustained damages in the amount of $15,000.00.

The Court believing that liability exists on the part of the respondent and that the damages are reasonable, an award of $15,000.00 is directed in favor of the claimants.

Award of $15,000.00.

Opinion issued April 29, 1977

LEWIS EDMON COX

(No. CC-77-20a)

RUTH MCPHERSON

(No. CC-77-20b)

JOHN C. RACER

(No. CC-77-20c)

VS.

DEPARTMENT OF MENTAL HEALTH

The respective claimants appeared in person.

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

PER CURIAM:

The claimants in these claims are or were employees at the respondent's Colin Anderson Center, and they are seeking awards for unpaid overtime compensation. Claimant, Lewis Edmon Cox, claims that he worked 52 overtime hours for which he was not paid during the months of February and March, 1976, and as such is entitled to an award of $185.64; claimant, Ruth McPherson, claims that she worked 283 1/2 overtime hours for which she was not paid during the months of January, February, March, April, May and June, 1976, and as such is entitled to an award of $1,267.25; and the claimant, John Racer, claims that he worked 40 overtime hours for which he was not paid during the month of June, 1976, and as such is entitled to an award of $178.80.

The respondent in its answers and in open Court admitted the validity of the respective claims, but asserted that there were not sufficient funds remaining in the appropriation for the respondent for the fiscal year 1975-76 from which these claims could have been paid, and respondent further contends that by reason of the foregoing, the claims should be disallowed on the basis of our decision in *Airkem Sales and Service v. Department of Mental Health*, 8 Ct. Cl. 180. With this contention we agree and on the basis of *Airkem Sales and Service*, supra, these claims are disallowed.

Claim disallowed.

Opinion issued April 29, 1977

BARBARA HENSON

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-21)

No appearance by the claimant.

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

PER CURIAM:

A written stipulation filed in this claim reflects that the claimant's vehicle was damaged when it was struck by a loose metal plate on a bridge owned and maintained by the respondent in Kanawha County, West Virginia. Being of the opinion that liability exists and that the stipulated amount of the damages; namely, $128.14 is reasonable, an award to the claimant in that amount is hereby made.

Award of $128.14.

Opinion issued April 29, 1977

RALPH UNDERWOOD, JR.

vs.

DEPARTMENT OF MINES

(No. CC-76-53)

Claimant appeared in person.

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

WALLACE, JUDGE:

The claimant, Ralph Underwood, Jr., filed this claim against the respondent for the cost of correcting contamination of his water well located on his farm at Alma, West Virginia.

The claimant testified that the Department of Mines improperly plugged an abandoned gas well within one hundred yards of his house and water well causing gas to infiltrate into the well water. The abandoned well had been there for years but no problems occurred until the respondent caused the well to be plugged.

In order to secure an uncontaminated water supply, the claimant originally intended to put in a cistern but instead drilled a new well. This claim, which is not denied by the respondent, is for the cost of drilling the new well and installing a Culligan service to remove the taste of gas from the water. The costs submitted by the claimant consisted of $280.00 for casing and the cost of drilling the new well, $334.35 for installation of a pump and fixtures, and $1,140.00 for the Culligan service. The total cost being $1,754.35.

Chapter 22, Article 4, Section 19 of the Code of West Virginia provides:

> "In any action for contamination or deprivation of a fresh water source or supply within one thousand feet of the site of drilling for an oil or gas well, there shall be a rebutable presumption that such drilling, and such oil or gas well, or either, was the proximate cause of the contamination or deprivation of such fresh water source or supply."

The Court is of the opinion that liability exists on the part of the respondent and finds that the claimant is entitled to a recovery of $1,754.35.

Award of $1,754.35.

Opinion issued April 29, 1977

WILLIAM N. WILLIAMS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-112)

Claimant appeared in person without counsel.

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

WALLACE, JUDGE:

The claimant, William N. Williams, filed a claim for damages to his 1973 Triumph automobile in the amount of $1,700.00.

On July 24, 1976, at approximately 2:00 to 2:30 p.m. Freddie Grounds was driving the claimant in the claimant's automobile along W.Va. Route 79, known locally as Cabin Creek Road, in Kanawha County. They were returning from a meeting in Decota, West Virginia.

The claimant testified that they were proceeding northerly along the road at approximately 35 to 40 miles per hour. The road was straight and dry. The weather was clear. As they were crossing a two lane wooden bridge at Lang, West Virginia, the plank flooring of the bridge became loose, the boards "bounced up" and became lodged underneath the automobile.

Freddie Grounds, the driver of the car, testified that he had driven the road every day and that they had crossed the bridge the morning of the accident on their way to Decota. He stated the bridge always rattled. He further testified that as the car crossed the bridge the floor planks became loose, one board went over the hood and two boards lodged underneath the car. The radiator, transmission, frame and other parts of the automobile were damaged.

There was no prior warning or indication that the flooring of the bridge would suddenly become loose.

The respondent introduced no evidence.

In the case of *Gene R. Monk v. State Road Comm'n.*, 8 Ct. Cl. 32, this Court held:

> ". . . a person exercising ordinary care for his safety would not reasonably have anticipated that the floor boards on the bridge

would be missing and claimant cannot be charged with contributory negligence or assumption of the risk."

In this case, the Court is of the opinion that a dangerous condition existed on the bridge which directly and proximately caused the damage to the claimant's automobile and that the claimant was free from contributory negligence.

The claimant in proof of his damages submitted estimates and bills totaling $1,128.66. It is the opinion of the Court that the claim should be allowed in the amount of $1,128.66.

Award of $1,128.66.

Opinion issued May 13, 1977

VIRGIE GIBSON

vs.

DEPARTMENT OF PUBLIC INTSTITUTIONS

(No. D-1017)

Charlotte R. Lane, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

The claimant was injured and her property damaged by three escaped convicts from Huttonsville Correctional Center, Huttonsville, West Virginia.

On Friday night, March 28, 1975, the three convicts, together with two others gained entrance to the basement of the Correctional Center through an unlocked cross-over door. From there they were able to enter the machine shop where they used a welding torch to cut out a ground level window and escaped. Two of the prisoners were captured early the next morning. The other three made their way to the home of claimant at Elk Waters, West Virginia about six miles away. They pried open a window and entered the house. They ransacked the house, destroying furniture and food from the freezer and using several of the rooms as a bathroom.

The claimant was employed at the Wamsley house to take care of Mrs. Wamsley, a stroke victim. The Wamsley home was about one-half mile from the Correctional Center. The claimant testified

that she went to her home about 4:30 p.m. the day after the escape. The doors were locked the same as they were on the previous Wednesday when she went to work. She unlocked the door to the porch and entered the kitchen from the porch. One of the convicts, with a silk stocking over his head, came out of the living room and stuck a 12-guage shotgun up to her face and told her not to scream. He demanded the keys to her car which she gave to him. She was forcibly put in a chair and tied up.

The convicts ripped out the telephone and left in her car taking with them the gun and some clothes. The claimant managed to get loose and screamed for her sister-in-law who lived nearby. Her sister-in-law responded and took her to the Pine Service Station where they notified the prison and the deputy sheriff at Valley Head, West Virginia, who subsequently apprehended the convicts. The claimant passed out and was taken to the David Memorial Hospital where she remained until she was released on the following Monday.

The claimant's arm was bruised by the action of the convicts, and she is still being treated for nerves and hypertension. The claimant maintains there was no warning of the escape of the convicts.

For this Court to allow recovery in this case, any liability for damages must be based upon acts constituting negligence which were the proximate cause of the damage.

In the case of *Lelia Hurst v. Department of Public Institutions*, 9 Ct. Cl. 155, this Court held:

> "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."

The Court finds that the claimant has not proved by a preponderance of the evidence that there was actionable negligence on the part of the respondent, which was the proximate cause of her damages and injuries, and disallows her claim.

Claim disallowed.

Opinion issued May 13, 1977

FRANCES N. LEE, MOTHER & NEXT FRIEND
OF RODNEY K. LEE

vs.

BOARD OF EDUCATION

(No. CC-76-59)

Mike Mullins and Leonard Knee, Attorneys at Law, for the claimant.

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

WALLACE, JUDGE:

Frances N. Lee, as mother and next friend of Rodney K. Lee filed this claim for injuries received by her son, Rodney K. Lee, while a student at the Romney School for the Deaf and Blind at Romney, West Virginia.

Rodney K. Lee is a mute aphasic, 20 years old with the mentality of a 10-12 year old boy. He was enrolled at the School to learn sign language to enable him to communicate. When he was first enrolled at the School, he roomed on the first floor of Seaton Hall Dormitory but was later moved to the second floor with boys more his size.

Each floor is supervised by an employee of the respondent known as a houseparent. Kirk Lockwood was the houseparent on the floor where Rodney Lee was quartered. His job, according to the testimony, was that of a substitute parent. He was to supervise the students, plan recreation, and perform whatever other functions that might be necessary.

On Saturday, March 1, 1975, Rodney was cleaning his room with his roommates. This was the normal Saturday morning routine at the School. Kirk Lockwood, the houseparent, was supervising the students in the cleaning. On this particular morning he left the floor for a few minutes to assist another student in emptying a trash can. On his return several students motioned to him to come quickly and led him to the bathroom where he found Rodney standing beside a sink injured and bleeding from the mouth. He took him to the infirmary and from there to a dentist for treatment. Later that day he was taken home by his parents. Rodney had three teeth knocked out. The resulting damage to his mouth and other

teeth caused the remaining teeth to abscess necessitating the eventual removal of all of his teeth.

The claimant, Mrs. Lee, testified that the incident so affected Rodney emotionally that it was necessary to remove him from the School.

Neither of Rodney's roommates was able to communicate with others, but by means of pantomime, they indicated that there had been some sort of fracas in their room. Rodney indicated he was hit in his mouth. Mark Minnick, a student with a room across the hall, had apparently come into Rodney's room and for reasons unknown struck or pushed Rodney against the metal beds. Upon inquiry, he admitted being in the room but denied hitting Rodney, claiming that he only pushed him. There was some indication that Rodney grabbed Minnick by the shirt, but whether it was before or after he was hit and/or pushed, was never determined. Jack Brady, the Superintendent of the School, testified that Minnick was not mentally retarded but had impaired hearing and some speaking ability.

The claimant maintains that Rodney would not have been injured if the School had provided closer supervision. She testified that she visited Rodney every two weeks and that her observation of the houseparents indicated they spent their time sitting in the lounge. However, she stated that "Mr. Lockwood made rounds and was nearly always on the move, watching after his boys."

Mr. Brady, as well as Robert W. Linzey, Principal of the School for the Deaf and Blind and Kirk Lockwood, the houseparent, testified they had no reason to believe that Mark Minnick would harm any of the other students. The testimony indicated that students at the School had discipline problems from time to time, but there was no evidence that these problems would lead to serious injuries to the students or property of the School. Mr. Brady stated that the students were given their freedom within reason and were treated as normal as possible.

It is regrettable that Rodney received the injuries that he did, but the record of the case does not disclose any negligence on the part of the respondent that would justify a recovery. The fact that Kirk Lockwood left the floor for a few minutes to assist a student in removing the trash is not in itself sufficient evidence to believe the accident could have been prevented if he had been there. He would have had to have been in Rodney's room, which was not the case.

Employees of the respondent testified they had no reason to believe there was such aggressiveness among the students that an accident of this type would happen. In any school where students are assembled and in this case lived together in dormitories, fracases will and do occur. In this case the respondent provided closer supervision due to the impairments of the various students but at the same time attempted to create an atmosphere where the students could pursue a near normal life. The students are not considered inmates nor the houseparents as wardens. Enrollment in the School is on a voluntary basis. No student is committed to the School. The guarantee of safety is no more or no less than if the student is enrolled in any other public school. The injuries received by Rodney were not forseeable, and the record fails to reveal any negligence on the part of the respondent which was the proximate cause of the accident. Accordingly, this Court is of the opinion to and does disallow the claim.

Claim disallowed.

Opinion issued May 13, 1977

MR. AND MRS. JOHN C. PERKINS, JR.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-13)

No appearance by the claimants.

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

PER CURIAM:

Upon the stipulation of the parties to the effect: that the respondent had placed a piece of steel sheet over a hole on the Miami Bridge at Cabin Creek; that a piece of that steel on January 17, 1977, which was bent upward about one foot struck one of the wheels on the claimants' truck; and that the claimants thereby sustained damage to their truck in the sum of $72.30; an award in that sum should be, and it is hereby made.

Award of $72.30.

Opinion issued June 9, 1977

MARVIN KIDD

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-12)

PER CURIAM:

By written stipulation filed herein, the claimant and respondent stipulated that on or about January 17, 1977, the claimant's vehicle hit and struck a loose metal plate on a bridge owned and maintained by the respondent in Kanawha County, West Virginia. The complaint alleged the bridge was located in Miami, West Virginia. The vehicle was damaged, and it was stipulated that the fair and equitable estimate of the damages sustained by the claimant is $52.50. Believing that liability exists on the part of the respondent and that the claimant is free of negligence and that the damages are reasonable, an award of $52.50 is directed in favor of the claimant.

Award of $52.50.

Opinion issued June 28, 1977

BOONE SALES, INC.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-119)

Roy S. Samms, Jr., Attorney at Law, for claimant.

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

GARDEN, JUDGE:

By real estate contract dated May 2, 1975, the claimant agreed to purchase certain real estate from Theresa Irene Snodgrass and others (hereinafter referred to as vendors) for a consideration of $12,000.00. On October 14, 1975, employees of respondent through its Rehabilitation Environmental Action Program entered upon the property and tore down a building on the property. On October 17, 1975, the vendors executed and delivered a deed conveying the

subject property to the claimant for the aforementioned consideration of $12,000.00. The real estate contract contained the following provision:

> "RISK OF LOSS: That any risk of loss to the property shall be borne by the Seller(s) until title has been conveyed to the Purchaser(s) and to deliver said property to said Purchaser(s) in as good condition as it is on the date of this agreement, ordinary wear and tear excepted."

Respondent has filed an amended motion to dismiss contending by reason of the above paragraph that only the vendors have the right to file a claim for damages and not the claimant, Boone Sales, Inc. With this contention we do not agree. The "Risk of Loss" paragraph would have given the claimant the right to rescind the contract and recover its down payment, but claimant apparently elected to consumate the contract. While the bare legal title remained in the vendors after the real estate contract was executed, the claimant did acquire the equitable title. When the deed was executed and delivered, the legal title and the cause of action for damages were transferred to claimant. This general rule of law is well expressed in 77 Am. Jur. 2d, Vendor and Purchaser, §362 as follows:

> "It is a general rule that the vendee in an executory contract for the sale of land, who has thereunder possession or the immediate right to possession, may maintain an action for damages against third-party trespassers or tortfeasors for injuries sustained after the making of the contract and affecting either his possessory rights or the freehold, and recover full damages, in the absence of evidence that the recovery would not afford complete compensation for the injuries, or that a further claim for damages for such injuries, or a part thereof, could be made by the vendor, at least where, if the latter was not a party, no valid objections were interposed either on the ground of his nonjoinder or the ground that the damages should be separated."

In view of the foregoing, respondent's amended motion to dismiss is overruled.

Motion to dismiss overruled.

Opinion issued June 28, 1977

MOSES KOLESAR

vs.

DEPARTMENT OF HIGHWAYS

(No. D-992)

Paul J. Kaufman, Attorney at Law, for claimant.

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

PER CURIAM:

Counsel for claimant and respondent have filed a written stipulation which reveals that for a period in excess of six years beginning in 1968, the respondent maintained an open storage dump for road salt at a location above claimant's property which is located on West Virginia Route 16 in McDowell County. As a result, run-off from the storage dump drained upon claimant's property, infiltrating the same and a water well located thereon. As a result the well water became undrinkable by reason of the salt content therein, all of which was confirmed by three separate reports of tests performed by the West Virginia Department of Health. As a further result, the plumbing in claimant's residence was damaged by corrosion, his land would no longer bear crops, his health was adversely affected and he was compelled to vacate his property.

The parties have further stipulated that an amount of $6,500.00 is a fair and equitable estimate of the damages sustained by the claimant. Based on our opinion in *Dixon v. Department of Highways,* 9 Ct. Cl. 81, we are of opinion that liability exists and believing that the stipulated amount of damages is not unreasonable, we hereby make an award to the claimant in the amount of $6,500.00.

Award of $6,500.00.

Advisory Opinion issued June 29, 1977

ROBERT H. SLACK

VS.

PUBLIC EMPLOYEES INSURANCE BOARD

(No. CC-77-105)

Authur T. Ciccarello, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

The Auditor of the State of West Virginia, Glen Gainer, Jr., has requested the Court to render an advisory opinion concerning the State's liability for payment of accrued annual leave that may be due and owing Robert H. Slack, formerly the executive secretary of the Public Employees Insurance Board. Mr. Slack resigned his position on February 14, 1977, and at that time had accrued 22¼ days of annual leave. At the time of his resignation, he was earning an annual salary of $22,500.00.

It is our opinion, as expressed in prior decisions of this Court, that liability exists, and the Mr. Slack's accrued annual leave should be paid. We have also computed that 22¼ days of annual leave at an annual salary of $22,500.00 has a total monetary value of $1,496.92.

Opinion issued June 30, 1977

DOWNER B. BOLEY

VS.

DEPARTMENT OF HIGHWAYS

(No. CC-76-136)

Claimant appeared in person.

Nancy Norman, Attorney at Law, for the respondent.

WALLACE, JUDGE:

The claimant, Downer B. Boley, filed his claim for $926.83 against the respondent for damages to his 1970 Ford F-100 truck. On August 25, 1976 at approximately 6:05 a.m. the claimant was

traveling at approximately 45 miles per hour along the northbound lane of West Virginia Route 31 about 2½ miles from Williamstown, West Virginia. Route 31 is a two-lane blacktop highway. The speed limit is 55 miles per hour.

The claimant testified that he was familiar with the road, having driven it for 10 to 12 years. As he proceeded around a curve in a low place in the road, his vehicle came up on a rise in the highway. He was blinded by an approaching vehicle which dimmed its lights. The claimant dimmed his lights and then returned them to high beam, at which time he saw an object in his lane of traffic. He swerved to miss it but struck it with the right side of his truck. The impact forced him over on the left side of the road onto the berm. He stopped his truck and upon investigation discovered that a road sweeper belonging to the respondent was across his lane of traffic, one end being about six inches from the center line of the road, and the tongue, which is attached to a truck when in use, extended to the right hand berm. There were no lights, reflectors, flares, or a watchman to warn of the danger.

Gregory Bailey, an employee of the respondent, testified that he helped detach the sweeper from the truck and park it some 20 feet off of the road the evening before the accident. It was parked in a wide area with other vehicles of the respondent to be ready for use the next day. The sweeper was secured in place by lowering the broom to the ground. The broom was raised or lowered by means of a hydraulic system which could be operated by hand. The berm of the road where the sweeper was parked sloped downward some 10 to 11 inches from the elevation of the road itself.

The claims investigator for the respondent testified there was sight view of 300 feet from the curve to the point of impact. His investigation did not reveal how the sweeper came to be on the road.

Although there was a sight view of 300 feet, it must be remembered it was taken in daylight, the accident occurred in the dark, and the claimant was momentarily blinded by the lights of an oncoming car. The sweeper itself had a relatively low profile to be seen under the existing conditions.

From the record it is apparent that someone pulled the sweeper onto the highway where it remained until struck by claimant's truck. It is also apparent that the sweeper was not properly secured for the night because it was able to be moved back onto the highway by persons unknown.

The record discloses no negligence on the part of the claimant that would bar his recovery. He was proceeding over a road he had driven many times at approximately 45 miles per hour. It was dark, the road dry. His visibility was momentarily diverted by the headlights of an oncoming automobile. As soon as the car passed he saw an object in the road, which later was determined to be the sweeper. Although he attempted to avoid hitting the sweeper, his efforts were unsuccessful.

The evidence further discloses that the respondent parked the sweeper off the road overnight and that it was secured by lowering the broom with a hand lever system which apparently could be operated by others. The equipment was then left unattended the remainder of the night.

The Court is of the opinion that the respondent's negligence in failing to properly secure its sweeper was the proximate cause of the accident and that there was no negligence on the part of the claimant that would bar his recovery. Accordingly, an award is hereby made to the claimant in the amount of $926.83.

Award of $926.83.

Opinion issued June 30, 1977

LONNIE W. BRADBURY

vs.

NONINTOXICATING BEER COMMISSION

(No. CC-77-30)

Claimant appeared in person.

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

GARDEN, JUDGE:

The claimant was employed by the respondent from March 1, 1969 to January 17, 1977, and during the last three years of that period he occupied the position of Deputy Beer Commissioner at a monthly salary of $1,035.00. At the close of calendar year 1976, he had accumulated thirty days of annual leave, and having worked from January 1, 1977 to January 17, 1977, he had accumulated an additional day and one-half, or a total of 31 1/2 days.

The Attendance and Leave Regulations of the Board of Public Works, promulgated on May 28, 1968, and in effect during claimant's employment provide as follows in respect to annual leave:

> "No more than thirty (30) working days of accumulated annual leave may be carried forward from one calendar year to another. *If an employee's services are terminated for any reason he cannot be paid for more than thirty (30) days of accumulated annual leave.* Accumulated annual leave shall be granted by the Appointing Authority or upon the authority delegated by him at such time or times as will not materially affect the efficient operations of the agency." (Emphasis added.)

It is apparent that the claimant is entitled to payment of accumulated annual leave, but that he is only entitled to 30 days. We hereby make an award to the claimant in the amount of $1,569.20.

Award of $1,569.20.

Opinion issued June 30, 1977

RONALD BURGHER

vs.

BOARD OF REGENTS

(No. CC-76-64)

Michael F. Gibson, Attorney at Law, for the claimant.

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

GARDEN, JUDGE:

In April of 1972, the claimant was employed as an associate professor of Speech and Dramatics at Concord College in Athens, West Virginia. At that time the applicable provision of the Concord College faculty handbook in respect to tenure provided as follows:

> "A person who has taught on the college or university level three or more years before being employed for teaching service in a college or university under the control of the West Virginia Board of Education (of Regents) shall normally be employed on probationary status for three years before becoming eligible

for tenure. At the end of this period the president shall recommend to the governing board either that the probationary faculty member be placed on tenure or that his employment be discontinued at the end of the contractual period. In the latter event, notice shall be given at least one year prior to the expiration of the probationary period."

Dr. Burgher, who had sufficient prior teaching experience, was thus on a probationary status for the academic years 1972-73, 1973-74 and 1974-75, the end of which he would be granted tenure or his employment would be discontinued provided notice of the discontinuance had been given him at least one year prior to the expiration of the probationary period. At the direction of President B. L. Coffindaffer, a letter dated May 16, 1974, was directed to Dr. Burgher by Dr. Marvin E. DeBoer, the Vice President for Academic Affairs and Dean of the Faculty. Because this letter is of such importance to our decision in this claim, the same is set out in full as follows:

"Dr. Ronald L. Burgher
Associate Professor of
Speech and Dramatic Arts
Concord College
Athens, West Virginia 24712

Dear Dr. Burgher:

You have reached that point in service with the College wherein to be in compliance with the stipulations in the Faculty Handbook regarding conditions of moving from a probationary to a tenure status, it is required that your appointment be reviewed.

Specifically, in your case, coming to Concord with prior service, the regulations require a review at the end of the second year of service at Concord so that in the event tenure is not to be awarded, the faculty member may be given the required twelve-month notice coinciding with the conclusion of the fifth probationary year of service.

Following an extensive divisional review, consultations, and an administrative review, it is with regret that I must inform you that the letter of appointment to be offered to you for the 1974-75 academic year must be a terminal one.

Under separate cover, you will receive a copy of the new Board of Regents Policy Bulletin 36 (March 12, 1974), Policy

Regarding Academic Freedom and Responsibility, Appointment, Promotion, Tenure and Termination of Employment of Professional Personnel. I would urge you to study that document as it relates to tenure, especially, and to note the cover resolution. If you wish to be considered for coverage by these provisions, it will be necessary for you to send your request to this office prior to July 1, 1974, *for consideration and appropriate action by the President and the Board of Regents.* (Emphasis added.)

If I can be of any assistance to you, please do not hesitate to stop by the office.

Sincerely,

Marvin E. De Boer"

Policy Bulletin 36, referred to in the letter was adopted by the Board of Regents on March 12, 1974, to become effective July 1, 1974. In respect to tenure Policy Bulletin 36 provides for a maximum period of probation of seven years and that at the end of six years any non-tenured faculty member will either be given notice in writing of tenure or offered a one-year written terminal contract of employment. In respect to the personnel covered by Policy Bulletin 36, the following language is used:

"The provisions of this policy relating to qualifications, contracts and tenure status, shall not apply to personnel with an effective date of employment prior to July 1, 1974; provided, however, any such appointee wishing to be covered by the provisions relating to qualifications, contracts and tenure status, may request such coverage in writing prior to July 1, 1974, which request for such coverage, *if approved by the President of the institution and the Board of Regents,* shall entitle the appointee to coverage, and such coverage shall be noted in, and become a part of the individual's permanent file." (Emphasis added.)

Dr. Burgher, in an attempt to retain at least the status of a probationary employee, elected to be covered by the provisions of Policy Bulletin 36 and directed a written request to be so covered to President Coffindaffer prior to July 1, 1974, but the evidence clearly demonstrates that his request was never approved by President Coffindaffer and the Board of Regents. Dr. Burgher pursued his rights through a faculty grievance procedure, but an

ultimate appeal of his termination to the Board of Regents resulted in an affirmance of President Coffindaffer's decision to terminate.

Dr. Burgher contends that Dr. De Boer's letter of May 14, 1974, was not an effective termination in that it was conditional and that his request to be covered by Policy Bulletin 36 isolated him from any effective termination. He contends that as a result he was unlawfully deprived of an additional one year's salary or $13,140.00, which he now seeks to recover in this claim.

In our opinion Dr. Burgher, even though he requested to be covered by Policy Bulletin 36, was never so covered because his request was never accepted by President Coffindaffer and the Board of Regents as was required by the clear language of Policy Bulletin 36 itself. Dr. DeBoer's letter in our opinion was unconditional and unequivocal in advising Dr. Burgher that his last year of employment was a terminal one, and fully complied with the provisions of the Concord College faculty handbook relating to tenure and which was in effect on May 14, 1974, the date of Dr. Burgher's termination notice. For the reasons expressed above, we are disallowing this claim.

Claim disallowed.

Opinion issued June 30, 1977

DAVID L. CLARK, SR.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-17)

AND

MARTINSBURG CONCRETE PRODUCTS COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-118)

Ralph C. Dusic, Jr., and *Jerome Radosh*, Attorneys at Law, for claimants.

Gregory W. Evers, Attorney at Law, for respondent.

WALLACE, JUDGE:

For the purpose of the hearing these claims against the Department of Highways arising out of the same accident were consolidated.

The claimant, David L. Clark, Sr., was employed as a truck driver for the claimant, Martinsburg Concrete Products Company, of Martinsburg, West Virginia. Clark had been a truck driver for the Company approximately three years. For the past two years he had driven the particular type of truck involved in the accident which was a concrete truck weighing 20,000 pounds empty and equipped with 16 gears, air brakes and power steering.

On August 29, 1975, Clark was returning to the plant of his employer at Martinsburg, West Virginia after delivering a load of concrete at Barteen. He was driving in a northerly direction on West Virginia Route 9 approaching Kearneysville, West Virginia in Jefferson County. The road was blacktopped, 20 feet 7 inches wide. The weather was clear, the road dry. The accident occurred at approximately 10:00 a.m.

The claimant, Clark, who was familiar with the road, testified that as he was approaching Kearneysville he down-shifted the truck to fourth-third gear as he entered the first of two curves. At this point the road straightens out then enters a second, sharper

curve. He stated that his speed was approximately 40 miles per hour. The maximum speed in fourth-third gear was 40 to 45 miles per hour. He further stated that as he drove out of the second curve he saw for the first time a road crew of respondent's employees some 150 to 200 feet in the distance; that a tan van vehicle was stopped in his lane of traffic and a man was talking to the driver. Trucks belonging to the respondent were stopped on the left berm of the highway and several employees were standing nearby, one or two in the left lane of the highway. He saw no signs or flagmen to warn him of any danger.

Clark testified, "Well, when I saw the tan van, I knew that if I kept going I would hit him and probably it would have killed him, and so I checked real quick to the left to see if I could go around him, but as I said, the State road trucks were off to the side of the road and the men were standing along the road and one or two men were in the road; and as I hit my brakes, the guys who were in the road kind of froze. . .so the only thing I could do, I headed for the bank on the right hand side of the road."

The truck hit the bank and overturned. Clark was thrown out of the truck and pinned under it until he was able to free himself.

The claimant Clark's leg was broken and he suffered severe cuts on his head and leg. He was not able to work for 18 weeks and, after returning, lost two more weeks of work occasioned by additional leg trouble. His doctor and hospital bills were $281.00 and $458.25 respectively. He testified that he was paid $3.75 for a 40 hour week and $5.13 for overtime. He stated he averaged 45 to 47 hours per week prior to the accident.

Donald Boyer, in his evidentiary deposition, testified that he had been employed by the respondent for six months, the last four months as a certified flagman. On the day of the accident he was one of the flagmen for a patching crew that was patching West Virginia Route 9 from the Jefferson County line to the Virginia state border. There was a flagman stationed at each side of the work crew, each with a red flag. He stated he was positioned a good 200 feet from the curve around which the concrete truck came. He first saw the truck as it was coming around the curve. He stated he couldn't have seen it before because it was a good sized curve. He further testified that he attempted to flag down the truck but when the driver put on the brakes they locked and the accident occurred. His testimony revealed that no signs were out because the crew was moving from spot to spot and they were in the process of

putting signs up when the accident happened. The signs had been out previously but, since the crew had moved five miles, they had been put back in the truck where they had remained for the last mile. There were no flares or other warning devices. The signs were put out five minutes after the accident. Boyer testified that his supervisor sent him up to the curve after the accident to flag and stop the traffic. He admitted that he had stopped a plumbing van prior to the accident but denied talking to the driver.

Donald Vernon Densmore, a 3½ year employee of the respondent, testified in his evidentiary deposition that he was the driver of the truck with the "men working" signs. He stated he was in the process of putting out the signs when the accident occurred. The signs on the far side of the crew were out. The other signs had not been put out because he stopped to help the work crew with a roller. He further testified that the flagman Boyer was 20 to 30 feet in front of the work crew and that he attempted to stop the truck but his brakes locked and it turned over.

John Mobley, manager of M & M Mobile Home Sales, located at the curve in question, testified he had seen the work crew earlier in the day on his way to the post office; that they had a flagman about ten feet in front and behind the crew. He saw no other warning signs. He stated there was no flagman at the curve until after the accident.

Another witness, Patricia Louise Grimm, who witnessed the accident, testified that she did not recall any signs; that the truck was going no more than 35 miles per hour; and that it was too late for the driver to do anything when he came upon the situation. She also testified that there was no flagman at the curve but there was one close to the work crew.

The testimony of the witnesses establishes that although there were flagmen present and flagging, there was no protection for traffic coming around the curve until it was too late. Claimant, Clark, did what he could to avoid the accident but to no avail. A flagman or a warning sign should have been located at the curve to warn of the presence of the work crew ahead. The Court is of the opinion that the negligence of the respondent was the cause of the accident and that the claimant, Clark, should recover. The claim of the Martinsburg Concrete Products Company which was consolidated and heard with the Clark claim was for damages to the truck involved in this accident. No evidence of damages to the truck was introduced for consideration by this Court and the Court is unable to make a finding and therefore disallows its claim.

Accordingly, the Court makes an award to the claimant, Clark in the amount of $5,572.00.

Award of $5,572.00 to David L. Clark, Sr.

Claim of Martinsburg Concrete Products Company disallowed.

Opinion issued June 30, 1977

DUNBAR PRINTING COMPANY

vs.

DEPARTMENT OF EDUCATION,
DIVISION OF VOCATIONAL EDUCATION

(No. CC-77-34)

Eugene R. Hoyer, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

In May of 1975 the respondent requested the claimant to print 5500 copies of the eight page May issue of FFA News at a cost of $749.20. Thereafter the respondent requested some additional folding of the printed material at an additional cost of $10.00. The material was printed, folded and delivered to respondent in June, and the claimant invoiced the respondent for $759.20 by invoice dated June 11, 1975. Thereafter a purchase order dated June 18, 1975, for $749.20 was issued, but the claimant was never paid for the services rendered.

The handling of this matter was most unusual and regrettably improper, but the respondent did receive the benefit of this printing. This certainly is a claim that in equity and good conscience should be paid. There were sufficient funds on hand at the close of the fiscal year 1974-75 from which this claim could have been paid. The Court is of opinion to and does hereby make an award to the claimant in the amount of $759.20.

Award of $759.20.

Opinion issued June 30, 1977

CLARENCE V. EASTES, JR.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-41)

Claimant appeared in person.

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

GARDEN, JUDGE:

On December 7, 1976, at about 4:45 p.m. the claimant was operating his 1966 Chevrolet station wagon in an easterly direction on West Virginia Route 25 in Nitro, West Virginia. His wife was employed at Waybright's Bakery located at 2402 First Avenue in Nitro, and he was attempting to pick her up after work. Route 25 at and near the ultimate scene of the accident was a two-lane roadway, one lane for eastbound traffic and the other for westbound traffic. During the summer of 1976, the respondent through its independent contractor, Orders and Haynes, had widened the south side of the eastbound traffic lane by some two and one-half feet of additional paving. Prior to this construction, a storm sewer drain had been located some two and one-half feet from the edge of the highway. No attempt had been made during construction to raise the elevation of this storm sewer drain. Consequently, after the construction, there was a drop of about 18 inches from the surface of the widened highway to the storm sewer drain.

The claimant had been unable to find a regular parking space in the vicinity of his wife's place of employment and had attempted to pull his car off of the traveled portion of Route 25. As a result his left front and left rear wheels struck this severe depression in the berm. As a further result the claimant damaged his muffler and tail pipe and his gas tank was ruptured. Necessary repairs were later effected at a total cost of $144.20.

We believe the preponderance of the evidence establishes that the respondent negligently created a dangerous condition along the berm of this road and that such negligence was the proximate cause of the accident and resultant damage to the claimant's vehicle. Believing further that the claimant was not guilty of negligence which proximately caused or proximately contributed

to causing the accident, we hereby make an award of $144.20 in favor of the claimant.

Award of $144.20.

Opinion issued June 30, 1977

CLIFFORD E. HONSAKER, JR.

VS.

DEPARTMENT OF HIGHWAYS

(No. CC-77-29)

PER CURIAM:

The claimant and the respondent filed a written stipulation with the Court which stipulated that on or about August 31, 1976, claimant's vehicle was struck by concrete debris from a dynamite blast detonated by employees of the respondent while working on West Virginia Route 26 in Berkeley County, West Virginia. Claimant's vehicle was damaged. It was stipulated that $10.14 is a fair and equitable estimate of the damage sustained by the claimant. Believing that liability exists on the part of the respondent and that the claimant is free from negligence and that the damages are reasonable, an award of $10.14 is directed in favor of the claimant.

Award of $10.14.

Opinion issued June 30, 1977

EMMETT HUNDLEY & FRANCES HUNDLEY

VS.

DEPARTMENT OF HIGHWAYS

(No. D-941)

Harry N. Barton, Attorney at Law, for the claimants.

Nancy J. Norman and *Nancy Loar,* Attorneys at Law, for the respondent.

WALLACE, JUDGE:

The respondent entered into a contract with Vecellio & Grogan, Inc. and Foster & Creighton Company to construct a public road in

Kanawha County, West Virginia known as Project I-64-2 (15) 57. The claimants brought action against the contractors and the respondent in the Circuit Court of Kanawha County, West Virginia, for damages to their property at 98 Cook Drive, Charleston, West Virginia, allegedly caused by the contractors when they trespassed on the property and cut and destroyed a large number of trees and shrubs. On motion, the respondent was dismissed as a defendant pursuant to Chapter 17, Article 4, Section 37 of the Code of West Virginia, which prohibits the State from being named defendant in a proceeding in Civil Court. Subsequently, the matter was settled with the contractors who were released by the claimants.

The claimants filed their claim in this Court against the respondent as a joint tort feasor. The respondent filed its motion to dismiss the claim upon the ground that the release executed by the claimants in the settlement of the civil action against the contractors also released the respondent.

The release released the two contractors "and all of their principals, employees, agents, subsidiaries, parent corporations, successors, and assigns". Counsel for the respondent contends that the respondent is a principal and was released. Claimants maintain that the contractors were independent contractors performing under a contract executed with the respondent.

In the case of *Tracy N. Spencer, Jr. v. The Travelers Insurance Company,* 148 W.Va. 111, the West Virginia Supreme Court of Appeals held:

> "The question as to whether a person is an employee or an independent contractor depends on the facts in any given case and all elements must be considered together. 27 Am. Jur., Independent Contractor, *5, page 485. Among the elements to be considered are the manner of selection of the person who is to do the work, how the person is to be paid for such work, the right to hire and to fire, and the right or power of control or supervision in connection with the work to be done, but the most important of all is the last mentioned element, that of power of control or supervision over the manner of doing the work. If the right to control or supervise the work in question is retained by the person for whom the work is being done, the person doing the work is an employee and not an independent contractor." See *Greaser v. Appaline Oil Company,* 109 W.Va. 396, *Davis v. Fire Creek Fuel Co.,* 144 W.Va. 537.

In the instant case, the respondent entered into a contract with the contractor based on its plans and specifications. The respondent retained only such control and supervision as was necessary to assure that the plans and specifications were followed but did not control or supervise the contractor's work or their employees.

> "The mere retention by the owner of the right to supervise or inspect work of an independent contractor as it progresses for the purposes of determining whether it is completed according to plans and specifications, does not operate to create the relation of master and servant between the owner and those engaged to work. . .
>
> An employer of an independent contractor may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the contract, including the right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work, without changing the relationship from that of owner and independent contractor." 41 Am. Jur. 2d, Independent Contractor, *10.

It is the opinion of this Court that the supervision by the respondent was not such control as to create a master-servant relationship and that the contractors, Vecellio & Grogan, Inc. and Foster & Creighton Co. were independent contractors. The respondent was in fact the principal or employer in the employment of the independent contractors to perform the contract in accordance with its plans and specifications.

Accordingly, the word "principal" as used in the release executed by the claimants does in fact release the respondent.

Respondent's motion to dismiss the claim is sustained.

Motion to dismiss sustained.

Opinion issued June 30, 1977

EDNA MAY LYONS

vs.

DEPARTMENT OF HIGHWAYS

(No. D-879)

William B. Carey, Attorney at Law, for the claimant.

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

WALLACE, JUDGE:

The claimant, Edna May Lyons, filed her claim against the respondent in the amount of $50,000.00 for damages resulting from a fall occasioned when she stepped into a pothole.

The accident occurred on May 22, 1974, at approximately 10:00 a.m. on Washington Street near the intersection of Congress Street in Berkeley Springs, West Virginia. Washington Street is also U.S. Route 522, maintained by the respondent. The weather was clear; the street dry.

A friend of the claimant, James E. Morrison, was in the habit of driving the claimant to work. It was customary to let her out of his car in front of a newsstand where she purchased a paper and then proceeded to walk to work in a store about four buildings away. At the place where he usually let her out of his automobile, the curb was painted yellow indicating a no parking zone.

On the morning of the accident, Morrison, as was his custom, let the claimant out of his automobile in front of the newsstand. He stopped his car 14 to 20 inches from the curb. The claimant got out of the car on the passenger side next to the curb. She shut the door, took a step or two, and tripped in a hole in the street and fell. Her left knee was severely injured. There were no other cars parked there and there were no obstructions between the car and the newsstand. The claimant testified she did not see the hole nor remembered it being there before.

The claims investigator for the respondent testified the hole was odd shaped, 19 inches long and 16 inches wide at the widest point. The deepest point was one inch.

Marshall Michael, who was the County Supervisor for the respondent in Morgan County, testified Washington Street or U.S.

522 was part of his responsibility. He testified that he and his crew tried to keep all potholes in the street filled. He stated he had no knowledge of the hole involved in this accident until the claims investigator made his investigation in February, 1976. No one had previously reported it.

The evidence in this case does not establish negligence on the part of the respondent but instead the record reveals that the negligence of the claimant caused her accident. The claimant was familiar with the place where she fell, having gotten out of the car there on numerous occasions, and with the exercise of reasonable care could have avoided her injury. In her testimony, she testified as follows: "Well, I remember that I was close to the curb and there was a lot of dirt on the curb where they had planted a pole, and I was looking at the curb to see where I could step up without getting in all of this loose dirt." "I was looking at the edge of the curb, and all at once, I just went forward. I stepped in this hole, and just fell flat on my stomach." ". . .I had my mind centered on the edge of the curb where all this dirt was and that, and I did not see that there was a hole there."

The Court is of the opinion and so finds that the evidence does not establish negligence on the part of the respondent and that the claimant's negligence was the cause of her accident and, accordingly, disallows her claim.

Claim disallowed.

Opinion issued June 30, 1977

MACIL J. NULL & MELVIN L. NULL

VS.

BOARD OF REGENTS

(No. CC-77-16)

Claimants appeared in person.

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

WALLACE, JUDGE:

The claimants, Macil J. Null and Melvin L. Null, filed their claim in the amount of $20,000.00 before this Court against the Board of Regents. Attached to the claim is a copy of the deed dated

September 11, 1975 executed by the claimants to the Board of Regents conveying the southern half of Lot 7, Block 1 as shown on the map of the Town of Montgomery and described as a parcel of land fronting approximately 40 feet on Fayette Pike extending northerly 45 feet, 8 inches. The deed was signed and acknowledged by the claimants on October 14, 1975.

The only testimony given on behalf of the claimants was offered by the claimant, Macil J. Null. She testified that she acquired the property in the name of Macil L. Jeffrey in 1946 and further that she and her husband, the claimant, Melvin L. Null, resided for 30 years in the property which was located at 806—806½ Fayette Pike, Montgomery, West Virginia. She stated that the description in the deed to the Board of Regents was incorrect, that the size of the lot was 45 feet 8 inches by 60 feet. Mrs. Null acknowledged that she and her husband agreed to sell the property to the respondent for $27,000.00.

The claimants contend that representatives of the respondent did not discuss nor negotiate the sale with them. Mrs. Null testified that the consideration should have been $50,000.00 but she would settle for $20,000.00, the amount of the claim. She further stated that she was a graduate of West Virginia Institute of Technology and also had sold real estate.

The respondent introduced as its Exhibit No. 1 a copy of a map showing the properties acquired by it including the claimants' property. The map shows claimants' property fronting 40 feet on Fayette Pike and extending northerly 45 feet 8 inches, the same as the description in the deed. The map shows a parcel between the north side of claimants' property and the south line of property owned by one Riggio, which claimants maintained should be included in their deed.

Respondent also introduced as its Exhibit No. 2 a copy of its letter to the claimant, Macil Null, dated April 7, 1975 entitled: "Subject: Tax Parcel 156, part of Lot 7, Block 1 of Montgomery (806 Fayette Pike)". The letter stated in part:

> "The purpose of this letter is to make you a firm offer of $27,000 for the subject property, with the right reserved for you to remove any items from the premises after completion of the sale . . .
>
> This sale can be closed upon certification of your title as good and marketable by the state's attorney. If you desire to

accept this offer, please affix your signature to the enclosed copy of this letter on the line so designated and return it to this office no later than April 30, 1975."

This letter is signed as accepted by Macil J. Null.

The claimant, Macil J. Null, testified that she and her husband agreed to sell their property "under pressure because we couldn't be heard and because we had so much illness. . .". She further admitted that she received and signed the letter to accept the respondent's offer to buy her property for $27,000.00. She also admitted that she and her husband signed and acknowledged the deed to the respondent on October 14, 1975, consummating the sale.

It is apparent from the record that the claimants agreed to sell their property for $27,000.00. There is no evidence that the property was worth more than the agreed consideration except Mrs. Null's statement that the consideration should have been $50,000.00. If there was a mistake in the description as to the proper size of the lot, that is a matter for the respondent to determine. Mrs. Null testified that she sold real estate and claims she had some knowledge in real estate transactions. If the amount offered for her property was insufficient, she was not obliged to accept. She could have refused the offer and let the issue of fair market value be determined in a condemnation suit.

Based on the record, the Court is of the opinion and does disallow the claim.

Claim disallowed.

Opinion issued June 30, 1977

THELMA RATCLIFF AND
WILLIAM GLEN RATCLIFF

VS.

DEPARTMENT OF HIGHWAYS

(No. D-884)

Menis Ketchum, Attorney at Law, for claimants.

Gregory W. Evers and *Dewey Jones*, Attorneys at Law, for respondent.

GARDEN, JUDGE:

On November 3, 1972, the respondent entered into a contract with Kenneth M. Dunn Co., Inc., Day Construction Company and Orders Construction Company, Inc., whereby the latter companies agreed to construct, in accordance with plans and specifications furnished by respondent, the Fort Gay—Nursery Gap Road in Wayne County, Project No. S-617 (18), and commonly referred to as a portion of the Tolsia Highway. The contract also effected a relocation of the then existing County Road 29 or Mill Creek Road.

The claimants were the owners of certain real estate that fronted on Mill Creek Road. Running parallel to the Mill Creek Road was a small creek, and during good weather and when the water level in the creek was low, the claimants in order to reach their residence would simply drive their car off of Mill Creek Road, ford the creek and then proceed over bottom land a distance of some 200 to 300 feet, up a small embankment and park next to their home. At times when the water level in the creek was high and the bottom land was flooded, the claimants would park their car off of Mill Creek Road, cross the creek by means of a pedestrian bridge and then walk the remaining distance to their home. At the time of the hearing William Glen Ratcliff and Thelma Ratcliff were 75 and 68 years of age respectively.

The plans for the new road relocated the then existing Mill Creek Road to a point on the other side of the creek and very near the residence of the claimants and generally bisected the property of the claimants. At and near the home of the claimants the plans also required an extensive amount of fill for the road bed, and as a result the level of the newly constructed highway exceeded the elevation of claimants' home. It was admitted by respondent at the

hearing that the plans did not specifically provide for a road or anything else which could be used by claimants as a means of ingress and egress during construction, although the plans did provide for permanent access after construction and which was later actually provided.

The claimants had left their home on the morning of May 24, 1973, so that Mrs. Ratcliff might keep an appointment with her doctor. She testified that the fill for the roadbed at that time was twelve to fifteen feet in height. The fact was disputed by respondent, but from pictures of the roadbed taken a few days later and which were introduced into evidence, we believe that the testimony of Mrs. Ratcliff is entitled to the greater weight. It had rained the day before and was raining again when the claimants returned from the visit to the doctor about 11:30 a.m. No means of ingress or egress having been provided for them, the Ratcliffs attempted to climb up and over the fill and in so doing Mrs. Ratcliff fell and sustained severe personal injury to her left knee.

The respondent introduced into evidence Section 104.5 of the West Virginia Department of Highways Standard Specifications—Roads and Bridges—adopted 1972, which reads in part as follows:

> "The Project, while undergoing improvement, shall be kept open to all traffic by the contractor in such condition that both local and through traffic will be adequately and safely accomodated."

The respondent contends, pursuant to the above, that it was the duty of the contractor to provide the Ratcliffs with a means of ingress and egress to their property, and that it therefore had no duty in this respect to the Ratcliffs. We are not certain that the above-quoted section specifically covers the providing of ingress and egress to individual residences such as the Ratcliffs. Even if it does, we are of opinion that the respondent has a duty to provide ingress and egress and that such duty is non-delegable. A right of access to and from a public highway is a property right of which a property owner can not be deprived without just compensation. *State ex. rel. Riddle v. Department of Highways,* 154 W.Va. 722, 179 S.E. 2d 10 (1971). Respondent also contends that the Ratcliffs were guilty of assumption of risk in attempting to climb the fill in adverse weather conditions when the fill was slippery. As indicated above, climbing the fill was the only course that they could follow to reach their home. To be guilty of assumption of

risk, a voluntary exposure must take place. Acceptance of risk is not voluntary if a defendant's tortious conduct has left a plaintiff no reasonable alternative course of conduct in order to avert harm to himself. 57 Am. Jur. 2d, Negligence *283. We are of opinion that the respondent was guilty of negligence in failing to provide access or in failing to see that access was provided for the Ratcliffs during the construction of this highway and that such negligence was the proximate cause of Mrs. Ratcliff's fall and resultant injuries. We are of the further opinion that the Ratcliffs were not guilty of assumption of risk.

Counsel for the parties during the hearing stipulated that the Ratcliffs had instituted a civil action against the contractors, Kenneth M. Dunn Co., Inc. and Day Construction Company, but that before trial a settlement had been effected whereby the Ratcliffs received $18,000.00 in settlement of their claims. This of course does not prevent the Ratcliffs from pursuing their claims against the respondent in this proceeding. Had the civil action been proceeded to trial and a verdict, later satisfied, been returned in the Ratcliffs' favor, that would have barred this proceeding, for an injured plaintiff is entitled to only one satisfaction for a personal injury. On the other hand it is clear that any award that we might make must be reduced by the amount of the settlement previously paid by the joint tort feasors.

As a result of her fall Mrs. Ratcliff experienced immediate pain in her left knee. She was seen the following day by her family physician, Dr. Lester of Louisa, Kentucky, who referred her to Dr. J. Marshall Carter, an orthopedic specialist of Huntington, West Virginia. An evidentiary deposition of Dr. Carter was read into evidence, and it was the doctor's opinion that Mrs. Ratcliff at the time of her fall had an advanced osteoarthritic condition in both knees. He was of the opinion that she possibly tore the medial cartilage of her left knee and that the fall aggravated the osteoarthritic condition and triggered an on-set of pain. Dr. Carter saw Mrs. Ratcliff a total of nineteen times prior to the hearing of this claim. On at least seven of these visits the doctor injected her knee with cortisone. He also fitted her with an elastic knee cage. The doctor was of opinion to a reasonable degree of medical certainty that the fall aggravated her pre-existing condition and that she would suffer pain and experience difficulty in walking the rest of her life. Dr. Carter's bill was in the amount of $878.00, which in his opinion was reasonable and necessary.

Mrs. Ratcliff testified that prior to her fall she had no trouble in walking, but she admitted that her knees would bother her if she were working on her feet for an extended period of time. Since the fall she testified that she has been in constant pain and takes Darvon five or six times a day in an effort to control the pain. She is unable to do her house work and estimated that she had spent $2,000.00 in hiring help to do this work. While she is able to move around a little bit, she testified that she must use her knee brace and a cane.

Prior to her fall two young grandchildren were living with her, children of her widowed daughter. Her daughter was paying her $200.00 a month for this service, but shortly after the fall it became necessary to place the children elsewhere because of Mrs. Ratcliff's inability to physically take care of them.

Pain and suffering is the largest element of damages in this claim and is of course most difficult to equate in a monetary figure. In view of all of the facts in respect to this physical injury, we feel that an award of $22,500.00 is justified, and crediting the respondent with the $18,000.00 settlement, we hereby make an award of $4,500.00.

Award of $4,500.00.

Opinion issued June 30, 1977

RAY R. REED & SHARON REED

VS.

DEPARTMENT OF HIGHWAYS

(No. D-919)

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

Gregory W. Evers and *Nancy Norman*, Attorneys at Law, for respondent.

WALLACE, JUDGE:

The claimants filed their claim against the respondent in the amount of $75,000.00 for damages to their property allegedly caused by a slide occasioned by the respondent cutting into the toe of the hill in front of their property. The claimants' property was located on West Virginia State Route 25/5, also known as Dutch

Hollow Road in Kanawha County, West Virginia. They purchased their property in 1961 and thereafter constructed a pre-cut home. The claimant, Ray R. Reed, did the interior finishing of the house as well as the installation of the septic tank system to service the house. A seat or shelf was cut out of the hillside for the location of the house. The hill directly in front of the house slopes down to the State road. A creek or stream runs along the opposite side of the road. The septic tank system installed by the claimant was installed in the hillside in front of the house. A 950 gallon tank was installed with four lines of field tile extending approximately 110 feet each, into the leeching field. The system was improperly installed and worked approximately 90 days. Three of the lines of field tile ran up hill necessitating the use of one line running down the hill and opening onto the road.

The claimant, Ray Reed, testified that in the early part of 1971, the respondent ditched back into the toe of the hill in front of claimants' property placing the excess dirt on the creek side of the road. In the early part of 1972 a large crack appeared in the road which later continued up the hill crossing in front of the house and then back down the hill to the road causing a slide in the hillside. Over a short period of time, the slide broke the gas line, destroyed the driveway and did considerable damage to the house.

When the crack in the road first appeared the respondent was notified and it was patched. Later as the slide developed the respondent was notified on several occasions. The respondent corrected the slide between January and March of 1973 by constructing a retaining wall of piling along the road in front of the claimants' property.

John R. Sefton testified that he was an engineering geologist for the Department of Natural Resources and was employed by the Department of Highways from June, 1971 to October 14, 1975 in the landslide section. He made the initial investigation of the slide involved in this claim on September 27, 1972 for the Materials Control Division. Investigation revealed that the material beneath the surface was sandy clay and the area had some seepage. Although Mr. Sefton stated he could not determine the exact cause of the slide, it was his opinion that there were several factors involved. The undercutting of the road by the creek probably caused a series of movements which eventually got into the yard. Another factor was the seepage from the claimants' yard itself which weakened its stability. He further testified that in this case

land use played an important part; that the location of the septic tank field was in a very unfortunate place with respect to contributing to slide problems in the yard because it was located in the head of the slide.

Although the respondent did not deny that it cut into the toe of the hill, Alvin Hammonds, District Maintenance Engineer for District I, which included Kanawha County, testified there were no orders to make any relocations or excavations beyond normal maintenance in the area of the slide at the time the claimant testified the respondent cut into the hill.

Prior to the hearing of this claim the Court was requested to and did view the premises. The view revealed the present condition of the property including corrective measures taken by the respondent to restore the claimants' property and to stop the slide.

The installation of the septic tank system by the claimant, Ray Reed, in a hillside unstable from natural seepage may have been a contributing factor; however, the proximate cause of the slide was the action of the respondent in clearing the ditch line and cutting into the toe of the hill.

Therefore, the Court finds that the action of the respondent was the proximate cause of the slide and resulting damages and further, after considering the view of the premises and the corrective measures taken by the respondent, makes an award to the claimants in the amount of $5,000.00.

Award of $5,000.00.

Opinion issued June 30, 1977

S. J. GROVES & SONS COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-614)

Jack Huffman and *Jeniver J. Jones*, Attorneys at Law, for claimant.

Stuart Reed Waters, Jr., and *Dewey B. Jones*, Attorneys at Law, for respondent.

GARDEN, JUDGE:

By contract dated September 23, 1969, entered into by the respondent and claimant, the latter contracted to construct a portion of I-79 in Braxton County and known as Project I-79-2 (32) 64. For use on the project, the claimant in December, 1970, purchased 52,420 tons of crushed aggregate from Kenton Meadows Company, Inc., at a cost of $104,840.00. The claimant in turn on December 21, 1970, invoiced the respondent for this aggregate and shortly thereafter the respondent paid claimant for this quantity of aggregate. This aggregate, with cement to be added later, was to be used on the project as cement treated base course. When this aggregate was purchased by respondent, it was not on the project site but was a part of Kenton Meadows' stockpile of aggregate located in Braxton County.

By May, 1971, the respondent through sophisticated testing had determined that the aggregate was deleterious and as such did not meet specification. The testing had revealed that the aggregate contained shale in excess of 5% and that in accordance with the specifications was not usable on the project. Twenty-three tests were made of the aggregate from samples taken from Kenton Meadows' stockpile, and these tests confirmed earlier testing that had been performed by respondent as the aggregate passed over a conveyor belt at the crusher, that the aggregate was deleterious. Conferences were held between officials of claimant and respondent in an effort to determine what could be done with the aggregate in order to bring it up to specifications. It was determined that if an additional 1.5% of cement was added to the aggregate, that the same would then have sufficient strength to be usable on the project.

As a result the respondent and the claimant entered into a written agreement on May 27, 1971, and which was entitled Supplemental Agreement No. 7, Change Order No. 14. This agreement which was introduced into evidence authorized the additional cement and in describing the reason for the supplemental agreement, the following language was set forth in the agreement:

> "This crushed aggregate available for use in Cement Treated Aggregate Base Course has been repeatedly sampled and tested, and was found to have a higher shale content than allowed. In order to use this material, an additional 1.5% of Portland Cement is needed to produce a quality finished product. *The addition of 1.5% cement above the present 4 1/2% to 5 1/2% band will be added by the contractor at no extra cost to the Commission.*" (Emphasis supplied.)

The claimant thus added the additional 1.5% of cement and the cement treated aggregate base course was used on the project. The claimant computed that it incurred an expense of $11,437.40 in adding this additional cement to the aggregate, and being prohibited from charging this amount to respondent by reason of the language of the supplemental agreement, it recouped this expense by back charging it to Kenton Meadows.

While it would appear from the style of the claim that the same was filed by S. J. Groves & Sons Company as claimant, it was admitted at the hearing by counsel for the claimant that the claim was in reality an attempt on the part of Kenton Meadows to recover in the name of S. J. Groves & Sons Company the $11,437.40 which it had been back charged. They (Kenton Meadows) assert, and quite correctly we believe, that they could not file suit directly against respondent by reason of lack of privity of contract. While Kenton Meadows cannot file a direct claim against respondent in its own name, S. J. Groves & Sons Company could have assigned its chose in action to Kenton Meadows and the latter could have proceeded against respondent as an assignee. This was not done, but even if it had, we believe the language of the supplemental agreement would have constituted a complete defense.

Kenton Meadows of course is of the opinion that the sampling from their stockpile was done improperly and that the samples were taken from unrepresentative parts of the stockpile and as such did not represent the true quality of the aggregate in the stockpile. We believe that the issue of the sampling, the testing and

the back charging of the expense of the additional cement are truly issues between S. J. Groves & Sons Company and Kenton Meadows and that the proper forum for the resolution of this issue is in a State court in a civil action brought by Kenton Meadows against S. J. Groves & Sons Company. For the reasons expressed above, we will make no award.

Claim disallowed.

Opinion issued June 30, 1977

PAUL SOWARDS, ET AL

vs.

DEPARTMENT OF HIGHWAYS

(No. D-865)

James W. St. Clair, Attorney at Law, for claimants.

Gregory W. Evers, Attorney at Law, for respondent.

GARDEN, JUDGE:

On the morning of September 2, 1974, the claimant, Paul Sowards, was operating his van type truck in a southerly direction on Charley's Creek Road in Cabell County. He was accompanied by his wife, Gail Sowards, his infant daughter, Christina Sowards, and his infant son, Christopher Sowards, all of whom are also claimants in this claim. A week or so prior to the accident date the claimant, Paul Sowards, had purchased a 1966 GMC truck which had been converted into a catering van, it being his hope that he could realize additional income by attending public events and selling soft drinks, popcorn, candies and other sundries from the catering van.

On the morning of the accident he and his family were on their way to a public auction where the claimant intended to pursue his newly acquired "moonlighting" occupation. In order to reach the site of the auction, it was necessary for the claimant to traverse Charley's Creek Road which is about 3.5 miles in length, and which we believe the evidence established was in deplorable condition. Claimants contend that the respondent was negligent in failing to maintain this strip of road in a reasonably safe condition. In any event the claimants contend that as a result of the condition of the road, the claimant, Paul Sowards, lost control of the van truck,

causing him to veer off of the road and down a steep embankment to his right. As the van truck rolled down the embankment the claimant, Paul Sowards, was thrown from the truck, the truck rolled over and ultimately ended on its wheels on top of the claimant, Paul Sowards, some 35 feet below the surface of Charley's Creek Road.

Forrest E. Vance testified on behalf of the claimants. Mr. Vance testified that since 1970 he had traveled Charley's Creek Road on a daily basis; that in 1970 the road was in poor condition and that he had spoken to employees of the respondent at the Barboursville headquarters but no results were obtained; that in 1974 he spoke to a Mr. Canfield in Commissioner Ritchie's office but again no repairs were effected. After the accident Mr. Vance saw the van over the hill, and he testified that where the van had gone over the hill, Charley's Creek Road was covered with holes, some 8 to 10 inches deep. Mr. Vance's testimony in respect to respondent being on notice of the condition of the road and in respect to the deplorable condition of the road was corroborated by witnesses Clay E. Byrd, Preston Miller and William E. Smith, Jr., who was an inspector for respondent from June of 1970 to November of 1971.

On behalf of the respondent Trooper Stanley Farley of the Department of Public Safety testified as to the results of his investigation of the accident. On cross-examination he admitted that the road was rough and that holes were present. He stated the road was not blacktopped and was deteriorating. William E. Bell, former assistant county maintenance supervisor for Cabell County, from March 1, 1974 and most of 1975, testified that Charley's Creek Road, being a secondary route, received routine maintenance in the spring and fall of 1974. He stated that in June or July of 1974 the road was graded and that slag was applied where needed. At the same time some of the ditch lines were pulled with the remainder being pulled in the fall of that year. Mr. Bell admitted that there were holes in the road, some the size of teacups and others the size of a football.

This is not a claim where an injured claimant has struck an isolated pothole on a West Virginia road. Those claims, unless unusual circumstances are present, are uniformly denied by this Court. Here however, we believe that the testimony abundantly demonstrated that Charley's Creek Road was not maintained in a reasonably safe condition and that the respondent, through many notices, knew or should have known of this condition. While the

respondent is not an insurer for the safety of those using the highways in this State, we do feel in those cases where the respondent has actual notice of a deplorable and dangerous condition in a highway or road, that it should take at least some steps to remedy the condition for the sake of motorists who are required to use such highway or road.

All of the claimants were taken to St. Mary's Hospital in Huntington. Christopher Sowards was treated for abrasions and shock and released, and thereafter sought no further medical treatment. A hospital bill for his treatment was rendered in the amount of $70.50. Christina Sowards received a laceration of the left upper lid, a laceration of the left forehead, a laceration of the left scalp and a laceration of the right hand. These lacerations were repaired by Dr. Ali A. Garmestani, a plastic surgeon. The scars resulting from these lacerations are permanent in nature. Dr. Garmestani rendered a bill for $180.00 for his services, and Christina's hospital bill amounted to $53.50. The claimant's wife, Gail Sowards, received numerous contusions in the accident, but she did not require any medical treatment or services.

As earlier indicated, the claimant, Paul Sowards, was thrown from the van, and when it came to rest the claimant was pinned under it. He was admitted as a patient at St. Mary's Hospital where he remained until September 9, 1974, under the care of Dr. Robert W. Lowe, an orthopedic specialist. His injuries were diagnosed by Dr. Lowe as a fracture of the right proximal humerus in the subcapital region, acute cervical strain, sprain and strain of the thoracic girdle area and an abrasion and laceration of the right side of his abdomen. Upon admission to the hospital, it was detected that the claimant was suffering from high blood pressure, and Dr. John F. Otto, an internist, was called in consultation, and Dr. Otto successfully treated the claimant for this condition through medication.

Mr. Sowards was unable to resume his employment at ACF Industries until October 28, 1974, and as a result lost a total of $907.01. He continued to consult Dr. Lowe, who last saw him on February 10, 1976, at which time he was still suffering pain in his thoracic area. In addition to the loss of wages set forth above, the claimant's total medical expenses amounted to $1,078.05. His van was destroyed as well as its contents and inventory, all of which were valued at a total of $1,650.00.

Believing that liability on the part of the respondent exists, we award the claimant, Paul Sowards the sum of $11,000.00, the

claimant, Christina Sowards the sum of $500.00, and to the claimants, Christopher Sowards and Gail Sowards, the sum of $250.00 each.

Award of $11,000.00 to Paul Sowards.
Award of $500.00 to Christina Sowards.
Award of $250.00 to Christopher Sowards.
Award of $250.00 to Gail Sowards.

Opinion issued June 30, 1977

PAUL EDWARD TUCKER

VS.

DEPARTMENT OF HIGHWAYS

(No. CC-77-14)

PER CURIAM:

The claimant and the respondent filed a written stipulation which stipulated that on or about January 25, 1977, the claimant's vehicle hit and struck a large hole in the right hand lane of U.S. Route 60 in South Charleston, Kanawha County, West Virginia. The respondent had previously covered the hole with a metal plate which had become dislodged. The vehicle was damaged, and it was stipulated that the fair and equitable estimate of the damages sustained by the claimant is $93.32. Believing that liability exists on the part of the respondent and that the claimant is free from negligence and that the damages are reasonable, an award of $93.32 is directed in favor of the claimant.

Award of $93.32.

Opinion issued June 30, 1977

L. E. WINE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-985)

William C. Garrett, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

The claimant, L. E. Wine, lived at Gem, West Virginia, which is approximately 2½ miles south of Burnsville in Braxton County, where he owned and operated a dairy farm. All but 8 acres of his land was condemned by the respondent for the construction of Interstate 79 or I-79. The remaining acreage is located between W.Va. State Route 3 and I-79. W.Va. State Route 3, which runs in a north-south direction west of and parallel to I-79, is located west of the claimant's property. To reach his property, it was necessary for the claimant to proceed on a road from W.Va. State Route 3 easterly crossing Salt Lick Creek by means of a ford. The claimant maintains that this road is his private road, the respondent claims it is Local Service Road 3/2 owned by it. The claimant testified that there is another creek approximately 200 yards south of his house known as Paddy's Run which flows under the Baltimore & Ohio Railroad track and empties into Salt Lick Creek. He stated there is or was prior to the construction of I-79 a road in the vicinity of Paddy's Run which he contends is Route 3/2.

The Nello Teer Company was the contractor for the respondent in the construction of this particular section of I-79. The road in question was used both by the contractor and the respondent. Vehicles proceeding to and from the construction site damaged the ford and the road. The claimant's house and its septic tank were damaged by trucks of the Nello Teer Company. Obert Wine testified that he rented claimant's house in June, 1971, and moved out on March 7, 1972, because of the conditions caused by the construction. He stated that the septic tank was damaged before he vacated the house and a truck ran into the house in April, 1972. He further testified that Local Service Road 3/2 was the road near Paddy's Run and not the road through the claimant's property.

Gerald L. Nicely, testifying for the claimant, testified that he was employed by the respondent as chief inspector in charge of field work on the construction of I-79. He stated that he knew there was a dispute over the road and that they were directed not to use it. He further testified that respondent had quit using the road when he left its employment in May, 1973.

George P. Sovick, employed by respondent as chief engineer of the Right-Of-Way Division, testified that the road in question was not a private road but was Local Service Road 3/2. He stated it became part of the respondent's road system in 1933 pursuant to an act of the West Virginia State Legislature.

The claimant and his wife, in the settlement of the respondent's condemnation suit against them for property needed in the construction of I-79, executed a deed to the respondent for 27.74 acres of land. A copy of the deed was attached to the claimant's claim and the respondent introduced a copy as its Exhibit No. 1. The recording data indicates it is recorded in Deed Book 326 at Page 259 in the Braxton County, West Virginia Clerk's office. The deed, bearing date March 9, 1973 and executed on March 13, 1973 and reciting the consideration of $19,900.00, described by metes and bounds the property conveyed to the respondent. The description by which the claimant and his wife conveyed property to the respondent recognized the existance of Local Service Road 3/2 over and through claimant's property. The 13th and 14th calls located in the westerly boundary of the description are as follows:

> "Thence continuing with the said proposed controlled access right-of-way line in a northern direction 225 feet, more or less, to a point in the southern existing right-of-way line of State Local Service Road 3/2, 189 feet radially left of I-79 Center Line Station 4280+75; thence crossing State Local Service Road 3/2 in a northern direction 33 feet, more or less, to a point in the northern existing right-of-way line of State Local Service Road 3/2, 192 feet radially left of I-79 Center Line Station 4281+08;".

The description continues and the calls again recite the disputed road in the eastern boundary line. The 23rd, 24th and 25th calls are as follows:

> "Thence continuing in a southwesterly direction 842 feet, more or less, to a point in the northern existing right-of-way line of State Local Service Road 3/2, 296 feet radially right of I-79 Center Line Station 4281+75; thence continuing across

State Local Service Road 3/2 in a southerwesterly direction 25 feet more or less, to a point within the existing right-of-way line of State Local Service Road 3/2, said point being 290 feet radially right of I-79 Center Line Station 4281+50; thence continuing with the said proposed controlled access right-of-way line in a southeasterly direction 10 feet, more or less, to a point in the southern existing right-of-way line of State Local Service Road 3/2, 295 feet radially right of I-79 Center Line Station 4281+43;".

The claimant's property and Local Service Road 3/2 with the above calls are clearly ascertainable on the maps introduced as claimant's Exhibits 2 and 5.

The deed further contained the following release which released the respondent from subsequent damage:

"For the consideration hereinbefore set forth the Grantor hereby releases Grantee, ... from any and all claims for damages ... of any nature ... arising ... from the construction and maintenance of the highway ... or from work performed ... Grantor further expressly releases all claims of Grantor for damages to any residue of land retained ... it being agreed that the compensation herein provided for as purchase price in full compensation both for the land herein described and for all rights and easements hereby released and all damages herein mentioned which Grantor has or may hereafter suffer."

The preponderance of the evidence establishes that the road claimed by the claimant is Local Service Road 3/2. This Court pursuant to West Virginia Code 14-2-21 cannot take jurisdiction over claims that are barred by the statute of limitations. The claimant filed his claim on July 17, 1975. The damage to the septic tank occurred prior to March, 1972, the damages to the house were in April, 1972. Claimant's witness, Nicely, testified the respondent had ceased to use the road when he left the construction job in May, 1973.

For the foregoing reasons as established by the record, the Court is of the opinion to and does disallow the claim of the claimant.

Claim disallowed.

REFERENCES

Abandoned Property
Advisory Opinions
Annual Leave
Assumption of Risk
Blasting
Board of Education
Board of Regents-See Colleges and Universities
Bridges
Building Contracts
Colleges and Universities
Condemnation
Contracts-See also Building Contracts
Damages
Dangerous Instrumentality
Deeds
Drains and Sewers-See also Waters and Watercourses
Electricity
Eminent Domain-See Condemnation
Expenditures
Falling Rocks-See also Landslides; Negligence
Fires and Fire Protection
Flooding
Hospitals
Interest
Judgments and Decrees
Jurisdiction
Landslides-See also Falling Rocks; Negligence
Motor Vehicles
National Guard
Negligence-See also Blasting; Falling Rocks; Landslides; Motor Vehicles; Streets and Highways
Notice
Nuisance
Parks and Playgrounds
Physicians and Surgeons-See Hospitals
Police
Printing
Prisons and Prisoners
Public Institutions
Public Officers
Real Estate
Rehearing
Relocation Assistance
Sick Leave
State
State Agencies
State Schools
Statutes
Stipulation and Agreement
Streets and Highways-See also Falling Rocks; Landslides; Motor Vehicles; Negligence
Taxation
Travel Expenses
Trees and Timber
Trespass
Wages
Waters and Watercourses-See also Drains and Sewers
Wells
W. Va. University-See Colleges and Universities
Workmen's Compensation Fund

ABANDONED PROPERTY

Where the claimant demolished and removed a two-story frame building at the direction of the Director of REAP, but there was no evidence that the State had legal title to said property, there was no benefit or enrichment inuring to the State to justify a payment of the claimant's claim. *Foster v. Dept. of Highways* (No. CC-76-8) 162

ADVISORY OPINIONS

Where a claim is filed in the Court presenting issues that are between two State agencies, the Court will render an advisory determination only pursuant to Code 14-2-18. *Dept. of Employment Security v. Dept. of Pub. Institutions* (No. D-798a&b) 6

The Court issued an advisory opinion where one State agency sold automotive supplies, gasoline and two trucks to another State agency for which that agency was not able to make payment as it over expended its budget. The Court indicated that payment should not be made based upon the decision in *Airkem Sales and Service, et al v. Department of Mental Health*, 8 Ct. Cl. 180 (1971). *Dept. of Highways v. Dept. of Public Institutions* (No. CC-76-128) 207

The Court rendered an advisory opinion concerning the States liability for payment of accrued annual leave indicating that liability did exist and the employee involved should be paid for his annual leave. *Slack v. Public Employees Ins. Bd.* (No. CC-77-105) 272

An advisory opinion was issued by the Court indicating that the claimant had legal claim against the respondent for the payment of invoices which were not paid within the proper fiscal year and for which the appropriated funds expired before the invoices could be paid. *W. Va. State Industries v. Dept. of Mental Health* (Nos. D-876a&b) 19

The Court rendered an advisory decision in this claim where the claimant alleged failure of the respondent to pay for goods delivered to the respondent State agency but the respondent failed to pay for the same within the proper fiscal year, certain amounts of the claim should be paid by the respondent State agency but a portion of the claim comes within *Airkem Sales and Service, et al v. Department of Mental Health*, 8 Ct. Cl. 180 as this portion is an over expenditure. *W. Va. State Industries v. Dept. of Public Institutions* (No. D-811b) 88

ANNUAL LEAVE

Where the claimants were employed as farmers on State owned farms by the Department of Public Institutions which farms were subsequently placed under the Farm Management Commission which did not retain these employees and as a result the claimants lost accrued annual leave, the Court made an award to these claimants for the annual leave that they would have been paid as the agency expired sufficient funds to pay said claims. *Adams, et al v. Dept. of Public Institutions* (Nos. CC-76-128a, c-t) .. 194

The Court made an award to the claimant for annual leave which he had accumulated during his employment by the respondent State agency for which he had not been paid at the time of the termination of his employment as the Attendance and Leave Regulations of the Board of Public Works, promulgated on May 28, 1968, provided for the payment of such annual leave. *Bradbury v. Nonintoxicating Beer Commission* (No. CC-77-30) 274

Where the claimant alleged that he was entitled to annual leave left on the books after his termination from employment with the respondent, the Court held that the "first in-first out rule" should be applied in calculating the amount due the claimant and therefore the claimant was made an award for his annual leave based upon his salary at the time of termination. *DeBoer v. Board of Regents* (No. CC-76-69) 232

Where the respondent contended that the claimant was fully paid for his services and was not entitled to payment for any unused accumulated leave, Policy Bulletin provisions in effect at the time that the claimant terminated his employment with the respondent applied to the claimant which entitled the claimant to the annual leave for which the Court made an award. *DeBoer v. Board of Regents* (No. CC-76-69) 232

The Court reversed a prior decision making an award to the claimant where the Court was informed that the claimant's annual leave had been transferred from one State agency to another and therefore, the claimant was not entitled to an award for annual leave which was involved in the prior decision. (See Adams et al v. Public Institutions, CC-76-128a, c-t, p 194). *Poling v. Dept. of Public Institutions* (No. CC-76-128m) 208

The Court rendered an advisory opinion concerning the State's liability for payment of accrued annual leave indicating that liability did exist and the employee involved should be paid for his annual leave. *Slack v. Public Employees Ins. Bd.* (No. CC-77-105) 272

ASSUMPTION OF RISK

Where the respondent contended that the claimant was guilty of assumption of risk in attempting to climb a fill which blocked the ingress and egress to her home, the Court held that to be guilty of assumption of risk, a voluntary exposure must take place and acceptance of the risk is not voluntary if the defendant's tortious conduct has left the claimant no reasonable alternative course of conduct in order to avert harm to himself. *Ratcliff v. Dept. of Highways* (No. D-884) 291

BLASTING

See also *Aetna Casualty & Surety Co., subrogee for Jimmy L. McKinney v. Department of Highways* (No. D-1036) 173

Where a contractor was ordered to shut down his blasting operations on a project due to the failure of a utility to remove its lines, the respondent stipulated this portion of the claim as it had no authority to shut down said operations and the Court made an award to the contractor in the stipulated amount. *Black Rock Contracting, Inc. v. Dept. of Highways* (No. D-597) ... 189

See also *The C & P Telephone Company of West Virginia v. Department of Highways* (No. D-900) 141

See also *Dorsey v. Department of Highways* (No. D-1029) 151

Testimony by claimant expert, a consulting geologist, which indicated that blasting operations which had taken place in a quarry along side of a highway in 1940 had induced fractures in the rock behind the face of the cliff and said fractures caused a boulder to break away resulting in claimant's accident, said testimony was not sufficient to make this claim an exception to the general rule and the claim was disallowed. *Hammond v. Dept. of Highways* (No. D-796) 234

See also *Honsaker v. Department of Highways* (No. CC-77-29) 284

See also *Linville v. Department of Highways* (No. CC-76-14) 142

See also *Motors Insurance Corporation, subrogee of Quincy E. Holstein v. Department of Highways* (No. D-1009) 98

See also *Speer v. Department of Highways* (No. D-906) 18

See also *State Farm Fire & Casualty Company and Edgar and Bessie Damewood v. Department of Highways* (No. D-1035) 147

See also *State Farm Mutual Automobile Insurance Company as subrogee of Thelma Criner v. Department of Highways* (No. D-780) 6

Where blasting operations by the respondent resulted in damage to the claimant's property, the Court followed the rule of law established by West

Virginia Supreme Court in the case of *Whitney v. Ralph Myers Contracting Corporation*, 146 W. Va. 130, 118 S.E. 2nd. 130 (1961) and made an award to the claimants. *Teets v. Dept. of Highways* (No. CC-76-3) 225

With respect to damage to real estate and a residence resulting from blasting operations conducted by the respondent, the measure of damage is the difference between the fair market value of the property prior to the blasting and the fair market value of the property after the blasting operations have been concluded. *Teets v. Dept. of Highways* (No. CC-76-3) 225

See also *Woodley v. Department of Highways* (No. CC-76-130) 252

BOARD OF EDUCATION

Where claimant's son, a student at a State school for the deaf and blind, was injured as the result of a fracas between him and another student, the Court held that the guarantee of safety to a student is no more or no less than if the student is enrolled in any other public school and, as the injuries received by the claimant were not forseeable nor did the record reveal any negligence on the part of respondent which was the proximate cause of the accident, the Court disallowed the claim. *Lee v. Board of Education* (No. CC-76-59) 266

Where the evidence disclosed that students in a State school for the deaf and blind are enrolled on a voluntary basis and that the school attempts to create an atmosphere where the student can pursue a near normal life, the guarantee of safety of the students is no more or no less than if the student is enrolled in any other public school. *Lee v. Board of Education* (No. CC-76-59) 266

BOARD OF REGENTS—See also colleges and universities

The Court disallowed a claim by an associate professor of Concord College for an additional one year's salary as the Court held that his last year was a terminal one in compliance with the Faculty Handbook relating to tenure, which was in effect at the date of his termination notice. *Burgher v. Board of Regents* (No. CC-76-64) 275

Where the claimant alleged that he was entitled to annual leave left on the books after his termination from employment with the respondent, the Court held that the "first in—first out rule" should be applied in calculating the amount due the claimant and therefore the claimant was made an award for his annual leave based upon his salary at the time of termination. *DeBoer V. Board of Regents* (No. CC-76-69) 232

Where the respondent contended that the claimant was fully paid for his services and was not entitled to payment for any unused accumulated leave, Policy Bulletin provisions in effect at the time that the claimant terminated his employment with the respondent applied to the claimant which entitled the claimant to the annual leave for which the Court made an award. *DeBoer V. Board of Regents* (No. CC-76-69) 232

The Court made an award to the claimant for work performed by claimant's decedent on a repair job at a State college where an emergency work authorization directed the decedent to proceed at a cost not exceeding $4,000.00 but the nature of the job turned out to require additional costs for which the decedent was not paid due to a change in administration as any other result would be unjust enrichment to the State. *Hedges v. Board of Regents* (No. D-831) 156

Where claimant suffered injuries when she collided with a wire or metal cable strung on a tennis court at a State College, the Court held that the respondent school was under a duty to maintain the physical education facilities in a reasonably safe condition, and, where it had breached that duty, the claimant was entitled to an award. *Landes V. Board of Regents* (No. CC-76-31) 215

Where the claimants alleged that the respondent State agency failed to fairly compensate the claimants for property sold to the respondent, the Court held that there was no evidence that the property was worth more than the agreed consideration and the claimants have a remedy through condemnation. *Null V. Board of Regents* (No. CC-77-16) 289

BRIDGES

It is common knowledge that precipitation may accumulate and freeze on bridge surfaces when it melts and runs off or evaporates on other portions of a roadway, therefore a claim of damage resulting from the claimant's automobile skidding on ice which had accumulated on a bridge surface was denied by the Court. *Bodo V. Dept. of Highways* (No. CC-76-28) 179

The mere presence of ice upon a bridge in the wintertime causing a traveler to slide or skid thereon, does not constitute negligence on the part of the respondent, therefore a claim was denied where the claimant alleged that the accident was the result of his skidding on ice on the surface of a bridge. *Bodo V. Dept. of Highways* (No. CC-76-28) 179

Even though the Court determined that the procedures followed by the respondent in inspecting the Silver Bridge prior to December, 1967, when it collapsed, were not sufficient inspecting procedures, the testimony overwhelmingly established that the collapse resulted from the phenomenon of stress-corrosion which phenomenon was unknown at the time of the collapse and, therefore, the Court denied the claims. *Cantrell & White V. Dept. of Highways* (Nos. D-240 and D-268o) 110

The Court held that the respondent was not negligent in purchasing the Silver Bridge as designed in 1926 as said design was prepared in accordance with good engineering practice at that time. *Cantrell & White v. Dept. of Highways* (Nos. D-240 and D-268o) 110

Where the testimony of experts was not based upon actual facts as they existed, the Court concluded that the claimants failed to establish by preponderance of the evidence that the construction of the Gallipolis Dam, the construction of the Point Pleasant Flood Wall or the run-away barge incident contributed to the collapse of the Silver Bridge; therefore, the Court did not afford much weight to such expert testimony. *Cantrell & White v. Dept. of Highways* (Nos. D-240 and D-268o) 110

While the Court was of the opinion that the respondent was guilty of negligence in its inspection procedures of the Silver Bridge this negligence was not the proximate cause of the collapse of the Silver Bridge. *Cantrell & White v. Dept. of Highways* (Nos. D-240 and D-268o) 110

Where the claimant sustained injuries to her leg when she stepped into a hole in a bridge floor, the Court held that the evidence warranted the inference that the hole had existed for a substantial time and the respondent was guilty of negligence which was the proximate cause of the claimant's injury. *Dunlap v. Dept. of Highways* (No. CC-76-6) 181

Where the claimant was not aware of a hole which existed in the floor of a bridge over which the claimant was walking and the claimant stepped into said hole, the Court held that the claimant was not guilty of any contributory negligence. *Dunlap v. Dept. of Highways* (No. CC-76-6) 181

See also *Ferguson v. Department of Highways* (No. D-880) 1

Where no evidence was presented indicating that respondent was aware of a crack in a board on a bridge where the claimant got her bicycle wheel caught in said crack and was thrown from the bridge, the Court held that the evidence did not justify a finding that the respondent should have been aware of the existence of the crack and therefore the claim was denied. *Fox v. Dept. of Highways* (No. D-899) 257

Where the claimant sustained personal injuries due to an accident which occurred while she was riding her bicycle across a bridge constructed and

maintained by the respondent primarily to accommodate automobiles, the Court held that the law does not require the respondent to be an insurer of the safety of pedestrians or bicyclists using such a bridge. *Fox v. Dept. of Highways* (No. D-899) 257

Claimant alleged damages to a culvert and bridge which afforded her access to her property which was operated as a trailer court which damage occurred during a flash flood causing the culvert to clog and overflow across a State road. Employees of the respondent attempting to clear the culvert in order to drain the water from the State road damaged the culvert, but the Court held that any negligence on the part of the respondent referred to by the claimant was too conjectural and speculative to form the basis for an award, and the claim was disallowed. *Heflin v. Dept. of Highways* (No. D-988) 152

See also *Henson v. Department of Highways* (No. CC-77-21) 261

Claimant was made an award based upon a stipulation entered by the claimant and the respondent which indicated that the claimant had fallen through a hole in a bridge where respondent was aware of the deteriorating condition of said bridge but had effected no repairs until after claimant's accident, the Court concluded that liability existed and that the proposed settlement was fair and equitable. *Kelly v. Dept. of Highways* (No. CC-76-29) 214

See also *Kidd v. Department of Highways* (No. CC-77-12) 269

See also *Liberty Mutual Insurance Company, subrogee of Charles C. Simpson v. Department of Highways* (No. D-912) 171

See also *Maryland Casualty Company, subrogee of Michael E. Heitz v. Department of Highways* (No. D-932) 14

See also *Murphy v. Department of Highways* (No. CC-76-133) 203

See also *Perkins v. Department of Highways* (No. CC-77-13) 268

See also *Roberts v. Department of Highways* (No. CC-76-126) 248

Claimant was made an award of $305.85 for damages sustained to his automobile when claimant was forced to drive his automobile through a creek bed due to the fact that the bridge over the creek was closed by the Department of Highways and there was no other passage way other than by fording the creek. *Shafer v. Dept. of Highways* (No. D-898) 60

See also *Simpson v. Department of Highways* (No. CC-76-60) 172

The Court denied a claim where claimant alleged that the lack of guardrails and warning signs on a bridge resulted in his skidding on ice on the bridge surface, damaging his automobile and causing him personal injury. *Snyder v. Dept. of Highways* (No. D-908) 166

Travelling on an icy road is always a hazardous undertaking, and considering the weather conditions and that the claimant was travelling a secondary road, he must have recognized that certain risks were involved, and where he attempted to approach and cross a very narrow, little-used bridge he must have foreseen some danger. The Court will not make an award to the claimant as the angle iron guardrails present on the bridge would have been adequate under normal circumstances. *Snyder v. Dept. of Highways* (No. D-908) 166

Where claimant alleged that the lack of guardrails on a bridge and lack of warning sign that the bridge would freeze before the road surface resulted in claimant crossing the bridge when it was covered with ice causing claimant to slide off the bridge, the Court held that any such sign indicating the presence of the bridge would have served no purpose as the claimant was aware of ice on the road and that the bridge did have angle iron type guardrails adequate for a bridge of this nature, there was no positive proof of neglect of a duty by the respondent as would constitute negligence. *Snyder v. Dept. of Highways* (No. D-908) 166

See also *State Farm Mutual Automobile Insurance Co., subrogee of Monroe Hamon v. Department of Highways* (No. D-1040) 103

See also *Thompson v. Department of Highways* (No. CC-76-10) 155

Where a claimant's automobile sustained damages when the planking of a bridge dislodged and came up underneath the automobile, the Court held that a dangerous condition existed on the bridge which directly and proximately caused the damage to the claimant's automobile and the Court made an award. *Williams v. Dept. of Highways* (No. CC-76-112) 263

Where claimant's automobile sustained damages when floor boards on a bridge dislodged and struck said automobile the Court held in line with a prior decision *Gene R. Monk v. State Road Comm'n.*, 8 Ct. Cl. 32, that a person exercising ordinary care for his safety would not reasonably have anticipated that the floor board on the bridge would be missing and claimant cannot be charged with contributory negligence or the assumption of risk. *Williams v. Dept. of Highways* (No. CC-76-112) 263

BUILDING CONTRACTS

Where a contractor was ordered to shut down his blasting operations on a project due to the failure of a utility to remove its lines, the respondent stipulated this portion of the claim as it had no authority to shut down said operations and the Court made an award to the contractor in the stipulated amount. *Black Rock Contracting, Inc. v. Dept. of Highways* (No. D-597) ... 189

Where the contract between the claimant contractor and the respondent provided a status of utilities sheet indicating relocation dates for utilities and the contractor, relying on this information in making its bid, sustained damages due to a delay in the removal of the utilities at the job site necessitating extra work on the part of the contractor, the Court made an award to the claimant contractor for damages sustained due to said delay. *Black Rock Contracting, Inc. v. Dept. of Highways* (No. D-597) 189

Claimant was awarded $3,856.86 for damage to its utility lines by an agent of the State which was installing traffic control signals at an intersection and without knowledge of an underground cable of the claimant bored through the cable. The lack of records on the part of the respondent to inform the contractor of the presence of the cable was the respondent's own fault and was no defense to the claim. *C & P Telephone Co. v. Dept. of Highways* (No. D-674) 25

Where the claimant was granted a permit to place a utility line within the State's right of way and one of the provisions of the permit was to save the respondent harmless from any damage or recourse whatsoever arising from the permission granted under the permit, the Court held that the provision was contrary to public policy and therefore invalid. *C & P Telephone Co. v. Dept. of Highways* (No. D-674) 25

Even though the agreement between the agents of the State and the claimant was not in the form required by law, the fact that the claimant was not a lawyer and would not be fully aware of the legal requirements necessary to make a perfectly formal contract with the State, the respondent was unjustly enriched at claimant's expense. *Cook v. Dept. of Fin. & Admin.* (No. D-702) 28

The Court will not absolve the State of liability from a contract where its agents made the contract even though it was made without compliance with the letter of the law and there was no question except technically as to the authority of the agents. *Cook v. Dept. of Fin. & Admin.* (No. D-702) ... 28

Where the respondent was unjustly enriched at the expense of the claimant where the claimant performed work to provide mobile home spaces to the respondent under a written agreement with the claimant, the Court made an award to the claimant for rent loss on the spaces which he was not able to lease. *Cook v. Dept. of Fin. & Admin.* (No. D-702) 28

The Court made an award to the claimant for work performed by claimant's decedent on a repair job at a State college where an emergency work authorization directed the decedent to proceed at a cost not exceeding $4,000.00 but the nature of the job turned out to require additional costs for which the decedent was not paid due to a change in administration as any other result would be unjust enrichment to the State. *Hedges v. Board of Regents* (No. D-831) 156

Claimant contractor was made an award for the balance due on a contract which he performed and for which there were funds available in the proper fiscal year but the funds had expired by operation of law when the architect failed to approve the balance estimate until after the close of the fiscal year. *J. J. Englert Co. v. Dept. of Pub. Institutions* (No. D-917) 22

Where the claimant and the respondent entered a contract for window replacement work and the balance due on the contract was not paid due to the fact that the architect did not approve the final estimate until after the close of the proper fiscal year, the Court made an award to the claimant for the balance due on the contract. *J. J. Englert Co. v. Dept. of Pub. Institutions* (No. D-917) 22

Claimant contractor was made an award for extra work performed where a waterline within the construction limits was not shown on the plans and specifications nor considered in the bid but the respondent State agency instructed claimant to work around said water pipe without payment for the extra work. *Lang Brothers, Inc. v. Dept. of Highways* (No. D-685) 217

Where claimant contractor's own negligence in failing to provide proper shoring and sheeting to prevent a break in a waterline located on the project resulted in damage to the waterline for which the claimant was billed by the owner of the waterpipe, the Court denied recovery to the claimant. *Lang Brothers, Inc. v. Dept. of Highways* (No. D-685) 217

Where claimant's contract was considered to be a waste job wherein there is more material located within the area than necessary for completion of the project which material had to be removed but claimant discovered rock within this material which it was able to use on the project, the claimant contended it should be paid at both the unclassified rate and the rock borrow rate which it would have received if the rock had been brought in from an outside site, the Court made an award to the claimant as the 1968 Standard Specifications adopted by the respondent provides for said payment even though the respondent contended that such payment would constitute paying twice for the same material. *Lang Brothers, Inc. v. Dept. of Highways* (No. D-685) 217

Claimant and respondent stipulated that the samples of concrete taken from the concrete placed by the contractor for the purposes of testing the strength of said concrete were not properly screened to remove a representative quantity of the larger aggregate particles from said samples of concrete, therefore, the testing results were not a true representation of the strength and value of the concrete. Tests by the contractor showed that the concrete was of adequate strength and there should not have been a reduction in the contract price. The Court made an award to the claimant for the amount deducted from the final settlement under the paving contract. *National Engineering & Contracting Co. v. Dept. of Highways* (No. D-753a) 143

Claimant was made an award for damages suffered by her as the result of a fall where a contractor failed to provide ingress and egress to claimant's home during the construction of a new highway as the Court held that the respondent has a duty to provide such ingress and egress and such duty is non-delegable. *Ratcliff v. Dept. of Highways* (No. D-884) 291

When the Court made an award to the claimant in an action wherein the claimant had also recovered against a contractor in the settlement of a civil action, the Court reduced the amount of its award by the settlement previously paid, as the State and the contractor were joint tort feasors. *Ratcliff v. Dept. of Highways* (No. D-884) 291

Where the claimant and respondent stipulate and agree that certain portions of a contract claim are compensable, the Court will make an award to the claimant in the amount agreed to by the parties. *Ryan Inc. of Wisconsin v. Dept. of Highways* (No. D-570) 69

Where a subcontractor filed a claim in the name of the general contractor as the subcontractor could not file suit directly against the respondent by reason of lack of privity of contract, the Court held that the contractor could have assigned its chose in action to the subcontractor. This was not done due to the fact that the contractor entered a supplemental agreement with the respondent which would have constituted a complete defense to the claim and the Court denied the claim by the subcontractor. *S. J. Groves & Son Co. v. Dept. of Highways* (No. D-614) 297

Where the respondent through its contractor attempted to provide access for the claimant to her mail box and attempted to relieve the muddy condition of the path by placing gray slate thereon, it can reasonably be said that all that should have been expected was done, and therefore the claimant was denied recovery for personal injury when she fell on the wet slate. *Webb v. Dept. of Highways* (No. D-696) 33

Where claimant alleges damages as the result of a contractor using a roadway through claimant's property which claimant asserted was a private road, the calls of the deed indicated and described the metes and bounds of the property conveyed recognizing the existence of the road as a State Local Service Road which was proof of the fact that the road was indeed a State Local Service Road which the contractor could properly use. *Wine v. Dept. of Highways* (No. D-985) 303

COLLEGES AND UNIVERSITIES—See also Board of Regents

The Court disallowed a claim by an associate professor of Concord College for an additional one year's salary as the Court held that his last year was a terminal one in compliance with the Faculty Handbook relating to tenure, which was in effect at the date of his termination notice. *Burgher v. Board of Regents* (No. CC-76-64) 275

Where the claimant alleged that he was entitled to annual leave left on the books after his termination from employment with the respondent, the Court held that the "first in—first out rule" should be applied in calculating the amount due the claimant and therefore the claimant was made an award for his annual leave based upon his salary at the time of termination. *DeBoer v. Board of Regents* (No. CC-76-69) 232

Where the respondent contended that the claimant was fully paid for his services and was not entitled to payment for any unused accumulated leave, Policy Bulletin provisions in effect at the time that the claimant terminated his employment with the respondent applied to the claimant which entitled the claimant to the annual leave for which the Court made an award. *DeBoer v. Board of Regents* (No. CC-76-69) 232

The Court made an award to the claimant for work performed by claimant's decedent on a repair job at a State college where an emergency work authorization directed the decedent to proceed at a cost not exceeding $4,000.00 but the nature of the job turned out to require additional costs for which the decedent was not paid due to a change in administration as any other result would be unjust enrichment to the State. *Hedges v. Board of Regents* (No. D-831) 156

Where claimant suffered injuries when she collided with a wire or metal cable strung on a tennis court at a State college, the Court held that the respondent school was under a duty to maintain the physical education facilities in a reasonably safe condition, and, where it had breached that duty, the claimant was entitled to an award. *Landes v. Board of Regents* (No. CC-76-31) 215

CONDEMNATION—See Eminent Domain

A motion to dismiss a claim for compensation for property taken by eminent domain by the respondent over and above a judgment entered by a Circuit Court was sustained by the Court as claims of this nature are excluded from the jurisdiction of the Court under the provisions of the West Virginia Code, Chapter 14, Article 2, Section 14 (5). *Anton v. Dept. of Highways* (No. CC-76-45) 229

Where the claimant sought recovery for expenses incurred during condemnation proceedings wherein claimant's property was condemned, the Court held that it had no jurisdiction under West Virginia Code 14-2-14 which excludes from the jurisdiction of this Court a proceeding which may be maintained against the State in a state court. *Hoover v. Dept. of Highways* (No. D-769) 109

Where the final order entered by the Circuit Court involving this claim indicated that the claimant and his wife accepted the amount awarded before that Court as full and complete payment for the taking or acquisition of the real estate and the damages alleged in the claim are the same damages, the Court sustained a motion to dismiss filed by the respondent. *Hoover v. Dept. of Highways* (No. D-769) 109

Where the claimants alleged that the respondent State agency failed to fairly compensate the claimants for property sold to the respondent, the Court held that there was no evidence that the property was worth more than the agreed consideration and the claimants have a remedy through condemnation. *Null v. Board of Regents* (No. CC-77-16) 289

CONTRACTS

Claimant was awarded $3,856.86 for damage to its utility lines by an agent of the State which was installing traffic control signals at an intersection and without knowledge of an underground cable of the claimant bored through the cable. The lack of records on the part of the respondent to inform the contractor of the presence of the cable was the respondent's own fault and was no defense to the claim. *C. & P. Telephone Co. v. Dept. of Highways* (No. D-674) 25

Where the claimant was granted a permit to place a utility line within the State's right of way and one of the provisions of the permit was to save the respondent harmless from any damage or recourse whatsoever arising from the permission granted under the permit, the Court held that the provision was contrary to public policy and therefore invalid. *C. & P. Telephone Co. v. Dept. of Highways* (No. D-674) 25

Where the claimant had a contract with the respondent to charge for 90 percent of its regular billing charges for patients sent to it by the respondent, the respondent will be held to the contract as a letter to modify said contract constituted a unilateral agreement only and was not binding upon the claimant. *Charleston Area Medical Center, Inc. v. Division of Vocational Rehab.* (No. D-1014) 101

Even though the agreement between the agents of the State and the claimant was not in the form required by law, the fact that the claimant was not a lawyer and would not be fully aware of the legal requirements necessary to make a perfectly formal contract with the State, the respondent was unjustly enriched at claimant's expense. *Cook v. Dept. of Fin. & Admin.* (No. D-702) 28

The Court will not absolve the State of liability from a contract where its agents made the contract even though it was made without compliance with the letter of the law and there was no question except technically as to the authority of the agents. *Cook v. Dept. of Fin. & Admin.* (No. D-702) ... 28

Where the respondent was unjustly enriched at the expense of the claimant where the claimant performed work to provide mobile home spaces to

the respondent under a written agreement with the claimant, the Court made an award to the claimant for rent loss on the spaces which he was not able to lease. *Cook v. Dept. of Fin. & Admin.* (No. D-702) 28

Claimant was made an award for demolition work which he performed at the request of a State employee on property which was sold to the State for the nonpayment of taxes as the Court held that the respondent was bound under the doctrine of apparent authority of the employee who so engaged the claimant. *Foster v. Highways* (No. CC-76-8) 199

Where claimant failed to prove a valid and enforcible contract with the respondent, the Court denied recovery for the demolition and removal of a two-story frame building which claimant demolished at the direction of the Director of REAP. *Foster v. Dept. of Highways* (No. CC-76-8) 162

Where the respondent contended that the employee of the respondent had no authority to enter a contract with the claimant and in so doing exceeded his authority, the Court held that the respondent was bound under the doctrine of apparent authority and therefore the claimant was made an award for work performed for the State. *Foster v. Department of Highways* (No. CC-76-8) 162

Claimant was denied recovery for interest on an alleged contract between the claimant and the respondent for which the claimant was not paid the principal amount of the contract for approximately two years after the contract work had been accepted by the respondent as the Court lacks jurisdiction in awarding interest unless the claim is based upon a contract which specifically provides for the payment of interest. *Hott and Miller, General Contractors v. Department of Highways* (No. D-683) 3

Where the respondent entered a contract under which the respondent retained only such control and supervision as was necessary to assure that the plans and specifications were followed but did not control or supervise the contractor's work or the employees, the Court held the supervision by the respondent was not such control as to create a master-servant relationship as the contractor was an independent contractor. Accordingly, the word "principal" as used in the release executed by claimants to the contractor for damages to real estate when the contractor trespassed upon claimant's property also released the respondent. *Hundley v. Dept. of Highways* (No. D-941) 284

Claimant contractor was made an award for the balance due on a contract which he performed and for which there were funds available in the proper fiscal year but the funds had expired by operation of law when the architect failed to approve the balance estimate until after the close of the fiscal year. *J. J. Englert Co. v. Dept. of Pub. Institutions* (No. D-917) 22

Claimant was denied recovery for interest alleged due on the balance of a contract which was not paid in the proper fiscal year and for which the contractor was forced to file a claim thereon where W. Va. Code 14-2-12 prohibits the Court specifically from making an award for interest unless the contract specifically provides for interest. *J. J. Englert Co. v. Dept. of Pub. Institutions* (No. D-917) 22

Where the claimant and the respondent entered a contract for window replacement work and the balance due on the contract was not paid due to the fact that the architect did not approve the final estimate until after the close of the proper fiscal year, the Court made an award to the claimant for the balance due on the contract. *J. J. Englert Co. v. Dept. of Pub. Institutions* (No. D-917) 22

Where the claimant agreed to perform architectural-engineering services for the claimant in the construction of a Mental Retardation Rehabilitation Center wherein specific deadlines were placed upon the claimant and the claimant met said deadlines and performed extra work required by the respondent State agency, but due to circumstances beyond the control of the claimant, the project was abandoned and never reactivated, the claim-

ant will be entitled to recover its fee. *Jordon, McGettigan & Yule v. Dept. of Mental Health* (No. D-680) 64

Where the claimant and respondent entered an architectural agreement providing for an eight percent fee based upon the construction cost of the project involved, and said project was never completed, the Court based its award on eight percent of the amount allocated for the project and six percent which was the usual and customary service fee based upon the inflated cost of the project as the additional two percent was intended to provide for the accelerated schedule required to meet the deadline for Federal Funds which deadline the architect was able to meet. *Jordon, McGettigan & Yule v. Dept. of Mental Health* (No. D-680) 64

Claimant contractor was made an award for extra work performed where a waterline within the construction limits was not shown on the plans and specifications nor considered in the bid but the respondent State agency instructed claimant to work around said water pipe without payment for the extra work. *Lang Brothers, Inc. v. Dept. of Highways* (No. D-685) 217

Where claimant's contract was considered to be a waste job wherein there is more material located within the area than necessary for completion of the project which had to be removed but claimant discovered rock within this material which it was able to use on the project, the claimant contended it should be paid at both the unclassified rate and the rock borrow rate which it would have received if the rock had been brought in from an outside site, the Court made an award to the claimant as the 1968 Standard Specifications adopted by the respondent provides for said payment even though the respondent contended that such payment would constitute paying twice for the same material. *Lang Brothers, Inc. v. Dept. of Highways* (No. D-685) 217

Where the claimant had bid on remodeling work to be performed by a State agency and his bid was not the low bid but he was advised by the Division of Purchasing to proceed with the work which was performed in a manner satisfactory to the respondent, the Court made a full award to the claimant based upon his contract bid. *Peck Brogan Building & Remodeling v. Workmen's Comp. Fund* (No. D-1012) 145

Where the claimant received written and oral notification from the Division of Purchasing that he was a successful bidder and was instructed by an agent of the department to proceed with the work, the Court held that to make an award other than the full amount of the bid which the contractor submitted, any other result would be unconscionable. *Peck Brogan Building & Remodeling v. Workmen's Comp. Fund* (No. D-1012) 145

Where the testimony revealed that the purchase order directing the claimant to perform remodeling work was not issued due to an inter-agency dispute, the Court made an award to the claimant for the work performed based upon the bid price. *Peck Brogan Building & Remodeling v. Workmen's Comp. Fund* (No. D-1012) 145

No award was made to the general contractor where the claim was actually by a subcontractor as the Court held that the issues were really between the subcontractor and the contractor and the proper forum for the resolution of this issue is in a State Court not the Court of Claims. *S. J. Groves & Son Co. v. Dept. of Highways* (No. D-614) 297

Where a subcontractor filed a claim in the name of the general contractor as the subcontractor could not file suit directly against the respondent by reason of lack of privity of contract, the Court held that the contractor could have assigned its chose in action to the subcontractor. As this was not done due to the fact that the contractor entered a supplemental agreement with the respondent which would have constituted a complete defense to the claim, the Court denied the claim by the subcontractor. *S. J. Groves & Son Co. v. Dept. of Highways* (No. D-614) 297

DAMAGES

Speculative and circumstantial evidence by the claimant to prove damage to his automobile, will not be deemed to approach the preponderance required for a recovery and the claim will be disallowed. *Bird & State Farm Mutual Automobile Ins. Co. v. Dept. of Highways* (No. D-934a&b) 91

Respondents motion to dismiss the action of the claimant based upon the "Risk of Loss" paragraph in a real estate contract was denied as the Court held that when the deed was thereafter executed and delivered, the legal title and cause of action for damages were transferred to the claimant as the vendee. *Boone Sales, Inc. v. Dept. of Highways* (No. CC-76-119) 269

Where many contributing factors brought about the damages to the real estate of the claimants, but there was not sufficient proof that any acts or omissions of the respondent were the direct and proximate cause of the damages, the Court will disallow the claims. *Caldwell, et al v. Dept. of Highways* (Nos. D-690, et al) 50

Where there was no evidence of damages to claimant's truck involved in an accident, the Court was unable to make a finding and therefore disallowed the claim. *Clark and Martinsburg Concrete Products Company v. Dept. of Highways* (Nos. CC-76-17 and CC-76-118) 279

Where the respondent admitted the damages done to claimant's automobile but disputed the amount of the claim for a complete refinishing of the paint of the automobile, the Court based its award to the claimant upon the testimony, the argument of counsel for the respondent and the Court's own inspection of the vehicle and made an award to the claimant in an amount which it judged to be fair and reasonable. *Dunbrack v. Dept. of Highways* (No. D-1015) 137

The Court permitted the claimant to testify as to the fair market value before and after the damages sustained to the property as the Court held that she was qualified to express her opinion as to valuation in respect to her own property, however, the Court accorded greater weight to the respondent's witness, a qualified real estate appraiser, because his qualifications were higher than those of the claimant. *Gannon v. Dept. of Highways* (No. D-675) 104

Where the final order entered by the Circuit Court involving this claim indicated that the claimant and his wife accepted the amount awarded before that Court as full and complete payment for the taking or acquisition of the real estate and the damages alleged in the claim are the same damages, the Court sustained a motion to dismiss by the respondent. *Hoover v. Dept. of Highways* (No. D-769) 109

Claimant was denied recovery for interest alleged due on the balance of a contract which was not paid in the proper fiscal year and for which the contractor was forced to file a claim thereon where Code 14-2-12 prohibits the Court specifically from making an award for interest unless the contract specifically provides for interest. *J. J. Englert Co. v. Dept. of Pub. Institutions* (No. D-917) 22

Claimant was denied recovery for personal expenses incurred in attending a hearing on a contract claim which he had filed before the Court, as the Court indicated that these expenses like attorneys' fees must be treated as an expense of litigation and must be borne by the party incurring the same. *J. J. Englert Co. v. Dept. of Pub. Institutions* (No. D-917) 22

Where the claimant and respondent entered an architectural agreement providing for an eight percent fee based upon the construction cost of the project involved, and said project was never completed, the Court based its award on eight percent of the amount allocated for the project and six percent which was the usual and customary service fee based upon the inflated cost of the project as the additional two percent was intended to provide for the accelerated schedule required to meet the deadline for Federal Funds which deadline the architect was able to meet. *Jordon, McGettigan & Yule v. Dept. of Mental Health* (No. D-680) 64

A given amount of surface water following its given natural course may not cause damage but if that same volume of water is diverted from its natural channels by artificial means in the Court's opinion it can be turned into a destructive force, especially where the uncontradicted testimony of the claimants established that their problems did not begin until after the construction of the new road which was alleged to have caused all of the water problems which the claimants experienced on their property. *Lafferty v. Dept. of Highways* (No. CC-76-44) 239

Where the claimants were not represented by counsel at their hearing and were unaware of the necessity of the manner of proving damages to their real estate, the Court suggested that the claimants employ counsel and file a petition for rehearing within the 30 day period pursuant to Rule 15 of the Court Rules. *Lafferty v. Dept. of Highways* (No. CC-76-44) 239

Where the testimony revealed that the purchase order directing the claimant to perform remodeling work was not issued due to an inter-agency dispute, the Court made an award to the claimant for the work performed based upon the bid price. *Peck Brogan Building & Remodeling v. Workmen's Comp. Fund* (No. D-1012) 145

Claimant was denied recovery for a doctor bill and damage to an automobile where the claimant failed to introduce proper evidence to support the items of special damage. *Plants v. Dept. of Highways* (No. D-672) 78

Where an appraisers report reflected a value on the property prior to the damages but failed to place a value on the property after the damages, the Court was of the opinion that the property did have at least some value after the damages and therefore this report was disregarded. *Teets v. Dept. of Highways* (No. CC-76-3) 225

With respect to damage to real estate and a residence resulting from blasting operations conducted by the respondent, the measure of damage is the difference between the fair market value of the property prior to the blasting and the fair market value of the property after the blasting operations have been concluded. *Teets v. Dept. of Highways* (No. CC-76-3) 225

Where the claimant and respondent agree by stipulation that slippage of a road resulted in damage to the property of the claimant and the amount of the claim has been stipulated and is a fair and reasonable valuation of the damages, the Court will make an award to the claimant in that amount. *White v. Dept. of Highways* (No. D-751) 148

DANGEROUS INSTRUMENTALITY

The Court found that a World War II Army tank displayed in front of a National Guard Armory did constitute a dangerous instrumentality based upon the evidence in this particular claim. *Tabit v. Adjutant General* (No. D-795) 174

DEEDS

Respondents motion to dismiss the action of the claimant based upon the "Risk of Loss" paragraph in a real estate contract was denied as the Court held that when the deed was thereafter executed and delivered, the legal title and cause of action for damages were transferred to the claimant as the vendee. *Boone Sales, Inc. v. Dept. of Highways* (No. CC-76-119) 269

Where the claimants alleged that the respondent State agency failed to fairly compensate the claimants for property sold to the respondent, the Court held that there was no evidence that the property was worth more than the agreed consideration and the claimants have a remedy through condemnation. *Null v. Board of Regents* (No. CC-77-16) 289

Where claimant allege damages as the result of a contractor using a roadway through claimant's property which claimant asserted was a private road, the calls of the deed indicated and described the metes and bounds of

the property conveyed recognizing the existence of the road as a State Local Service Road which was proof of the fact that the road was indeed a State Local Service Road which the contractor could properly use. *Wine v. Dept. of Highways* (No. D-985) 303

DRAINS AND SEWERS—See also Waters and Watercourses

Where expert witnesses for both the claimant and the respondent testified that continuous saturation by water of the hillside above the claimants over a period of many years was the direct cause of the downslope movement of the land causing the damages to the property without sufficient proof that acts or omissions by the respondent where the direct or proximate cause, the Court will disallow the claim. *Caldwell, et al v. Dept. of Highways* (Nos. D-690 et al) 50

Where the claimants alleged that the respondent was negligent in the maintenance of their road and collected surface water diverting the same through culverts and casting the same upon their land causing damage thereto, the respondent will not be held liable unless he substantially changed the course of the flow of the water down the hillside from the time the culverts were installed on the road. *Caldwell, et al v. Dept. of Highways* (Nos. D-690 et al) 50

Where the claimant and respondent stipulated that the proximate cause of the land movement which caused damage to the claimant's dwelling was the improper drainage on the highway and failure of the respondent to maintain the existing drainage, the Court made an award to the claimants in the amount stipulated between the parties. *Casto v. Dept. of Highways* (No. D-744) 259

See also *Cooper v. Department of Highways* (No. D-922) 1

The Court made an award to the claimant for damage sustained to his vehicle when he pulled off the traveled portion of the road and his automobile went into a storm sewer drain 18 inches below the surface of the roadway where the preponderance of the evidence established that the respondent negligently created a dangerous condition along the berm of the road and such negligence was the proximate cause of the accident. *Eastes v. Dept. of Highways* (No. CC-77-41) 283

Claimant was made an award for property damage resulting from flooding of property when a culvert belonging to the respondent was closed with concrete causing water to back up and flood onto the claimant's property. *Gannon v. Dept. of Highways* (No. D-675) 283

Claimant alleged damages to a culvert and bridge which afforded her access to her property which was operated as a trailer court which damage occurred during a flash flood causing the culvert to clog and overflow across a State road. Employees of the respondent attempting to clear the culvert in order to drain the water from the State road damaged the culvert, but the Court held that any possible fault on the part of the respondent referred to by the claimant was too conjectural and speculative to form the basis for an award, and the claim was disallowed. *Heflin v. Dept. of Highways* (No. D-988) 152

Claimant's claim was denied where the respondent established that it conducted its highway improvement project in a reasonable prudent manner, did nothing to appreciably increase the flow of water or change the character of the drainage, and there was no act or omission of the respondent which proximately caused the damages sustained by the claimant. *Holdren v. Dept. of Highways* (No. D-607) 75

A given amount of surface water following its given natural course may not cause damage but if that same volume of water is diverted from its natural channels by artificial means in the Court's opinion it can be turned into a destructive force, especially where the uncontradicted testimony of the claimants established that their problems did not begin until after the

construction of the new road which was alleged to have caused all of the water problems which the claimants experienced on their property. *Lafferty v. Dept. of Highways* (No. CC-76-44) 239

Where the claimants were not represented by counsel at their hearing and were unaware of the necessity or the manner of proving damages to their real estate, the Court suggested that the claimants employ counsel and file a petition for rehearing within the 30 day period pursuant to Rule 15 of the Court Rules. *Lafferty v. Dept. of Highways* (No. CC-76-44) 239

Where the claimant alleged that damage to his house occurred when employees of the respondent while cleaning out a ditchline in front of his property caused a slide, the Court held that the claimants had not proved by a preponderance of the evidence that respondent's acts could be considered the direct proximate cause of injury to claimant's property. *Lovejoy v. Dept. of Highways* (No. D-853) 163

See also *Peak v. Department of Highways* (No. D-973) 170

Where the claimant alleged that a road adjacent to his property had been negligently graded by an employee of the respondent resulting in water drainage flowing down the road causing rocks to be left in the road which in turn were thrown against his house by automobiles using the road and the evidence revealed that the road had always been a natural rocky drain down the mountain, the Court disallowed the claim. *Robinette v. Dept. of Highways* (No. D-982) 182

Claimant was made an award of $163.10 for damage to his automobile which resulted when the claimant was forced into a culvert due to a flooding hazard in the highway which respondent had notice of but had failed to rectify. *Tinsley v. Dept. of Highways* (No. D-979) 87

ELECTRICITY

See *The C & P Telephone Company of West Virginia v. Department of Highways* (No. D-997) 210

See also *Monongahela Power Company v. Department of Highways* (No. D-957) 58

See also *The Potomac Edison Co. v. Department of Highways* (No. CC-76-135) 204

EMINENT DOMAIN—See Condemnation

EXPENDITURES

Where the claimants were employed as farmers on State owned farms by the Department of Public Institutions which farms were subsequently placed under the Farm Management Commission which did not retain these employees and as a result of claimants lost accrued annual leave, the Court made an award to these claimants for the annual leave that they would have been paid as the agency expired sufficient funds to pay said claims. *Adams, et al v. Dept. of Public Institutions* (Nos. CC-76-128a, c-t) .. 194

See also *American Can Company v. Department of Mental Health* (No. D-965) 83

See also *Ashland Chemical Company v. Department of Public Institutions* (No. D-928) 97

Claimant, Deputy Director of the Department of Mental Health, was awarded $1,020.00 as the sum due and owing from the respondent State agency to the claimant as salary properly payable to him for his raise for the fiscal year where the claimant had refrained from giving himself the raise in order that all other members of the Department might have their increases first, and as a result the claimant's raise was granted to him at the end of the fiscal year but the fiscal year ended before his personal salary increase

could be encumbered properly. *Clowser v. Dept. of Mental Health* (No. D-913) 35

See also *Columbia Gas of West Virginia, Inc. v. Department of Public Institutions* (No. CC-76-110b) 198

Claimants were awarded jury fees where the claimants delayed in presenting their vouchers for reimbursement until the appropriated funds were expired, but there were funds available at the end of the fiscal year for the payment of these jury fees. The Court held that the expiration of the funds after the end of the fiscal year simply deprived the claimants of their immediate satisfaction or remedy of recovery but did not affect the legality of the claim. *Day and Wright v. State Auditor* (Nos. D-944 and D-963) 42

Where the legislature failed to appropriate funds for expenditure in the proper fiscal year for the payment of unemployment taxes due and payable by two hospitals to the West Virginia Unemployment Compensation Commission, it would not have been proper for the Commissioner to pay the taxes when no funds were available. *Dept. of Employment security v. Dept. of Public Institutions* (Nos. D-789a&b) 6

The Court issued an advisory opinion where one State agency sold automotive supplies, gasoline and two trucks to another State agency for which that agency was not able to make payment as it over expended its budget, the Court indicated that payment should not be made based upon the decision in *Airkem Sales and Service, et al v. Department of Mental Health*, 8 Ct. Cl. 180 (1971). *Dept. of Highways v. Dept. of Public Institutions* (No. CC-76-128) 207

See also *Doctors Butler, Aceto & Assoc., Inc. v. Department of Public Institutions* (No. D-969) 41

The Court made an award to the claimant for printing work which it performed for the respondent but for which it was never paid as this is a claim that in equity and good conscience should be paid by the State. *Dunbar Printing Co. v. Dept. of Education, Div. of Voc. Ed.* (No. CC-77-34) 282

See also *Exxon Company, U.S.A. v. Department of Public Institutions* (No. CC-76-91a&b) 205

See also *Gambro, Inc. v. Division of Vocational Rehabilitation* (No. CC-77-9) 211

See also *International Business Machines Corporation v. Sinking Fund Commission* (No. D-1013) 71

See also *International Business Machines Corporation v. Secretary of State* (No. D-1026) 85

Where claimant's services were requested by respondent, the charges reasonable and there were sufficient funds in respondent's appropriation to pay for said services, the Court made an award to the claimant. *Kitching v. Div. of Voc. Rehab.* (No. D-971) 23

See also *Lashley Tractor Sales v. Department of Public Institutions* (No. CC-76-27) 159

See also *Mellon-Stuart Company v. Department of Public Institutions* (No. D-772) 71

See also *Mountaineer Motel, Inc. v. Department of Public Institutions* (No. CC-76-15) 99

See also *Parke, Davis & Company v. Department of Mental Health* (No. D-1028) 85

See also *Pfizer, Inc. v. Department of Mental Health* (No. D-956) 41

See also *Physicians Fee Office v. Department of Public Institutions* (No. D-816e) 59

See also *Rocchio v. John M. Gates, State Auditor* (No. D-1022) 86

Claimant was awarded $679.50 for an invoice submitted for an advertisement placed by the respondent in the magazine of the claimant where a confusion in billing resulted in the expiration of the fiscal year in which payment for the invoice could have been made. *Ski South Magazine v. Dept. of Commerce* (No. D-903) 17

Where claimants supplied merchandise and services to a Department of the State but the funds of the Department were transferred to a new commission at the end of the fiscal year, the Court made awards to the claimants for said merchandise and services as there would have been sufficient funds to pay for said claims if the transfer had not been made. *Southern States Morgantown Cooperative, Inc., Et al v. Dept. of Public Institutions* (No. CC-76-140) 250

See Also *St. Joseph's Hospital v. Department of Mental Health* (No. CC-77-10) 251

The Court reversed a prior decision in which it had made an award to the claimant as the State agency involved notified the Court that there were insufficient funds with which to pay these claims at the end of the fiscal year, the Court denied the claims on the basis of *Airkem Sales and Service, et al v. Department of Mental Health*, 8 Ct. Cl. 180 (1971). *St. Joseph's Hosp. v. Dept. of Mental Health* (No. CC-76-114a-f) 209

See also *Valley Welding Supply Company v. Department of Public Institutions* (No. D-820b) 97

Where the claimant sought compensation for professional services rendered to State patients in a State hospital but the proper procedure for the payment of the services was not followed, the Court made an award to the claimant for services accepted by the State. *Wang v. Dept. of Public Institutions* (No. D-370a) 46

See also *Warner P. Simpson Co. v. Department of Commerce* (No. CC-76-137) 208

An advisory opinion was issued by the Court indicating that the claimant had legal claim against the respondent for the payment of invoices which were not paid within the proper fiscal year and for which the appropriated funds expired before the invoices could be paid. *W.Va. State Industries v. Dept. of Mental Health* (Nos. D-876a&b) 19

The Court rendered an advisory decision in this claim where the claimant alleged failure of the respondent to pay for goods delivered to the respondent State agency but the respondent failed to pay for the same within the proper fiscal year, certain amounts of the claim should be paid by the respondent State agency but a portion of the claim comes within *Airkem Sales and Service, et al v. Department of Mental Health*, 8 Ct. Cl. 180 as this portion is an over expenditure. *W. Va. State Industries v. Dept. of Public Institutions* (No. D-811b) 88

See also *Xerox Corporation v. Department of Public Institutions* (No. D-948a&b) 62

FALLING ROCKS—See also Landslides; Negligence

Where there is nothing in the record to show that the failure of the State to erect and maintain falling rock signs had any cause or connection with the accident complained of by the claimant, the Court will deny the claim. *Dickinson v. Dept. of Highways* (No. D-938) 72

A claim for damages to an automobile caused by falling rocks was denied where the Court held that there was no evidence to show negligence of the respondent as there was no work of any type being conducted by the respondent at the accident point which would have loosened or caused rocks to fall and there were signs along the highway warning of falling rocks. *Ervin v. Dept. of Highways* (No. D-955) 168

Testimony by claimant expert, a consulting geologist, which indicated that blasting operations which had taken place in a quarry along side of a highway in 1940 had induced fractures in the rock behind the face of the cliff and said fractures caused a boulder to break away resulting in claimant's accident, said testimony was not sufficient to make this claim an exception on the general rule and the claim was disallowed. *Hammond v. Dept of Highways* (No. D-796) 234

The Court has consistently held in many similar cases that the State is not a guarantor of the safety of travelers on its highways and that its duty to travelers is one of reasonable care and diligence in the maintenance of a highway under all the circumstances; therefore, the Court disallowed a claim where the claimant struck a rock in the road. *Hammond v. Dept. of Highways* (No. D-796) 234

The unexplained falling of a rock onto a highway without a positive showing that the respondent knew or should have known of a dangerous condition or could have anticipated injury to personal property the evidence is insufficient to justify an award to the claimant for an accident resulting when the claimant struck a rock in the road. *Hammond v. Dept. of Highways* (No. D-796) 234

Claimant was denied recovery for damages alleged to have occurred to his automobile when he struck a large rock in the road which he alleged resulted from a rock slide off of the hill adjacent to the road, as the claimant admitted in his own testimony that his failure to see the rock resulted from a lack of concentration. *Huffman v. Dept. of Highways* (No. D-771) 9

Claimant was denied recovery for damages alleged to have resulted when he struck a rock in the road where the evidence failed to establish that the respondent knew or should have known of the presence of the rock or that it had had sufficient time to remove the same. *Huffman v. Dept. of Highways* (No. D-771) 9

The negligence of the driver of a vehicle cannot be imputed to the passenger therein, therefore the Court made an award to a claimant passenger where the Court found the Department of Highways to be negligent in its maintenance of a roadway known to be subject to falling rocks. *Smith v. Dept. of Highways* (No. D-946) 221

Where the record disclosed that for many years an area where the claimants' accident occurred was subject to falling rocks continuously and known for many years to be hazardous, it is negligence for respondent to do nothing more than to patrol the road for said rocks. *Smith v. Dept. of Highways* (No. D-946) 221

Where the evidence indicated that if the driver of the vehicle had kept his vehicle under proper control and speed, he would have seen the rock in the road which caused the accident, the negligence of the claimant barred him from recovery. *Smith v. Dept. of Highways* (No. D-946) 221

FIRES AND FIRE PROTECTION

Respondents motion to dismiss the action of the claimant based upon the "Risk of Loss" paragraph in a real estate contract was denied as the Court held that when the deed was thereafter executed and delivered, the legal title and cause of action for damages were transferred to the claimant as the vendee. *Boone Sales, Inc. v. Dept. of Highways* (No. CC-76-119) 269

Claimants were made an award for loss of timber where it was apparent that respondents employees were guilty of negligence in failing to take sufficient precautions to prevent the ignition of leaves near a signpost where the employees were using an acetylene torch. *Perkins & Hamrick v. Dept. of Highways* (Nos. CC-76-57 and CC-76-58) 242

Claimants were made an award for timber loss where a secondary fire attributable to the reawakening of the first fire caused said damages as the

first fire was the result of negligence on the part of respondents employees. *Perkins & Hamrick v. Dept. of Highways* (Nos. CC-76-57 and CC-76-58) ... 242

FLOODING

Claimant was made an award of $10,492.50 based upon an agreement whereby the claimant provided toilets in a disaster area in Logan County, West Virginia, but due to a merger of two State agencies, the claimant had not been paid for said services. *Cadle v. Office of Emergency Services* (No. D-1006) 83

Claimant was denied recovery for alleged damages to her automobile when she drove her car into flood waters which she should have seen in the careful operation of her automobile. *Clarke v. Dept. of Highways* (No. D-715) 15

Claimant was made an award for property damage resulting from flooding of property when a culvert belonging to the respondent was closed with concrete causing water to back up and flood onto the claimant's property. *Gannon v. Dept. of Highway* (No. D-675) 104

Claimant alleged damages to a culvert and bridge which afforded her access to her property which was operated as a trailer court which damage occurred during a flash flood causing the culvert to clog and overflow across a State road. Employees of the respondent attempting to clear the culvert in order to drain the water from the State road damaged the culvert, but the Court held that any possible fault on the part of the respondent referred to by the claimant was too conjectural and speculative to form the basis for an award, and the claim was disallowed. *Heflin v. Dept. of Highways* (No. D-988) 152

Claimant's claim was denied where the respondent established that it conducted its highway improvement project in a reasonable prudent manner, did nothing to appreciably increase the flow of water or change the character of the drainage, and there was no act or omission of the respondent which proximately caused the damages sustained by the claimant. *Holdren v. Dept. of Highways* (No. D-607) 75

Claimants damage to real estate allegedly caused by water flowing off a mountainside from a State highway located 1,000 feet above the claimant was denied where the Court held that the respondent exercised reasonable care and diligence in the maintenance of its highways as surface water is considered a common enemy which each landowner must fight off as best he can, provided that the owner of higher ground cannot inflict damages to an owner of a lower ground beyond which is reasonable and necessary. *Holdren v. Dept. of Highways* (No. D-607) 75

Where the claimant alleged that surface water caused damage to his real estate, the Court held that one storm did not cause the destruction of claimant's home, but over the years the supporting ground had become so saturated that it had become unstable and could not support the structure. *Holdren v. Dept. of Highways* (No. D-607) 75

Where the claimants were not represented by counsel at their hearing and were unaware of the necessity or the manner of proving damages to their real estate, the Court suggested that the claimants employ counsel and file a petition for rehearing within the 30 day period pursuant to Rule 15 of the Court Rules. *Lafferty v. Dept. of Highways* (No. CC-76-44) 239

Claimant was made an award of $163.10 for damage to his automobile which resulted when the claimant was forced into a culvert due to a flooding hazard in the highway which respondent had notice of but had failed to rectify. *Tinsley v. Dept. of Highways* (No. D-979) 87

HOSPITALS

Where the claimant had a contract with the respondent to charge for 90 percent of its regular billing charges for patients sent to it by the respon-

dent, the respondent will be held to the contract as a letter to modify said contract constituted a unilateral agreement only and not binding upon the claimant. *Charleston Area Medical Center, Inc. v. Division of Vocational Rehab.* (No. D-1014) 101

The Court made an award to the claimant hospital for services rendered to a prisoner taken to the hospital by troopers who had arrested the prisoner, where the prisoner was never in the custody of the county. The Court held that a moral obligation existed to pay the claim and made an award to the claimant. *Montgomery General Hosp. v. Dept. of Public Safety* (No. D-1001) 160

See also *Pfizer, Inc. v. Department of Mental Health* (No. D-956) 41

See also *St. Joseph's Hospital v. Department of Mental Health* (No. CC-77-10) 251

The Court reversed a prior decision in which it had made an award to the claimant as the State agency involved notified the Court that there were insufficient funds with which to pay these claims at the end of the fiscal year. The Court denied the claims on the basis of *Airkem Sales and Services, et al v. Department of Mental Health*, 8 Ct. Cl. 180 (1971). *St. Joseph's Hosp. v. Dept. of Mental Health* (No. CC-76-114a-f) 209

Where claimants' building, equipment and merchandise were damaged by acts committed by two patients of the respondent State hospital who were negligently allowed to leave the State hospital, the claimant will be entitled to reimbursement for the damages sustained. *Swisher v. Dept. of Mental Health* (No. D-881a&b) 61

Where the claimant sought compensation for professional services rendered to State patients in a State hospital but the proper procedure for the payment of the services was not followed, the Court made an award to the claimant for services accepted by the State. *Wang v. Dept. of Public Institutions* (No. D-370a) 46

INTEREST

Claimant was denied recovery for interest on an alleged contract between the claimant and the respondent for which the claimant was not paid the principal amount of the contract for approximately two years after the contract work had been accepted by the respondent as the Court lacks jurisdiction in awarding interest unless the claim is based upon a contract which specifically provides for the payment of interest. *Hott and Miller, General Contractors v. Department of Highways* (No. D-683) 3

Claimant was denied recovery for interest alleged due on the balance of the contract which was not paid in the proper fiscal year and for which the contractor was forced to file a claim thereon where Code 14-2-12 prohibits the Court specifically from making an award for interest unless the contract specifically provides for interest. *J. J. Englert Co. v. Dept. of Pub. Institutions* (No. D-917) 22

JUDGEMENTS AND DECREES

A motion to dismiss a claim for compensation for property taken by eminent domain by the respondent over and above a judgment entered by a Circuit Court was sustained by the Court as claims of this nature are excluded from the jurisdiction of the Court under the provisions of the West Virginia Code, Chapter 14, Article 2, Section 14 (5). *Anton v. Dept. of Highways* (No. CC-76-45) 229

Where the final order entered by the Circuit Court involving this claim indicated that the claimant and his wife accepted the amount awarded before that Court as full and complete payment for the taking or acquisition of the real estate and the damages alleged in the claim are the same damages, the Court sustained a motion to dismiss by the respondent. *Hoover v. Dept. of Highways* (No. D-769) 109

JURISDICTION

A motion to dismiss a claim for compensation for property taken by eminent domain by the respondent over and above a judgment entered by a Circuit Court was sustained by the Court as claims of this nature are excluded from the jurisdiction of the Court under the provisions of the West Virginia Code, Chapter 14, Article 2, Section 14 (5). *Anton v. Dept. of Highways* (No. CC-76-45) 229

Where the claimant sought recovery for expenses incurred during condemnation proceedings wherein claimant's property was condemned, the Court held that it had no jurisdiction under West Virginia Code 14-2-14 which excludes from the jurisdiction of this Court a proceeding which could be maintained against the State in a State court. *Hoover v. Dept. of Highways* (No. D-769) 109

Claimant was denied recovery for interest on an alleged contract between the claimant and the respondent for which the claimant was not paid the principal amount of the contract for approximately two years after the contract work had been accepted by the respondent as the Court lacks jurisdiction in awarding interest unless the claim is based upon a contract which specifically provides for the payment of interest. *Hott and Miller, General Contractors v. Department of Highways* (No. D-683) 3

No award was made to the general contractor where the claim was actually by a subcontractor as the Court held that the issues were really between the subcontractor and the contractor and the proper forum for the resolution of this issue is in a State court not the Court of Claims. *S. J. Groves & Son Co. v. Dept. of Highways* (No. D-614) 297

Where the damages for which the claimant filed his claim had occurred more than two years prior to the filing of the claim, the Court held that it could not take jurisdiction as the claim was barred by the statute of limitations pursuant to West Virginia Code 14-2-21. *Wine v. Dept. of Highways* (No. D-985) 303

LANDSLIDES—See also Falling Rocks; Negligence

Where a claimant filed for damages to his home and property as the result of a landslide, the Court held that the statute of limitations does not run where there is a continuing and intermittant trespass to real estate but there could be no recovery for damages sustained more than two years prior to the filing of the claim and therefore the damages to the home of the claimants which were sustained more than two years prior to this action are not recoverable. *Block v. Dept. of Highways* (No. CC-76-4) 195

Where claimants' property was damaged as a result of a landslide initiated by the activity of the respondent, the Court made an award to the claimants for damage to their lot where the damage was continuing as the statute of limitations does not bar the claimants from recovery. *Block v. Dept. of Highways* (No. CC-76-4) 195

Where the claimants and respondents entered a written stipulation indicating that as the result of activity by the respondent a landslide was initiated which continued and extended into the area of the property of the claimants resulting in damage to their homes and property, the Court, having made an extensive personal examination of the premises and observed the damages to the respective properties, made awards to the claimants. *Bohrer, Mason & Durig v. Dept. of Highways* (Nos. 684a-c) 197

Where expert witnesses for both the claimants and the respondent testified that continuous saturation by water of the hillside above the claimants over a period of many years was a direct cause of the downslope movement of the land causing the damages to the property without sufficient proof that acts or omissions by the respondent were the direct or proximate cause, the Court will disallow the claims. *Caldwell, et al v. Dept. of Highways* (Nos. D-690 et al) 50

Where many contributing factors brought about the damages to the real estate of the claimants, but there was not sufficient proof that any acts or omissions of the respondent were the direct and proximate cause of the damages, the Court will disallow the claims. *Caldwell, et al v. Dept. of Highways* (Nos. D-690, et al) 50

Where the claimant and respondent stipulated that the proximate cause of the land movement which caused damage to the claimant's dwelling was the improper drainage on the highway and failure of the respondent to maintain the existing drainage, the Court made an award to the claimants in the amount stipulated between the parties. *Casto v. Dept. of Highways* (No. D-744) 259

Claimant was made an award of $12,039.52 for injuries sustained by him in an accident where the Court found that the claimant was driving at a lawful rate of speed and without knowledge or warning of the same, the claimant drove into a slip which caused him to lose control of his vehicle, as the evidence revealed that the respondent knew of the slip but had failed to provide warning signs or to correct the condition. *Harmon v. Dept. of Highways* (No. D-1016) 107

Where the claimant's accident and resulting injuries occurred when claimant's truck drove into a slip of which respondent had prior notice and did nothing to correct the same or to erect warning signs of danger, the claimant is entitled to recovery. *Harmon v. Dept. of Highways* (No. D-1016) 107

Claimant was denied recovery for damages alleged to have resulted when he struck a rock in the road where the evidence failed to establish that the respondent knew or should have known of the presence of the rock or that it had had sufficient time to remove the same. *Huffman v. Dept. of Highways* (No. D-771) 9

Where the claimant alleged that damage to his house occurred when employees of the respondent while cleaning out a ditchline in front of his property caused a slide, the Court held that the claimants had not proved by a preponderance of the evidence that respondent's acts could be considered the direct proximate cause of injury to claimants' property. *Lovejoy v. Dept. of Highways* (No. D-853) 163

Claimant was made an award of $3,000.00 for damages to their barn when the respondent negligently allowed a culvert to become plugged resulting in a slip which eventually extended to the barn of the claimants causing damage thereto. *Melrose v. Dept. of Highways* (No. D-629) 57

Where claimant installed a septic tank system which may have contributed to the slide problems on his property but the proximate cause of the slide was the action of the respondent, the Court made an award to the claimant for damages which were a result of said slide. *Reed v. Dept. of Highways* (No. D-919) 294

Where the proximate cause of a slide which occurred on a claimants' property causing damage to the real estate and residence was the action of the respondent in clearing a ditchline and cutting into the toe of the hill, the Court made an award to the claimants. *Reed v. Dept. of Highways* (No. D-919) 294

Where the record disclosed that for many years an area where the claimants' accident occurred was subject to falling rocks continuously and known for many years to be hazardous, it is negligence for respondent to do nothing more than to patrol the road for said rocks. *Smith v. Dept. of Highways* (No. D-946) 221

Where respondents employee while filling a slip accidentally caused mud to slide into and permeate claimant's well ruining said well, the Court made an award to the claimant for the actual cost of drilling the new well. *Wray v. Dept. of Highways* (No. CC-76-87) 252

Where the claimant and respondent agree by stipulation that slippage of a road resulted in damage to the property of the claimant and the amount of

the claim has been stipulated and is a fair and reasonable valuation of the damages, the Court will make an award to the claimant in that amount. *White v. Dept. of Highways* (No. D-751) 148

MOTOR VEHICLES

See *The American Road Insurance Company, subrogee of Shellie Morgan, Jr. v. Department of Highways* (No. CC-76-101) 186

See also *Anderson v. Department of Highways* (No. D-1018) 135

See also *Asbury v. Department of Highways* (No. CC-76-145) 230

Claimant was made an award for damages to its tractor trailer which was used by employees of the respondent in establishing a roadblock in order to capture two thieves fleeing in an automobile and the automobile crashed into the tractor trailer causing the damages. *Associated Dry Goods v. Dept. of Pub. Safety* (No. D-991) 21

Speculative and circumstantial evidence by the claimant to prove damage to his automobile, will not be deemed to approach the preponderance required for a recovery and the claim will be disallowed. *Bird & State Farm Mutual Automobile Ins. Co. v. Dept. of Highways* (Nos. D-934a&b) 91

Where the respondent introduced direct, adverse testimony by its operator who was the only person with specific knowledge as to the snow plowing operation alleged to have caused the damages to claimant's automobile, the Court will disallow the claim. *Bird & State Farm Mutual Automobile Ins. Co. v. Dept. of Highways* (Nos. D-934a&b) 91

It is common knowledge that precipitation may accumulate and freeze on bridge surfaces when it melts and runs off or evaporates on other portions of a roadway, therefore a claim of damage resulting from the claimant's automobile slidding on ice which had accumulated on a bridge surface was denied by the Court. *Bodo v. Dept. of Highways* (No. CC-76-28) 179

The mere presence of ice upon a bridge in the wintertime causing a traveler to slide or skid thereon, does not constitute negligence on the part of the respondent, therefore a claim was denied where the claimant alleged that the accident which happened was the result of his skidding on ice on the surface of a bridge. *Bodo v. Dept. of Highways* (No. CC-76-28) 179

The claimant was made an award for damages to his automobile when he struck a highway road sweeper which was in his lane of traffic on the highway as the evidence revealed that the respondent had failed to properly secure the sweeper at the edge of the roadway and it was left unattended. *Boley v. Dept. of Highways* (No. CC-76-136) 272

See also *Buckeye Union Insurance Co., subrogee of Raymond L. Maddy v. Department of Highways* (No. D-764) 9

Where the claimant is able to observe the edge and surface of the road and has sufficient room on his side of the road to operate his vehicle with safety, he should stay in his lane of traffic; therefore, a claim will be denied as claimant's contributory negligence bars recovery. *Butcher v. Dept. of Highways* (No. D-967) 49

Claimant was denied recovery for alleged damages to her automobile where she drove her car into flood waters which she should have seen in the careful operation of her automobile. *Clarke v. Dept. of Highways* (No. D-715) 15

The Court made an award to the claimant who sustained injuries while driving a cement truck which went into a bank and overturned, as the evidence revealed that respondent's employees had failed to provide a flagman or warning sign at a curve in the road to warn of the presence of a work crew ahead. *Clark and Martinsburg Concrete Products Co. v. Dept. of Highways* (Nos. CC-76-17 and CC-76-118) 279

Where an employee of the respondent directed claimant who was driving a truck to proceed between the respondents parked vehicle and pipes on a roadway but, due to insufficient room for the truck to pass, the same was damaged, the Court made an award to the claimant for failure of the respondent's employee to exercise proper care under the circumstances. *Conley v. Dept. of Highways* (No. CC-76-93) 206

Where the claimant alleged damage to his automobile when he struck a hole in the road, the Court held that if the claimant was travelling at the modest rate of 25 miles per hour as alleged and had adequate headlights, he should have seen a hole of the size complained of and he would not have struck the hole with such force as to rupture two tires. The Court denied the claim. *Davis v. Dept. of Highways* (No. CC-76-18) 150

Where the respondent admitted the damages done to claimant's automobile but disputed the amount of the claim for a complete refinishing of the paint of the automobile, the Court based its award to the claimant upon the testimony, the argument of counsel for the respondent and the Court's own inspection of the vehicle and made an award to the claimant in an amount which it judged to be fair and reasonable. *Dunbrack v. Dept. of Highways* (No. D-1015) 137

Where employees of the REAP Division of the Department of Highways removed the wrong vehicle which sustained damages while in REAP's possession, the Court made an award to the claimant based upon a stipulation submitted by the claimant and the respondent. *England v. Dept. of Highways* (No. CC-76-50) 210

Claimant was made an award for damages to her automobile which were sustained when she struck a hole in the road of which she was aware but which she was unable to avoid due to a narrow berm and rock cliff on one side and a vehicle approaching in the opposite lane of traffic and the evidence revealed that the respondent had notice of the defect some 6 months prior to claimant's accident. *Giles v. Dept. of Highways* (No. CC-76-43) 212

For the claimant to operate a motor vehicle in disregard of visible hazards such as holes in the road or breaks in the pavement of which a driver is aware or on the exercise of reasonable care should be aware, such action constitutes assumption of a known risk which bars recovery. *Horace Mann Ins. Co., subrogee for Bradshaw v. Dept. of Highways* (No. CC-76-61) 237

See also *McConaha v. Department of Highways* (No. D-1027) 143

See also *McFann v. Department of Highways* (No. D-909) 17

See also *Prudential Property & Casualty Insurance Co., subrogee of Beverly J. Maxwell v. Department of Highways* (No. D-921) 2

See also *Riddle v. Department of Highways* (No. D-947) 59

An award was made to a claimant whose automobile sustained damages in going through a creek bed where it was the duty of the respondent to either prohibit the traffic or to provide reasonable measures of safety to the public at that place. *Shafer v. Dept. of Highways* (No. D-898) 60

Claimant was made an award of $305.85 for damages sustained to his automobile when claimant was forced to drive his automobile through a creek bed due to the fact that the bridge over the creek was closed by the Department of Highways and there was no other passage way other than by fording the creek. *Shafer v. Dept. of Highways* (No. D-898) 60

Where the preponderance of the evidence did not establish that the accident
alleged by the claimant was caused by the negligence of the respondent but instead the claimant was damaged in an effort to avoid an accident with a bus which he testified had forced him off the road, the Court will disallow the claim. *Shawver v. Dept. of Highways* (No. CC-76-42) 184

Where the evidence indicated that if the driver of the vehicle had kept his vehicle under proper control and speed, he would have seen the rock in the

road which caused the accident, the negligence of the claimant barred him from recovery. *Smith v. Dept. of Highways* (No. D-946) 221

Claimant was made an award of $894.00 for damage to the insured automobile when members of the National Guard commandeered said automobile and as a result of their carelessness and negligence, said automobile was destroyed. *Stonewall Casualty Co. v. Adjutant General* (No. D-1037) 101

See also *Travelers Insurance Company as subrogee of William R. Beckner v. Department of Highways* (No. D-901) 2

Where claimant's automobile sustained damages when floor boards on a bridge dislodged and struck said automobile the Court held in line with a prior decision *Gene R. Monk v. State Road Comm'n.*, 8 Ct. Cl. 32, that a person exercising ordinary care for his safety would not reasonably have anticipated that the floor board on the bridge would be missing and claimant cannot be charged with contributory negligence or the assumption of the risk. *Williams v. Dept. of Highways* (No. CC-76-112) 263

See also *White v. Department of Highways* (No. D-1004) 47

NATIONAL GUARD

Claimant was made an award of $894.00 for damage to its insured's automobile when members of the National Guard commandeered said automobile and as a result of their carelessness and negligence, said automobile was destroyed. *Stonewall Casualty Co. v. Adjutant General* (No. D-1037) 101

Where members of the West Virginia National Guard commandeered an automobile owned by claimant's insured and as a result of their carelessness and negligence said automobile was destroyed, the Court made an award to the claimant for the value of the automobile less the salvage later realized by the claimant. *Stonewall Casualty Co. v. The Adjutant General* (No. D-1037) 101

The Court found that a World War II Army tank displayed in front of a National Guard Armory did constitute a dangerous instrumentality based upon the evidence in this particular claim and as such does come within the dangerous instrumentality rule. *Tabit v. Adjutant General* (No. D-795) 174

The defense of contributory negligence was not applied in a case where an 8 year old claimant while playing on a surplus Army tank displayed as a World War II monument suffered permanent injury due to a fall on the same. *Tabit v. Adjutant General* (No. D-795) 174

Where a surplus Army tank was placed by the respondent on the lawn in front of an Armory, which was open to the public including small children, without any limit or restraint, the Court held that the claimant was not a trespasser. *Tabit v. Adjutant General* (No. D-795) 174

While an Army tank on display by the respondent as a war memorial for public viewing is not dangerous in the abstract, the Court held that respondent had assumed the duty of providing for the safety of children known to climb on the tank, and also that the failure of the respondent to protect children from falling constitutes such negligence as entitles the claimant to recover for injuries sustained while playing on the tank. *Tabit v. Adjutant General* (No. D-795) 174

NEGLIGENCE—See also Blasting; Falling Rocks; Landslides; Motor Vehicles; Streets and Highways

Where the cause of an accident was alleged to be a substance on the pavement of the road due to negligence on the part of the respondent but the evidence relating to the cause of the accident was left to the conjecture and speculation of the Court, the Court denied the claim. *Barker v. Department of Highways* (No. D-966a&b) 187

Where the claimants alleged that a substance on the pavement caused their vehicle to slide but there was no evidence that the presence of the substance was caused by negligence on the part of the respondent, the Court denied the claims. *Barker v. Department of Highways* (No. 966a&b) 187

Where the Court found that the claimant was guilty of contributory negligence in the lack of due care in striking a hole in the road and the respondent was also guilty of negligence in allowing the hole to exist, the Court held that the contributory negligence of the claimant was the proximate cause of the accident and disallowed the claim. *Beaucham v. Dept. of Highways* (No. D-1024) 103

Where a claimant sustained personal injuries in an accident which he alleged to be the result of failure of the respondent to erect warning signs indicating to a motorist that he was approaching a sharp curve, the Court held in accordance with past decisions of both this Court and the West Virginia Supreme Court of Appeals that the duty to erect guard rails, center lines or danger signals at a particular location was discretionary and such failure did not constitute negligence. *Bickerstaff v. Dept. of Highways* (No. D-746) 254

The mere presence of ice upon a bridge in the wintertime causing a traveler to slide or skid thereon, does not constitute negligence on the part of the respondent, therefore a claim was denied where the claimant alleged that the accident which happened was the result of his skidding on ice on the surface of a bridge. *Bodo v. Dept. of Highways* (No. CC-76-28) 179

The claimant was made an award for damages to his automobile when he struck a highway road sweeper which was in his lane of traffic on the highway as the evidence revealed that the respondent had failed to properly secure the sweeper at the edge of the roadway and it was left unattended. *Boley v. Dept. of Highways* (No. CC-76-136) 272

Where the claimants alleged that the respondent was negligent in the maintenance of their road and collected surface water diverting the same through culverts and casting the same upon their land causing damage thereto, the respondent will not be held liable unless he substantially changed the course of the flow of the water down the hillside from the time the culverts were installed on the road. *Caldwell, et al v. Dept. of Highways* (Nos. D-690 et al) 50

The Court held that the respondent was not negligent in purchasing the Silver Bridge as designed in 1926 as said design was prepared in accordance with good engineering practice at that time. *Cantrell & White v. Dept. of Highways* (Nos. D-240 and D-268o) 110

While the Court was of the opinion that the respondent was guilty of negligence in its inspection procedures of the Silver Bridge, this negligence was not the proximate cause of the collapse of the Silver Bridge as to constitute the proximate cause the phenomenon of stress-corrosion must have been foreseeable. *Cantrell & White v. Dept. of Highways* (Nos. D-240 and D-268o) 110

Claimant was denied recovery for alleged damages to her automobile where she drove her car into flood waters which she should have seen in the careful operation of her automobile. *Clarke v. Dept. of Highways* (No. D-715) 15

The Court disallowed the claimant's alleged claim where the Court found that claimant's damages were the proximate result of her own acts and omissions. *Clarke v. Dept. of Highways* (No. D-715) 15

Where claimant sustained injuries while driving a cement truck which went into a bank and overturned, the evidence revealed that respondents employees had failed to provide a flagman or warning sign at a curve in the road to warn of the presence of a work crew ahead. *Clark and Martinsburg Concrete Products Co. v. Dept. of Highways* (Nos. CC-76-17 and CC-76-118) 279

Where an employee of the respondent directed claimant who was driving a truck to proceed between the respondent's parked vehicle and pipes on a roadway but due to insufficient room for the truck to pass the same was damaged, the Court made an award to the claimant for failure of the respondent's employee to exercise proper care under the circumstances. *Conley v. Dept. of Highways* (No. CC-76-93) 206

See also *Cremeans v. Department of Highways* (No. D-980) 37

Where the condition which developed on the highway in the breaking up of the pavement should have been anticipated by the respondent, its failure to investigate the breakup of the concrete base and the dislodgement of the portions thereof constituted negligence, which negligence resulted in a dangerous condition causing the damage which the claimant suffered. *Crockett v. Department of Highways* (No. D-790) 38

Where the claimant alleged damage to his automobile when he struck a hole in the road, the Court held that if the claimant was travelling at the modest rate of 25 miles per hour as alleged and had adequate headlights, he should have seen a hole of the size complained of and he would not have struck the hole with such force as to rupture two tires and the Court denied the claim. *Davis v. Dept. of Highways* (No. CC-76-18) 150

Where the claimant sustained injuries to her leg when she stepped into a hole in a bridge floor, the Court held that the evidence warranted the inference that the hole had existed for a substantial time and the respondent was guilty of negligence which was the proximate cause of the claimant's injury. *Dunlap v. Dept. of Highways* (No. CC-76-6) 181

Where the claimant was not aware of a hole which existed in the floor of a bridge over which the claimant was walking and the claimant stepped into said hole, the Court held that the claimant was not guilty of any contributory negligence. *Dunlap v. Dept. of Highways* (No. CC-76-6) 181

The Court made an award to the claimant for damage sustained to his vehicle when he pulled off the traveled portion of the road and his automobile went into a storm sewer drain 18 inches below the surface of the roadway where the preponderance of the evidence established that the respondent negligently created a dangerous condition along the berm of the road and such negligence was the proximate cause of the accident. *Eastes v. Dept. of Highways* (No. CC-77-41) 283

A claim for damages to an automobile caused by falling rocks was denied where the Court held that there was no evidence to show negligence of the respondent as there was no work of any type being conducted by the respondent at the accident point which would have loosened or caused rocks to fall and there were signs along the highway warning of falling rocks. *Ervin v. Dept. of Highways* (No. D-955) 283

A claim for personal injury and property damage resulting from actions of three escaped convicts from Huttonsville Correctional Center was denied where the Court held that the claimant had not proved by a preponderance of the evidence that there was actionable negligence on the part of the respondent which would have constituted the proximate cause of the damage and injuries to the claimant. *Gibson v. Dept. of Public Institutions* (No. D-1017) 264

Even though road construction signs may have been properly in place where the claimants came upon a hazardous condition suddenly and without sufficient warning and the condition of the road was the result of negligence of the respondent, the Court made awards to the claimants. *Hale and Wingate v. Dept. of Highways* (Nos. D-842 and D-843) 93

Respondent was found to be negligent when its employees filled in a hole in the highway with slag and pea gravel which proved to be unstable when subjected to heavy traffic creating a hazardous condition which resulted in injuries to the claimants. *Hale and Wingate v. Dept. of Highways* (Nos. D-842 and D-843) 93

Where the claimant's accident and resulting injuries occurred when claimant's truck drove into a slip of which respondent had prior notice and did nothing to correct the same or to erect warning signs of danger, the claimant is entitled to recovery. *Harmon v. Dept. of Highways* (No. D-1016) 107

Claimant's damage to real estate allegedly caused by water flowing off a mountainside from a State highway located 1,000 feet above the claimant was denied where the Court held that the respondent exercised reasonable care and diligence in the maintenance of its highways as surface water is considered a common enemy which each landowner must fight off as best he can, provided that the owner of higher ground cannot inflict damages to an owner of a lower ground beyond which is reasonably necessary. *Holdren v. Dept. of Highways* (No. D-607) 75

For the claimant to operate a motor vehicle in disregard of visible hazards such as holes in the road or breaks in the pavement of which a driver is aware or on the exercise of reasonable care should be aware, such action constitutes assumption of a known risk which bars recovery. *Horace Mann Ins. Co., subrogee for Bradshaw v. Dept. of Highways* (No. CC-76-61) 237

Claimant was denied recovery for damages alleged to have occurred to his automobile when he struck a large rock in the road which he alleged resulted from a rock slide off of the hill adjacent to the road, as the claimant admitted in his own testimony that his failure to see the rock resulted from a lack of concentration. *Huffman v. Dept. of Highways* (No. D-771) 9

Claimant was denied recovery for damages alleged to have resulted when he struck a rock in the road where the evidence failed to establish that the respondent knew or should have known of the presence of the rock or that it had had sufficient time to remove the same. *Huffman v. Dept. of Highways* (No. D-771) 9

Where there was no evidence in the record to show that the respondent had any knowledge that a manhole cover had in some manner gotten into the street, the Court held that the well established law in West Virginia is that the State is not an insurer of its highways and the user thereof travels at his own risk, the Court found the respondent free of negligence and disallowed the claim. *Hutchens v. Dept. of Highways* (No. CC-76-5) 153

Claimant was awarded $58.00 for damage to her automobile which resulted from tar splashing on her automobile when she was directed by a flagman to proceed into an area where fresh tar had just been placed upon the highway by employees of the respondent and claimant was not informed of this fact, such failure on the part of the employees of the respondent established negligence. *Kelly v. Dept. of Highways* (No. D-882) 12

Where claimant suffered injuries when she collided with a wire or metal cable strung on a tennis court at a State college, the Court held that the respondent school was under a duty to maintain the physical education facilities in a reasonably safe condition, and, where it had breached that duty, the claimant was entitled to an award. *Landes v. Board of Regents* (No. CC-76-31) 215

Where claimant contractor's own negligence in failing to provide proper shoring and sheeting to prevent a break in a waterline located on the project resulted in damage to the waterline for which the claimant was billed by the owner of the waterpipe, the Court denied recovery to the claimant. *Lang Brothers, Inc. v. Dept. of Highways* (No. D-685) 217

Where claimant's son, a student at a State school for the deaf and blind, was injured as the result of a fracas between him and another student, the Court held that the guarantee of safety to a student is no more or no less than if the student is enrolled in any other public school and, as the injuries received by the claimant were not forseeable nor did the record reveal any negligence on the part of respondent which was the proximate cause of the accident, the Court disallowed the claim. *Lee v. Board of Education* (No. CC-76-59) 266

The Court disallowed claimant's action where the evidence established that the negligence of the claimant caused her to fall when she stepped into a hole as the claimant was familiar with the site of the accident and with the exercise of reasonable care could have avoided her own injury. *Lyons v. Dept. of Highways* (No. D-879) 287

Where the claimant lost control of her automobile resulting in an accident which occurred when she struck an area in the highway where the asphalt had completely disappeared leaving a hole some six to eight inches deep and about 15 feet in length extending from the berm into the traveled portion of the claimant's lane of traffic, the Court made an award to the claimant for the failure of respondent to repair this condition which was the proximate cause of the accident. *Mullins & Stephy v. Dept. of Highways* (No. D-954) 201

Where the respondent failed to repair a dangerous condition in a State road such failure constituted negligence which was the proximate cause of the accident and an award was made to claimants who sustained damages as a result of an accident. *Mullins & Stephy v. Dept. of Highways* (No. D-954) 201

Claimants were made an award for damage to their timber where it was apparent that respondent's employees were guilty of negligence in failing to take sufficient precautions to prevent the ignition of leaves near a signpost where the employees were using an acetylene torch. *Perkins & Hamrick v. Dept. of Highways* (Nos. CC-76-57 and CC-76-58) 242

Claimant was made an award for personal injuries which resulted when claimant's automobile struck a large hole covered with water which had existed on a main artery for at least one to two weeks prior to claimant's accident and the preponderance of evidence clearly demonstrated that the respondent should have known of the dangerous condition existing in the roadway. *Plants v. Dept. of Highways* (No. D-672) 78

Where the proximate cause of a slide which occurred on claimant's property causing damage to the real estate and residence was the action of the respondent in clearing a ditchline and cutting into the toe of the hill, the Court made an award to the claimant. *Reed v. Dept. of Highways* (No. D-919) 294

Where the record failed to disclose any actionable negligence on the part of the respondent but on the contrary amply demonstrated that the respondent exercised reasonable care in the maintenance of its roadside park, a claim by a woman who fell into a hole in the grass in the park was denied. *Riffle v. Dept. of Highways* (No. CC-76-111) 246

Where the preponderance of the evidence did not establish that the accident alleged by the claimant was caused by the negligence of the respondent but instead the claimant was damaged in an effort to avoid an accident with a bus which he testified had forced him off the road, the Court will disallow the claim. *Shawver v. Dept. of Highways* (No. CC-76-42) 184

The claimant alleged damage to his automobile as the result of two tree limbs striking claimant's automobile but, as there was no evidence that the tree was rotten, and the incident occurred during a storm, the Court denied the claim as being an act of God for which the respondent can not be held responsible or liable even though it occurred on the premises of the respondent. *Shortridge v. Dept. of Highways* (No. D-984) 184

The negligence of the driver of a vehicle cannot be imputed to the passenger therein, therefore the Court made an award to a claimant passenger where the Court found the Department of Highways to be negligent in its maintenance of a roadway known to be subject to falling rocks. *Smith v. Dept. of Highways* (No. D-946) 221

Where the evidence indicated that if the driver of the vehicle had kept his vehicle under proper control and speed, he would have seen the rock in the road which caused the accident, the negligence of the claimant barred him from recovery. *Smith v. Dept. of Highways* (No. D-946) 221

Where the record disclosed that for many years an area where the claimants' accident occurred was subject to falling rocks continuously and known for many years to be hazardous, it is negligence for respondent to do nothing more than to patrol the road for said rocks. *Smith v. Dept. of Highways* (No. D-946) 221

Travelling on an icy road is always a hazardous undertaking, and considering the weather conditions and the kind of road that the claimant was travelling which was a secondary road, he must have recognized that certain risks were involved, and where he attempted to approach and cross a very narrow, little-used bridge he must have foreseen some danger, the Court will not make an award to the claimant for damages received by him when he slid on ice on said bridge and his car slid off of the bridge as the angle iron guardrails would have been adequate under normal circumstances on the bridge. *Snyder v. Dept. of Highways* (No. D-908) 166

Where claimant alleged that the lack of guardrails on a bridge and lack of warning sign that the bridge would freeze before the road surface, resulted in claimant's crossing the bridge when it was covered with ice causing claimant to slide off the bridge, the Court held that any such signs indicating the presence of the bridge would have served no purpose as the claimant was aware of ice on the road and that the bridge did have angle iron type guardrails adequate for a bridge of this nature, there was no positive proof of neglect of a duty by the respondent as would constitute negligence and create a moral obligation on the part of the State. *Snyder v. Dept. of Highways* (No. D-908) 166

Where claimants were injured as the result of striking a hole in the road and the testimony indicated that the road was not maintained in a reasonably safe condition and that the respondent through many notices knew or should have known of the condition of the road, the Court made awards to the claimants for their injuries. *Sowards, et al v. Dept. of Highways* (No. D-865) 299

Claimant was made an award of $894.00 for damage to its insured's automobile when members of the National Guard commandeered said automobile and as a result of their carelessness and negligence, said automobile was destroyed. *Stonewall Casualty Co. v. Adjutant General* (No. D-1037) 101

Where members of the West Virginia National Guard commandeered an automobile owned by claimant's insured and as a result of their carelessness and negligence said automobile was destroyed, the Court made an award to the claimant for the value of the automobile less the salvage later realized by the claimant. *Stonewall Casualty Co. v. The Adjutant General* (No. D-1037) 101

Where claimants' building, equipment and merchandise were damaged by acts committed by two patients of the respondent State hospital who were negligently allowed to leave the State hospital, the claimant will be entitled to reimbursement for the damages sustained. *Swisher v. Dept. of Mental Health* (Nos. D-881a&b) 61

The defense of contributory negligence was not applied in a case where an 8 year old claimant while playing on a surplus Army tank displayed as a World War II monument suffered permanent injury due to a fall on the same. *Tabit v. Adjutant General* (No. D-795) 174

While an Army tank on display by the respondent as a war memorial for public viewing is not dangerous in the abstract, the Court held that respondent had assumed the duty of providing for the safety of children known to climb on the tank, and also that the failure of the respondent to protect children from falling constitutes such negligence as entitles the claimant to recover for injuries sustained while playing on the tank. *Tabit v. Adjutant General* (No. D-795) 174

Where the claimant saw the condition of the slate-covered path constructed for her to reach her mail box over a construction area and it was

clear that she knew the condition of the path and knew that the material was slippery, it was her own negligence that proximately caused her accident and bars her recovery. *Webb v. Dept. of Highways* (No. D-696) 33

Where the respondent through its contractor attempted to provide access for the claimant to her mail box and attempted to relieve the muddy condition of the path by placing gray slate thereon, it can reasonably be said that all that should have been expected was done, and therefore the claimant was denied recovery for personal injury when she fell on the wet slate. *Webb v. Dept. of Highways* (No. D-696) 33

Where actionable negligence on the part of the respondent is not established by the evidence, the Court will deny the claim of the claimant. *White v. Dept. of Highways* (No. D-758) 138

It is well established law in West Virginia that the State is not an insurer of its highways, and, if there is not a preponderance of proof of negligence on the part of the State's employees, the user of a highway travels at his own risk. The Court used this reasoning in denying a claim where the claimant's automobile unavoidably struck a broken tree limb hanging out into claimant's lane of traffic. *Widlan v. Dept. of Highways* (No. CC-76-1) 149

Where a claimant's automobile sustained damages when the planking of a bridge dislodged and came up underneath the automobile, the Court held that a dangerous condition existed on the bridge which directly and proximately caused the damage to the claimant's automobile and the Court made an award. *Williams v. Dept. of Highways* (No. CC-76-112) 263

Where claimant's automobile sustained damages when floor boards on a bridge dislodged and struck said automobile the Court held in line with a prior decision *Gene R. Monk v. State Road Comm'n.*, 8 Ct. Cl. 32, that a person exercising ordinary care for his safety would not reasonably have anticipated that the floor board on the bridge would be missing and claimant cannot be charged with contributory negligence or the assumption of the risk. *Williams v. Dept. of Highways* (No. CC-76-112) 263

See also *Yanasy v. Department of Highways* (No. CC-76-76) 253

NOTICE

Although the Department of Highways is not an insurer for the safety of those using the highways in the State, in those cases where the respondent has had actual notice of a deplorable and dangerous condition in a road it should take steps to remedy the condition for motorists who are required to use such road and since the claimants in the instant claim were injured as the result of the dangerous condition of the road, the Court made awards to the claimants. *Sowards, et al v. Dept. of Highways* (No. D-865) 299

Where claimants were injured as the result of striking a hole in the road and the testimony indicated that the road was not maintained in a reasonably safe condition and that the respondent through many notices knew or should have known of the condition of the road, the Court made awards to the claimants for their injuries. *Sowards, et al v. Dept. of Highways* (No. D-865) 299

NUISANCE

The defense of contributory negligence was not applied in a case where an 8 year old claimant while playing on a surplus Army tank displayed as a World War II monument suffered permanent injury due to a fall on the same. *Tabit v. Adjutant General* (No. D-795) 174

Where a surplus Army tank was placed by the respondent on the lawn in front of an Armory, which was open to the public including small children, without any limit or restraint, the Court held that the claimant was not a trespasser. *Tabit v. Adjutant General* (No. D-795) 174

While an Army tank on display by the respondent as a war memorial for public viewing is not dangerous in the abstract, the Court held that respondent had assumed the duty of providing for the safety of children known to climb on the tank, and also that the failure of the respondent to protect children from falling constitutes such negligence as entitles the claimant to recover for injuries sustained while playing on the tank. *Tabit v. Adjutant General* (No. D-795) 174

PARKS AND PLAYGROUNDS

Where no evidence was presented indicating that respondent was aware of a crack in a board on a bridge where the claimant got her bicycle wheel caught in said crack and was thrown from the bridge, the Court held that the evidence did not justify a finding that the respondent should have been aware of the existence of the crack and therefore the claim was denied. *Fox v. Dept. of Highways* (No. D-899) 257

Where the claimant sustained personal injuries due to an accident which occurred while she was riding her bicycle across a bridge constructed and maintained by the respondent primarily to accommodate automobiles, the Court held that the law does not require the respondent to be an insurer of the safety of pedestrians or bicyclists using such a bridge. *Fox v. Dept. of Highways* (No. D-899) 257

Where the record failed to disclose any actionable negligence on the part of the respondent but on the contrary amply demonstrated that the respondent exercised reasonable care in the maintenance of its roadside park, a claim by a woman who fell into a hole in the grass in the park was denied. *Riffle v. Dept. of Highways* (No. CC-76-111) 246

PHYSICIANS AND SURGEONS—See Hospitals

POLICE

When a trustee from the Penitentiary, who was assigned to a State Police barracks as a janitor, stole an automobile belonging to a trooper and had an accident with the automobile, damaging the same, the Court denied recovery to the trooper as there was no reason for the respondent to anticipate this criminal act. *Catlett v. Dept. of Public Institutions* (No. D-964) 135

Where claimant's automobile was damaged through the act of a trustee assigned to a State Police barracks, the Court found no negligence on the part of the respondent in failing to anticipate that the trustee would joyride in an automobile belonging to a trooper. *Catlett v. Dept. of Public Institutions* (No. D-964) 135

The Court made an award to the claimant hospital for services rendered to a prisoner taken to the hospital by troopers who had arrested the prisoner, and the prisoner was never in the custody of the county, the Court held that a moral obligation existed to pay the claim and made an award to the claimant. *Montgomery General Hosp. v. Dept. of Public Safety* (No. D-1001) 160

PRINTING

The Court made an award to the claimant for printing work which it performed for the respondent but for which it was never paid as this is a claim that in equity and good conscience should be paid by the State. *Dunbar Printing Co. v. Dept. of Education, Div. of Voc. Ed.* (No. CC-77-34) 282

See also *Warner P. Simpson Co., v. Department of Commerce* (No. CC-76-137) 208

PRISONS AND PRISONERS

When a trustee from the Penitentiary, who was assigned to a State Police barracks as a janitor, stole an automobile belonging to a trooper and had an

accident with the automobile, damaging the same, the Court denied recovery to the trooper as there was no reason for the respondent to anticipate this criminal act. *Catlett v. Dept. of Public Institutions* (No. D-964) 135

Where claimant's automobile was damaged through the act of a trustee assigned to a State Police barracks, the Court found no negligence on the part of the respondent in failing to anticipate that the trustee would joyride in an automobile belonging to a trooper. *Catlett v. Dept. of Public Institutions* (No. D-964) 135

Where the claimant was tried, convicted, sentenced, fined $1,000.00, then placed on probation after paying said fine and the indictment was later dismissed, the portion of the fine paid was directed by the Circuit Court to be returned to the claimant and there was no statutory provision by which said fine could be refunded, the Court made an award to the claimant. *Duvernoy v. Auditor & Treasurer* (No. D-905) 63

A claim for personal injuries and property damage resulting from actions of three escaped convicts from Huttonsville Correctional Center was denied where the Court held that the claimant had not proved by a preponderance of the evidence that there was actionable negligence on the part of the respondent which would have constituted the proximate cause of the damage and injuries to the claimant. *Gibson v. Dept. of Public Institutions* (No. D-1017) 264

A claim for personal injuries and property damage resulting from the acts of three escaped convicts from a State correctional center was denied as the Court followed the prior decision of *Lelia Hurst v. Department of Public Institutions*, 9 Ct. Cl. 155, wherein the Court held that any liability for damages must be based upon acts constituting negligence which were the proximate cause of the damage. *Gibson v. Dept. of Public Institutions* (No. D-1017) 264

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PUBLIC INSTITUTIONS

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PUBLIC OFFICERS

Where claimants theory of liability was based upon the doctrine of apparent agency, the Court held that this theory is not applied to cases involving public officers and employees and the claim was disallowed. Adam, et al v. Dept. of Highways (No. D-1011) 227

Claimant was made an award for damages to its tractor trailer which was used by employees of the respondent in establishing a roadblock in order to capture two thieves fleeing in an automobile and crashed the automobile

into the tractor trailer causing the damages. *Associated Dry Goods v. Dept. of Pub. Safety* (No. D-991) 21

Where claimant failed to prove a valid and enforcible contract with the respondent, the Court denied recovery for the demolition and removal of a two-story frame building which claimant demolished at the direction of the Director of REAP. *Foster v. Dept. of Highways* (No. CC-76-8) 162

Where the claimant demolished and removed a two-story frame building at the direction of the Director of REAP, but there was no evidence that the State had legal title to said property, there was no benefit or enrichment inuring to the State to justify a payment of the claimant's claim. *Foster v. Dept. of Highways* (No. CC-76-8) 162

The Court made an award to the claimant for work which he performed in good faith relying upon representations made in a brochure distributed by the government. The Court held in order to do justice, the Court must be liberal in interpreting the acts of individuals in dealing with public authorities. *James v. Governor and Dept. of Natural Resources* (No. D-785) .. 31

REAL ESTATE

Where the claimants and respondents entered a written stipulation indicating that as the result of activity by the respondent a landslide was initiated which continued and extended into the area of the property of the claimants resulting in damage to their homes and property, the Court, having made an extensive personal examination of the premises and having observed the damages to the respective properties, made awards to the claimants. *Bohrer, Mason & Durig v. Dept. of Highways* (Nos. D-684a-c) .. 197

The Court permitted the claimant to testify as to the fair market value before and after the damages sustained to the property as the Court held that she was qualified to express her opinion as to valuation in respect to her own property, however, the Court accorded greater weight to the respondent's witness, a qualified real estate appraiser, because his qualifications were higher than those of the claimant. *Gannon v. Dept. of Highways* (No. D-675) 104

See also *Kayser v. Department of Highways* (No. D-810) 12

Where the claimants were not represented by counsel at their hearing and were unaware of the necessity or the manner of proving damages to their real estate, the Court suggested that the claimants employ counsel and file a petition for rehearing within the 30-day period pursuant to Rule 15 of the Court Rules. *Lafferty v. Dept. of Highways* (No. CC-76-44) 239

See also *Nohe v. Department of Highways* (No. D-968) 33

See also *Peak v. Department of Highways* (No. D-973) 170

See also *Sloane v. Department of Highways* (No. CC-76-121) 249

Where an appraiser's report reflected a value on the property prior to the damages but failed to place a value on the property after the damages, the Court was of the opinion that the property did have at least some value after the damages and therefore this report was disregarded. *Teets v. Dept. of Highways* (No. CC-76-3) 225

See also *Wiley v. Department of Highways* (No. D-781) 35

REHEARING

The Court granted a rehearing to the claimant in order for the claimant to supply evidence to substantiate his claim. *Foster v. Dept. of Highways* (No. CC-76-8) 199

Where the claimants were not represented by counsel at their hearing and were unaware of the necessity or the manner of proving damages to their real estate, the Court suggested that the claimants employ counsel and file a

petition for rehearing within the 30-day period pursuant to Rule 15 of the Court Rules. *Lafferty v. Dept. of Highways* (No. CC-76-44) 239

RELOCATION ASSISTANCE

Where a requirement for relocation assistance was the actual filing of a written claim for said assistance, a claim was denied where claimants did not comply with this requirement and the Court held that the respondent had no authority to waive this requirement and therefore the claim was denied. *Bastin v. Dept. of Highways* (No. CC-76-24) 230

SICK LEAVE

Claimant was denied payment for accrued sick leave after leaving the employment of the State as the Rules and Regulations governing working hours and time off filed by the respondent State agency made no provision for the payment of accrued sick leave upon the termination of employment. *Price v. Department of Pub. Safety* (No. D-924) 4

STATE

Where the respondent was unjustly enriched at the expense of the claimant where the claimant performed work to provide mobile home spaces to the respondent under a written agreement with the claimant, the Court made an award to the claimant for rent loss on the spaces which he was not able to lease. *Cook v. Dept. of Fin. & Admin.* (No. D-702) 28

Claimant was denied payment for accrued sick leave after leaving the employment of the State as the Rules and Regulations governing working hours and time off filed by the respondent State agency made no provision for the payment of accrued sick leave upon the termination of employment. *Price v. Department of Pub. Safety* (No. D-924) 4

STATE AGENCIES

Where the claimants were employed as farmers on State owned farms by the Department of Public Institutions, which farms were subsequently placed under the Farm Management Commission which did not retain these employees and as a result the claimants lost accrued annual leave, the Court made an award to these claimants for the annual leave that they would have been paid as the agency expired sufficient funds to pay said claims. *Adams, et al v. Dept. of Public Institutions* (Nos. CC-76-128a, c-t) .. 194

The Court made an award to the claimant for annual leave which he had accumulated during his employment by the respondent State agency for which he had not been paid at the time of the termination of his employment as the Attendance and Leave Regulations of the Board of Public Works, promulgated on May 28, 1968, provided for the payment of such annual leave. *Bradbury v. Nonintoxicating Beer Commission* (No. CC-77-30) 274

Claimant was made an award of $10,492.50 based upon an agreement whereby the claimant provided toilets in a disaster area in Logan County, West Virginia, but due to a merger of two State agencies, the claimant had not been paid for said services. *Cadle v. Office of Emergency Services* (No. D-1006) 83

Where the claimant had a contract with the respondent to charge for 90 percent of its regular billing charges for patients sent to it by the respondent, the respondent will be held to the contract as a letter to modify said contract constituted a unilateral agreement only and not binding upon the claimant. *Charleston Area Medical Center, Inc. v. Division of Vocational Rehab.* (No. D-1014) 101

Where funds of the respondent were available at the end of the fiscal year but were exhausted after the end of the fiscal year, the Court ordered payment of the claimants for jury fees holding that the expiration of the funds simply deprived the claimants of their immediate satisfaction or

remedy of recovery not the legality of the claims notwithstanding the fact that there was a delay in presenting the vouchers for reimbursement. *Day and Wright v. State Auditor* (Nos. D-944 and D-963) 42

Where the legislature failed to appropriate funds for expenditure in the proper fiscal year for the payment of unemployment taxes due and payable by two hospitals to the West Virginia Unemployment Compensation Commission, it would not have been proper for the Commissioner to pay the taxes when no funds were available. *Dept. of Employment Security v. Dept. of Public Institutions* (Nos. D-798a&b) 6

The Court issued an advisory opinion where one State agency sold automotive supplies, gasoline and two trucks to another State agency for which that agency was not able to make payment as it overexpended its budget, the Court indicated that payment should not be made based upon the decision in *Airkem Sales and Service, et al v. Department of Mental Health*, 8 Ct. Cl. 180 (1971). *Dept. of Highways v. Dept. of Public Institutions* (No. CC-76-128) 207

Even though there were no statutory procedures for the State to authorize the refund of a fine paid, the Court held that it had jurisdiction to effect a refund based upon W. Va. Code 14-2-13, which authorizes the Court to make an award in claims against the State where the State in equity and good conscience should pay, as any other result would constitute unjust enrichment to the State of West Virginia. *Duvernoy v. Auditor & Treasurer* (No. D-905) 63

The Court reversed a prior decision making an award to the claimant where the Court was informed that the claimant's annual leave had been transferred from one State agency to another and therefore, the claimant was not entitled to an award for annual leave which was involved in the prior decision. (See Adams et al v. Public Institutions, CC-76-128a, c-t, p. 194). *Poling v. Dept. of Public Institutions* (No. CC-76-128m) 208

See also *Rocchio v. State Auditor* (No. D-1022) 86

Where final approval for a wage increase was not received by the department until November 14, 1975, and the policy of the department was to exempt employees retired prior to that time from the salary increase even though it was applied retroactively to other persons on the payroll, the claimant was not entitled to said retroactive pay raise as she had retired effective October 31, 1975, therefore the Court disallowed her claim. *Simms v. Dept. of Highways* (No. CC-77-86) 248

The Court rendered an advisory opinion concerning the State's liability for payment of accrued annual leave indicating that liability did exist and the employee involved should be paid for his annual leave. *Slack v. Public Employees Ins. Bd.* (No. CC-77-105) 272

Where claimants supplied merchandise and services to a department of the State but the funds of the department were transferred to a new commission at the end of the fiscal year, the Court made awards to the claimants for said merchandise and services as there would have been sufficient funds to pay for said claims if the transfer had not been made. *Southern States Morgantown Cooperative, Inc., et al v. Dept. of Public Institutions* (No. CC-76-140) 250

The Court reversed a prior decision in which it had made an award to the claimant as the State agency involved notified the Court that there were insufficient funds with which to pay these claims at the end of the fiscal year, the Court denied the claims on the basis of *Airkem Sales and Service, et al v. Department of Mental Health*, 8 Ct. Cl. 180 (1971). *St. Joseph's Hosp. v. Dept. of Mental Health* (No. CC-76-114a-f) 209

An advisory opinion was issued by the Court indicating that the claimant had legal claim against the respondent for the payment of invoices which were not paid within the proper fiscal year and for which the appropriated funds expired before the invoices could be paid. *W. Va. State Industries v. Dept. of Mental Health* (Nos. D-876a&b) 19

The Court rendered an advisory decision in this claim where the claimant alleged failure of the respondent to pay for goods delivered to the respondent State agency but the respondent failed to pay for the same within the proper fiscal year, certain amounts of the claim should be paid by the respondent State agency but a portion of the claim comes within *Airkem Sales and Service, et al v. Department of Mental Health*, 8 Ct. Cl. 180 as this portion is an over-expenditure. *W. Va. State Industries v. Dept. of Public Institutions* (No. D-811b) 88

STATE SCHOOLS

Claimant was awarded $1500 as compensation for work done in anticipation of a scholarship for college where the work was done under a program presented in a brochure distributed to young people in high schools throughout the State. *James v. Governor and Dept. of Natural Resources* (No. D-785) 31

Where claimant's son, a student at a State school for the deaf and blind, was injured as the result of a fracas between him and another student, the Court held that the guarantee of safety to a student is no more or no less than if the student is enrolled in any other public school and, as the injuries received by the claimant were not forseeable nor did the record reveal any negligence on the part of respondent which was the proximate cause of the accident, the Court disallowed the claim. *Lee v. Board of Education* (No. CC-76-59) 266

Where the evidence disclosed that students in a State school for the deaf and blind are enrolled on a voluntary basis and that the school attempts to create an atmosphere where the student could pursue a near normal life, the guarantee of safety of the students is no more or no less than if the student is enrolled in any other public school. *Lee v. Board of Education* (No. CC-76-59) 266

STATUTES

Where a motor carrier purchased an excess supply of uniform identification cab cards for the registration identification of its vehicles operating in West Virginia, the Court refused to make an award for the excess stamps as there is statutory provision for motor carriers to file for one or more supplemental applications if the need arises and motor carriers need not purchase an abundant supply and thus end up with an excess. *Ace Doran Hauling & Rigging Co. v. Public Service Commission* (No. D-1000) 140

Where the claimant motor carrier purchased 200 motor carrier stamps in excess of the amount that it would need and offered to return these stamps to the respondent for a refund, the respondent, having no statutory authority to make such refund, refused the same and the Court held that to allow the claim would result in every motor carrier doing business with this State filing a claim for the cost of any unused identification stamps which was not intended in the statutory provisions, the claim was denied. *Ace Doran Hauling & Rigging Co. v. Public Service Commission* (No. D-1000) 140

A motion to dismiss a claim for compensation for property taken by eminent domain by the respondent over and above a judgment entered by a Circuit Court was sustained by the Court as claims of this nature are excluded from the jurisdiction of the Court under the provisions of the West Virginia Code, Chapter 14, Article 2, Section 14 (5). *Anton v. Dept. of Highways* (No. CC-76-45) 229

Where a claimant filed for damages to his home and property as the result of a landslide, the Court held that the statute of limitations does not run where there is a continuing and intermittant trespass to real estate but there could be no recovery for damage sustained more than two years prior to the filing of the claim and therefore the damages to the home of the claimants which were sustained more than two years prior to this action are not recoverable. *Block v. Dept. of Highways* (No. CC-76-4) 195

Even though there were no statutory procedures for the State to authorize the refund of a fine paid, the Court held that it had jurisdiction to effect a refund based upon W. Va. Code 14-2-13, which authorizes the Court to make an award in claims against the State where the State in equity and good conscience should pay, as any other result would constitute unjust enrichment to the State of West Virginia. *Duvernoy v. Auditor & Treasurer* (No. D-905) 63

Where the claimant was tried, convicted, sentenced, fined $1,000.00, then placed on probation after paying said fine and the indictment was later dismissed, the portion of the fine paid was directed by the Circuit Court to be returned to the claimant but there was no statutory provision by which said fine could be refunded, the Court made an award to the claimant. *Duvernoy v. Auditor & Treasurer* (No. D-905) 63

Where the claimant sought recovery for expenses incurred during condemnation proceedings wherein claimant's property was condemned, the Court held that it had no jurisdiction under West Virginia Code 14-2-14 which excludes from the jurisdiction of this Court a proceeding which could be maintained against the State in a State court. *Hoover v. Dept. of Highways* (No. D-769) 109

Where the damages for which the claimant filed his claim had occurred more than two years prior to the filing of the claim, the Court held that it could not take jurisdiction as the claim was barred by the statute of limitations pursuant to West Virginia Code 14-2-21. *Wine v. Dept. of Highways* (No. D-985) 109

STIPULATION AND AGREEMENT

Where the claimant and respondent stipulated that the proximate cause of the land movement which caused damage to the claimant's dwelling was the improper drainage on the highway and failure of the respondent to maintain the existing drainage, the Court made an award to the claimants in the amount stipulated between the parties. *Casto v. Dept. of Highways* (No. D-744) 259

Where employees of the REAP Division of the Department of Highways removed the wrong vehicle which sustained damages while in REAP's possession, the Court made an award to the claimant based upon a stipulation submitted by the claimant and the respondent. *England v. Dept. of Highways* (No. CC-76-50) 210

Claimant was made an award based upon a stipulation entered by the claimant and the respondent which indicated that the claimant had fallen through a hole in a bridge where respondent was aware of the deteriorating condition of said bridge but had effected no repairs until after claimant's accident, the Court concluded that liability existed and that the proposed settlement was fair and equitable. *Kelly v. Dept. of Highways* (No. CC-76-29) 214

Where the respondent maintained an open storage dump for road salt above claimant's property which resulted in drainage onto claimant's property rendering the well water undrinkable, the parties stipulated the amount of the damages and the Court made an award in that amount. *Kolesar v. Dept. of Highways* (No. D-992) 271

Where the claimant and respondent agree by stipulation that slippage of a road resulted in damage to the property of the claimant and the amount of the claim has been stipulated and is a fair and reasonable valuation of the damages, the Court will make an award to the claimant in that amount. *White v. Dept. of Highways* (No. D-751) 148

STREETS AND HIGHWAYS—See also Falling Rocks; Landslides; Motor Vehicles; Negligence

Where claimants theory of liability was based upon the doctrine of apparent agency, the Court held that this theory is not applied to cases involving

public officers and employees and the claim was disallowed. *Adams, et al v. Dept. of Highways* (No. D-1011) 227

Where the claimant was traveling on a primary road and unavoidably struck an unusually deep and wide hole in his lane of traffic, the Court will make an award to the claimant for the damages sustained to his automobile. *Baker v. Dept. of Highways* (No. D-933) 48

Where the claimants alleged that a substance on the pavement caused the vehicle to slide but there was no evidence that the presence of the substance was caused by negligence on the part of the respondent, the Court denied the claims. *Barker v. Department of Highways* (Nos. 966a&b) 187

Where a claimant sustained personal injuries in an accident which he alleged to be the result of failure of the respondent to erect warning signs indicating to a motorist that he was approaching a sharp curve, the Court held in accordance with past decisions of both this Court and the West Virginia Supreme Court of Appeals that the duty to erect guard rails, center lines or danger signals at a particular location was discretionary and such failure did not constitute negligence. *Bickerstaff v. Dept. of Highways* (No. D-746) 254

See also *Brassfield v. Department of Highways* (No. D-970) 24

Where the claimant is able to observe the edge and surface of the road and has sufficient room on his side of the road to operate his vehicle with safety, he should stay in his lane of traffic; therefore, a claim will be denied as claimant's contributory negligence bars recovery. *Butcher v. Dept. of Highways* (No. D-967) 49

Where the claimant was granted a permit to place a utility line within the State's right of way and one of the provisions of the permit was to save the respondent harmless from any damage or recourse whatsoever arising from the permission granted under the permit, the Court held that the provision was contrary to public policy and therefore invalid. *C & P Telephone Co. v. Dept. of Highways* (No. D-674) 25

Claimant was made an award for damage to his automobile when he struck a loose slab of concrete which completely stopped the car and caused the car to be lodged on the piece of concrete as the condition of the road was such that the respondent should have known of the dangerous condition and should have repaired the same. *Crockett v. Dept. of Highways* (No. D-790) 38

Where the condition which developed on the highway in the breaking up of the pavement should have been anticipated by the respondent, its failure to investigate the break up of the concrete base and the dislodgement of the portions thereof constituted negligence, which negligence resulted in a dangerous condition causing the damage which the claimant suffered. *Crockett v. Department of Highways* (No. D-790) 38

Where the claimant alleged damage to his automobile when he struck a hole in the road, the Court held that if the claimant was travelling at the modest rate of 25 miles per hour as alleged and had adequate headlights, he should have seen a hole of the size complained of and he would not have struck the hole with such force as to rupture two tires; therefore, the Court denied the claim. *Davis v. Dept. of Highways* (No. CC-76-18) 150

Where the road was straight and the claimant was traveling at a moderate rate of speed, the case falls within the purview of many prior holdings of the Court wherein the Court held that the State is not a guarantor of the safety of its travelers on its roads and bridges, and users of the highway travel at their own risk as the State cannot and does not assure a safe journey. *Dickinson v. Dept. of Highways* (No. D-938) 72

Where there is nothing in the record to show that the failure of the State to erect and maintain falling rock signs had any cause or connection with the accident complained of by the claimant, the Court will deny the claim. *Dickinson v. Dept. of Highways* (No. D-938) 72

The Court made an award to the claimant for damage sustained to his vehicle when he pulled off the traveled portion of the road and his automobile went into a storm sewer drain 18 inches below the surface of the roadway where the preponderance of the evidence established that the respondent negligently created a dangerous condition along the berm of the road and such negligence was the proximate cause of the accident. *Eastes v. Dept. of Highways* (No. CC-77-41) 283

Claimant was made an award for damages to her automobile which were sustained when she struck a hole in the road of which she was aware but which she was unable to avoid due to a narrow berm and rock cliff on one side and a vehicle approaching in the opposite lane of traffic and the evidence revealed that the respondent had notice of the defect some 6 months prior to claimant's accident. *Giles v. Dept. of Highways* (CC-76-43) 212

See also *Gregory v. Department of Highways* (No. D-972) 98

Even though road construction signs may have been properly in place where the claimants came upon a hazardous condition suddenly and without sufficient warning and the condition of the road was the result of negligence of the respondent, the Court made awards to the claimants. *Hale and Wingate v. Dept. of Highways* (Nos. D-842 and D-843) 93

Respondent was found to be negligent when its employees filled in a hole in the highway with slag and pea gravel which proved to be unstable when subjected to heavy traffic creating a hazardous condition which resulted in injuries to the claimants. *Hale and Wingate v. Dept. of Highways* (Nos. D-842 and D-843) 93

The unexplained falling of a rock onto a highway without a positive showing that the respondent knew or should have known of a dangerous condition or could have anticipated injury to personal property the evidence is insufficient to justify an award to the claimant for an accident resulting when the claimant struck a rock in the road. *Hammond v. Dept. of Highways* (No. D-796) 234

Claimant was made an award of $12,039.52 for injuries sustained by him in an accident where the Court found that the claimant was driving at a lawful rate of speed and without knowledge or warning of the same, the claimant drove into a slip which caused him to lose control of his vehicle, as the evidence revealed that the respondent knew of the slip but had failed to provide warning signs or to correct the condition. *Harmon v. Dept. of Highways* (No. D-1016) 107

Claimant was denied recovery for damages alleged to have occurred to his automobile when he struck a large rock in the road which he alleged resulted from a rock slide off of the hill adjacent to the road, as the claimant admitted in his own testimony that his failure to see the rock resulted from a lack of concentration. *Huffman v. Dept. of Highways* (No. D-771) 9

Where there was no evidence in the record to show that the respondent had any knowledge that a manhole cover had in some manner gotten into the street, the Court held that the well established law in West Virginia is that the State is not an insurer of its highways and the user thereof travels at his own risk and the Court found the respondent free of negligence and disallowed the claim. *Hutchens v. Dept. of Highways* (No. CC-76-5) 153

Where there was no proof in the record to show that the respondent had any notice of the dangerous condition in the highway nor was there any proof of negligence on the part of the respondent, the Court held that the user of the highway travels at his own risk. In the instant claim the claimant's automobile was damaged when the driver of the vehicle struck a hole in the road. *Jeter v. Dept. of Highways* (No. CC-76-20) 154

Claimant was awarded $58.00 for damage to her automobile which resulted from tar splashing on her automobile when she was directed by a flagman to proceed into an area where fresh tar had just been placed upon the highway by employees of the respondent and claimant was not in-

formed of this fact, as such failure on the part of the employees of the respondent established negligence. *Kelly v. Dept. of Highways* (No. D-882) 12

Claimant was awarded $38.37 for damage to his automobile where he struck a hole in the road on U.S. Route 60 east of Charleston, which is a very heavily travelled highway in the State and deserves more attention from a maintenance standpoint than possibly some secondary roads in remote areas. *Lohan v. Dept. of Highways* (No. D-910) 39

The respondent, while not an insurer of its highways, does owe a duty of exercising reasonable care and diligence in the maintenance of its highways; therefore, if the respondent knew or should have known of the defect in the highway, it must take the necessary steps within a reasonable period of time to repair the defect such as a hole in the road which claimant struck at night and sustained damage to his automobile therefrom. *Lohan v. Dept. of Highways* (No. D-910) 39

The Court disallowed claimant's action where the evidence established that the negligence of the claimant caused her to fall when she stepped into a hole as the claimant was familiar with the site of the accident and with the exercise of reasonable care could have avoided her gwn injury. *Lyons v. Dept. of Highways* (No. D-879) 287

Where the claimant lost control of her automobile resulting in an accident which occurred when she struck an area in the highway where the asphalt had completely disappeared leaving a hole some six to eight inches deep and about 15 feet in length extending from the berm into the traveled portion of the claimant's lane of traffic, the Court made an award to the claimant for the failure of respondent to repair this condition which was the proximate cause of the accident. *Mullins & Stephy v. Dept. of Highways* (No. D-954) 201

Where the respondents failed to repair a dangerous condition in a State road such failure constituted negligence which was the proximate cause of the accident and an award was made to claimants who sustained damages as a result of an accident. *Mullins & Stephy v. Dept. of Highways* (No. D-954) 201

Claimant was made an award for personal injuries which resulted when claimant's automobile struck a large hole covered with water which had existed on a main artery for at least one to two weeks prior to claimant's accident and the preponderance of evidence clearly demonstrated that the respondent should have known of the dangerous condition existing in the roadway. *Plants v. Dept. of Highways* (No. D-672) 78

Where there was not one scintilla of evidence which would prove that the claimant struck potholes alleged to be the proximate cause of claimant's accident and resultant injuries, the Court disallowed the claim as the claimant failed to carry the burden of proof. *Riffle v. Dept. of Highways* (No. D-794) 244

See also *Romeo v. Department of Highways* (No. CC-77-22) 220

It is well settled law that a user of our highways travels thereon at his own risk, and the State does not assure him a safe journey and the Supreme Court of Appeals has further held that the placement of warning signs and guardrails is within the discretion of the Department of Highways. *Snyder v. Dept. of Highways* (No. D-908) 166

Although the Department of Highways is not an insurer for the safety of those using the highways in the State, in those cases where the respondent has had actual notice of a deplorable and dangerous condition in a road it should take steps to remedy the condition for motorists who are required to use such road and since the claimants in the instant claim were injured as the result of the dangerous condition of the road, the Court made awards to the claimants. *Sowards, et al v. Dept. of Highways* (No. D-865) 299

Where claimants were injured as the result of striking a hole in the road and the testimony indicated that the road was not maintained in a reasonably safe condition and that the respondent through many notices knew

or should have known of the condition of the road, the Court made awards to the claimants for their injuries. *Sowards, et al v. Dept. of Highways* (No. D-865) 299

See also *Tucker v. Department of Highways* (No. CC-77-14) 302

Where the claimant alleged injuries due to a fall in a hole in a road which claimant had crossed on frequent, previous occasions in daylight and after dark, the Court held that with the exercise of reasonable care she could have avoided her injury. *White v. Dept. of Highways* (No. D-758) 138

It is well established law in West Virginia that the State is not an insurer of its highways, and, if there is not a preponderance of proof of negligence on the part of the State's employees, the user of a highway travels at his own risk. The Court used this reasoning in denying a claim where the claimant's automobile unavoidably struck a broken tree limb hanging out into claimant's lane of traffic. *Widlan v. Dept. of Highways* (No. CC-76-1) 149

Where the claimant's automobile was damaged when the claimant struck a broken tree limb hanging out into her lane of traffic the Court held that while the respondent in such a case may not unreasonably delay the removal of a hazardous obstruction upon a State highway, neither will liability arise until the respondent knows or should know that a hazard exists. *Widlan v. Dept. of Highways* (No. CC-76-1) 149

Where the respondent constructed a hard-surface road not wide enough for two lanes of traffic to pass and knew that the traveling public would have to use the berm in order to pass an approaching vehicle which berm gave way through no fault of the claimant, the respondent was held liable for a dangerous condition. *Wilson v. Dept. of Highways* (No. D-885) 139

TAXATION

Where a motor carrier purchased an excess supply of uniform identification cab cards for the registration identification of its vehicles operating in West Virginia, the Court refused to make an award for the excess stamps as there is statutory provision for motor carriers to file for one or more supplemental applications if the need arises and motor carriers need not purchase an abundant supply and thus end up with an excess. *Ace Doran Hauling & Rigging Co. v. Public Service Commission* (No. D-1000) 140

Where the claimant motor carrier purchased 200 motor carrier stamps in excess of the amount that it would need and offered to return these stamps to the respondent for a refund, the respondent, having no statutory authority to make such refund, refused the same and the Court held that to allow the claim would result in every motor carrier doing business with this State filing a claim for the cost of any unused identification stamps which was not intended in the statutory provisions, the claim was denied. *Ace Doran Hauling & Rigging Co. v. Public Service Commission* (No. D-1000) 140

Claimant was made an award of $24,474.67 for unused, prepaid tax crowns and lids it had in its possession when it discontinued doing business in W.Va. for which the Beer Commission could not reimburse the claimant, as any other decision would result in unjust enrichment to the State. *The F. & M. Schaefer Brewing Co. v. Nonintoxicating Beer Commission* (No. D-904) 73

Where the respondent recognized and admitted that there was only one completed transaction and the State was entitled to only one tax but due to circumstances beyond the control of the claimant, two license taxes were paid for the same vehicle, the Court will make an award to the claimant as retaining the duplicate tax would constitute unjust enrichment. *Mid-Mountain Mack, Inc. v. Dept. of Motor Vehicles* (No. D-962) 90

Claimant was made an award for crowns and lids purchased by it from the respondent but unused when its operations ceased, as it would constitute unjust enrichment to the State if the claimant is not to be reimbursed for said expenditure. *The Queen City Brewing Co. v. Nonintoxicating Beer Commission* (No. D-923) 100

TRAVEL EXPENSES

An award was made to the claimant for travel expenses incurred by the claimant while on official business for the respondent State agency which were not paid by the agency due to its negligence in losing the documentation of the travel expenses submitted by the claimant. *Neal v. Dept. of Mental Health* (No. CC-76-7) 170

TREES AND TIMBER

See *Jefferson v. Department of Highways* (No. D-1023) 90

See also *Pittsenbarger v. Department of Highways* (No. CC-76-83) 204

See also *Toppings v. Department of Highways* (No. D-987) 156

Where an employee of the respondent was operating a chain saw to remove tree limbs on the grounds of the respondent and in doing so he negligently caused a limb from a tree to fall against claimant's automobile damaging the same, the Court made an award to the claimant for said damage. *Partlow & Inland Mutual Ins. Co. v. Dept. of Mental Health* (No. D-981) 44

Claimants were made an award for loss of timber where it was apparent that respondent's employees were guilty of negligence in failing to take sufficient precautions to prevent the ignition of leaves near a signpost where the employees were using an acetylene torch. *Perkins & Hamrick v. Dept. of Highways* (Nos. CC-76-57 and CC-76-58) 242

Claimants were made an award for timber loss where a secondary fire attributable to the reawakening of the first fire caused said damages as the first fire was the result of negligence on the part of respondent's employees. *Perkins & Hamrick v. Dept. of Highways* (Nos. CC-76-57 and CC-76-58) ... 242

The claimant alleged damage to his automobile as the result of two tree limbs striking claimant's automobile but, as there was no evidence that the tree was rotten, and the incident occurred during a storm, the Court denied the claim as being an act of God for which the respondent can not be held responsible or liable even though it occurred on the premises of the respondent. *Shortridge v. Dept. of Highways* (No. D-984) 45

Where the claimant's automobile was damaged when the claimant struck a broken tree limb hanging out into her lane of traffic the Court held that while the respondent in such a case may not unreasonably delay the removal of a hazardous obstruction upon a State highway, neither will liability arise until the respondent knows or should know that a hazard exists. *Widlan v. Dept. of Highways* (No. CC-76-1) 149

See also *Westfield Insurance Company, subrogee of David Sago v. Department of Highways* (No. D-859) 15

TRESPASS

Where the respondent entered a contract under which the respondent retained only such control and supervision as was necessary to assure that the plans and specifications were followed but did not control or supervise the contractor's work or the employees, the Court held the supervision by the respondent was not such control as to create a master-servant relationship as the contractor was an independent contractor. Accordingly the word "principal" as used in the release executed by claimants to the contractor for damages to real estate when the contractor trespassed upon claimant's property also released the respondent. *Hundley v. Dept. of Highways* (No. D-941) 284

Where a surplus Army tank was placed by the respondent on the lawn in front of an Armory, which was open to the public including small children, without any limit or restraint, the Court held that the claimant was not a trespasser. *Tabit v. Adjutant General* (No. D-795) 174

WAGES

The Court disallowed a claim by an associate professor of Concord College for an additional one year's salary as the Court held that his last year was a terminal one in compliance with the Faculty Handbook relating to tenure, which was in effect at the date of his termination notice. *Burgher v. Board of Regents* (No. CC-76-64) 275

Claimant, Deputy Director of the Department of Mental Health, was awarded $1,020.00 as the sum due and owing from the respondent State agency to the claimant as salary properly payable to him for his raise for the fiscal year where the claimant had refrained from giving himself the raise in order that all other members of the Department might have their increases first, and as a result the claimant's raise was granted to him at the end of the fiscal year but the fiscal year ended before his personal salary increase could be encumbered properly. *Clowser v. Dept. of Mental Health* (No. D-913) 35

See also *Cox v. Department of Mental Health* (No. CC-77-20a) 260

See also *McPherson v. Department of Mental Health* (No. CC-77-20b) 260

See also *Racer v. Department of Mental Health* (No. CC-77-20c) 260

Where final approval for a wage increase was not received by the department until November 14, 1975, and the policy of the department was to exempt employees retired prior to that time from the salary increase even though it was applied retroactively to other persons on the payroll, the claimant was not entitled to said retroactive pay raise as she had retired effective October 31, 1975, therefore the Court disallowed her claim. *Simms v. Dept. of Highways* (No. CC-77-86) 248

WATERS AND WATERCOURSES—See also Drains and Sewers

Where expert witnesses for both the claimant and the respondent testified that continuous saturation by water of the hillside above the claimants over a period of many years was the direct cause of the downslope movement of the land causing the damages to the property without sufficient proof that acts or omissions by the respondent were the direct or proximate cause, the Court will disallow the claim. *Caldwell, et al v. Dept. of Highways* (Nos. D-690 et al) 50

Where the claimants alleged that the respondent was negligent in the maintenance of their road and collected surface water diverting the same through culverts and casting the same upon their land causing damage thereto, the respondent will not be held liable unless he substantially changed the course of the flow of the water down the hillside from the time the culverts were installed on the road. *Caldwell, et al v. Dept. of Highways* (Nos. D-690 et al) 50

A claim for damage to real estate due to surface water will be denied where all of the evidence, direct and circumstantial, indicate that claimant did not provide adequate protection against the ever-present water hazard as he is required to do by law. *Holdren v. Dept. of Highways* (No. D-607) 75

Claimants damage to real estate allegedly caused by water flowing off a mountainside from a State highway located 1,000 feet above the claimant was denied where the Court held that the respondent exercised reasonable care and diligence in the maintenance of its highways as surface water is considered a common enemy which each landowner must fight off as best he can, provided that the owner of higher ground cannot inflict damages to an owner of a lower ground beyond which is reasonably necessary. *Holdren v. Dept. of Highways* (No. D-607) 75

Where the claimant alleged that surface water caused damage to his real estate, the Court held that one storm did not cause the destruction of claimant's home, but over the years the supporting ground had become so

saturated that it had become unstable and could not support the structure. *Holdren v. Dept. of Highways* (No. D-607) 75

A given amount of surface water following its given natural course may not cause damage but if that same volume of water is diverted from its natural channels by artificial means in the Court's opinion it can be turned into a destructive force, especially where the uncontradicted testimony of the claimants established that their problems did not begin until after the construction of the new road which was alleged to have caused all of the water problems which the claimants experienced on their property. *Lafferty v. Dept. of Highways* (No. CC-76-44) 239

Claimant was made an award of $3,000.00 for damages to their barn when the respondent negligently allowed a culvert to become plugged resulting in a slip which eventually extended to the barn of the claimants causing damage thereto. *Melrose v. Dept. of Highways* (No. D-629) 57

Where the claimant alleged that a road adjacent to his property had been negligently graded by an employee of the respondent resulting in water drainage flowing down the road causing rocks to be left in the road which in turn were thrown against his house by automobiles using the road and the evidence revealed that the road had always been a natural rocky drain down the mountain, the Court disallowed the claim. *Robinette v. Dept. of Highways* (No. D-982) 182

WELLS

Where the respondent maintained an open storage dump for road salt above claimant's property which resulted in drainage onto claimant's property rendering the well water undrinkable, the parties stipulated the amount of the damages and the Court made an award in that amount. *Kolesar v. Dept. of Highways* (No. D-992) 271

Where blasting operations by the respondent resulted in damage to the claimant's property, the Court followed the rule of law established by West Virginia Supreme Court in the case of *Whitney v. Ralph Myers Contracting Corporation*, 146 W.Va. 130, 118 S.E. 2nd. 130 (1961) and made an award to the claimants. *Teets v. Dept. of Highways* (No. CC-76-3) 225

With respect to damage to real estate and a residence resulting from blasting operations conducted by the respondent, the measure of damage is the difference between the fair market value of the property prior to the blasting and the fair market value of the property after the blasting operations have been concluded. *Teets v. Dept. of Highways* (No. CC-76-3) 225

Where employees of the respondent improperly plugged an abandoned gas well causing claimant's well to be contaminated and thus unusable, the Court made an award for the cost of drilling a new well. *Underwood v. Dept. of Mines* (No. CC-76-53) 262

Where respondent's employee while filling a slip accidentally caused mud to slide into and permeate claimant's well ruining said well and claimant had to have a new well drilled, the Court made an award to the claimant for the actual cost of drilling the well. *Wray v. Dept. of Highways* (No. CC-76-87) 252

W.VA. UNIVERSITY—See Board of Regents; Colleges and Universities

WORKMEN'S COMPENSATION FUND

Where the claimant had bid on remodeling work to be performed by a State agency and his bid was not the low bid but he was advised by the Division of Purchasing to proceed with the work which was performed in a manner satisfactory to the respondent, the Court made a full award to the claimant based upon his contract bid. *Peck Brogan Building & Remodeling v. Workmen's Comp. Fund* (No. D-1012) 145

Where the claimant received written and oral notification from the Division of Purchasing that he was a successful bidder and was instructed by an agent of the department involved to proceed with the work, the Court held that to make an award other than the full amount of the bid which the contractor submitted where the work was done in a satisfactory manner would be unconscionable. *Peck Brogan Building & Remodeling v. Workmen's Comp. Fund* (No. D-1012) 145

Where the testimony revealed that the purchase order directing the claimant to perform remodeling work was not issued due to an inter-agency dispute, the Court made an award to the claimant for the work performed based upon the bid price. *Peck Brogan Building & Remodeling v. Workmen's Comp. Fund* (No. D-1012) 145