STATE OF WEST VIRGINIA

Report

of the

Court of Claims

For the Period from July 1, 1991

to June 30, 1993

By

CHERYLE M. HALL

Clerk

Volume XIX

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

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Letter of Transmittal

To His Excellency
The Honorable Gaston Caperton
Governor of West Virginia

Sir:

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

Respectfully Submitted,

Cheryle M. Hall,
Clerk

Terms of Court

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OPINIONS

OPINION ISSUED JULY 9, 1991

ALLEN FUNERAL HOME
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-91-146)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

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

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

Award of $400.00.

OPINION ISSUED JULY 9, 1991

WILLIAM H. BELL AND WANDA R. BELL
VS.
DIVISION OF HIGHWAYS
(CC-89-159)

Michael E. Froble, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

BAKER, JUDGE:

On May 12, 1989, claimants, husband and wife, brought this action against respondent for failure to properly maintain drains, culverts, and related road structures adjoining and fronting their residence beside U.S. Route 52, claimants contend that water flowed onto their property causing damage thereto.

The critical issue to be addressed is not one of negligence, but whether the claim was timely filed. If claimants waited too long to bring action, the two-year Statute of Limitations, having expired before the filing of the claim, will bar consideration. The Court, under the provisions of W.Va. Code §14-2-21, has no jurisdiction over a claim which is not filed within the time specified by the applicable statute of limitations. Under W.Va. Code §55-2-12, this claim must have been brought within two years from the date of injury. This provision commences the running of the two-year limitation, "after the right to bring same shall have accrued, if it be for damage to property." The two years began to run upon the date when the damages would have been detected. Damages were known to claimants more than two years prior to the filing of the claim. The claim was filed with this Court May 12, 1989. If the alleged injury of water damage to claimant's house, sidewalk, and retaining wall was determined to have occurred in 1984, the claim must be dismissed, as the Court lacks jurisdiction to consider a matter so untimely filed.

Claimants aver that although damage was first observed in 1984, the damage was "continuing all the way up until 1987, so as of May 1987, there was still damage." Claimants argue that W. Va. Code §55-2-12 as interpreted by Handley v. Town of Shinnston, 169 W.Va. 617, 289, S.E.2d 201, "would seem to indicate that where there are continuing damages, that the accrual is the date of last injury which would be the (1987) date of repair," rather than the earlier (1984) date when damage was first determined. Claimants' argument of a continuing damage theory until 1987 has not been established by the evidence. Claimant's own expert witness, John E. Caffrey, stated that he believed that damage was caused by the respondent's "eighteen inch pipe" at the connection to a twelve inch pipe on claimant's property. Respondent's witness, William R. Bennett, an assistant district engineer situate in claimants' community, testified that repairs to the connection of the two pipes as well as repairs to the eighteen inch pipe under U.S. Route 52 were effected by respondent on or about May 6, 1985. Further maintenance was performed by respondent in May 1987. A fifteen inch culvert was placed within the eighteen inch culvert. Respondent contends that this was done to appease the claimants not because there were problems or leaks from the pipe under U. S. Route 52. It is the opinion of the Court that claimants' cause of action would have commenced no later than May 1985, and would have expired as of May 1987. The filing in May of 1989 was not within the applicable statute of limitations. Therefore, the Court lacks jurisdiction to hear this claim, and it must be disallowed.

Claim disallowed.

OPINION ISSUED JULY 9, 1991

E & M PRODUCTS, INC.
VS.
DIVISION OF CULTURE AND HISTORY
(CC-91-154)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $36.00 for the monthly connection fee of a fire alarm system provided the Independence Hall, a facility of the respondent in Wheeling, West Virginia. The invoice for the fee was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $36.00.

Award of $36.00.

OPINION ISSUED JULY 9, 1991

CHARLES R. HERRIOTT
VS.
RAILROAD MAINTENANCE AUTHORITY
(CC-91-147)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant's vehicle sustained damage to two tires when claimant was driving the vehicle over a railroad crossing owned and maintained by the respondent State agency. The railroad ties at the crossing were not properly maintained, and an exposed spike at the crossing punctured the tires on claimant's vehicle. Respondent admits the facts of the claim and that the amount claimed is fair and reasonable.

Accordingly, the Court makes an award to claimant in the amount of $113.37 for the damage to his vehicle.

Award of $113.37.

OPINION ISSUED JULY 9, 1991

FRANK R. LAVENDER, JR.
VS.
DEPARTMENT OF PUBLIC SAFETY
(CC-91-121)

Claimant appeared in person.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,876.00 for back wages from the respondent. Claimant served as Acting Logistics Officer with the respondent, under a special Order, but was not compensated for the additional responsibilities commensurate with rank. The data submitted for the wage disparity was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,876.00.

Award of $1,876.00.

OPINION ISSUED JULY 9, 1991

MOORE BUSINESS FORMS, INC.
VS.
STATE TREASURER
(CC-91-134)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $379.00 for equipment provided respondent. The invoice for the equipment was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $379.00.

Award of $379.00.

OPINION ISSUED DECEMBER 2, 1991

ASSOCIATED RADIOLOGISTS, INC.
VS.
DIVISION OF CORRECTIONS
(CC-91-216)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $28.00 for medical services provided an inmate in the custody of the respondent State agency.

Respondent, in its Answer, admits the validity of the claim, but states that there were sufficient funds in it appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED DECEMBER 2, 1991

AT&T COMMUNICATIONS
VS.
DIVISION OF CORRECTIONS
(CC-91-65)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $318.92 for telecommunication services provided respondent.

Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED DECEMBER 2, 1991

BARBOUR COUNTY SHERIFF'S DEPARTMENT
VS.
DIVISION OF CORRECTIONS

(CC-91-250)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $5,888.50 for housing and medication provided inmates in the Barbour County Jail.

Respondent, in its Answer, admits the validity of the claim, but states that there were sufficient funds in its appropriation for the fiscal year in question from which to pay this claim.

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

Claim disallowed.

OPINION ISSUED DECEMBER 2,1991

PAUL A. BLAIR, M.D.
VS.
DIVISION OF CORRECTIONS
(CC-91-212)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $380.00 for medical services rendered to an inmate in the custody of the respondent State agency.

Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED DECEMBER 2, 1991

CAMDEN-CLARK MEMORIAL HOSPITAL

DIVISION OF CORRECTIONS
(CC-91-223)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $9,091.95 for medical services rendered to an inmate in the custody of the respondent State agency.

Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED DECEMBER 2, 1991

HARRY ELLIS, JR., AND ROSIE ELLIS, AS PARENTS AND GUARDIAN
OF KIMBERLY D. ELLIS, THEIR DAUGHTER, AND
KIMBERLY D. ELLIS, INDIVIDUALLY
VS.
DIVISION OF HIGHWAYS
(CC-86-163)

William Steele, Attorney at Law, for claimants.
James D. Terry and Glen A. Murphy, Attorneys at Law, for respondent.

PER CURIAM:

On April 20, 1989, Kimberly Ellis was driving in a southerly direction on Indian Creek Road when she lost control of the 1978 Chevrolet Nova she was operating, and her vehicle struck a tree located at Dean's Trailer Park, near the community of Pinch of Kanawha County. The tree was off the road and down an embankment. Claimant Kimberly Ellis sustained massive and disabling physical injuries.

Claimant allege negligence on the part of respondent for failing to have placed guardrails on the site of the road at the scene of the accident. It is uncontroverted that the accident site was without a guardrail.

The investigating officer, Deputy R. W. Starks, of the Kanawha County Sheriff's Department, expressed an opinion that guardrails were needed in the described area, and that guardrails were installed by respondent subsequent to claimant Kimberly Ellis' accident.

Charles Raymond Lewis, Planning and Research Engineer for the respondent, testified that claimant Kimberly Ellis' accident was the "first in what was more or less a string of accidents along there." (Tr. Vol. I, at p.8.).

This Court has consistently followed the precedent established by the W. Va. Supreme Court in *Adkins v. Sims, 130 W. Va. 645, 46 S.E.2d 81 (1947)* wherein that Court, in addressing the issue of guardrails or a lack thereof, stated:

> We do not think the failure of the state road commissioner to provide guard rails and road markers, 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 another, on whether it should provide guard rails, center lines or danger signals at that point, is an act of negligence...
> We do not mean to say that situations may not arise where the failure of the road commissioner properly to maintain a highway, and guard against accidents, occasioned by the condition of the road, may not be treated as a such positive neglect of duty as to create a moral obligation against the State, for which the Legislature may appropriate money to pay damages which proximately resulted therefrom. But this is not such a case....

Counsel for claimant, not mindful of this precedent, requested that the Court allow additional time after the hearing for new evidence to be admitted relative to the issue that respondent may have had notice of a need for guardrails. Counsel proposed to offer testimony by Deputy Stark that he had personally visited respondent's office to request the placement of guardrails in the affected area. However, the Court has been informed that Deputy Stark does not recall if he made his request for guardrails before or after the claimant's accident.

Accordingly, the Court is of the opinion that claimants have not met the burden of proof required to establish negligence on the part of respondent. While the Court is most sympathetic to the tragedy that has befallen claimant Kimberly Ellis, the Court must deny this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 2, 1991

MICHAEL ANTHONY GRALEY AND STEPHANIE SHAWN GRALEY
VS.
DIVISION OF MOTOR VEHICLES
(CC-91-90)

Claimant represents selves.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

This claim in the amount of $238.91 was advanced by the claimants in order to recover taxes paid in the purchase of a new 1991 S-10 Chevrolet truck. The truck was repurchased by the manufacturer due to manufacturer defects. **Claimant did not attempt to recover the described taxes from the manufacturer, General Motors.**

Respondent avers that the Court lacks jurisdiction to allow a refund for sales tax. Respondent, however does stipulate that the sales tax was paid and collected by the State in the described amount of $238.91. It is the opinion of the Court that the claimants lack standing to recover the sales tax in an action in the Court of Claims. WV Code §46A-6A-4(a) et seq. provides in part that in a civil action by a consumer:

> (a) If the nonconformity results in substantial impairment to the use or market value of the new motor vehicle and the manufacturer has not replaced the new motor vehicle pursuant to the provisions of section three [§46A-6A-3] of this article, or if the nonconformity exists after a reasonable number of attempts to conform the new motor vehicle to the applicable express warranties, **the consumer shall have a cause**

> **of action against the manufacturer in the circuit court** of any county having venue.
> (b) In any action under this section, the consumer may be awarded all or any portion of the following:
> © The cause of action provided for in this section shall be available only against the manufacturers.

The claimant had a legitimate cause of action against the manufacturer for a refund of the sales tax or registration fee paid to the State. He did not, for whatever reason, assert or collect it, taking a settlement that did not include provision for the refund of said tax or fee. In the opinion of the Court the State has no moral obligation to make a refund of the tax or fee which the claimant might have collected from the manufacturer.

As this Court lacks jurisdiction over the subject matter of this claim, the Court must deny the claim. See also *Linksweiler vs. Division of Motor Vehicles*, CC-90-295, an unpublished opinion, issued February 22, 1991.

Claim disallowed.

OPINION ISSUED DECEMBER 2, 1991

TIMOTHY L. KEELY AND LINDA J. KEELY
VS.
DIVISION OF HIGHWAYS
(CC-91-122)

Claimant appeared in person.
James D. Terry, and Glen A. Murphy, Attorneys at Law, with Alan Williams, legal intern, for respondent.

PER CURIAM:

On or about 6:30 p.m., January 27, 1991, the claimants' 1989 Chevrolet Cavalier was struck by falling rock at the intersection of State Route 14 (Greenbrier Street) and Hillcrest Drive, Kanawha County. Overhanging the intersection is a 100 foot high cliff. Claimant, Timothy Keely, testified that on the evening in question rock began to fall on their vehicle as they were awaiting the intersection traffic light to turn green. There was a vehicle immediately in front of the claimants' car, and one behind, preventing their escape from the falling rock. A twelve inch by eight inch rock struck the hood of the claimants' car, and a smaller rock chipped their rear window. Repairs to the vehicle were estimated to cost $406.82.

Claimants have a $500.00 deductible on their car insurance, that effectively precludes recovery for the described damage. Fortunately, the claimants and their 12-month-old child were not injured in this accident. However, they have sought to recover the property damage, arguing that respondent was negligent by not maintaining the cliff and safeguarding the traveling public from the hazard.

Testimony is uncontroverted that falling rock signs are absent in the vicinity of the cliff. Timothy Keely testified that he was aware of the falling rock in the area, having previously observed falling rock in the area. Mr. Keely testified that he "grew up in that area and used to travel (Greenbrier Street) every day." When asked how often rock fell, Mr. Keely testified, "...every time it rains." When asked whether he had contacted respondent to inform them of this hazard, Mr. Keely answered "no."

Respondent avers that it is not responsible for the rock fall, and was not otherwise negligent. Respondent's witness, Calvert Mitchell, a road maintenance supervisor, testified that no complaints had been received about rock falls in the accident area.

The case law governing liability for rock falls permits a finding of negligence against respondent, when "it has been demonstrated that respondent knew or should have known that a particular area of highway was dangerous because of frequent rock slides, and adequate precautions to remove the hazard or warn motorists were not taken." *Hammond v. Dept. of Highways*, 11 Ct.Cl. 234 (1977). This Court has additionally held that "the lack of falling rock signs does not make the State liable, without convincing evidence of such a hazard." *Jude v. Dept. of Highways*, 13 Ct. Cl. 28 (1979).

Conversely, claimant testified that he was aware that rock falls occurred in the described area, and had seen rocks in and along the road-side prior to the accident. As the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, the Court must deny this claim. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by the rock fall, it must have had either actual or constructive notice of the condition and a reasonable amount of time to take corrective action *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1977). It appears to this Court that the requisite notice was not provided to respondent. The Court is therefore of the opinion to deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 2, 1991

LIFETEAM EMS AMBULANCE, INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-91-278)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $188.50 for unpaid transportation costs for the retrieval of a corpse to be taken to the Medical Examiner's Office for investigation. The invoice for the transportation costs was processed for payment in the proper fiscal year; however, respondent believed the invoice was excessive and refused all but $27.00 of the invoice. Respondent asserts that the Office of the Medical Examiner may attempt to pay "a reasonable amount set by the Office of the Medical Examiner toward the costs of the transportation of bodies." West Virginia Code §61-12-10(a). The transportation guidelines for the West Virginia Medical Examiner's system provides that "transportation providers will be reimbursed at the rate of $30.00 per trip or $1.00 per loaded mile..." It appears uncontroverted that the total distance transported was twenty-seven miles.

Pursuant to the provision cited by the above-mentioned statute and regulations of the Medical Examiner's Office, the Court holds that the claimant is entitled to only $27.00 of the claimed amount of $188.50. The Court must disallow the amount of $161.50.

Award of $27.00.

OPINION ISSUED DECEMBER 2, 1991

GAYLE MAURANTONIO
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY OF WEST VIRGINIA
(CC-90-336)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $52.75 for damage and destruction of her clothing which occurred when claimant washed her clothing in a machine owned and operated at a West Virginia University housing accommodation, a facility of the respondent. The respondent admits the validity and amount of the claim, and states that the claim has not been paid.

In view of the foregoing, the Court makes an award in the amount of $52.75.

Award of $52.75.

OPINION ISSUED DECEMBER 2, 1991

CAROLYN SUE MCCOY
VS.
DEPARTMENT OF ADMINISTRATION
(CC-91-19)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $108.00 for annual increment pay properly due from respondent. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $108.00.

Award of $108.00.

OPINION ISSUED DECEMBER 2, 1991

NICOLET INSTRUMENT CORPORATION

VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES -
OFFICE OF THE CHIEF MEDICAL EXAMINER
(CC-91-282)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,239.00 for the repair of equipment belonging to respondent. The invoice for the repairs was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,239.00.

Award of $1,239.00.

OPINION ISSUED DECEMBER 2, 1991

JAMES D. RYMER
VS.
ALCOHOL BEVERAGE CONTROL ADMINISTRATION
(CC-91-242)

Claimant present in person.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,274.00 for mileage expenses incurred while performing tasks within the scope of his employment. The invoices for the mileage expenses were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate

fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,274.00.

Award of $1,274.00.

OPINION ISSUED DECEMBER 2, 1991

SYLVIA TORNING
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY OF WEST VIRGINIA
(CC-91-221)

PER CURIAM:

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

Claimant seeks $35.00 for damage and destruction of her personal property alleged to have been caused by the negligence of the respondent. Claimant seeks the replacement cost of her stainless steel cooking pot which was damaged when the stove in her residence at a West Virginia University housing facility malfunctioned. Respondent admits the validity of this claim in the amount of $35.00, but states that funds were not appropriated for the fiscal year in question from which to pay such claim.

In view of the foregoing, the Court makes an award in the amount of $35.00.

Award of $35.00.

OPINION ISSUED DECEMBER 2, 1991

TRI-STATE ASPHALT CORPORATION
VS.
DIVISION OF HIGHWAYS
(CC-91-190) AND (CC-91-191)

Robert J. Samol, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Respondent's Motion(s) to Dismiss were heard by the Court on July 19, 1991 in the following titled matters.

In Claim No. CC-91-190, claimant sought additional compensation for extra work and related expenses arising out of a certain contract for road resurfacing, more specifically identified as the Cross Creek resurfacing in Brooke County, Project No. S305-7-2.02. It appears uncontroverted that the parties entered into a contract for road resurfacing approximately 2/6 miles of this state highway on or about May 29, 1990. Claimant avers that the contract did not include nor adequately compensate it for the installation of shoulder and ditches commensurate with the project. Claimant contends the extra work caused it to incur anticipated and uncompensated costs in the amount of $5,315.44 plus pre-judgment interest. Respondent argued that claimant failed to file a timely and proper claim for the enumerated extra work, as required by Standard Specification 109.8-Acceptance and Final Payment, a provision incorporated by reference and extant within all same or similar state highway construction contracts. **Specification 109.8 requires that the contractor file any claim which it has reserved on the Final Voucher Estimate with the Court of Claims within 120 days of the execution of the Final Voucher Estimate.** It is uncontroverted that claimant did not file a claim for the extra work within the 120 day period. **The Final Voucher Estimate was executed by the claimant on December 7, 1990, and the subject claim was filed on June 6,1991, 181 days later.**

In Claim No. Cc-91-191, claimant sought additional compensation for traffic control expense and a substantive change in the scope of the resurfacing of the McKeffery-Moundsville Road in Marshall County, more specifically designated as Project No. F-0002(162)L (S326-2-15.57). Claimant asserts additional costs of $11,033.79 for the traffic control, and $50,000.00 plus interest for the requested non-performance of a major item of the contract, resulting in loss of contribution to overhead. **The Final Voucher Estimate for the completed project was executed by the claimant on December 11, 1990, and the subject claim was filed on June 6, 1991, 177 days later.**

This Court has previously held that a failure to meet contractually established filing dates is jurisdictional and bars further consideration of the claim. See *Central Asphalt Paving Co. v. State Road Commission on W.Va.*, 9 W.Va. Ct. of Cl. 277 (1973), and more recently, *Tri-State Asphalt Corp. v. W.Va. Department of Highways,* Claim No. CC-88-79, an unpublished Opinion sustaining a dismissal issued April 21, 1989.

Accordingly, upon due consideration of the pleadings, exhibits, written memoranda and argument of counsel, the Court is of the opinion to, and does hereby, sustain respondent's Motion(s) to Dismiss both Claims, CC-91-190 and Cc-91-191.

The Court has been requested to consider whether the 120 day provision is unreasonably limited.

Whether the 120 day period is too limited is a separate and distinct issue. In Central Asphalt Paving Ct. v. The State of West Virginia and the State Road Commission of West Virginia, 9 W.Va. Ct. of Cl. (1973), this Court formally addressed the issue of whether a contractual provision fixing a 90 day limitation, which differs from the time fixed by the general statute of limitations, 10 years, is valid and enforceable. The Court held that 'such contractual provisions fixing a limitation period, **unless precluded by statute or public policy, or unless the same are unreasonable or unreasonably short,** are binding on the contracting parties and will relieve the obligor from the general imitation statute." See W.Va. Code, 55-2-6a.

Contractual limitation provisions appear frequently in insurance polices, fraternal benefits certificates, bonds, and various other types of contracts. Accordingly, the 120 day limitation as it is **voluntarily entered into**, does not appear unreasonable, and properly supersedes the general limitations. See 6 A.L.R. (3d) 1197. The purpose of the 120 day limitation was to bring an end and resolve disputes relating to the construction contract, and does not appear to cause or create an undue advantage to either party.

However, in *O'Neil v. City of Parkersburg*, 160 W.Va. 649, 237 S.E.2d 504 (1977), the West Virginia Supreme Court of Appeals struck down a 30 day limitation for filing a notice of claim for municipal negligence. The Court held that such an abrupt notice period was a violation of equal protection and due process. The Court more recently stated in *Gibson v. W.Va. Dept. of Highways*, ___ W.Va. ___, May 24, 1991, that the time period (limitation) must bear some rational relationship to the goal to be achieved by the statute, and the goal must not abridge constitutional rights.

The purpose for the 120 day provision herein is to **provide finality to the construction contract such that payment may be made, with notice of residual or unliquidated claims.** Unlike the 30 day municipal limitation for reserving a claim, the 120 days was mutually agreed to, voluntarily entered into, and does not abridge constitutional rights. In construing a similar limitation relating to Workers' Compensation claims, the W.Va. Supreme Court of Appeals held that these limitations have never been held to contravene the constitutional provision against the impairment of a contract. The Court observed that the limitations do not impair contracts, but merely require prompt enforcement thereof. The Court also observed that contractual limitations do not destroy or affect any vested interest or rights. *Taylor v. W.Va. Workers' Compensation Comm.* 140 W.Va. 572, 86 S.E.2d at 118 (1955).

The Court rhetorically asks in *Taylor*, "Is a workman's compensation claim inherently of such a different character or of such higher sanctity that it should be singled out and held immune to a statute of limitation?" Likewise, the Court of Claims may properly ask whether the construction claim is to be so immune, especially when one considers that the limitations was contractually and voluntarily accepted.

In summary, voluntary construction limitations such as the 120 days supersede the general statute of limitations, and are reasonable if not so short as to abrogate arbitrarily a right of action. The 120 days provides finality for both the contractor and the State for the receipt of payment and

the assessment of contingent liabilities for said work against the State budget. **Accordingly, public policy is not violated by such a fiscal planning tool, or are the rights of the contractor prejudiced by its application.** Claimant has not argued why 120 days is too limited, and the Court need not speculate as to same. The United States Supreme Court once stated, "Statutes of limitation find their justification in necessity and convenience rather than in logic...They have come into the law not through the judicial process, but through legislation. They represent a public policy about the privilege to litigate." *Chase Securities Corp. V. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628. Establishing or legislating public policy in terms of limitations of actions is generally not within the jurisdiction of the Court of Claims.

Accordingly, the Court sustains the Motions and these claims are dismissed.

Claims dismissed.

OPINION ISSUED DECEMBER 2, 1991

UNIVERSITY OF WEST VIRGINIA COLLEGE OF GRADUATE STUDIES
VS.
SUPREME COURT OF APPEALS
(CC-91-218)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $10,117.46 for cooperative educational funding for the West Virginia Institute of Justice. The invoices for the funding were not processed for payment in the proper fiscal year, therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $10,117.46.

Award of $10,117.46.

OPINION ISSUED DECEMBER 2, 1991

JOHN G. WARD
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-91-204)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $140.95 for eye glasses which were damaged during an altercation at the Eastern Regional Jail, a facility of the respondent. The respondent admits the validity and amount of the claim; however, respondent is unable to reimburse claimant for the eye glasses as there is no fiscal method for respondent to process such a payment.

As the respondent has admitted the facts and liability in this claim, the Court makes an award of $140.95.

Award of $140.95.

OPINION ISSUED DECEMBER 2, 1991

XEROX CORPORATION
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-91-245)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $872.71 for maintenance on copy machines provided to respondent.

Claimant accepts the amount of $851.73 as full settlement of the claim. The invoices for the services were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $851.73.

Award of $851.73.

OPINION ISSUED DECEMBER 10, 1991

JEFF FERRELL
VS.
DIVISION OF HIGHWAYS
(CC-90-362)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On the morning of October 4, 1990, claimant was driving his 1979 Chevrolet Chevette on the northbound lane of Route 110 between Elkview and Clendenin, Kanawha County. When he returned later that morning traveling in the southbound lane of Route 119, he noticed rocks in his lane some 200 yards ahead. He testified that he could neither bring his vehicle to a stop nor steer his vehicle around the rocks. The vehicle he was driving went over the rocks and sustained substantial damage to the transmission and to the undercarriage. When questioned by the Court at the hearing as to how fast he was traveling, the claimant could not remember. However, the claimant forwarded a handwritten note dated May 1, 1991, and received on May 3, 1991, stating that he was probably traveling faster than the 25 miles per hour posted speed limit. The claimant was not injured in the accident. The cost to repair the vehicle was estimated at $1,058.41. The claimant testified that the market value of his damaged vehicle was not more than $50.00 to $75.00. He did not have collision or comprehensive insurance. He brought this claim in the amount of $4,100.00 for replacement of the vehicle.

The respondent denies liability for the damage caused by the rocks in the road. An area highways supervisor, Calvert Mitchell, testified that he was familiar with the section of the road where the claimant's accident occurred. He stated that the described area does experience falling rock, and the area is appropriately marked and designated with "Falling Rock" signs and flashing lights. The speed limit is posted at 25 miles per hour in the area. He further testified that no calls concerning rocks in the road were received immediately before or after the claimant's accident.

As the state is neither an insurer nor a guarantor of the safety of persons traveling on its highways, the Court must deny this claim. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by the rock fall, it must have had either casual actual or constructive notice of the condition and a reasonable amount of time to take corrective action. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1977). It appears to this Court that the requisite notice was not provided to respondent.

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

Claim disallowed.

OPINION ISSUED DECEMBER 10, 1991

AVANELL R. HINKLE, EXECUTRIX OF THE ESTATE OF
HERBERT F. HINKLE, DECEASED
VS.
DIVISION OF HIGHWAYS
(CC-89-97)

George I. Sponaugle, II, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

This is a claim filed by an Executrix under West Virginia Code 55-7-6 (historically Lord Campbell's Act) for the wrongful death of her decedent.

On July 22, 1987, at about 4:10 p.m., Herbert F. Hinkle, claimant's decedent, was operating a 1950 Massey Ferguson farm tractor, with rear wheel chains attached, in a westerly direction on the northerly side of West Virginia Secondary Route 5/5 in Pendleton County, West Virginia, known and hereinafter referred to as Germany Valley Road, en route from his nearby home to his nearby church, in order to spread gravel. A "scoop" (front-mounted bucket) was turned downward, and the rear end of the tractor was weighted for stability. The weather was clear and dry, and the road straight.

The decedent had crossed a bridge over the Northfork River, and had thereafter proceeded, along the northerly side of the road, the tractor's right wheels on the berm and the left wheels on the pavement of the road, some 369 feet, 5 inches from the bridge, when the tractor's right wheels struck a depression or void place in the berm. Mr. Hinkle lost control of the tractor, which flipped to the

right and rolled down a steep embankment and landed on Mr. Hinkle, causing his death.

For purposes of this opinion, the Germany Valley Road between the Northfold River on the east and U.S. Route 33 on the west, a distance of less than one-half-mile in the aggregate, will be referred to as the "roadway," and the point where the tractor went over the embankment will be referred to as the "scene of the accident."

The claimant, the duly qualified Executrix of the will of Herbert F. Hinkle, alleges that respondent had duties, 1) to design, construct and maintain the roadway in a condition safe for the traveling public, including the decedent, and 2) to protect the traveling public from a hazardous condition in the roadway, by placing warning signs in the vicinity of the dangerous place and by erecting and maintaining protective barriers at the scene of the accident, further alleging that respondent had a duty to cut weeds around and over the depression or void place in the berm; and claimant further alleges that respondent was guilty of negligence by failing to perform said duties, and that its negligence proximately caused the death of Mr. Hinkle.

By its Answer, respondent denies that it was negligent; alleges that negligence on the part of the decedent was the proximate cause of his death, that there were intervening or superseding causes of the death, that there were intervening or superseding causes of the death of Mr. Hinkle not attributable to the respondent, and that decedent assumed the risk of injury by being on the roadway; and respondent invokes comparative negligence as an affirmative defense.

Deeming the configuration of the Germany Galley Road between the Northfork River and U.S. Route 33, and its appearance and condition at the time of the accident to be essential to an understanding of the issues in this case, the Court will essay a short history of the roadway, as well as a brief description of its physical features at the time of the accident, insofar as they are pertinent to a decision in this case.

Germany Valley Road has been a public road from "the time whereof the memory of man runneth not to the contrary." Only since 1933, when the State assumed responsibility for "county" roads, has it been part of the state road system. The "roadway" (between Northfork River and U.S. Route 33) is essentially level, river bottom land, with working farm land on either side. Until 1959 the roadway followed the natural grade of the land through which it ran.

In 1959, however, the respondent, or its predecessor State agency, undertook to rebuild and realign the roadway and, to do so, acquired from one Harper (Deed Book 80, page 186) a fee simple title to a parcel of 1.22 acres, running eastwardly from U.S. Route 33, toward the Northfork River. The westerly part of such acquisition was 80 feet in width, and the remainder part 50 feet in width. By the deed aforesaid, respondent covenanted, as part of the consideration for the land transfer, to construct and maintain a "cattlepass," under the road to be constructed, for the movement of Harper's cattle from his land on the northerly side of the rebuilt road to his land on the southernly side thereof. To fulfill its contractual obligation to Harper, respondent designed and built an earthen ramp, over a metal culvert for cattle, and constructed a road over the ramp, which, at the point where

the road passed over the Culvert, was about 10 feet above natural ground level. The width of the road over the ramp was 19 feet, 8 inches, and the paved surface of the road was 14 feet in width, from 1960 until 1985; in 1985 the pavement was widened to 16 feet and 3 inches, but the berm was not widened. The embankments on both sides of the culvert were about 10 feet above natural ground level and were very steep; in the vicinity of the culvert they were reinforced by stone.

There was testimony that, after the pavement was widened in 1985, there was a berm along the roadway, from Northfork River to U.S. Route 33, of 12 to 18 inches. The investigating officer, Sergeant Gary White, testified that, generally on the ramp there was a berm of 12"to 18" on each side of the pavement, but that at the scene of the accident "there's very little berm there at all. It just dropped in." A witness for the claimant, Jimmy Morgan Bogan, a frequent traveler on the road, testified with reference to the berm at the scene of the accident, "To my knowledge, they just wasn't no shoulder there." The decedent's daughter Betty L. Marshall, testified that grass obscured the point where the berm should have been at the scene of the accident, and that one looking down at that point "could see where there was nothing there." Respondent's witness, James M. Waybright, crew leader of the maintenance force which worked on roads in the area at and before July 22, 1987, testified with reference to the scene of the accident, "... the berm on top was never more than eight inches because it was walled up with rocks, small like rocks, walled straight up to that." Respondent's witness, William W. Hartman, Maintenance Engineer for District 8 of the Division of Highways, testified that some time after the accident he examined the berm at the scene of the accident and estimated its width to have been six to eight inches.

There was evidence as to the presence of weeds on the embankment, at and near the scene of the accident, conflicting s to how recently they had been cut, and the effect of weeds at that point as possibly having obscured decedent's ability to detect the defect in the berm; but we are of the opinion that the evidence, *ore tenus* and by photographs admitted into the record, is inconclusive and conjectural.

What is certain, however, is that:

a)
the berm at the scene of the accident was, on July 22, 1987, and for whatever reason, inexcusably inadequate to support any kind of motor vehicle, and the deficiency had existed for at least two years before the accident and was known or should have been known to respondent for that whole period, inasmuch as respondent's employees and their supervisors had frequently worked in the immediate area;

b)
there were, on that date, no signs at or near the scene of the accident, to warn travelers of a dangerous condition in the roadway.

c)
there were no barriers, erected by respondent, to prevent a traveler from falling of the road at that point, where there was little or no shoulder.

d)
the tractor which Mr. Hinkle was driving had been operated by him, immediately before the accident, in a lawful manner, and in a manner which was customary and acceptable in the community, i.e., with the right wheels on the berm; and

e)
the decedent knew, or should have known by reason of his life-long familiarity with and use of said roadway, of the deficiency in the berm at the scene of the accident.

Immediately before the accident Mr. Hinkle, then 67 years of age and in good health, was a semi-retired farmer, and was drawing a small Social Security retirement benefit. In his earlier years he had been a most industrious and productive individual, engaged not only extensively in farming, but also as operator of a sawmill and a repair garage. On his income tax returns for 1985 and 1987, Schedules C, he showed no net income, his receipts from his efforts in those years being matched by his expenses in his businesses.

Mr. Hinkle was survived by his wife of many years, Avanell R. Hinkle, by two married daughters, and by his dependent mother of advanced years, who resided with him and his wife.

The emotional, psychological, physical, and economic effect of Mr. Hinkle's sudden death, on Avanell R. Hinkle, his wife, was quite severe. We are given to believe, from the evidence, that all through her married life she had been a homemaker, and was entirely dependent upon him, not only as a source of income but also for moral support and comfort, transportation, record-keeping, business transactions and advice; in short, she left activities outside of the home to her husband; after his death, being unable to handle the businesses, she was forced to sell most of her husband's livestock and other business assets, and what had therefore represented a potential source of income ceased to exist. The emotional effect of losing her husband in such circumstance was described as devastating, and she has suffered, and continues to suffer long periods of depression. Mrs. Hinkle was unable to continue to care for her mother-in-law, who was moved to a nursing home. Mrs. Hinkle now lives alone.

The funeral expenses for Mr. Hinkle were $3,268.00.

Upon the foregoing findings of fact, the Court makes the following conclusions of law:

a)
respondent is an agency of the State of West Virginia, with duties of general supervision and direction over the State's road program and the construction, reconstruction, repair and maintenance of state roads and highways. W.Va. Code 17-2A-8.

b)

the State has a moral duty to keep its roads in a safe condition for travel on them. *Price v. Sims*, 134 W.Va. 173, 58 S.E.2d 657 (1970).

c)

the duty of the State is to exercise reasonable care and diligence in the maintenance of its highways under all circumstances. *Shaffron v. Dept. of Highways*, 9 W.Va. Ct. Cl. 176 (1974).

d)

respondent was negligent in its design and construction, in 1959, of the ramp carrying the Germany Valley Road over the cattle culvert at the scene of the accident in this case, in failing to make the ramp wide enough to carry, not only the paved portion of the orad, but also a berm of sufficient width for the safety of motor vehicles and travelers on said public road; said negligence was a proximate cause of the death of claimant's decedent.

e)

respondent was negligent in failing to observe and repair an erosion of an already narrow berm at the scene of the accident, although its agents and servants had been in and around the point many times over a period of at least two years prior to the accident; and respondent's negligence was a proximate cause of the accident of July 22, 1987, in which Mr. Hinkle died.

f)

respondent was negligent in failing to warn the traveling public of a dangerous condition in a public road, and to erect and maintain warning signs and controls; and respondent's negligence was a proximate cause of said accident.

h)

claimant's decedent knew or should have known of the defective berm prior to the accident, and his failure to avoid the defective berm was a proximate cause of the accident.

This Court has, in past decisions, held that a lower standard of care and maintenance is required for the berm or shoulder of a public road, than for the regularly traveled portion of the road, this being the so-called New York rule. An exception to the rule, recognized both in New York and West Virginia, is that the higher standard of care and maintenance required for the traveled portion of the road will be applied for the shoulder when an emergency requires it. See *Retzel v. State*, 94 Misc.2d 562, 405 N.Y.S.2d 391 (1978). The *Retzel* Court says that not only an emergency may require the higher standard of care and maintenance, but other circumstances may, also, make the higher standard of care applicable. many states, of course, do not have the double standard of care, one for the traveled portion of the road and one for berms, and indeed, in view of the many, and varied, and legitimate, intended and necessary uses made of the berms by the motoring public, it is difficult to rationalize a double standard.

It is difficult also, perhaps more so, to understand how any standard of care and maintenance,

however low, could justify or excuse the non-existence or substantial absence of a berm along a highway at a point only inches from a ten-foot drop over a steep embankment.

As a result of the combined negligence of respondent and of the decedent, proximately causing the death of Mr. Hinkle, the claimant has substantial damages 1) for the reasonable funeral expenses of the decedent, in the amount of $3,268.00, and 2) damages of $75,000.00 to Avanell R. Hinkle for mental anguish and for the loss of the care, support and society of her husband. The Court ascribes 25% of the cause of the fatal accident to Mr. Hinkle, and, therefore, reduces the total damages of $78,268.00 by 25% to $58,701.00.

Award of $58,701.00.

OPINION ISSUED DECEMBER 10, 1991

BRALEY & THOMPSON, INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-91-280)

Harold S. Albertson, Jr., Attorney at Law, for claimant.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant filed a claim seeking the amount of $12,472.50, for intensive in-home support services for a client of the respondent State agency. The Court notes that the correct total of the invoices is $12,475.20. The invoices for the services were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and the amount of the claim for the corrected total of the invoices, and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $12,475.20.

Award of $12,475.20.

OPINION ISSUED DECEMBER 10,1991

BELINDA S. MORTON
VS.
DIVISION OF HIGHWAYS
(CC-87-235)

DIANA CASSADY
VS.
DIVISION OF HIGHWAYS
(CC-87-232)

Marsha Dalton, Attorney at Law, for claimant Belinda Morton, and Belinda Morton, Attorney at Law, for claimant Diana Cassady.
James D. Terry, Attorney at Law, for respondent.

HONLON, JUDGE:

These claims arose out of the same accident; therefore, the Court consolidated the claims for the purposes of the hearing and the decision.

On or about August 27, 1985, the claimant Belinda Morton was a passenger in a vehicle being driven by claimant Diana Cassady. They were traveling north on State Route 16, in Fayette County. Claimant Cassady was a student residing in San Francisco, California, but was visiting West Virginia at the time of the accident. Ms. Cassady's vehicle is alleged to have passed over unidentified debris in the road, causing her to lose control of the vehicle and to swerve into a mountain. The accident occurred near the community of Beckwith. Claimant Morton suffered a concussion, fractured sternum, lacerations to her left leg, and dislocation of her ankle and knee. She was hospitalized for 30 days for her injuries. Claimant Cassady suffered a broken jaw, shattered cheekbones and damage to her teeth. She was hospitalized for ten days after the accident.

Claimants contend that the unidentified debris caused Ms. Cassady momentarily to lose control of her Datsun station wagon, and thus the vehicle ran into the adjoining mountain cliff. Claimants also allege that respondent either placed the debris on the roadway, or conversely was negligent in not removing same. The debris was described as an oily substance with a sand and gravel base.

The respondent denies negligence and avers no knowledge of the debris alleged to have been present on the roadway prior to the accident.

Respondent's witnesses, including Fayette County Deputy Sheriff, Carl D. Dancy, testified that there "wasn't any oil or anything unusual on the highway." The Deputy was the investigating officer for the accident. He testified that the sand present at the accident scene was "kicked up" from the wreaked vehicle, and that there were "no mass amounts of sand on the road." Deputy Dancy

concluded his testimony by observing that "if there would have been any debris of any amount on the road, I would have had problems and I didn't."

An alternative theory advanced by claimants is that construction activity was present in the accident area, and this activity may have resulted in debris on the roadway. However, respondent's records reflect that on the date of the accident "Activity 256," shoulder and ditch repair was being conducted. This activity was discussed in some detail, suggesting to the Court that the brooms that follow the grader removed errant materials that might otherwise accumulate on the roadway.

Other repair activity alleged by the claimant included the placement of "hot mix" on Route 16. This allegation was refuted by respondent's witness, Thornton L. Johnson, a Fayette County Assistant Road Supervisor. Mr. Johnson testified that hot mix was placed upon a different area road, State Secondary Route 21/3, and not upon Route 16. Additional allegations of road repair failed to connect the activity in time to the accident site.

The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by the debris, it must have had either actual or constructive notice of the defective condition and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways*, 11 Ct. Cl. 150 (1977). It is the opinion of the Court that claimants have failed to establish notice, either actual or constructive, that debris which posed a hazard to the traveling public was present. In fact, the Court is of the opinion that the evidence fails to establish the presence of debris of a hazardous nature on the roadway.

The Court, having considered all of the evidence put forth in these claims, concludes that claimants have failed to establish negligence on the part of the respondent, and therefore, the Court must deny these claims.

Claim disallowed.

OPINION ISSUED DECEMBER 10, 1991

RICHARD A. ROHR AND JAMES L. ROHR
VS.
DIVISION OF NATURAL RESOURCES
(CC-89-194)

Thomas M. Regan, Attorney at Law, for claimant.
Maria Fakadej, Assistant Attorney General, for respondent.

BAKER, JUDGE:

Claimants rent and operate a large farm in Upshur County, primarily for the production of corn. During the months of June and July, 1987, claimants planted two fields of corn over a fifty-four acre area. As quickly as they planted the corn, Canada geese appeared to consume or otherwise destroy the crop. Claimants contacted agents of the respondent for assistance with the trespassing geese, and were allegedly advised that the Canada geese were the property of the Federal government, and, as such, were a protected species. Claimants, although cautioned not to harm the geese, were provided advice as to methods to scare the geese from the fields of corn. Claimants were given instructions on the use of "shell crackers" and propane cannons to disturb and frighten the geese. Claimants indicated that farming was not their only vocation, and, as construction contractors, they did not have the time to stand guard over the fields to scare the geese away.

The Canada geese allegedly destroyed most of the June and July, 1987, planting of corn. The claimants replanted corn and again suffered substantial destruction to their corn crop by the errant and foraging geese. The corn crop yield during the summer of 1987 was unusually low as compared to the yield of corn from the other fields which were not disturbed by geese. The average yield per undisturbed acre was 110 bushels. Claimants instituted this action to recover lost earnings for corn destroyed by the Canada geese. The claimants calculated the loss as follows:

Undisturbed fields
54 acres x 110 bushels/acre=5,940 bushels
Disturbed fields
54 acres x 30 bushels/acre=1,620 bushels

5,940 bushels - 1,620 bushels = 4,320 bushels lost.

Claimants introduced evidence that the average rate per bushel of corn paid by the Southern States Buckhannon Cooperative in November 1987 was $2.45 per bushel. Accordingly, the claimants calculated that their loss on $4,320 bushels of corn was $10,584.00.

The respondent avers that the cause(s) of the damage complained of is/are inconclusive, and that inaction upon the part of the claimants to prevent the destruction of their corn crop was the actual and proximate cause of loss. The respondent also questions the calculation of claimants' alleged loss.

It is uncontroverted that the West Virginia Legislature promulgated a policy of importing and encouraging the development of foreign game birds within the territorial borders of the state. See W.Va. Code §20-1-4. The term "wild birds" as defined in Chapter 20 of the W.Va. Code includes geese. However, wild birds of any species are just that -wild birds. As *ferra naturale* the Canada geese do not "belong" to the government or to individuals. The Canada geese are not native fowl within the State. They breed in Canada, and traverse West Virginia borders only for the purpose of flying to Mexico for the winter. For the claimants to prevail in this action, they must prove that the offending geese are an instrumentality of the State, or within the control and custody of same. The facts are uncontroverted concerning the presence of the Canada geese on or about claimants property.

Small numbers of the geese were imported and then released with the hope of creating resident populations by the respondent in 1980, and again in 1983, within one mile of the claimants corn fields. However, claimants did not commence farming activity upon their leased property until 1986, three to six years after the release of the geese. Unlike the holding in *Kay v. Dept. of Natural Resources*, 14 W.Va. Ct. Cl. 270, where the State was liable for similar geese damage, because the damage occurred immediately after the birds were released, the facts and circumstances herein are different in time and proximity. It is uncontroverted that the claimants leased their disturbed corn fields several years after, and not before or contemporaneously with the birds' release. Accordingly, the *Kay* decision is inapplicable to the present case.

The Court further holds that respondent was not in possession of or control of the Canada geese. The respondent was at most a regulator. As a regulator, respondent made available to claimants the methods suitable to address the problem of their crop destruction by the Canada geese. It appears uncontroverted that the claimants did not take full advantage of the advice and equipment. Claimant James Rohr stated "...I couldn't have employees sit over there in the middle of the field all day long."

Claimants have failed to demonstrate to this Court that respondent has a duty to act to ameliorate the damage caused by Canada geese beyond the measurers of disseminating information and supplying equipment such as shell crackers and propane cannons to the claimants or other parties in the same situation. It is uncontroverted that the respondent provided the described assistance. As claimants have failed to establish negligence on the part of the respondent. the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 10, 1991

BRINLEY I. STALEY AND MARJORIE A. STALEY
VS.
DIVISION OF HIGHWAYS
(CC-89-315)

John R. Angotti, Attorney at Law, for claimants.
James D. Terry, Attorney at Law, for respondent.

STEPTOE, JUDGE:

Claimants brought this action to recover damages to their property located in Monongalia County, West Virginia. Claimants allege respondent failed to properly maintain drains and culverts situate along Boy Scout Camp Road (Evansdale Turnpike), Morgantown, Monongalia County.

Claimant asserts that on June 22, 1989 "there was a flood in the area," that caused personal property and structural damages. Respondent was notified on June 23, 1989, and inspected the flooding. Approximately 30 days later, flooding again occurred, causing additional damage to claimants' house. This claim is brought for damages in the amount of $25,000.00.

Respondent confirms that an inspection of the flood area was made on or about June 23, 1989; and the drains and culverts were not determined to require cleaning, although a culvert appeared "blocked." Respondent avers that the water damage to the residence was the result of unusual localized rainfall, and inadequately designed roof and ground water drainage, unrelated to respondent's peripheral road culverts and drains.

Testimony indicates that claimant designed and constructed the house involved here, and that claimant is not an architect, or licensed contractor. He is by trade a carpenter, not an engineer. Claimant testified that he did not install a drain within his basement, as it did not appear necessary. Claimant was certainly aware that his house was below road surface, and the potential for flooding was present. The construction of an apartment building adjacent to claimants' house may have further contributed to the water flow (drainage) directed down toward claimants' house. The apartment building was likewise designed and built by claimant. There appears to this court a nexus between the appearance of the new apartment building and the enhanced probability of flooding to claimants' house. Claimant testified that for some 20 years prior to 1989, the house was not subject to flooding. However, the apartment was built in the last three years, and during the first year (1988) claimant testified there was a drought in the area. That leases 1989 as the first real test of whether the apartment location may have in some fashion contributed to or caused the flooding to claimants' house. Before the construction of the apartment building there was no report flooding; but in 1989, within one year of its construction, flooding resulted.

Likewise of concern to the Court is the unusual weather and excessive rainfall experienced in the area of claimants' house, during the Summer months of 1989. After the initial "torrential" rainfall on June 22, 1989, claimant experienced flooding to the basement. Flooding again occurred one month later, during heavy rain. The Court recognizes that Hurricane Hugo was active and present in late Summer of 1989 and the increase in rainfall is attributable to the hurricane.

The case law in this area is well settled. Where a preponderance of the evidence clearly indicates that claimants' property is located in a natural drainage area and work performed by the respondent in the vicinity was not the proximate cause of the damage, the Court must deny the claim. *Edward Lawson and Beulah Lawson vs. Dept. of Highways*, 15 Ct.Cl. 169 (1984). The Court has consistently held where damage to property was the result of heavy rainfall, rather than inadequate maintenance of drainage, the claim must be denied. *Helen D. Hudson and Joseph E. Hudson vs. Dept. of Highways*. The Court is satisfied from the testimony and demonstrative renderings that claimants' property is below the road surface, and below the drainage area of any area adjacent apartment building. Accordingly, the house received water run off, for which the homeowner may have inadequately designed his own drainage. It is not the position of this Court to engage in speculation. It is the burden of the claimant to plead and prove with a preponderance of the evidence

that the damage was the actual and proximate consequence of negligent conduct by respondent. That burden was not reached, and the claim must be disallowed.

Claim disallowed.

OPINION ISSUED DECEMBER 18, 1991

RUBY REDMAN
VS.
DIVISION OF HIGHWAYS
(CC-89-282)

Nelson R. Bickley, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

HANLON, JUDGE:

On January 19, 1988, the claimant was traveling south on Route 220 near Petersburg, Grant County. At approximately 11:00 p.m. on that date, claimant encountered several rocks in the road as she approached Eagles-Nest Gap, 1.1 mile north of Petersburg. Although claimant avoided striking the smaller rocks, she was unable to avoid a larger rock as she came around a blind curve. She lost control of her 1981 Mercury Cougar, it rolled over and she was injured. She was transported to Grant Memorial Hospital in Petersburg, where she remained for three days with multiple contusions and related trauma. Claimant seeks $6,000.00 for injuries sustained and property damage relating to this accident. Claimant believes that respondent was negligent in the cause of claimant's injuries. Respondent avers that no act of negligence was committed and that intervening and superseding causes were the proximate cause of claimant's accident.

It appears to this Court that the single-vehicle accident was the result of fallen rocks obstructing a section of U.S. Route 220 near Petersburg. The witness for claimant, Julia Harwood, testified that she drove through the Eagles-nest Gap between 10;15 and 10:30 p.m. on the evening of the accident, and that rocks were present on the road. This witness further testified that other drivers indicated that they would notify the respondent immediately of the rock slide. Respondent's witness, Lincoln Rohrbaugh, a night watchman for the respondent's area maintenance office, testified that he received a call concerning fall rocks on Route 220, at 10:45 p.m. Later testimony from this witness revealed that notification came from "Grant Comm", the Grant County Emergency Community Center. Grant Comm receives or intercepts calls when the telephone at the night watchman's office is unanswered. This leaves open the possibility that notification of a rock slide may have come in earlier than as reported. In other words, efforts may have been made to report the rock slide 30 to 45 minutes before claimant's accident, according to Julia Harwood's testimony. Ms. Harwood testified that, "a guy in front of me had stopped at a store and told the lady that was

working to call." Thus, the issue before the Court is whether sufficient time was given for respondent to ameliorate the described road hazard. The night watchman testified that after closing the maintenance yard, he traveled to the accident site to verify the road hazard. The watchman arrived too late to have prevented claimant's collision. It appears to the Court that had greater diligence been used, claimant's accident may have been avoided. The rocks appeared to have been on the road between 15 to 40 minute prior to the claimant's accident. Given the severity of the danger, it was incumbent upon the respondent to use greater dispatch to remove or otherwise warn motorists of this peril. Having failed to do so in a timely manner, respondent is adjudged partly responsible for the consequences. Social policy justified the imposition of this heightened duty to act in the prevention of imminent harm. Accordingly, claimant's expectation of safe passage on the highways was violated. Claimant's speed of travel was thirty miles per hour at the time of the accident. The speed of travel appears reasonable for wet conditions, and does not suggest in and of itself contributory negligence.

There is conflicting testimony whether falling rock warning signs were present at the accident site. A witness for claimant, Linda Harvey, testified that her employer, J.F. Allen Construction Company, had removed warning signs in January of 1988 and had not replaced the signs until December of 1989, ten months after claimant's accident. Roger Keplinger, respondent's witness, testified that the signs were present for over 21 years. However, respondent's witness did not testify that the signs were present on the night of claimant's accident. It is therefore the opinion of the Court, that claimant's witness provided more convincing testimony such that the Court is inclined to believe no falling rock signs were present when the accident occurred. it is however significant to note that claimant testified she was aware that Eagle-nest Gap had rock slides. If the warning signs were removed, claimant may have believed that the falling rock hazard had been repaired and abated. In any event, the absence of signs may have contributed to claimant's accident as she would not have been conscious of the potential peril. However, claimant after having avoided the smaller rock fall, did not testify to reducing her speed, albeit 30, and had she done so may have avoided the peril awaiting her around the curve. The Court believes that the doctrine of comparative negligence applies to this case, and finds that respondent is 70% negligent and claimant is 30% negligent. The parties stipulated claimant's medicals at $2,000.00 of which a certain portion was paid by claimant's insurance. Claimant's automobile insurance also covered her vehicle, exclusive of a $100.00 deductible. Claimant lost two months wages as a housekeeper, in the amount of $600.00. claimant also incurred medical expenses in the amount of $450.00 for the services of a chiropractor and she has experienced pain and suffering as a result of her injuries. The Court therefore makes an award to claimant of $2,150.00 which is reduced to $1,505.00 based upon the doctrine of comparative negligence.

Award of $1.505.00.

OPINION ISSUED DECEMBER 20, 1991

HOLLOWAY CONSTRUCTION COMPANY
VS.
DIVISION OF HIGHWAYS

(CC-88-312)

Thomas E. Potter, James R. Snyder, Abba I. Friedman, and Robert L. Johns, Attorneys at Law, for claimant.
Robert F. Bible, Attorney at Law, for respondent.

HANLON, JUDGE:

Claimant contractor entered into a contract with respondent, designated as Project No. X320-G-73.02(03) or Federal Project No. APD-323(84), on February 19, 1982, for the construction of that portion of Corridor G from Davis Creek to Charleston, West Virginia. The project commenced with fill bench construction involving blasting and excavating the earth's surface. Preconstruction conferences were held on March 3 and March 17, 1982, and notice to proceed was given. Claimant substantially completed the project on or about June 15, 1986. The project was accepted by respondent on July 27, 1987. The total amount of the contract for this project was $27,950,257.59. Claimant alleges its actual cost for construction was $34,323,000.00, with a resulting loss in excess of $6,617,449.00 not including interest. On June 30, 1988, claimant executed the final Voucher Estimate for the project in the amount of $27,708,281.10, reserving the right to bring certain claims, hereafter identified as issues. Claimant filed this action against the respondent in a 42-count Complaint demanding judgment in the amount of $7,453,096.00, plus interest, on the following issues:

I.
FAILURE TO COMPENSATE CLAIMANT FOR
MATERIALS IN ACCORDANCE WITH CONTRACT PROVISIONS

Claimant contends that the contract required respondent to pay claimant for 'aggregate base course" in an agreed upon quantity of 39,204 cubic yards to be paid in a lump sum. Respondent applied the unit bid price to 35,768 cubic yards rather than the quantity of 39,204 cubic yards as provided in the contract. Claimant argues that this resulted in an underpayment of $109,952.00 which remains unpaid. Respondent denies the allegation. The amounts involved are uncontroverted. The only issue for the Court is whether the claimant should be paid for unexpended materials, as in this claim for aggregate base course which was not used on the project. There is no reason in law or equity for respondent to pay claimant for 39,204 cubic yards of base aggregate when only 35, 768 cubic yards were provided. This portion of the claim is denied.

II.
CALCULATION OF FUEL ADJUSTMENTS

The fuel adjustments provided under the contract were to be based upon 39,204 cubic yards of base course. Claimant alleges that respondent applied the adjustment with an erroneous calculation and that $6,500.00 remains unpaid. Respondent denies this allegation. Pursuant to West Virginia Department of Highways Special Provision For Price Adjustment of Fuels, §109.10, dated February 15, 1980, and incorporated in the claimant's Bid Proposal, this item could have been paid if properly due. It is the finding of the Court that this item represents a fuel adjustment based upon the difference between the 39,204 and 35,768 cubic yards of base aggregate, an amount previously disallowed, and, in accordance with that finding, the Court denies this item.

III.
WATER AREA RELOCATION

Respondent approved the change and use of a waste area situate between station 263+03 and station 269+00. Respondent designated in this area for claimant's use throughout the construction of the project. Claimant thereupon used the area for filling and stockpiling stone. On or about May 24, 1984, when claimant had stockpiled 39,000 cubic yards of stone in the designated area, respondent ordered claimant to immediately remove the stone. Claimant compiled with this request, but alleges that it lost approximately 19,800 cubic yards of stone during the relocation. Claimant has introduced evidence that the amount of $5.80 per cubic yard is the customary and reasonable cost of this stone. The expense to claimant for the lost stone is $115,830.00. Claimant further alleges that it also had increased costs for equipment, labor, and overhead resulting from the relocation of the stone. The Court recognizes that the order to remove the stockpiled stone was unilateral on the part of the respondent. The claimant relied upon representations made to it by respondent to its detriment. It is the opinion of the Court that the claimant is entitled to recover the cost of the stone lost during the relocation operation; however, the Court denies the cost for equipment, labor, and overhead. Accordingly, the Court will make an award to claimant in the amount of $115,830.00 for this item.

IV.
PLAN ERRORS-WATER LINE, GAS LINE, SEWER LINE, TELEPHONE LINE, AND ELECTRICAL POWER LINE LOCATIONS

The contract required various water, gas, electric, sewer, and telephone lines to be relocated on the project. Numerous water lines and other underground utilities were mistakenly cut and damaged when utility plans failed to indicate the proper locations of the lines. As a result, claimant alleges increased costs for relocating and repairing the broken lines. Claimant also alleges numerous errors and omissions in the locations of the designated utilities. Additional excavation was necessary causing inefficiencies and increased costs unanticipated under the contract. Claimant concludes that as a result of the inadequate utility plans, its schedule was interrupted resulting in increased equipment, labor, and overhead and other costs. Claimant contends that respondent breached an implied warranty of the sufficiency of the plans and specifications under the contract, thereby entitling claimant to be compensated for the increased costs. The claimant cites as its authority *§104.2 of the 1978 Standard Specifications of the West Virginia Department of Highways*, which

provides in part:

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

Respondent asserts that claimant was informed that there was no guarantee of the exactness of the utility locations. Respondent cites as its authority the *1978 Stand Specification §105.6* which states:

> In general, it is to be understood that the Contractor has considered in his bid all of the permanent and temporary utility appurtenances in their present or relocated positions as shown on the Plans, and that no additional compensation will be made by the State for any delays, inconvenience, or damage sustained by him due to interference from the utility appurtenances or the operation of moving them. The locations of the underground utilities shown on the Plans have been obtained by diligent field checks and searches of available records. It is believed that they are essentially correct, **but the Department makes no guarantees as to their exact locations**. (Emphasis supplied.)

Respondent further contends that in *Tri-State Stone v. Dept. of Highways,* 9 W. Va. Ct. Cl. 90 (1972) this Court held that the risk of extra expense for utility relocations falls upon the contractor. Respondent believes that even if the utility relocations constituted "changed conditions", claimant should seek compensation only for those changes which were **"noticed"** to respondent. Respondent established that claimant failed to provide the required notice of the changed conditions resulting from utility relocations and should not be compensated. See *Westbrook Construction, Inc. v. Division of Highways,* Cc-89-508, W.Va. Ct.Cl., unpublished opinion (1991). The Court finds that the claimant is bound by the terms of the contract which provided that the respondent did not guarantee the locations of the utilities; therefore, the Court denies this portion of the claim in its entirety.

V.
DEFECTIVE PLANS - STORM DRAINAGE SYSTEM

The plans and specifications provided by respondent for the claimant indicated the location of storm drainage systems which allegedly contained design defects relative to grade alignment and

elevation. Additional errors are alleged for junction chambers and bend structures with no consideration to the potential interferences with other utilities. Claimant contends that the storm drainage plan errors caused increased costs for extra excavation, extra embankment, topographical grading, and unanticipated rock excavation. Claimant alleges s breach of an implied warranty of sufficiency of the plans and specifications for performing the contract, and that it incurred additional costs in the amount of $135,232.00 as a result of this breach. Respondent restates its position that it is not a guarantor of the sufficiency of plans. The Court determined that all costs attributed to this item must be denied upon the same principals previously enunciated by the Court in the discussion of the utility issue.

VI.
UNILATERAL REDUCTION OF BLASTING LIMITS

Claimant entered into the contract in reliance upon the plans and specifications that permitted blasting at a maximum peak particle velocity (p.p.v.) of any shot of 2.0 inches per second. Claimant initiated its blasting operations utilizing the 2.0 p.p.v. per second through the summer of 1983. Respondent unilaterally ordered a blasting limit reduction to a maximum p.p.v. of 1.0 inches per second.

On August 22, 1983, claimant formally objected to the respondent's new limit of 1.0 inch per second. Claimant appears to have requested a meeting to be held in the District Office of the respondent in order for respondent to justify this change and for the claimant to explain to respondent that its blasting records demonstrated that it had been meeting all the specifications. Respondent replied by correspondence dated September 7, 1983, informing claimant that if it presented evidence that **no damage** had occurred as a result of claimant's blasting, respondent would consider restoring the maximum peak particle velocity to 2.0. Claimant was unable to do this as there had been some damage to buildings in the area due to fly rock.

As a result of respondent's directive, claimant changed its blasting techniques. An analysis of claimant's blasting records reveals that after September 1, 1983, claimant reduced the average amount of explosives per hole from 33.97 lbs. to 18.33 lbs. (or 46%); decreased average hole depth from 14.03 feet to 12.33 feet (or 12%); and decreased its average powder column height from 7.87 feet to 5.63 (or 28%).

These unilateral reductions as mandated by respondent attenuated the progress of claimant's excavation, grading, utility relocation, and bridge work. Prior to the change, claimant's grading cycle consisted of excavation (blasting), loading excavated rock onto a truck and trucking the rock directly into fills. Due to the reduction in the parameters of claimant's excavation, the rock generated by blasting was so large that much of it had to be reblasted and subsequently broken up by a crane with a pumpkin ball before it could be used in the fill operations. In addition, the blasting reduction resulted in smaller cuts, thus confining the work area. It appears to the Court that the changes caused a significant reduction in production and productivity. Claimant introduced trucking records revealing that after September 1, 1983, excavation production was reduced by

approximately 50%, from nearly 80,000 cubic yards per month to less than 4,000 cubic yards per month.

As a result of the blasting reduction, claimant completed grading operations ten months behind schedule, was forced into one unplanned winter of work, and was required to spend an additional eight months to shoot and move rock material on the project. Claimant states that increased costs for equipment, labor, fuel, and overhead resulted as enumerated at page 14 herein.

Respondent avers that it was not timely notified that claimant expected extra compensation due to peak particle velocity reductions. Accordingly, respondent contends that the claimant's failure to provide notice of the changed conditions precludes claimant from receiving compensation for any alleged extra work. Respondent cites as its authority *Vecellio and Grogan v. Department of Highways*, 14 W.Va. Ct.Cl. 451 (1983), and *Westbrook Construction, Inc. v. Division of Highways*, CC-89-508, a W.Va. Ct. Cl., unpublished (1991), wherein this Court denied compensation to claimant contractors for changed conditions where notice was not provided to respondent and **force account records** were not maintained by respondent.

The Court finds that the blasting reduction caused additional costs to the claimant, but these costs are not construed as "extra work" as defined by *§105.17 of the Standard Specifications*. Extra work contemplated under §105.17 is **work outside of the contract**. The blasting reduction and resulting costs to the claimant involved work clearly **within the contract**. The Court stated in *C.J. Langenfelder & Son, Inc. v. State of West Virginia and the State Road Commission of West Virginia*, 8 W.Va. Ct. Cl. 197 (1971), that work clearly covered within the contract is not "extra work." Accordingly, the provisions of *§105.17* are not applicable. Claimant incurred increased costs for performing the blasting operation, and the Court will make an award for a portion of these costs as discussed in the Damages section of this Opinion.

A portion of this loss represents extra costs incurred as a result of a storm in 1986. On May 10, 1986, claimant formally notified respondent that it was substantially completed with the project. On May 12 and 13, 1986, a severe storm occurred and caused significant damages to complete work. On May 13, 1986, claimant's officials met with respondent's Project Engineer to request extra payment for the washed out areas pursuant to the "Act of God" clause contained in the specifications. *Standard Specifications Roads and Bridges Adopted 1978, §107.16.*

Since the occurrence of the storm does not bring claimant within the "Act of God" provision, claimant contends that had it been allowed to perform its work in accordance with the original blasting specifications, the project would have been completed prior to the storm. For replacing the washed out areas claimant alleges additional costs of $107,000.00. The Court denies this portion of the claim as claimant has failed to establish any liability on the part of the respondent.

VII.
TRAFFIC CONTROL PLAN DESIGN CHANGES AND UNREASONABLE DELAYS IN IMPLEMENTING SUCH CHANGES

The urban location of the construction contract required claimant to provide unimpeded domestic traffic flow throughout the construction site in its traffic control plan. Detours could and did cause construction inefficiency and interruptions to planned construction activities on the project. Although claimant submitted requests for changes in the project traffic control plan, it is alleged that respondent failed to consider the requests in a timely fashion, resulting in unnecessary delay and disruption to construction and contract completion. Claimant contends that respondent breached its duties to administer the traffic control, thereby creating increased costs for equipment, labor, fuel, overhead, and general delay damages, in the amount of $25,176.00. Respondent countered that the contract plans did not require seven-day responses to detour requests and that traffic control was not impeded by the conduct of respondent's agents. The Court, having reviewed the documents pertaining to this item of damage, is of the opinion to make an award to the claimant in the amount of $20,624.00.

VIII.
REFUSAL TO ACCEPT COMPLETED WORK

Claimant put forth a claim on behalf of its subcontractor, Charleston Construction, Inc., for increased costs which resulted when respondent would not accept certain pavement and shoulder work. Specifically, claimant was required to remove and replace approximately eighty feet of 24' wide pavement, fifty feet of 3" wide roadway shoulder, and thirty feet of 10" wide roadway shoulder in the area of Station No. 312+50. As a result of removing and replacing the described roadway pavement and shoulder, claimant alleges its subcontractor incurred additional labor, equipment, and materials in the amount of $10,954.85, however, Claimant's Exhibit No. 33 shows the actual costs to be $10,254.85;

Respondent denies that it is responsible for the costs of removing and replacing the pavement.

The evidence established that there was a water problem beneath the pavement which caused the pavement to settle. The claimant placed the pavement in accordance with the specifications of the contract. The Court is of the opinion that the replaced pavement was necessitated by factors which were not within claimant's control. The Court makes an award for $10,254.85 for this item of damages.

IX.
FAILURE TO COMPENSATE CLAIMANT FOR WORK PERFORMED AND COSTS INCURRED

Claimant requests additional costs resulting from respondent's revisions to the retaining wall constructed at Station No. 385+00. The work involved in this revision was paid for by respondent under the unit bid prices; however, the amount of $200.00 remains due and owing for surveying.

Respondent admits that the described retaining wall survey cost is properly due, and has agreed that claimant is entitled to recover $200.00 for this work; the Court therefore makes an award for the $200.00.

Claimant subcontractor, N.H. Stone, Inc., installed and relocated chain link fence in the area of Route 119 and Route 601. A change in a controlled access right-of-way unilaterally implemented by respondent resulted in increased costs for fencing in the amount of $1,022.61. Respondent does not deny that additional fencing was required by these changes in the contract. The Court makes an award in the amount of $1,022.61 for this item.

As a result of the delays in the performance of this contract, claimant's subcontractor, Charleston Construction, Inc., incurred increased costs for labor and concrete plant equipment rental. Claimant requests the amount of $49,319.91 for the increases costs. However, the actual cost, according to the calculations of the subcontractor, was $46,093.30. The Court makes an award to claimant on behalf of this subcontractor in the amount of $46.093.40.

Respondent directed claimant to relocate a quarry road to provide better access for residential driveways in the area. Claimant relocated the quarry road, thereby incurring increased labor, equipment, fuel, and overhead costs for which claimant has not been paid. Claimant has not provided documentation of the increased costs for this road, and the Court will not speculate as to same. This item is denied.

At the conclusion of the project, claimant was ordered to backfill and landscape areas not called for under the original contract. Claimant seeks additional compensation for its extra costs incurred for such construction activity, but "force account records" were not maintained for this "extra work." The Court will also deny this portion of the claim.

DAMAGES

In order to calculate the additional costs incurred by claimant with respect to the **blasting claim**, the **utilities claim** and **traffic control claim**, claimant used two alternative methods, one based on lost productivity and one based on delay. Respondent contends that these calculations are theoretical. As to the blasting claim, claimant's damage analyses were based upon claimant's certified payrolls and equipment records, which tracked each piece of equipment while it was on the job. Claimant's damages arising from the blasting change were calculated by comparing actual pre-change and post-change excavation productivity to determine the additional costs incurred by Holloway for the productivity analysis. The scheduling analysis also examined pre-change and post-progress records to determine the delay caused by the change.

Claimant's expert witness, Thomas P. Dekar, furnished an analysis of the blasting, utility, and traffic control claims by utilizing the actual labor and equipment records.

Respondent objected to Dr. Dekar's calculations of actual direct labor cost, especially to the

markup of 40% to cover overhead.* The markup is permissible by *§109.4.1 of the Specifications* where force account records are maintained. Force account records were not maintained; therefore, the 40% markup will bot be considered by the Court as an item of the damages. The 7% prime contractor markups will not be included by the Court on any of the items of damages.

Claimant asserts that the following enumerated costs resulted from the delays associated with utility relocations, blasting reduction, and traffic control, collectively in the amounts of:

Gross Labor		$2,172,341.54
40% Overhead Markup*		868,936.62
Payroll Taxes & Insurance		477,915.13
Union Fringes	332,473.78	
Equipment		3,041,349.00
Quantity Control		17,633.81
PL & PD Insurance		140,000.00
		$7,050,649.88

The Court has determined that this itemization is more accurate for determining the actual damages sustained by the claimant.

Without reviewing the relative merit of each item at this time, nor adjusting or disallowing same, the Court must first determine the issue raised by the respondent that timely notice was not provided, whereupon the respondent did not maintain force account records. Respondent avers that the failure to notice the respondent's engineer that there were changed condition(s) requires the disallowance of all such items. *Section 109.4.8 of the West Virginia Department of Highways Specifications of 1978* further provides that:

> The Contractor's representative and the (respondent's) Engineer shall compare records daily of the cost of work done as ordered on a **force account basis**, and shall indicate agreement by signature on such records.
>
> No payment will be made for work performed on a force account basis until the Contractor has furnished the Engineer with duplicate itemized statements of the cost of such force account work detailed.

It is uncontroverted that force account records were not maintained. But this is not a claim asserting "extra work." It is, in the language in *Langenfelder,* "essentially a claim for damages resulting from a breach of contract, causing losses to the contractor sounding in tort." Id. Claimant has demonstrated by a preponderance of the evidence that substantial damages were suffered in the performance of this contract.

The Court concludes that the unilateral breach of contract by the respondent relating to the reduction of blasting limits was the direct and proximate cause of claimant's most significant increased costs. However, the Court finds that the claimant was in part responsible for the increased costs by not exercising greater diligence in the performance of the blasting operations. There were other problems encountered by claimant during the blasting operations which may have contributed

to the 50% decrease in efficiency, including, but not limited to, the method of the blasting operations and the haul road problems. The Court is of the opinion that the respondent's action in limiting the peak particle velocity contributed to at least 37.5% of the delays experienced by claimant. Therefore, the Court will make an award for 75% of the increased costs. The Court, having reviewed all of the particulars put forth by claimant, makes an award for two portions of the blasting delay. The gross labor costs and the insurance portions are awarded by the Court in the amount of$1,747,481.52.

A recapitulation of the award made by the Court for all items considered hereinabove is as follows:

Blasting Operations	$1,747,481.52
Waste Area Relocation	115,830.00
Subcontractor (Charleston Construction, Inc). Extra Costs	46,093.40
Subcontractor (Charleston Construction Inc.) Pavement Replacement	10,254.85
Traffic Control	20,624.00
Subcontractor (N.H. Stone, Inc.) Fencing	1,022.61
Retaining Wall Survey Costs	200.00
TOTAL	$1,941,506.38

The Court is of the opinion to and does award to claimant and its subcontractors the amount of $1,941,506.38, plus interest in the amount of $464,994.00 in accordance with the provisions of W.Va. Code §14-3-1, for a total award of $2,406,500.38.

Award of $2,406,500.38.

OPINION ISSUED JANUARY 17, 1992

DAVID L. AKERS
VS.
PUBLIC SERVICE COMMISSION
(CC-90-406a)

Claimant present in person.
Richard Hitt, Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted to the Court upon the Notice of Claim and the Answer filed by respondent.

Claimant seeks recovery for a pro rata annual increment increase which he earned during the 1988-89 Fiscal Year. Claimant retired during this fiscal year and was not compensated for the pro rata annual increment which he earned from July 1, 1988 through December 31, 1988, in the amount of $378.00.

The Court has previously considered the issue in this claim and determined that claimant is entitled to an award for his pro rata share of the annual incremental salary increase earned during the 1988-89 Fiscal Year. See *Roberts v. Div. of Health*, CC-90-270, Unpublished Opinion issued January 25, 1991.

In view of the foregoing the Court makes an award to claimant in the amount of $378.00.

Award of $378.00.

OPINION ISSUED JANUARY 17, 1992

DAVID L. AKERS
VS.
PUBLIC SERVICE COMMISSION
(CC-90-406b)

Claimant present in person.
Cassius Toon, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for annual leave compensation which he contends he did not receive upon his retirement from the respondent State agency on December 31, 1988.

Claimant alleges that the respondent failed to include certain holidays as a part of his lump sum annual leave payment for which he would have received compensation if he had continued

on respondent's payroll for January and February, 1989. He also contends that the method of calculating his per day salary was incorrect as respondent did not include any part of the annual increment only claimant's actual base gross salary.

Respondent State agency contends that claimant was paid in accordance with the practices and procedures of all State agencies for determining the per day salary and the lump sum annual leave payment.

The Court has reviewed all of the evidence in this claim and has determined that the practices and procedures followed by the respondent State agency in calculating the lump sum annual leave amount to be paid to the claimant on the date of his departure were in accordance with the practices and procedures applied to al employees at that time.

In view of the foregoing, the Court is of the Opinion and does deny this claim.

Claim disallowed.

OPINION ISSUED JANUARY 17, 1992

ANN MARIE ALTIZER
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY OF WEST VIRGINIA
(CC-91-312)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,144.00 for mileage expense incurred while teaching a course at a community college of Marshall University, a facility of the respondent. The travel expense vouchers for the mileage expense were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,144.00.

Award of $1,144.00.

OPINION ISSUED JANUARY 17, 1992

AMERICAN DECAL & MFG. CO.
VS.
DIVISION OF MOTOR VEHICLES
(CC-91-374)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimants seeks $5,388.75 for motorcycle decals provided respondent. The invoice for the decals was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $5,388.75.

Award of $5,388.75.

OPINION ISSUED JANUARY 17, 1992

LORA BARKER
VS.
DIVISION OF HIGHWAYS
(CC-90-190)

Claimant's son, Roger Baker, for claimant.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On February 16, 1990, the claimant's son, Roger Barker, was driving the claimant's

1983 Ford Ranger, four wheel drive truck, south on Route 20 in the vicinity of the Blue Stone Dam in Summers County. At approximately 12:00 noon on that date, a beach ball-size rock fell from a mountain ledge adjoining Route 20 and struck claimant's truck. The rock shattered the windshield and crushed the cab of the truck. Roger Barker testified that the rock was between 150 to 200 pounds. Fortunately, he was not seriously injured and sustained only minor cuts and abrasions. The vehicle repair was estimated to cost $1,516.12. Neither the claimant nor her son had insurance to cover the damages.

The respondent denies negligence as it did not have notice that this particular rock was going to fall. However, Bobby Joe Maddy, Summers County Road Supervisor for the respondent, testified that the ledge adjoining the southbound lane of Route 20 in the area of the accident is not shelved or otherwise secured to prevent rocks from falling onto the highway. Mr.

Maddy further testified that rocks fall there continually. Although signs warning of this hazard are posted, the claimant testified he did not see them.

The rule of law governing road hazards provides that the State is neither an insurer nor a guarantor of the safety of travelers on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for respondent to be found liable for the damages sustained, the claimant must prove that it the respondent had actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. Davis v. Dept. of Highways, 11 Ct.Cl. 150 (1976). It appears to the Court that the respondent was on notice of the possibility of rocks falling in this area of Route 20 prior to this accident, and that respondent has taken insufficient action to remedy the potential hazard to the travelers of this route. See Koenig and Koenig v. Dept. of Highways, Claim No. CC-87-219, Unpublished Opinion issued December 20, 1989. The evidence indicates that the respondent conducted an engineering survey of this rock fall area five years before the accident, but took no other action to abate the hazard. Given the frequency and severity of this "continuing" hazard, it is not sufficient for the respondent to escape liability by arguing that no repairs may be made until federal funds become available.

In view of the foregoing, the Court is of the opinion to and does award the amount of $1,516.12 to the claimant.

Award of $1,516.12.

OPINION ISSUED JANUARY 17, 1992

WALTER C. BLOWER AND KARL F. HILL
VS.
EDUCATIONAL BROADCASTING AUTHORITY
(CC-90-139)

George A. Stozle, Attorney at Law, for claimants.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

This is a claim for the award of uncompensated annual leave. It appears uncontroverted from the facts that claimant Hill had accrued 49 days of annual leave. Upon his separation from employment in 1985, he was compensated for only 30 of the 49 days. Mr. Hill accordingly seeks an award for the 19 days that were uncompensated, and an additional two holidays in November, totaling 21 days. The per day gross earnings for claimant Hill was $96.15 for a total claim in the amount of $2,019.15.

Claimant Blower alleges similar facts and circumstances. He had accumulated 53 days of unexpended leave by the date of his resignation in 1985. Respondent paid him for 29 of those days, leaving 24 days uncompensated. Three additional days for holidays were also to be paid to Mr. Blower. The holidays involved were Christmas, New Year's Day, and Martin Luther King Day. In total, 27 days were not compensated, which comprises claimant's claim. The 27 days multiplied by his average per day rate of $97.55 equals the sum of $2,633.85 (claimant asserts the sum of $2,633.95 but the correct sum is $2,633.85. Mr. Blower seeks to recover this amount. Neither the number of days nor the rate of compensation were contested by the respondent.

During the tenure of the claimants with the respondent, respondent engaged in a practice of compensating annual leave beyond a 30 day carryover limitation, although respondent's personnel guidelines, effective as of July 1, 1984, and specifically enumerated as section 5.02, prohibits such practice. It appears from the testimony that respondent's management permitted this practice of compensating annual leave beyond the 30 day carryover period by accepting and extending resignation or departure dates, and by including and extending annual leave for holidays occurring within the accrued leave periods.

Claimant further contend that a "grandfather clause" permitted them to receive compensation of actual annual leave beyond the 30 day carryover policy adopted as of December 31, 1985, as their employment occurred prior to the adoption of the particular provision.

It appears to the Court that the custom practice of the respondent was to provide full compensation for annual leave, although the annual leave exceeded the 30 day limitation. Claimants relied upon this practice in contemplation of their resignations. The Court is of the opinion that equity and good conscience dictate that the claimants herein receive full compensation for their unexpended annual leave as agreed to by the parties at the time of their resignations.

The Court therefore makes an award to Mr. Hill in the amount of $2,019.15 and the Court makes an award to Mr. Blower in the amount of $2,633.85.

Award of $2,019.15 to Karl F. Hill.

Award of $2,633.85 to Walter C. Blower.

OPINION ISSUED JANUARY 17, 1992

KATHLEEN M. BRAKE
VS.
DIVISION OF HIGHWAYS
(CC-89-171)

J. David Judy, III, Attorney at Law, for claimant.
Jeff Miller, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to her 1981 Toyota which occurred when claimant was operating her automobile on State Route 42/7 in Grant County. The incident occurred on February 3, 1989, at approximately 10:15 p.m. Claimant came upon a creek where a bridge had been removed by respondent on that same day. A barricade placed at the edge of the road was not in place and claimant drover her vehicle into the creek causing damages to her automobile in the amount of $3,361.71. Claimant alleges respondent was negligent as it failed to warn the traveling public that the bridge was no longer present and that respondent failed to place a proper barricade at the edge of the road where the bridge was out.

Respondent alleges that there were signs on the roads leading to the creek which adequately warned the traveling public that the bridge was not present. Respondent also contends that a barricade had been placed at the edge of the road on the day in question and that respondent did not have notice that the barricade had been removed until after claimant's accident.

Claimant and a friend, Timothy L. Huffman, went to Day Park located on State Route 42/9. When they left the park, claimant drove out of the park onto State Route 42/7. Claimant was operating her vehicle at approximately 10 to 15 miles per hour. It was dark and cloudy with some fog and rain. Claimant drove her vehicle about one-tenth of a mile when the vehicle went off the road and went into a creek. Claimant did not see any barricade at the edge of the road prior to driving the vehicle into the creek. The evidence established that a barricade was later found in the creek approximately 100 feet from the scene of the accident. Claimant was unfamiliar with this area and, in fact, testified that she thought she was leaving the park the same way she had driven into the park. She was actually on State Route 42/7 rather than State Route 42/5.

Officer Randall Keplinger, Deputy Sheriff for Grant County, discovered claimant's mishap while he was on duty at 10:15 p.m. He was on the opposite side of the creek from claimant's accident. He observed the area and saw an L-shaped wooden barricade located on that side of the

creek. The barricade had reflecting material on it, but no sign was on it. This barricade faced the traffic approaching from his side of the creek. He testified that there was neither a warning sign nor barricade present on the side of the creek where claimant's vehicle had gone into the creek. he stated that it was his opinion that the accident was not the result of excessive speed on the part of the driver.

Gene Allen Stickley, respondent's crew leader, testified that he was with the bridge crew that had removed the super structure of the bridge from the creek bed on the day of this accident. The bridge had been taken down on the previous day. When he left the site, there was a Type 3 or "L shaped" barricade with a sign noting "Bridge Closed" placed by the crew at the edge of the road where the bridge was removed. This was the customary practice for the crew. A permanent type of barricade with steel posts and guardrail is placed at such sites by the construction section at a later time, normally within a week after a bridge is removed.

Don I. Pyle, a safety inspector for respondent, testified that there was a sign at the intersection of State Routes 5 and 42/9 which read "Road Closed to Thru Traffic". This sign was at the intersection where claimant approached the entrance to Day Park. There were also two signs warning the traveling public that read "Bridge Closed" and "Road closed Thru Traffic" located on State Route 42/7 at the intersection of State Route 5 on the opposite side of Day Park which claimant would not have observed. This particular bridge had been closed by respondent during the summer of 1985. The signs had been in place since that time.

It is apparent to the Court that the claimant and her passenger were unfamiliar with the roads in the area of this accident. However, the Court is also of the opinion that respondent had signs in place to adequately warn the traveling public that the bridge was not in place. Claimant passed one sign which warned the public "Road Closed to Thru Traffic" as she approached the park. It is also the opinion of the Court that respondent did not have sufficient notice that the barricade across the road at the edge of the creek was not in place. The crew had left the scene at approximately 1:30 p.m. and the claimant's accident occurred at approximately 10:15 p.m.

The law of West Virginia is well settled that the State is neither an insurer nor a guarantor of the safety of travelers on its highways. *Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947).* This Court has applied this principal in many previous claims. To prevail in a negligence action against respondent, the claimant must establish that the respondent knew or should have known that a hazard existed and that respondent had sufficient time in which to remedy the situation. The Court is of the opinion that claimant has failed to establish negligence on the part of the respondent in this claim.

In accordance with the findings of facts and conclusions of laws as indicated hereinabove, the Court must deny this claim.

Claim disallowed.

OPINION ISSUED JANUARY 17, 1992

DONNA BRUNETTI
VS.
DEPARTMENT OF EDUCATION
(CC-91-301)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks reimbursement in the amount of $248.00 for tuition for a class taken for certification.

Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED JANUARY 17, 1992

CASTO TECHNICAL SERVICES
VS.
BOARD OF DIRECTORS OF THE STATE COLLEGE SYSTEM
(CC-91-326)

Thomas G. Casto, Attorney at Law, for claimant.
John G. Hackney, Jr., Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $16,401.00 for services rendered to West Virginia Institute of Technology, a facility of the respondent under a contract for all labor and equipment necessary to provide corrective, predictive, and preventative maintenance on all heating, ventilating, air

conditioning and temperature control and related systems. The invoice for services rendered in

January 1990 was not processed for payment int he proper fiscal year; therefore, the claimant has not been paid.

In view of the foregoing, the Court makes an award in the amount of $16,401.00.

Award of $16,401.00.

OPINION ISSUED JANUARY 17, 1992

ALLEN J. CODY
VS.
DIVISION OF CORRECTIONS
(CC-91-324)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant brought this action in the amount of $144.00 for increment increase pay which was not paid to the claimant due to a clerical error on the part of the respondent State agency.

Respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which cold have been paid if the clerical error had not occurred.

In view of the foregoing, the Court makes an award in the amount of $144.00.

Award of $144.00.

OPINION ISSUED JANUARY 17, 1992

CALVEN F. COMER, SR., AND JOSEPHINE COMER
VS.
DIVISION OF HIGHWAYS
(CC-90-420)

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

PER CURIAM:

At 6:30 a.m., on December 7, 1990, the claimants' 1986 Chevrolet Monte Carlo was damaged when it crossed a six foot by four foot hole in the westbound lane of Route 60, approaching the Kelley's Creek bridge, near Cedar Grove in Kanawha County. Mr. Comer testified that he was driving claimants' vehicle on this date, but he was unable to avoid the hole since a coal truck was passing and obstructing the adjoining westbound lane. The respondent had attempted to cover the hole with two large steel plates. However, Mr. Comer testified that one of the plates had been knocked away, exposing the underpinning and rebar of the bridge. Mr. Comer stated that he could actually see through the hole to the water below the bridge. No warning signs were present to alert motorists of this hazard. Fortunately, neither Mr. or Mrs. Comer were injured. Their vehicle sustained damages in the amount of $704.01. The windshield was cracked upon impact with the hole and required replacement. The invoice for the windshield was $235.86. The required replacement of two ruptured tires, two broken rims, and repair of an upper control arm, complete with a front and alignment was estimated to cost $468.15. The claimants appear to have both liability and collision insurance with State Farm Insurance. Their policy contains a comprehensive coverage provision with a $250.00 deductible. The insurer advised the claimants to file with the Court of Claims before they would review the claim. The insurer, however, assisted the claimants with photographs of the accident site and estimates for repairs to their vehicle.

The respondent denies any negligence. James Dingess, respondent's Supervisor for eastern Kanawha County, testified that he was familiar with the hole in the bridge on Route 60 that the claimants encountered. He indicated that temporary repairs were initiated around 1:00 a.m. on

December 7, 1990. Two steel plates, four by eight feet and weighing 400 pounds each were placed by an end loader over the described hazard. Mr. Dingess further testified that additional repair was required when one of the plates had moved, exposing the hole between 4:00 and 5:00 a.m. that morning.

It appears to the Court that the temporary steel plates somehow moved between 5:00 a.m. and 6:30 a.m. on December 7, 1990, exposing the hole in the bridge which caused claimant's accident. Although the respondent positioned flagmen near the bridge while conducting temporary repairs, Mr. Dingess testified that there were time periods when flagmen were not at the bridge on the morning of the claimant's accident.

It is the opinion of the Court that the respondent was negligent in its failure to warn and adequately safe guard the traveling public from this known hazard and its negligence did directly and proximately cause the damages to claimants' vehicle. Therefore, the Court will make an award to the claimants for the amount of their insurance deductible which is $250.00.

This Court has previously held that claims for which insurance may be available will not receive awards except for the deductible. See *Sommerville vs. Division of Highways*, an unpublished Opinion of the Court of Claims, issued June 14, 1991. Accordingly, an award in the amount of $250.00 is granted to the claimants.

Award of $250.00.

OPINION ISSUED JANUARY 17, 1992

WADE DAVIS
VS.
DIVISION OF HIGHWAYS
(CC-90-260)

John R. Mitchell, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon written stipulation that respondent is liable to claimant in the amount of $500.00 based upon the following facts.

That claimant was injured in an automobile accident which occurred July 26, 1989, in Kanawha County, West Virginia, on U.S. Route 119, a public road maintained by the respondent.

That as a result of the aforesaid accident, the claimant sustained injuries to his head, neck, and all extremities.

That the claimant has been fully compensated through his insurance carrier for all medical bills incurred as a result of the accident along with compensation for property damage to his motor vehicle.

That there is sufficient evidence which, if uncontroverted, would indicate that the respondent's maintenance of the highway at the location of the claimant's accident was deficient and that this deficiency was the proximate cause of the claimant's motor vehicle accident, which said accident caused claimants injuries.

That there is a moral obligation on the part of the respondent to compensate the claimant for his pain and suffering resulting from the aforesaid injuries and that full and just compensation would be Five Hundred Dollars ($500.00).

In view of the foregoing, the Court makes an award to claimant in the stipulated amount of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 17, 1992

DIVISION OF CORRECTIONS/PRISON INDUSTRIES
VS.
DEPARTMENT OF TAX AND REVENUE
(CC-91-215)

Rita Stuart, Attorney at Law, for claimant.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $50,000.00 for forms printed as requested by the respondent State agency. The invoices were to be processed through intergovernmental transfers. The invoices for the services were processed for payment in the proper fiscal year; however, there were insufficient funds in the General Revenue fund to satisfy the invoices and the State Auditor was unable to transfer funds to claimant's account. The respondent State agency had sufficient funds in its

appropriation to satisfy the invoices had the General Revenue fund met anticipated levels. As a result of the shortfall in the General Revenue Fund, the respond has not paid claimant. The respondent admits the validity of the claim.

The Court is of the opinion that this claim is not an over expenditure claim within the holding of this Court's opinion in *Airkem Sales and Service, et al. vs. Dept. of Mental Health,* 9 Ct. Cl. 180 (1971). That opinion specifically applies to claims wherein State agencies had attempted to spend more money then had been appropriated to it in the Budget Bill as passed by the Legislature. The respondent State agency herein did have sufficient funds appropriated to satisfy claimant's invoices. However, the General Revenue fund for all agencies of the State of West Virginia experienced a shortfall at the end of the fiscal year. Thus, neither the Secretary nor the immediate director of the respondent State agency attempted to expend funds which were not in the budget appropriated to the agency for the fiscal year in question. It is the opinion of the Court that the ruling in the Airkem opinion does not apply to this claim.

In view of the foregoing, the Court makes an award to the claimant in the amount of $50,000.00.

Award of $50,000.00.

OPINION ISSUED JANUARY 17, 1992

EXXON COMPANY, U.S.A.
VS.
STATE TREASURER
(CC-91-338)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $132.70 for gasoline provided an employee of the respondent. The employee was operating a vehicle owned by the State. The invoices for the gasoline were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $132.70.

Award of $132.70.

OPINION ISSUED JANUARY 17, 1992

FEDERAL DEPOSIT INSURANCE CORPORATION
VS.
DIVISION OF BANKING
(CC-91-389)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $2,494.28 for equipment service provided respondent. The invoices for the services were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $2,494.28.

Award of $2,494.28.

OPINION ISSUED JANUARY 17, 1992

JACK GREGORY AND SHIRLEY GREGORY
VS.
DIVISION OF HIGHWAYS
(CC-91-93)

Jack Gregory appeared on behalf of the claimants.

Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

On January 30, 1991, at approximately 6:00 p.m., the claimant was traveling west on Interstate 64 between the Greenbrier and Broad Street exits, in Charleston, Kanawha County. In the described area near Mile Post 98, the claimants' 1989 Nissan Sentra fell into a hole described by the claimant as being two to four feet wide, two to four feet long, and 12 inches deep. The hole was reportedly full of water, and could not be seen by the claimant. Upon impact with the hole, the front right tire ruptured, and the vehicle was knocked out of alignment. The claimant testified that he was traveling between 45 and 50 miles per hour when the accident occurred, and that he had no warning of this hole in the road. The damaged tire was replaced and balanced, and the vehicle was realigned. Receipts admitted into evidence indicate the cost of the tire was $40.28, inclusive of the balancing and applicable taxes. The alignment was an additional $19.95. These repair costs total $60.23. The claimant testified that insurance did not pay for the repairs. The claimant testified that the damaged tire was a new replacement, and that it had approximately 10,000 miles of wear when the accident occurred.

The respondent's witness, Herbert C. Boggs, Interstate Maintenance Assistant for the respondent, testified that he was familiar with the hole that the claimant had described. He stated that an accident had occurred earlier on the same evening, and in the same area as the claimant's accident. Mr. Boggs' testimony indicates that the first accident was reported around 4:30 P.m. to the respondent, but repairs to the hole may not have been completed before midnight. The claimant's 6:00 p.m. accident appears to have happened after the respondent had notice of the hazard, but before repairs were undertaken on the evening of January 30, 1991.

Considering the evidence in the light most favorable to the claimants, and holding that the respondent was on notice of the described road hazard, the Court finds the respondent negligent for failing to warn the travelers of the interstate of this hazard. The Court, however, is unwilling to recommend full reimbursement for a tire replacement without adjustment for its prior use. Accordingly, the Cost of the new tire is reduced by 25%. The Court therefore makes an award to the claimants in the amount of $50.13.

Award of $50.13.

OPINION ISSUED JANUARY 17, 1992

HARRISON COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-91-64)

Edward Matko, Prosecuting Attorney of Harrison County, for claimant.
John E. Shank, Deputy Attorney General, for claimant.

PER CURIAM:

This claim was submitted for determination upon the Answer filed by the respondent, and correspondence received from the claimant, wherein the claimant agreed with the amount stated in the Answer as settlement of the claim.

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

The Court previously determined in the *County Comm'n. of Mineral County v. Div. of Corrections*, an unpublished opinion of the Court of Claims issued November 21, 1990, that the respondent State agency is liable to the claimant for the cost of housing these inmates.

Pursuant to the holding in the Mineral County Opinion, the respondent reviewed this claim to determine the number of inmate days for which respondent may be liable. Respondent then filed an Answer admitting the validity of the claim and that the amount of $24,930.00 is a fair and reasonable settlement of the claim.

In view of the foregoing, the Court makes an award to claimant in the amount of $24,930.00.

Award of $24,930.00.

OPINION ISSUED JANUARY 17, 1992

MCKINLEY ENGINEERING COMPANY
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-91-2)

Claimant appeared in behalf of company without counsel.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

From a contract dated September 28, 1988, by and between claimant and the respondent, claimant was to have performed certain design work on the Northern Regional Jail. On or about March 30, 1989, claimant was notified by John L. King, Executive Director of the respondent to suspend work on the contract due to inadequate governmental funding. By letter dated November 8, 1989, the respondent canceled the aforementioned contract. The claimant promptly submitted costs associated with work it had completed pursuant to the contract by invoice by letter dated February 1, 1990, with payment of all invoiced costs less the amount of $1,722.80. The action was brought to recover the alleged balance due in the amount of $1,722.80.

Frank G. Shumaker, Deputy Director of the respondent agency, testified that the $1,722.80 of disallowed expenses were the result of unauthorized engineering evaluations, travel, and non-contract related long-distance telephone calls.

In addressing each allowed item, it appears from the evidence that the engineering evaluations were properly authorized and completed pursuant to the contract. Accordingly, the amounts of $455.00 and $520.00 for site evaluations requested by respondent's former Board member, John Tominack, and former Executive Director, John King, are valid. Claimant's travel expenses of $700.60 are the reasonable costs associated with the previously described site evaluations, and were likewise valid.

The remaining disallowed item is that of long distance telephone charges in the amount of $47.20. It appears to the Court that the respondent has paid a portion of the original invoiced charges of $96.31. The remaining amount of $47.20 appears to the Court to be for telephone calls which were not due the claimant under the contract. Therefore, this amount is denied.

In view of the foregoing, the Court makes an award to the claimant in the total amount of $1,675.60.

Award of $1,676.60.

OPINION ISSUED JANUARY 17, 1992

PHYLLIS HAYNES EDENS, CCR, INC.
VS.
WORKERS' COMPENSATION FUND
(CC-91-391)

Claimant represents self.

John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $399.57 for court reporter services provided respondent. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $399.57.

Award of $399.57.

OPINION ISSUED JANUARY 17, 1992

R. L. WHARTON, LTD
VS.
DIVISION OF ENVIRONMENTAL PROTECTION
(CC-91-331 a)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $7,270.00 and $1,308.60 in interest for plugging and filling oil and gas wells as directed by the respondent state agency. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In accordance with West Virginia Code $14-2-12 the Court hereby denies interest in the amount of $1,308.60.

In view of the foregoing, the Court makes an award in the amount of $7,270.00.

Award of $7,270.00.

OPINION ISSUED JANUARY 17, 1992

SCOTT LUMBER COMPANY
VS.
DIVISION OF CULTURE AND HISTORY
(CC-91-333)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,545.00 for a door custom made for Independence Hall in Wheeling, West Virginia provided respondent. The invoice for the door was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,545.00.

Award of $1,545.00.

OPINION ISSUED JANUARY 17, 1992

WEST VIRGINIA REGIONAL JAIL
AND CORRECTIONAL FACILITY AUTHORITY
VS.
DIVISION OF CORRECTIONS
(CC-91-235)

Richard M. Guttman, Assistant Attorney General, for claimant.
George P. Stanton, III, Assistant Attorney General, and Rita Stuart, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court upon a stipulation agreed to by the parties.

The claimant maintains the Eastern Regional Jail which provides accommodations for prisons from several counties. Many of these prisoners have been sentenced and committed to other facilities, Huttonsville Correctional Center and West Virginia Penitentiary, and owned and operated by respondent; however, respondent is unable to house such prisoners at such other facilities due to overcrowded conditions in such other facilities, and has caused such prisoners to be incarcerated at the Eastern Regional Jail.

Respondent has been unable to process the invoices received from the claimant during the 1990-91 fiscal year as it did not have sufficient funds within its budget for these expenses.

Claimant and respondent have agreed that claimant has incurred fair and reasonable costs in the amount of $37,000.00 for providing accommodations for these inmates.

In view of the foregoing the Court makes an award to the claimant in the amount of $37,000.00.

Award of $37,000.00

OPINION ISSUED JANUARY 17, 1992

PAUL R. WILSON
VS.
DIVISION OF HIGHWAYS
(CC-91-259)

Claimant represents self.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for determination upon a stipulation of the facts of the claim as follows.

Claimant, on or about July 30, 1991, was traveling on Green Valley Drive, also known as County Route 8, in Kanawha county, West Virginia, when his vehicle came upon some “red clay mud” and claimant lost control of his vehicle. It was necessary for a tow truck to be called to free the vehicle from the “red clay mud’.

County Route 8 is owned and maintained by respondent. The "red clay mud" came to exist upon the road surface as a result of an operation performed by employees of the respondent.

As a result of this incident, claimant incurred monetary damages in the amount of $215.28 for having his vehicle towed. Respondent stipulated that this amount was reasonable and necessary.

In view of the foregoing the Court makes an award to the claimant in the amount of $215.28.

Award of $215.28.

OPINION ISSUED JANUARY 23, 1992

NORMAN BONNER
VS.
DIVISION OF HIGHWAYS
(CC-89-202)

John W. Cooper, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

BAKER, JUDGE:

On or about November 4, 1985, along the Dry Fork River in an area known as Gladwin, Tucker County, significant flooding occurred. What is commonly described as the "Jenningston Road" was severely damaged by the flood and required major repair. The respondent, in order to effect repairs to the road, needed rock and topsoil. These materials were not readily available. Due to the urgency of the situation, respondent requested that claimant allow rock and topsoil to be removed from his property for the repairs to the road. An estimated 40 to 50 truck loads of rock and topsoil were allegedly removed by respondent from four to five acres of claimant's property. Shortly after repairs were made to the road, a landslide occurred in the Gladwin area. Respondent then requested that claimant provide a waste area for deposit of the landslide material. Claimant agreed to the creation of a waste area with the understanding that respondent would contour, grade, and seed the previously excavated fill area utilizing the landslide waste.

Prior to the flooding, claimant asserts that the four of his property involved in this matter was a meadow used for growing hay. As a result of the placement of waste material in this meadow, it is no longer suitable for the production of hay. Claimant alleges that rocks and weeds now flourish where the meadow once existed.

In the spring of 1986, as Kanawha Stone, a contractor for respondent, was finishing up its work, it attempted to rough-grade claimant's property, but a rain of several days' duration made the site too muddy for its heavy equipment to work. Kanawha Stone moved off the job, and respondent's project supervisor and project engineer offered to let claimant do the restoration with his own equipment and to pay him through Kanawha Stone, for which he had previous done subcontract work. By occupation, claimant is a small excavation contractor principally involved in constructing sewers and related facilities. He testified that he did not have adequate equipment to perform the regrading; therefore, he solicited two other contractors for estimates to perform this grading operation. The "rough grade" of his five acres and reseeding was estimated to cost $12,000.00. Both solicited bids approximated this amount.

The testimony is rather ambiguous as to what occurred after the offer to claimant in the spring of 1986. It is uncontroverted that the work has not been performed. Respondent has not initiated its own repair of this property. It further appears that a meeting between claimant and respondent's representatives occurred in January 1987, at which time respondent requested a right of way from claimant, perhaps in exchange for re-grading and repairing the five acres.

Claimant's counsel characterizes this matter as one involving a simple contract dispute for which services, in exchange for use of property, were to be performed. The issue of a right of way is currently before the Circuit court of Tucker County in reverse condemnation proceedings. The issue before this Court is whether a contract for the initial grading and reseeding of claimant's five acres was ever made, and whether there was a breach of that agreement due to non-performances. The issue of the right of way and an ancillary matter concerning a culvert are excluded from the Court's consideration, pending disposition of the action before the Tucker County Circuit Court.

This Court finds that respondent was permitted to use claimant's land as a waste area in return for its agreement to use reshape, rough-grade and reseed it, and that respondent failed to perform. Claimant was not to have his land restored to its original condition, but he was entitled to what respondent agreed to do.

The Court has determined that claimant is entitled to a quantum merit award for restoring the land, using his own equipment, if he chooses. Testimony indicated that respondent would allow claimant five to seven days to perform the necessary work. He would be entitled to the cost of reseeding. The Court is of the opinion that he work can be performed at a cost substantially less than the estimates $12,000.00. The Court is of the opinion that the amount of $5,900.00 is fair and reasonable compensation.

In accordance with the above, the Court makes an award to claimant in the amount of $5,900.00.

Award of $5,900.00.

OPINION ISSUED JANUARY 23, 1992

MARION COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-91-398)

George Higinbotham, Attorney at Law, for claimant.
George P. Stanton, III, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for determination upon the Answer filed by the respondent and correspondence received from the claimant, wherein the claimant agreed to accept the amount stated in the Answer as settlement of the claim.

Claimant, County Commission of Marion County, provides and maintains a facility for the incarceration of prisoners who have committed crimes in Marion County. Some of the prisoners held in the county facility have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action to recover the costs of housing for prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the county prison facility for periods of time beyond the date of the commitment order.

The Court previously determined in the *County Comm'n of Mineral County v. Div. of Corrections*, an unpublished opinion of the Court of Claims issued November 21, 1990, that the respondent is liable to the claimant for the cost of housing these inmates.

Pursuant to the holding in the Mineral County Opinion, the respondent reviewed this claim to determine the number of inmate days for which respondent may be liable. Respondent then filed an answer admitting the validity of the claim and that the amount of $20,554.00 is a fair and reasonable settlement of the claim.

In view of the foregoing, the Court makes an award to claimant in the amount of $20,554.00.

Award of $20,554.00.

OPINION ISSUED JANUARY 23, 1992

FRANKLIN W. QUILLIN, JR., DDS PC
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-90-388)

Stephen C. Littlepage, Attorney at Law, for claimant.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

Claimant is a dentist with a practice predominantly serving children in the Huntington area. Many of his patients received services which are paid for through a Medicaid reimbursement program operated by respondent. The reimbursement are funded in part from federal dollars and in part from State dollars. Claimant alleges that he was not properly reimbursed for services rendered to Medicaid patients during the period of 1984-1988. He brought this action to recover unreimbursed fees in the amount of $16,620.00.

Respondent contends the claimant is not entitled to reimbursement for a certain number of the alleged billings as these were already reimbursed to the claimant; a certain number of the billings are barred by a Medicaid established requirement that the bills be filed for reimbursement within one year of the services; and a certain number of the billings needed information to establish Medicaid criteria for reimbursement.

Respondent has established and claimant does not dispute that certain of the billings have been paid and satisfied by respondent. This group of billings is, therefore, no longer under consideration by the Court.

The second group of billings has been established as having been submitted to respondent more than one year after the services were rendered by claimant. As the claimant failed to submit these particular bills in accordance with Medicaid guidelines, respondent is unable to receive federal Medicaid dollars for reimbursing claimant for these billings. The Court is of the opinion that claimant was negligent for failing to bill respondent in a timely manner for his services. The bills in this category are denied by the Court.

The last category of bills for which the claimant has not been paid involve submissions to respondent within a year, but respondent failed to pay claimant as there were various problems with ascertaining Medicaid numbers for the patients or some other agency problem including the lack of funds. The Court is of the opinion that claimant is entitled to an award for these bills which were originally billed to respondent in the amount of $4,009.00. Claimant testified that he generally received 50% of the original bill in Medicaid reimbursement.
Therefore, the Court is of the opinion to and does make an award to claimant in the amount of $2,004.00.

Award of $2,004.00.

OPINION ISSUED JANUARY 24, 1992

CITY OF GRAFTON
VS.
DIVISION OF CORRECTIONS
(CC-91-330)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover late charges in the amount of $1,073.60 when the respondent State agency's facility, Pruntytown Facility, failed to pay water service fees and fire service fees within a twenty-fay period. The Public Service Commission has provided a late charge penalty in the tariff for claimant.

Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED MARCH 4, 1992

NORMAN C. ADKINS
VS.
DIVISION OF HIGHWAYS
(CC-91-270)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On August 23, 1991, the claimant was departing from work in his vehicle around

11:30 p.m. when an approaching vehicle, a Chevrolet truck, kicked up a six by eight inch rock onto claimant's windshield and hood. This incident occurred on Maple Meadow Road, a road owned and maintained by the respondent in Raleigh County. The other vehicle was driven by Vernon Sears, a fellow employee and friend of the claimant. Immediately after the incident, the claimant requested that Mr. Sears file a claim with his insurer, but he was advised that the accident was the result of a road hazard for which no insurance was available. The claimant's own insurer, Auto Club Insurance, likewise asserted this was an uninsured risk, although claimant's $500.00 deductible would have excluded coverage in either event. The claimant testified that he was able to replace the broken windshield for $200.00. The cost to repair the dents is estimated at $200.00 for a total claim of $400.00.

The claimant testified that approximately eight hours before his accident he traveled upon Maple Meadow Road to go to work and he observed respondent's heavy equipment clearing and scraping the road in the vicinity of his accident. He testified that respondent's grader and end loader were cleaning ditch lines adjoining Maple Meadow Road. It is his opinion that the road was left in the road during the maintenance operation being performed by respondent's employees. Unfortunately, the claimant's theory of how the rock was in the road is uncorroborated. not witnesses were called by the claimant. The gap of some eight hours between his observation of road crews in the area of the accident and his striking a rock in the alleged road repair area is too attenuated to permit an inference that the respondent may have created or caused the hazard. No other reports of rock int he road were received by the respondent on that date. The burden of proof is upon the claimant to show by a preponderance of the evidence that the respondent's conduct caused the hazard complained of. The claimant has failed to establish negligence. It is too speculative in time for the Court to conclude that respondent's presence in the area caused or contributed to the claimant's accident in the absence of stronger evidence.

In accordance with the findings of fact and conclusions of law stated hereinabove, the Court is of the opinion to and must deny the claim.

Claim disallowed.

OPINION ISSUED MARCH 4, 1992

RUTH M. SMITH
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY OF WEST VIRGINIA
(CC-92-13)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $75.00 for personal items damaged in a storage facility when a plumbing problem occurred at West Virginia University, a facility of the respondent. Respondent, admitted the validity and amount of the claim; however, respondent does not have a fiscal method to reimburse claimant for her damages.

In view of the foregoing, the Court makes an award in the amount of $75.00.

Award of $75.00.

OPINION ISSUED MARCH 5, 1992

ROGER D. RICHARDS AND JUDITH A. RICHARDS
VS.
DIVISION OF HIGHWAYS
(CC-89-465)

Thomas C. Cady, Attorney at Law, for claimants.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On July 12, 1989, the claimants, husband and wife, were together on a Honda 1100 motorcycle riding south on U.S. Route 19, near Arnettsville, Monongalia County. They were on vacation and were traveling from their home in Michigan to ride through the mountains. The claimants allege that a large pool of water and debris had washed onto this road in the area of Fire Locator No. 11M N-19 485, and that respondent failed to prevent or otherwise warn the traveling public of this hazard, thereby causing the claimants' accident. Both claimants suffered physical and emotional injuries when they fell from their motorcycle after it skidded out of control on the water.

The respondent denies negligence for the alleged water hazard and avers that the claimants' own negligence and/or intervening and superseding causes were the proximate cause of this accident. The claimants contend that the respondent was negligent by allowing water to pool

across Route 19 in the vicinity of their accident. Ms. Ruth Wilgus, whose house is above but within 30 yards of the accident site, testified that water and not debris was present on the road when the accident occurred. Ms. Wilgus remembers seeing the accident from her front porch. She testified that the motorcycle came over a rise in the hill and the front wheel lifted up, and the motorcycle slid out from under the riders. Ms. Wilgus described this July 12, 1989, day as a hot afternoon. She testified that water "was oozing up in the cement---in the roadway." She recalled calling the respondent three or four times before the accident to complain about the ice that formed during the wintertime. She testified that water also collects on the road surface during the summertime. The record however is silent as to whether Ms. Wilgus likewise complained of this summertime condition to the respondent. Her last complaint concerning the wintertime road condition was one year before the accident. Ms. Wilgus stated the speed limit is 25 miles-per-hour in the vicinity of the accident and described it as a speed zone.

Mr. Woodrow Lake, a property owner of the vicinity of the accident whose home is above the accident site on an incline, testified that he too had observed running water on the road surface, and was advised by the respondent to construct a small dam-like structure to prevent water run-off from his driveway onto the roadway. However, when asked whether he had taken this action before or after the accident, Mr. Lake testified that he had constructed a speed bump type dam on his driveway after the accident. He had not spoken with respondent about the water on the road before the accident.

Richard Lee McGee, a police officer from the University Police Department, Morgantown, testified that he was three car lengths behind the claimants when their accident occurred. He stated that he was traveling 35-miles-per-hour, and that "they (the claimants) were going maybe a little faster than I was." The Officer observed that when he claimants passed the Arnettsville School, they went over a little grade in the road, and began to slide. Officer McGee described the road surface as nice, and the weather as a beautiful, sunny day. He did observe an area of water on the right-hand side of the road, which extended halfway into the right lane. The Officer could not remember seeing water before on this section of roadway. He described the patch of water as rain-like, but could not estimate its depth. He added that, "the road is really windy and you don't travel too fast on it...".

James M. Beer, District 4 Clarksburg Road Maintenance Engineer for respondent, testified that he had not observed a water problem in the accident area prior to the claimant's accident. When asked about the road condition that he examined after the accident, Mr. Beer stated, "I found absolutely nothing but I understand water may be seeping through the road but I have not found it any time I've been there and I haven't found any signs such as alligator cracking or spalling that would indicate that a lot of water was coming through the road."

Mr. Richards testified that as he topped the hill, traveling 25 to 30 miles per hour, he saw debris on the road surface. Although unable specifically to identify the debris on the road surface. Although unable specifically to identify the debris, he described it as muddy water. **He was not immediately alarmed by the road condition, and believed he could travel over the water.**

He testified, "As we went over the rise, I noticed that there was muddy water in the road, quite a bit of muddy water in the road, but it was not enough that it concerned me because I've drove over water many times and had no problem whatsoever." When the back end of the motorcycle began to slide, Mr. Richards could not compensate for this and he lost control of the motorcycle. He did not realize the road was banked to the right, and he kept turning the will of the bike to the right to come out of the slide. **It appears he did not reduce his speed of travel commensurate with the water hazard, nor did he attempt to avoid the water on the road.** Mr. Richards made no attempts to go around the water, but instead he decided to drive through the water. His decision to keep the wheel turned to the right after he began to slide may have further contributed to this accident. Mr. Richards testified that "(I)f I could have kept the wheel pointed straight down the road, we probably would have made it...".

The Monongalia County Sheriff's Department investigated the accident. Deputy Kenneth David Britton testified as the investigating officer that in his expert opinion, "...the vehicle went out of control basically because of some type of negligence on the part of either the operator, the passenger, or both parties involved." When asked whether the water on the road surface was sufficient to cause the vehicle to go out of control, the Deputy replied, "In my opinion, if an individual had been operating the vehicle in a prudent manner within the guidelines of the posted speed limit, the accident should not have occurred." The Deputy further testified that the speed limit in this area was 40 miles per hour. He described the water on the road as clear, and extending no more than one foot into the 22 foot wide southbound lane.

In accordance with the decision in the case of *Adkins v. Sims*, 130 W.Va. 645, 46 S.E. 2d 81 (1947), this Court has consistently held that the State is not a guarantor of the safety of the travelers on its roads. "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 circumstances." *Parsons v. State Road Comm'n.*, 8 Ct. Cl. 35 (1969). The State can neither be required nor expected to keep its highways absolutely free of ice and snow at all times, and the presence of an isolated ice patch on a highway during winter months, or a water patch in summer is generally insufficient to charge the State with negligence. See A. Jr. 2d Highways, Streets, and Bridges §506 and *Christo v. Dotson,* 151 W.Va. 696, 155 S.E.2d 571 (1967).

In view of the foregoing, the Court is of the opinion that the claimants have not established negligence on the part of the respondent. Therefore, the Court must deny this claim.

Claim Disallowed.

OPINION ISSUED APRIL 2, 1992

STEVE CLARK
VS.
DEPARTMENT OF ADMINISTRATION
(CC-91-157)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

On or about April 16, 1991, an evening rain and wind storm passed through the Dunbar, Kanawha County, area. The claimant had parked his 1979 Ford LTD on 28th Street adjoining the respondent's surplus property and storage facility. The storm with wind gusts in excess of 70 miles per hour lifted the claimant's vehicle and caused the damage to the vehicle. The claimant seeks damages in the amount of $1,131.87 for repairs. Debris from the roof dented the left front fender, broke the driver's side window and front windshield, and dented and cut the driver's side roof of his vehicle.

The facts appear uncontroverted by the respondent. The issue before the Court is whether the respondent is liable for the damage occasioned by the storm.

The claimant and the respondent have both indicated that the storm was unusual and intense. A witness for the claimant, Barry Clark, testified that the storm was the worst that he had ever seen in the area. He stated, "It was the biggie, as they call it. It's the one I think that took the roof off of the Ramada Inn."

Kenneth Frye, manager of respondent's facility testified that the roof on the surplus property building had recently been repainted and was in good repair.

After careful consideration of the record in this case, the Court has determined that no action or inaction on the part of the respondent was the proximate cause of the damages suffered by the claimant. Rather, it appears the damage occurred during a period of unusually turbulent wind and rain. While the Court is sympathetic with the claimant's plight, the claimant

has not established any negligence on the part of the respondent. Therefore, court must deny this claim.

Claim disallowed.

OPINION ISSUED APRIL 2, 1992

STERLING CLAY
VS.
DIVISION OF HIGHWAYS
(CC-91-220)

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

PER CURIAM:

On June 17, 1991, the claimant and his wife traveled from their Branchland, Lincoln County residence to Huntington, by way of Four-Mile Road and County Route 8. Upon returning to Branchland later that day, the claimant's wife, Jean Clay was driving the claimant's 1984 Chevrolet Cavalier when the vehicle struck a guardrail near the entrance to the Pound Fork Bridge in Branchland on Four-Mile Road. The claimant alleges that the wife could not have avoided colliding with it. As a result of the collision, the claimant seeks to recover the amount of $799.60 for repairing the front side and bumper of his vehicle.

The respondent denied negligence and asserted that intervening and superseding causes were the proximate cause of the claimant's damage, and that such damage is not directly attributable to any act or omission on the part of the respondent.

The Court, having considered the evidence in this claim, finds that vandalism caused the guardrail to become dislodged from its mounting and left upon the road-side. Timothy S. Pullen, a road maintenance supervisor for respondent in Lincoln County, testified that neighborhood children were probably removing bolts from the wooden support blocks that attach the guardrails to the posts. The children wanted the wooden support blocks. These blocks were valued as either firewood, or for their allegedly intoxicating smoke. The witness further testified that one child had recently been asphyxiated while attempting to burn (smoke) a block. After a second incident involving the attempted theft of the blocks occurred, the respondent adopted a policy of cutting off the bolts that affix the blocks and battering their ends so that removal of the bolts and blocks would be all but impossible without a torch.

From the foregoing facts the Court has determined that the acts of a third party caused and created the road hazard that proximately caused the claimant's vehicle damage. The vandalism to the guardrail support is an intervening and superseding act. Accordingly, the respondent did not have notice of or any opportunity to guard against such malicious act(s). Respondent cannot be held responsible for the consequences. It is apparent that once the conduct of the vandals was discovered, the appropriate measures were taken by the respondent to prevent further mischief.

As the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, the Court must deny this claim. See *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947).

Claim disallowed.

OPINION ISSUED APRIL 2, 1992

THOMAS C. FERREBEE, JR.
VS.
DIVISION OF HIGHWAYS
(CC-91-292)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to his vehicle which occurred when it struck the stub portion of a missing stop sign at the intersection of the Elkview Exit on Interstate 79. The incident occurred on September 23, 1991, at approximately 5:00 a.m. It was raining and foggy. Claimant's vehicle sustained damage to the exhaust system and oil pan. The cost of repairs is $291.75.

Respondent denies negligence for this incident as it did not have notice of the missing stop sign.

Claimant testified that he was on his way to work when he and a traveling companion decided to get off Interstate 79 at the Elkview Exit. He was following a van which ran over the post when it preceded through the intersection to turn left. The claimant's vehicle went over the post when he followed the van. The stub portion of the stop sign was six-to-eight inches high. The claimant was not familiar with this area. He was not aware that the stub of the stop sign was sticking up in the roadway until his vehicle struck it.

Richard L. Bailey, an employee in respondent's sign shop, testified that he was notified that the stop sign was missing on September 24, 1991. he investigated the situation wand replaced the stop sign immediately. He indicated that this are was newly constructed because a mall had just been built at the intersection. He stated that there was an area of white reflective tape about 12 inches wide at the location for the stop sign. The tape had been placed in June 1991 and was present on the date of claimant's accident.

The issue before the Court is whether the respondent had prior notice and a reasonable amount of time to correct the situation prior to the claimant's accident. The facts indicate that the respondent did not have prior notice, and the claimant has failed to prove otherwise. The burden of proof is upon the claimant to demonstrate with a preponderance of the evidence that the

respondent had actual or constructive notice of the road defect. This burden has not been sustained. As the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, the Court must deny this claim. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by the missing stop sign, it must have had actual or constructive notice of the condition and a reasonable amount of time to take correction action. *Davis v. Dept. of Highways*, 11 Ct. Cl. 150 (1977). It is the opinion of the Court that respondent did not have the required notice of the missing stop sign at this intersection.

In accordance with the findings of the Court, this claim must be denied.

Claim disallowed.

OPINION ISSUED APRIL 2, 1992

HERBERT L. FLINN
VS.
DIVISION OF HIGHWAYS
(CC-91-277)

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

PER CURIAM:

On September 14, 1991, at 2:30 a.m., the claimant was driving his 1979 Pontiac Grand Prix between 30 to 35 miles per hour on Windy Ridge Road, a State secondary route in Wirt County, when his vehicle proceeded over mud in the road whereupon the vehicle slid over an embankment. The claimant was not injured, but alleges vehicular damage in the amount of $1,000.00. His vehicle was towed form the accident site by a farm tractor. The claimant testified that he is able to drive the vehicle; however, he further stated that when the current inspection sticker expires, he will be unable to continue operating the vehicle without replacing and repairing all of the damaged body parts.

The accident occurred during a rain storm that had turned recently excavated dirt into mud along the road. The claimant testified that no warning signs were present in the area to warn of the resurfacing and/or road construction activity. The claimant contends that the respondent was negligent for allowing the dirt to accumulate on this tar and chip road while the resurfacing work was unattended and incomplete.

The respondent acknowledged that work was going on in the area of the accident. The respondent admits that clay was left on the road, and that signs warning of this hazard had been

mistakenly removed by a mowing crew prior to the claimant's accident.

In view of the foregoing the Court finds that the respondent was negligent in its maintenance of this road. However, the Court cannot speculate as to the claimant's actual vehicle damages. The claimant has not produced a bill of sale nor an installment loan contract establishing the value of his vehicle. He testified that he paid $1,000.00 for the vehicle and financed this amount. Two repair estimates admitted in evidence indicate that the car is beyond economic repair, and that the vehicle is a total loss. The claimant testified that he has between $700.00 and $800.00 outstanding on his installment loan. The 12-year-old vehicle at the time of the accident reportedly had 48,000 miles on the odometer.

It is the opinion of the Court claimant is entitled to an award of $750.00 which represents fair and reasonable amount for his loss.

Award of $750.00.

OPINION ISSUED APRIL 2, 1992

THOMAS V. FORTUNE, II
VS.
DIVISION OF HIGHWAYS
(CC-90-244)

Claimant represents self.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

On February 12, 1980, at approximately 7:00 p.m., the claimant's automobile struck a hole in the westbound lane of State Route 10 near the Ellis Addition triangle in Logan County. The impact with the hole broke the front left rim, and permanently damaged the front left tire of the claimant's 1987 Ford Merkur. The hole was described only as a large hole, approximately 50 feet after the stoplight at the intersection of Route 10 and Route 119. The claimant's automobile struck the hole after claimant first stopped at the intersection and then proceeded at a speed between five to seven miles-per-hour. A certificate of insurance requested by the Court indicates that the claimant maintained full liability, collision, and comprehensive automobile insurance with Allstate. His collision and comprehensive deductibles as they appear on the certificate are in the amount of $250.00. The claimant requests reimbursement in the amount of $515.39, for the replacement of one tire, one rim, and an alignment. He testified that no claim for damages was turned in to Allstate.

Th respondent denied any negligence and, more specifically, denied that it had notice

of the existence of the defect in the road. A witness for the respondent, Hobart Adkins of the Logan County Highway Maintenance Office, testified that he recalled a problem with a particular hole in the area of the claimant's accident, but neither this witness nor the claimant could identify with specificity the problem area.

The issue before the Court is whether the respondent had prior notice and a reasonable amount of time to correct the road defect before the claimant's accident. The record in this claim establishes that the respondent did not have prior notice of the defect in the road, and the claimant has failed to prove otherwise. The burden of proof is upon the claimant to demonstrate with a preponderance of the evidence that the respondent had actual or constructive notice of the road defect. That burden has not been met. The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by the road defect, it must have had actual or constructive notice of the condition and a reasonable amount of time to take corrective action. *Davis v. Dept. of Highways,* 11 Ct. Cl. 150 (1977). The Court is of the opinion that the requisite notice was not provided to respondent.

Accordingly, this claim must be disallowed.

Claim disallowed.

OPINION ISSUED APRIL 2, 1992

ARLES B. HALLEY AND VERDEEN HALLEY
VS.
DIVISION OF HIGHWAYS

(CC-90-123)

John R. Mitchell, Attorney at Law, for claimants.
James D. Terry, Attorney at Law, for respondent.

STEPTOE, JUDGE:

This claim arises out of a one-car automobile accident which took place at approximately 11:12 a.m. on 2 March 1988, in Kanawha County, West Virginia, on West Virginia, on West Virginia State Route 622, a two-lane road also known as Martins Branch Road and hereinafter referred to as "the highways." As a result of the accident Arles B. Halley ("the claimant") sustained the total loss of the motor vehicle he owned and had been operating, and grievous and permanent injuries, and incurred large medical expenses.

It is alleged by the claimant that he "...drove his vehicle over a defect in the highway which threw him to the right high berm then to the left and over an embankment.", and, inferentially, that his property damage and personal injuries were proximately caused by the negligence of the respondent in failing in its duty to keep the public highway in a safe condition for the benefit of the motoring public.

Respondent denies that it was negligent, and invokes the affirmative defense of comparative negligence.

The accident was investigated by Sgt. Michael Y. Rutherford, of the Kanawha County Sheriff's Department, who arrived on the scene at 11:33 a.m., some 25 minutes after the accident. Sgt. Rutherford, who has had considerable training at the West Virginia State Police Academy and extensive experience in preparing automobile accident reports, did a thorough job of investigation and reporting of the accident. According to his report, a copy of which appears in the record as part of Claimant's Exhibit NO. 1, the accident happened in daylight, the weather was cloudy, the road surface was blacktop and was dry, there were no traffic controls at the scene, no other vehicle was involved, the vision of the claimant (driver) was not obscured and he did not smell of alcohol; no statement was taken from the claimant at the scene because of the severity of his injuries. It was also reported by Sgt. Rutherford that the front of the claimant's vehicle and the entire driver's side were points of initial contact with a utility pole just south of the highway. The officer placed the scene of the accident on West Virginia 622, about 2.7 miles west of U.S. Route 21, and testified that the claimant had been driving in a westerly direction.

Uncontroverted testimony of a witness for the respondent was to the effect that the highway, at the scene of the accident, was 18 feet, 8 inches wide, divided into two lanes of 9 feet 4 inches, each. Other evidence disclosed that the middle of the highway at the scene was conspicuously marked by two yellow lines.

The claimant testified that his speed had been 30 miles per hour as he approached the scene, which he had reduced to 23 or 24 miles per hour. He was steering with one hand when, he said, the steering wheel was jerked out of his hand when the car hit a bump in the road, and he was shaken up and the car shortly "was into that telephone pole," thereafter he had no recollection of what happened. He testified that, before the accident, he did not know the speed limit at and just before the place where his car swerved out of control, and that he saw no speed signs while approaching the place of the accident.

A witness for the claimant, Kenneth R. Stone, testified that he lived in the immediate vicinity of the scene of the accident; his attention to the claimant's car was attracted by the noise of the squealing of tires as it came down the road and then went sideways across the road from the northern side to the southern side. He observed it hit a telephone pole on the southern side of the road and said that it was going "sort of airborne and landed in my dad's driveway." He gave as his opinion that the speed of the car, when he first saw it, was at least 35 miles per hour. He also testified that he was familiar with a hump in the surface of the highway where claimant's car went out of control; that the respondent, when repaving the road in the past, found and attempted to

remove the hump caused by subterranean pressures, but that the hump always came back; and that there had been complaints to respondent about the hump, or surface irregularity, prior to this accident.

Each party presented an audio/video tape of the scene of the accident and the approach hereto from the east, and both tapes were admitted into evidence without objection. Claimants' tape was made 12 March 1988, while the tape of the respondent was made 3 April 1991, but both showed the same speed limit sign of 35 miles per hour approximately one-tenth of a mile before reaching the accident scene.

Findings of Fact on Issue of Liability

The Court makes the following findings of fact based upon the record herein, including evidence admissible under the rules of evidence:

1) The bump or hump, or irregularity in the surface of the pavement of the highway at the scene of the accident, alleged by claimants to have caused the claimant to lose control of his vehicle, was a raised area in the surface of the road which measured 12 feet in length, 7 feet in width, and a maximum height of 5 inches, all of which area was covered with asphalt faired snugly to the regular road surface. From the claimants' audio/video tap, it appears that fifteen vehicles, apparently selected at random, passed over the irregularity in the westbound lane of traffic, at speeds estimated to be 25 miles per hour to 50 miles per hour, without reducing speed or deviating from their chosen direction, but each showed a downward movement of the forward part of the car upon reaching the westerly end of the irregular area, which movement was absorbed by shock absorbers and each car passed on without incident. Tests made by the investigating officer produced like results.

2) The claimant, proceeding in a westerly direction along the highway, failed to see a sign one-tenth of a mile from the accident scene, stating that the speed limit was 35 miles

per hour, and he testified that before the accident he did not know what the speed limit was in the area.

3) Immediately before and at the time his car passed over the bump, the claimant was driving his car with only one hand on the steering wheel.

4) After having passed over the bump, claimant's vehicle swerved to the right and entered the berm 140 feet down the road at a point designated as "tiremark" on the diagram made part of the investigating officer's report. West-tending tiremarks continued 262 fee, eventually crossing the highway, and across the southerly berm, and striking a utility pole, the base of which, at ground level, was several feet below the level of the highway; the front and left side of the car struck the pole at highway level, with such force that the pole was partially splintered and its lower end was moved in its hole some inches. The vehicle came to rest, on its tires, in a paved private

driveway, a few feet below the level of the base of the pole and facing in a westerly direction. The grass-covered slope between the highway and said driveway, of a width of some twenty feet, in the middle of which was the utility pole, was but little disturbed by the car in its passage from the highway to the driveway, a fact which is corroborative of the statement of the eyewitness Stone, that the car "...was sort of airborne..." at the time.

Conclusions of Law

1) The State of West Virginia in neither an insurer nor a guarantor of the safety of motorists on its highways. Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947). An award may be made by this Court to a person traveling on a public road, however, if it be proven by a preponderance of the evidence that the State was negligent in the maintenance of the road, and having notice of defect or dangerous condition in the road, did not promptly take corrective measures, and a traveler sustained damages to his person or property as a proximate result of said negligence.

In this case there existed on 2 March 1988 an irregularity in the level of the surface of the highway over which the claimant was driving, caused by some natural phenomenon not identified or described in the record, which irregularity had been corrected from time to time but which regularly recurred and was patched and repatched. The speed limit at that point was 35 miles per hour, as posted by a sign one-tenth of a mile east of the irregularity, and there was another sign, two-tenths of a mile east of the irregularity, advising of rough road ahead.

The record does not show any previous accident, at this point in the road, which was reported to authorities.

It is the opinion of the Court that the irregularity in the road surface was not, of itself, a dangerous condition or a hazard to drivers approaching it from the east at a lawful speed, and that respondent was not negligent in its maintenance of the highway.

2) The very force of the claimant's vehicle when it struck the utility pole at the end of a measured 262-foot skid indicates a high rate of speed at that time and an even higher rate of speed and failure to keep his vehicle under control were the moving proximate causes of the accident and the damages which the claimant sustained.

3) The claimant was negligent in failing to observe and comply with posted speed limits, in failing to keep both hands on his steering wheel, and in failing to keep his vehicle under control, and his failures aforesaid were the proximate causes of his damages.

As the Court has determined that the respondent was not negligent, it is unnecessary to discuss damages or the claim of Mrs. Halley. Accordingly, the Court must deny this claim.

Claim disallowed.

OPINION ISSUED APRIL 2, 1992

WILLIAM L. HARDING
VS.
DIVISION OF HIGHWAYS
(CC-91-262)

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

PER CURIAM:

On August 7, 1991, the claimant was traveling west on his 1983 Honda CB1000F motorcycle on Route 40, also known as National Road, in Wheeling, Ohio County. As he passed the Edgington Lane and Route 40 intersection in the passing lane, his claimant was able to maintain control of the motorcycle, but it was damaged as it struck the hole. An estimate was provided by the claimant for repair and replacement of the front fork assemblies and the front brakes in the amount of $1,063.86. An accident report was filed with the Wheeling Police Department. The claimant did not have collision or comprehensive insurance.

The claimant testified that the hole in the road surface was five inches deep, five to six feet wide, and three to four feet in length. He more precisely described the hole as a dip where water or respondent's activities causes the ground and the asphalt to sink. The claimant was not aware of the existence of the road defect and there were no warning signs or barricades to alert motorists of the defect.

The respondent denied negligence in this matter. However, the respondent's witness, Joseph Louis Reed, the Ohio County Superintendent for road maintenance, testified that his office had prior notice of the road surface defect. Mr. Reed informed the Court that the dip in the road was the result of the City of Wheeling cutting a sewer line across the road, thereby causing a sinking area of two-and-a-half to three inches in the road surface. Mr. Reed further testified that he had personally observed the dip after receiving a complaint from the owner of the Marathon gas station. The Marathon station is located beside the defect in the road. The complaint was made prior to the accident, as was Mr. Reed's inspection.

The Assistant County Superintendent for Ohio County, Thomas Arlow Sims, similarly testified that he too had observed the dip in the road on or about August 5, 1991, some two days prior to claimant's accident on August 7, 1991. Repairs were not attempted until August 10, 1991, at which time the dip was described as having become much deeper.

In view of the foregoing, the Court makes the following findings of fact and conclusions of law. There existed a hazard to the traveling public upon the road surface, more specifically described and situated in the are of 1123 National Road, Wheeling, Ohio County. The hazard was an unprotected and exposed sinking area in the road of a depth of three to five inches. Respondent had both constructive and actual knowledge of this hazard prior to the accident. Respondent had adequate time to attempt temporary repairs and/or to warn motorists of the hazard, and, having failed timely to take corrective action, respondent is negligent. This negligence caused the claimant's described damages.

Accordingly, the Court makes an award to the claimant in the amount of $1,063.86.

Award of $1,063.86.

OPINION ISSUED APRIL 2, 1992

LOUIS J. ANTHONY & COMPANY
VS.
DIVISION OF HIGHWAYS
(CC-90-337)

Claimant represents self.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

On September 20, 1990, Theodore McCombs, an employee of the claimant, was driving a company truck, described as a six wheeler-ten speed, en route from Pittsburgh to Wheeling. As he approached Exit 2a, the Mound de Chantal exit on Interstate 70 west, near Wheeling, Ohio County, in the early morning darkness, the truck crossed over debris in the road and sustained a flat inside back tire. An estimate was provided for the replacement cost of the tire in the amount of $290.00.

Mr. McCombs testified that he believed the debris to be cardboard when he first observed it on the highway. However, when the truck struck the debris it appeared to have been broken fiberglass barrels being used as hazard barrels.

Michael M. Kloeppner, sales manager and adjuster for the claimant, was notified of the flat tire by the driver and he visited the accident scene a few hours later. He too described the road as covered with flattened and broken neon construction hazard barrels. He further testified that insurance was not available to cover the loss.

The respondent denied any negligence. Milton M. Davis, a Maintenance Supervisor for the Ohio County area roads, testified that he was first notified of the debris on the interstate shortly after the driver's flat tire. This witness further testified that construction in the are had been on-going all summer, and that a private contractor of unknown identity had installed the hazard barrels.

The issue before the Court is whether the respondent had prior notice and a reasonable amount of time to remove the debris prior to the accident. The facts indicate that respondent did not have prior notice of the debris on the road, and the claimant has failed to prove otherwise. The burden of proof is upon the claimant to demonstrate with a preponderance of the evidence that the respondent had actual or constructive notice of the road hazard. That burden has not been satisfied. As the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, the Court must deny this claim. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to he held liable for damage caused by the road debris, it must have had actual or constructive notice of the condition and a reasonable amount of time to take corrective action. *Davis v. Dept. of Highways*, 11 Ct. Cl. 150 (1977). It is the opinion of the Court that the respondent did not have notice of the debris on the interstate, and, therefore, respondent did not have an opportunity to remove the debris prior to the incident described by the claimant's witnesses.

In accordance with the findings of the Court hereinabove, this claim must be denied.

Claim disallowed.

OPINION ISSUED APRIL 2, 1992

ROSE MECKLEY
VS.
DIVISION OF CORRECTIONS
(CC-90-271)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

The claimant asserts a three-count claim alleging negligence on the part of the respondent as the cause of her loss of the following items of personal property: (1) one pair of contact lenses, (2) one pillow case, and (3) one pair of eye glasses. The claimant requests that the respondent provide the eye glasses to the claimant as a remedy for the loss of her contact lenses.

During the month of April 1990, the claimant was incarcerated at Pruntytown Correctional Center, a facility of the respondent. On April 4, 1990, the claimant was transported to Broaddus Hospital. During this hospital visit, the claimant alleges that her contract lenses may have been removed or otherwise lost by the hospital's housecleaning staff when her room was cleaned. The claimant testified that she placed the lenses in a lens case on the nightstand beside her bed in her private room. The lens case was missing from the nightstand on the following morning. Medical personnel and guards were unable to find or locate the lens case or the lenses. The claimant alleges that the replacement cost of a new set of lenses is $225.00 plus $60.00 for an eye examination and fitting. The claimant further alleges that eye glasses would cost $120.00 for the lenses and $130.00 for the frames.

The pillow case alleged to have been misplaced by the respondent was a standard white pillow case with brown stripes brought by the claimant to the hospital. It was removed from her possession by guards and was not returned to claimant when she left the hospital.

The Court is of the opinion that negligence on the part of the respondent for the loss of contact lenses has not been established by a preponderance of the evidence. The loss of the lenses was not the fault of the respondent. The lenses were not in the custody and control of the respondent.

As to the claim for the replacement cost of the pillow case, the claim is too minor for the Court to recognize as justiciable. **De minimus non curat lex.** The law does not bother with trifles.

The request for replacement eyeglasses is a matter not within the jurisdiction of the Court of Claims. If the claimant believes she has been denied access to medical care, that is a matter to be governed by 42 U.S.C. 1983, an action not within the jurisdiction of the Court of Claims.

Accordingly, this claim must be denied.

Claim disallowed.

OPINION ISSUED APRIL 2, 1992

JAMES MICHAEL MCKINLEY AND MRS. JAMES MICHAEL MCKINLEY, HIS WIFE
VS.
DIVISION OF HIGHWAYS
(CC-87-165)

Larry E. Losch, Attorney at Law, for claimant.

James D. Terry, Attorney at Law, for respondent.

STEPTOE, JUDGE:

Claimant was driving his Ford Pinto east on State Route 41 in Nicholas county, West Virginia, on or about June 16, 1985, when the right front wheel crossed a hole within the paved portion of the right lane, causing momentary loss of control, during which time claimant was thrown against the steering wheel. This Court determined the issue of liability in favor of the claimants in an opinion issued on April 29, 1991. The issue of damages was entertained by the Court in a subsequent hearing.

Claimant James Michael McKinney alleges that he sustained personal injury as a result of this accident. He sought medical assistance several hours after the accident. He drove himself to the Summersville Memorial Hospital and he was admitted for observation of potential back injuries. He was released on June 20, 1985. Claimant alleges severe back injuries, and other injuries, and that as a proximate result of said injury he has been permanently disabled from gainful employment. The claimant's wife alleges loss of consortium. Property damage to claimants' Ford Pinto was alleged in the amount of $2,000.00.

Mr. McKinney testified that prior to his car accident he had been gainfully employed by Fayette Block Company, earning the prevailing minimum wage. This employment began in 1980 and appeared to be seasonal employment from June to November of each year. Mr. McKinney stated that Fayette Block could not make blocks in the wintertime, and he would be laid off accordingly. However, Mr. Keith Kiser, who coordinates unemployment and welfare benefits for the West Virginia Department of Health and Human Resources serving the community in which the claimants reside, testified that Department records reflect that Mr. McKinney had discontinued this work due to illness in October of 1984. Mr. Kiser's testimony thus indicated that the claimant had stopped working at Fayette Block eight months before the automobile accident. The claimant's initial testimony was that he was working for Fayette Block at the time of the accident. The claimant subsequently changed this testimony under cross examination and stated that he was laid off from Fayette Block when the accident occurred, "because it was wintertime." The automobile accident occurred in June of 1985, summertime. It appears that the claimant was not employed by Fayette Block when the automobile accident occurred. Accordingly, estimates of the claimant's loss of earnings based upon projected employment with Fayette Block cannot and will not be considered by the Court.

Furthermore, the Court is concerned that the claimant's alleged inability to work as a result of the alleged injuries sustained in the automobile accident may have been the result of a pre-existing physical injury or impairment, unrelated and not aggravated by the automobile accident which is the subject of this claim. Mrs. McKinney testified that her husband had complained about back pain while he worked as a janitor at the Nettie Grade School. The claimant testified that he did not have a prior history of back pain before the automobile accident. However, Mr. Kiser, the

representative of the State welfare programs, testified that Department of Health and Human Resources records verify that the claimant was employed as the custodian of the Nettie Grade School after leaving Fayette Block in 1984. Therefore, it is apparent that claimant's back pain was observed by his wife when he worked as a janitor which was prior to the automobile accident in 1985.

Claimant's physicians testified that he had a congenital back defect. A degenerative disc and arthritis were also observed, both of which were suggested by physicians to be preexisting and unrelated to the accident complained of. When the claimant was seen by Dr. J. Stephen Shank at the Summersville Memorial Hospital, the doctor noted in the outpatient record that the claimant had "an acute muscle strain, peptic ulcer, and arthritis." Dr. Andrew E. Landis, an orthopedic surgeon, who evaluated the claimant for the respondent, testified that the claimant probably sustained a minor strain/sprain type of injury to his low back as a result of the automobile accident described. Dr. Landis qualified this observation by stating that in his opinion the claimant's subjective complaints far outweighed the objective findings, and the complaints may have been made for purposes of secondary gain. Dr. Landis notes that the claimant's previous medical records evidence that he hurt his back in a logging industry accident in 1987, two years after the car accident. The court is not unmindful of the claimant's testimony when asked under oath, "Were you ever hurt on the job anywhere with your back?" and the claimant replied, "No, never was."

The claimant testified that his earnings per year approximated $7,000.00 to $9,000.00. Estimates of the claimant's lost earnings resulting from the inability to work were then premised upon those amounts. The claimant was unable to substantiate these earnings with income tax returns as the unavailable. However, the respondent provided the Court with a Social Security Administration statement of claimant's reported earnings. This document indicates that claimant's prior representation of gross earnings were exaggerated. Upon review of the exhibit, Dr. William E. Cobb, an economist, testified that the claimants' actual reported earnings were significantly less than as represented to him, and were probably between $1,000.00 to $1,500.00 per/year from 1971 to 1985. The Court will not consider income which claimant earned for odd jobs, but he did not report this income to State and Federal authorities in tax returns.

The claimant has additionally alleged that his vehicle was damaged in the accident. Again the Court must note the inconsistency of the claimant's testimony. The claimant's testimony in the transcript dated September 27l, 1990, was that the front right tire had not been punctured when it crossed the hole in the road. Asked a second time whether he was sure the tire had not been damaged, he replied, "No, it didn't leak." However, when asked again during the hearing December 6, 1991, the claimant repled that, "the right tire went flat." The claimant further testified that he had to change the tire. As no estimate of repair was entered into evidence, the Court will not speculate as to what damage actually occurred.

No testimony was received from Mrs. McKinney suggesting a loss of consortium. Although this issue was pleased, it has not been established by the evidence.

The Court is of the opinion that the facts in this claim fail to support an award for

damages for the automobile accident which occurred on June 16, 1985. Accordingly, the Court is of the opinion to and does this claim for damages.

Claim disallowed.

OPINION ISSUED APRIL 2, 1992

RHONDA NOLAN
VS.
DIVISION OF CORRECTIONS
(CC-90-372)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

On or about April, 1990, the claimant's 17-year-old daughter, Robin Nolan, was admitted to the Salem Youth Center for a 30 day evaluation. The claimant alleges that her daughter was in possession of three rings and two sets of earrings upon entering respondent's facility, but that the items were not returned to her daughter upon her departure from respondent's facility, or thereafter.

Claimant's daughter testified that the jewelry included three rings of which two were birthstone rings, and one was a diamond cluster ring, and five earrings. A receipt of unspecified purpose, but appearing to represent the purchase price of a $74.15 diamond cluster ring, was introduced into evidence, along with an installment contract executed by a Helen Crawford, involving a $52.95 birthstone ring. No other documentation was provided to establish the purchase, ownership, or replacement cost(s) of this jewelry. Accordingly, the Court may not speculate as to the existence or value of a third ring, or the earrings.

The claimant's daughter further testified that no inventory of her possession was made when she entered the respondent's facility, nor did she sign an inventory list. In the absence in accounting for this personalty, the Court may not create or speculate as to same. In actions such as this the claimant as a bailor must prove that a delivery to the respondent bailee occurred before a prima facie case is established for the bailee's failure to return the items. In other words, the bailor has the burden of proof. Only when the bailee has acknowledged possession of goods does the bailor's cause of action accrue. Under the present facts and circumstances, **the absence of an inventory precludes the Court from further consideration of the claim.** The bailor's evidence must be more than surmise and conjecture, for the Court to consider this matter. W.Va. Code §46-7-102(1)(a) and 46-7-403(1)(b) only shift the burden of going forward with the evidence where the bailee has acknowledged possession of items, and thus is under a duty of reasonable care to return

same. Since the claimant's daughter has no receipt for the items of jewelry alleged to have been deposited with the respondent and witnesses, Deputy Fred R. Daily of the Cabell County Sheriff's Office, and his wife, Mrs. Peggy Daily, both testified that they did not notice the jewelry when transporting her to and from the respondent's facility, the claimant has failed to establish a prima facie case of negligence and bailment. The duties and responsibilities of a bailee cannot be thrust upon one without knowledge and acceptance of the subject matter. 2C Michie's Jurisprudence, Bailments, §3, p.123.

Accordingly, this claim must be disallowed.

Claim disallowed.

OPINION ISSUED APRIL 2, 1992

GARY L. NORMAN
VS.
DIVISION OF HIGHWAYS
(CC-91-127)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On December 4, 1990, the claimant was traveling east on Interstate 64 in a freezing rain storm with poor visibility when his vehicle went over a broken section of concrete near the entrance to the West Virginia Turnpike in Kanawha County. It was approximately 9:15 p.m. The claimant described the hazard as four feet wide and two feet deep. The damage to his vehicle was caused by the broken concrete in the road and not by the hole itself. The claimant testified that he avoided the hole, but struck the pieces of concrete strewn along the lane in which he was traveling. His 1987 Toyota Corolla sustained unspecified damage to the front axle, struts, rims, tires, and wheel assembly. The damage was repaired at a cost of $1,636.06, and was paid by the claimant's insurer, Aetna Casualty. However, $250.00 of this sum was paid by the claimant as his deductible. The Court will consider only the claimant's portion of his deductible as a recoverable loss in this matter. Accordingly, Aetna Casualty as Subrogee of Gary L. Norman, is dismissed as a party in this claim pursuant to the Court's holding in Wanita Sommerville/State Farm Fire and Casualty vs. Div. of Highways, Claim no. CC-89-374, an unpublished Opinion disallowing subrogation by vehicle insurers as moral obligations of the State, issued January 4, 1991.

The respondent denied negligence as it did not have adequate notice of the hazardous condition. Herbert C. Boggs, an Interstate Maintenance Assistant responsible for the highway at the

accident site, testified that his office did not have prior notice of the described hole nor of pieces of concrete scattered along the road. Although he acknowledged that pavement may "blow-up" as the result of freezing weather, his office was unaware of this occurrence at the accident site until a telephone call came in at 9:15 p.m. on December 4, 1990.

The issue before the Court is whether the respondent had prior notice and a reasonable amount of time to correct the road defect before the claimant's accident. The facts indicate that the respondent did not have prior notice. The burden of proof is upon the claimant to demonstrate with a preponderance of the evidence that the respondent had actual or constructive notice of the road defect. This burden has not been satisfied. As the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, the Court must deny this claim. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be half liable for damage caused by the road defect, it must have had actual or constructive notice of the condition and a reasonable amount of time to take corrective action. *Davis v. Dept. of Highways,* 11 Ct. Cl. 150 (1977). It is the opinion of the Court that the respondent did not have adequate notice of the broken concrete which resulted from the concrete "blow-up" on the highway. The Court is familiar with incidents of this nature occurring on concrete portions of highways and/or interstates in West Virginia. The respondent is unable to determine when such events will occur. The respondent is under a duty to warn the traveling public and/or to repair such areas, but it must be

afforded adequate time in which to act after it has received notice of the incident.

In accordance with the findings of the Court, this claim must be denied.

Claim disallowed.

OPINION ISSUED APRIL 2, 1992

SALERNO BROTHERS, INC.
VS.
DIVISION OF HIGHWAYS
(CC-89-305)

James C. West, Jr., Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On June 9, 1989, claimant's employee, Paul Emery, was operating a make-shift mobile crane on State Route 3, more commonly known as the Shinnston-Mannington Road, approximately two miles west of Shinnston in Harrison County. The vehicle, described as weighting

75,000 pounds and being 11 feet 10.5 inches high, 8 feet 2.5 inches wide, and 35 feet 6 inches long was traveling east on Route 3, when a westbound tractor-trailer (lowboy design) approached in the opposing lane. Believing that both vehicles could not safely proceed at the same time, the claimant's employee brought the crane to a complete stop to allow the approaching truck to pass first. Joseph Salerno, President of claimant corporation, initially stated that the berm of Roue 3 gave way when the two vehicles passed and the crane over-turned into an adjacent stream. His subsequent testimony suggests that the roadway, not the berm, gave way. The crane fell over the bank adjacent to Route 3. The crane is alleged to have been completely destroyed by the accident and damages are sought in the amount of $250,000.00. The claimant alleges that respondent was negligent as the road and the berm were not adequate, and there were no guardrails present to prevent or protect against such an accident.

The respondent denies negligence and avers that the claimant's employee's negligence was the cause of this accident. The respondent states that the crane is a limited use vehicle that was being operated unlawfully without a permit, and was being driven by an inexperienced driver. The respondent also contends that the claimant's employee merely drove the vehicle off the side of the road, and that the roadway did not collapse. The respondent further contends that the purpose of requiring a permit for a limited use vehicle such as the crane which is the subject mater of this claim is to allow the State to assist in the safe transportation of such equipment on the highways.

The claimant disagrees with the contention that a permit was required for the transportation of the crane. It is uncontroverted that no permit had been issued.

The respondent's witness, Allen D. Blackwood, a State Weight Enforcement Officer, testified that the crane was an "S" classified vehicle, meaning special mobile registration. He stated that an S-vehicle exceeded legal dimensions of weight and size must have a permit before it may be lawfully operated upon the State roads and highways. Officer Blackwood testified that this crane exceeded the legal dimensions of weight and width, and should not have been operated without a permit. He stated that a permit would have designated what route could be used, at what time the vehicle could be driven, and what traffic control would be appropriately required. When asked whether this vehicle was being legally operated on the road when the accident occurred, Officer Blackwood testified it was illegal to be on the highways without a permit.

The West Virginia Supreme Court of Appeals has consistently held that the **violation of a statute is prima facie evidence of negligence.** *Anderson v. Moulder,* 183 W.Va. 72, 394 S.E.2d 61, (1990). The claimant failed to obtain the required permit for the operation of the crane. W.Va. Code §17-C-17 requires the permit. The Court cannot in equity and good conscience authorize an award where State law has been violated, and such violations may have proximately caused or significantly contributed to the accident which is the subject mater of the claim.

The claimant must prove by a preponderance of the evidence that respondent was negligent. No negligence on the part of the respondent has ben established. The road upon which

the crane was driven was 19.6 feet in width which appears to be adequate width for an 8 foot wide vehicle. Further, the absence of a guardrail for this road does not constitute negligence. The West Virginia Supreme Court of Appeals has stated in *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947) that the failure of the state road commission to provide guard rails does not constitute negligence where no fault was found with the road. Considering the financial limitations placed upon the road commissioner, the Supreme Court stated in *Adkins* that it would be impossible to place guard rails on all points of danger in our mountainous terrain. The Court is of the opinion that claimant has failed to establish that the conditions on Route 3 were the proximate cause of the accident which caused the damages to claimant's crane.

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

Claim disallowed.

OPINION ISSUED APRIL 2, 1992

LAURA E. WOLFE
VS.
DIVISION OF VETERANS AFFAIRS
(CC-91-258)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover the amount of the proceeds from a life insurance policy which she alleges was wrongfully terminated by the respondent when she resigned from her position at Barboursville Veterans Hospital, a facility of the respondent. claimant alleged that the respondent misled her when she was not informed that she had the right to continue a life insurance policy on her husband in the amount of $5,000.00 for which she had paid premiums as a State employee. The policy terminated ta the time claimant left her employment with the State agency.

Respondent denies any responsibility for claimant's failure to continue the life insurance policy after her termination.

Claimant testified that she paid the premiums for the $5,000.00 life insurance policy on her husband while she was a State employee. She terminated her employment on January 31, 1990. Her husband died in June 1991. She later determined that she could have paid the premiums and maintained the policy after leaving her employment with the State, but she was unaware of her right to do so.

Deborah Thacker, a Clerk III at the Barboursville Veterans Hospital, testified that she handled personnel matters for the respondent at the hospital. She did not have an exit interview with the claimant when she terminated from her employment. She was aware that employees are able to continue spousal life insurance under the Cobra Plan when employees terminate their employment at a State agency. She stated that she advised employees of this option at an exit interview.

The record in the claim is not clear. However, the evidence established that the claimant did not have an exit interview due to the circumstances of her termination.

The Court is of the opinion that the claimant has failed to establish by a preponderance of the evidence that she was misled by the respondent. It appears that she terminated her employment and life policies for herself and her husband when she left the employment of the respondent.

In accordance with the findings of fact in this claim, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED APRIL 30, 1992

MICHAEL E. GOWER
VS.
DIVISION OF HIGHWAYS

(CC-90-385)

Claimant represents self.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

On or about October 19, 1990, approximately 6:00 p.m., the claimant, a resident of Fairmont, Marion County, was driving his 1988 Ford F150 pick-up truck with at boat in tow on Manley Chapel Road, a Marion County road identified to the Court as County Route 56/1. The

claimant alleges that his truck went through a hole at the right edge of this road, described as two and a half feed long, with an unknown depth, at an unidentified location near Fairmont, Marion County. The hole was first observed by the claimant some 40 to 50 yards prior to the truck striking the hole. The claimant testified that the hole was filled with water, and he was therefore unable to anticipate its depth. He made no effort to slow down his truck or to drive around it. The hole is alleged by the claimant to have damaged the alignment of his pick-up truck. An estimate for the alignment repair was provided by claimant in the amount of $130.00, with an additional $31.80 claimed for the cost of the alignment estimate. The total initial claim was filed in the amount of $161.80. The realignment has not been preformed. Claimant also alleges additional expenses due to excessive wear caused by misalignment of the front tires. By amended complaint the claimant now requests the replacement of the front tires which were driven some 8,000 miles since the date of the accident. An estimate has been provided in the amount of $200.00 for new front tires. The claimant testified that the front tires currently have 31,000 miles of wear and had 23,000 miles of wear at the time of the accident. The amended complaint also requests reimbursement for wage loss while the claimant attended Court to present his claim, related travel expenses, and the cost of film and developing used in the preparation of his claim. The total amended claim is now stated in the amount of $495.30. claimant maintains full vehicle coverage with Horace Mann Insurance Company, with a deductible believed to be $250.00. He has not submitted the claim to his insurer. No witness testified for the claimant nor was evidence provided by the claimant to establish that the alleged road defect was known to the respondent.

The issue before the Court is whether the respondent had prior notice and a reasonable amount of time to correct the road defect before the claimant's accident. The evidence indicates that the respondent did not have prior notice, and the claimant has failed to prove otherwise. The burden of proof is upon the claimant to demonstrate by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect. As the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, the Court must deny the claim. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by the road defect, it must have had actual or constructive notice of the condition and a reasonable amount of time to take corrective action. *Davis v. Dept. of Highways,* 11 Ct. Cl. 150 (1977). It appears to this Court that the requisite notice was not provided to respondent.

The law of damages requires a correlative duty upon the part of the claimant to minimize damages. In other words, damages are not compensable where they have been unnecessarily escalated, or could have been attenuated. Accordingly, the claim for a new set of tires could not have been awarded without an appropriate offset since an alignment would have prevented the excessive wear before the additional 8000 miles were driven.

It should be further noted that expenses incurred in the courses of preparing and prosecuting claims before this Court are the responsibility of the individual litigants and are not compensable.

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

Claim disallowed.

OPINION ISSUED APRIL 30, 1992

CHARLES E. LOWTHER AND MARTHA G. LOWTHER
VS.
DIVISION OF HIGHWAYS
(CC-90-214)

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

PER CURIAM:

On May 3, 1990, the 20-year-old son of the claimants, Charles Steven Lowther, was driving a 1979 Chevrolet Monte Carlo. Although he was the equitable owner of the automobile, the automobile was titled in the names of the claimants. Claimant testified that his vehicle went through water running along the southbound lane of Route 19 whereupon he lost control of the vehicle and it hydroplaned into an embankment. The accident occurred approximately two miles from Milford in Lewis County. Both the driver and a passenger, Michele McHenry, were injured in the accident. Both suffered concussions. Liability insurance paid for Ms McHenry's hospitalization and related expenses. However, no insurance was maintained by the claimant which covered their son's hospitalization and medical expenses nor his vehicle damage. Claimants brought this claim in the amount of $6,000.00 to recover these expenses. The Monte Carlo was purchased by the son from his parents for the amount of $2,500.00. The vehicle was a total loss, but claimant's son received $75.00 paid for its salvage value. The claimants' son sustained an aggravated injury to a pre-existing congenital injury of his jaw which required approximately $4,000.00 in medical expenses.

The accident area is described as a 21-year-old section of Route 19 between Weston and Roanoke near the former Union Drilling property in Lewis County. The specific accident site was described as having two feet wide tire tracks in the road surface where the water pooled. The tracks extended for several yards and appeared to have formed from tar used to repair the road surface.

Charles Edward Lowther, who was driving a vehicle behind his son when the accident occurred, described the accident site as 50 feet of two feet tracks created by truck weight upon a tar road surface. He further described this section of the road as having three to four inches of water collecting and running within the described tar tracks whenever it rains in the area.

Bruce Garrett, the Lewis County Highway Supervisor, testified that wear marks are present within the described section of Route 19, but that the road is in fairly good condition. When asked

whether complaints were ever received concerning water accumulation on the road surface in the accident area, this witness answered no.

Carlin Kendrick, who manages the respondent's traffic records, testified that the accident site, more specifically identified as the area around mile post 20.4, did not have a pattern of accidents sufficient to alert the respondent that the road section may be dangerous. This witness concluded that traffic records did not suggest that this section of road was troublesome area for hydroplaning or wet road conditions.

The issue before the Court is whether the respondent had prior notice and a reasonable amount of time to correct the alleged road defect before Charles S. Lowther's accident. The facts indicate that the respondent did not have prior notice of a defect in the road section, and the claimants have failed to prove otherwise. The burden of proof is upon the claimants to demonstrate with a preponderance of the evidence that the respondent had actual or constructive notice of the road defect. That burden has not been satisfied. As the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, the Court must deny this claim. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by the road defect, it must have had actual or constructive notice of the condition and a reasonable amount of time to take corrective action. *Davis v. Dept. of Highways,* 11 Ct. Cl. 150 91977). It appears to this Court that the requisite notice was not provided to respondent.

In accordance with the finding of facts and conclusions of law as indicated hereinabove, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED APRIL 30, 1992

LARRY A. WILSON AND MILDRED P. WILSON
VS.
DIVISION OF HIGHWAYS

(CC-90-196)

Robert T. Goldenberg, Attorney at Law, for claimants.
James D. Terry and Glen A. Murphy, Attorneys at Law, for respondent.

HANLON, JUDGE:

Claimants are the owners of real property situate near Mountwood Park, Wood County. In 1960 they purchased a tract of approximately 18 acres and made improvements to a tavern on the property by converting it into a dwelling house. The house fronts on old U.S. Route

50 (hereinafter referred to as Route 50/41). In 1968 respondent condemned seven acres of claimants' property situate on the southwesterly side of old Rt. 50 for the construction of new Route 50. This construction created an 85 foot fill bank across the old highway as well as Walker Creek which ran along the same in front of claimants' house. During this construction, a large culvert was placed under the fill bank for Walker Creek to flow from the north side to the south side of the fill bank. On September 15, 1989, a flood occurred from Walker Creek onto claimants' property. As a result, claimants' residence and personal property sustained substantial damage. Claimants brought this action to recover $40,000.00 for these damages.

Claimants allege that the flood was caused by respondent's negligent maintenance of the Walker Creek culvert. A large mound of dirt allegedly obstructed the inlet end of the culvert causing the water to back up the flood claimants' property.

Respondent contends that the flooding resulted from a storm in excess of the amount required to cause a 50-year flood.[1] The culvert at issue is a seven foot culvert built to met the 1968 Interstate Standards, i.e., a 50-year storm. Respondent also contends that Mountwood Dam and Lake constructed on the south side of the fill bank by the U.S. Conservation Service, a federal agency, after new Route 50 was built contributed to the flooding. Weather Service records indicate that 3.6 to 3.8 inches of rain fell in Wood County on September 15, 1989, causing flooding in the general area of claimants' property.

Claimants' property is located on the east side of Route 50/41 with Walker Creek meandering in a southerly direction along the west side of the road. The highway fill bank for new Route 50 is on the south side of claimants' residence where it creates a dead end for Route 50/41 and, but for the culvert, a dam for Walker Creek. The Mountwood Park lake and the dam are located on the south side of the fill bank for Route 50. The outlet end of the culvert is approximately 1000 feet from the Mountwood Park lake.

Claimant had experienced flooding on their property on four prior occasions with the first flood occurring the 1971. None had occurred prior to the construction of the fill an culvert. During these floods the water came up to the foundation of claimants' residence. On September 15, 1989, at 3:00 a.m. claimants were alerted by a neighbor about rising water. Claimants immediately fled their home with their son as it was already surrounded by water. Their home sustained extensive flood damage. They were unable to live in their house and had to rent another for ten months while theirs was repaired and made habitable again. According to the testimony of James C. Andrews, a real estate appraiser in Wood County, claimants' property was worth $37,500.00 prior to the flood and nothing after. A repair estimate prepared and testified to by James P. Reese, Jr., was in the amount of $36,000. Testimony also indicated an alleged loss of personal property valued at

[1]A 50-year storm or 50-year rainfall means that once in 50 years, maybe twice in 100 years, maybe four times in 200 years, rainfall intensity will either be of that magnitude or will exceed that magnitude.

approximately $6,715.00.

Harry W. Pitts, a registered professional engineer, testified that he examined the area surrounding claimants' property, Walker Creek, as well as the culvert under Route 50. He determined from rainfall records that approximately three inches of rain fell in a 24 hour period during the flooding of September 15 to 16, 1989. It was his opinion that this rainfall would be in line with a 10-year flood. In his opinion the culvert, which measured 84 inches in diameter, should easily take the water flow of a 10 year storm. Mr. Pitts described a mound of earth that had built up in front of the mouth of the culvert approximately 12 inches from the mouth. The mound was described as being 3.2 feet high at its highest point and six feet in length. It was his opinion that this mound of earth obstructed the flow of Walker Creek into the culvert and caused the water to "churn" at the culvert's mouth which in turn decreased the amount of water going into the culvert causing water to back up and flood the area of claimants' home and property. At the time of the flood there was nothing in the culvert to obstruct the flow of water. He testified that in his opinion the capacity of the culvert was thus decreased by as much as 50% by the mound of dirt at the entrance to the culvert.

The Mountwood Park dam has a spill way in case water reaches the top of the dam. During this flood the water level reaches the top of the dam. During this flood the water level did not flow over the spillway. It was Mr. Pitts opinion that the level of water in the lake did not cause a back-up of water in the culvert nor did it contribute to the flooding of claimants' property.

He further testified that the storm in question was not of the intensity of a 50-year storm inasmuch as 4.8 inches in 24 hour period would have been required for the same. The rainfall on this occasion of September 15, 1989, was recorded at 3.6 to 3.8 inches. Thus, a 50-year flood could not have occurred and the culvert should have handled the run-off in the stream. However, the culvert did not handle the run-off because the mound of dirt and debris at the mouth of the culvert decreased its inlet capacity and, as a result, the flood on claimants' property was the direct result of the mound of dirt at the mouth of the Walker Creek culvert.

G. R. Kalwar, a registered professional engineer for respondent and currently an external design engineer who originally took part in the design of the culvert for Walker Creek to pass through the fill bank for Route 50, was respondent's primary expert witness. He explained that the requirements of the Federal Highway Administration for construction of Appalachian Corridors at the time required a review of 50-year storm conditions for culverts designed and constructed on such projects. The Walker Creek culvert was based upon the 50-year storm run-off calculations. Accordingly, an 84 inch diameter culvert was placed beneath the fill bank for Route 50. This culvert would accommodate a run-off from Walker Creek at the rate of 340 cubic feet of water per second. Kalwar testified that in his opinion the mound of dirt at the mouth of the culvert would not affect the ability of the culvert to handle 340 cubic feet of water per second from Walker Creek. He further stated that conditions known as ponding on the north side of Route 50 if a storm exceeding the intensity of a 50-year storm occurred.

The Court, having reviewed all of the evidence in this claim, makes the following

findings of facts:

(1) The storm which occurred on September 15 and 16, 1989, was a cloudburst from which 3.6 to 3.8 inches of rain fell in a 24 hour period.

(2) The storm was not a 50-year storm as defined by the U.S. Weather Bureau standards for this area.

(3) However, the Court has determined that the effect of the storm was of the nature of a 50-year storm or more.

(4) The inlet end of the culvert on Walker Creek was obstructed by a mound of dirt which partially reduced the capacity of the culvert to accept water at a rate of 340 cubic feet per second.

(5) Mountwood Park Lake did not contribute to the flooding or ponding which occurred on the inlet end of the culvert.

(6) Claimants had experienced flooding on their property on four occasions prior to this flood and were aware of the existing obstruction in Walker Creek at the mouth of the culvert.

(7) However, claimants had not informed respondent of the condition of the mound at the mouth of the culvert on Walker Creek.

(8) The construction of Route 50 which occurred more than 10 years prior to the flood which is the subject matter of this claim altered the run-off from Walker Creek by creating a large fill bank which in essence was a dam across Walker Creek with the site of claimants' house and out-buildings being the low point most likely to flood should the culvert be obstructed.

In accordance with the facts in this claim the Court makes the following conclusions of law.

(1) The construction of new U.S. Route 50 having occurred more than 10 years prior to the occurrence of the flood, a claim based upon this construction is barred by W.Va. Code §55-2-6(1). See *Gibson and Holcomb v. W. Va. Dept. of Highways, et. al.*, 185 W.Va.214, 406 S.E.2d 440 (1991).

(2) The respondent failed to maintain its culvert properly by allowing a mound of dirt to obstruct its inlet end thus reducing its capacity.

(3) The failure of respondent properly to maintain the area in front of the culvert in question constitutes negligence.

(4) Claimants must also bear some responsibility for the flood for failing to notify respondent of the obstruction in Walker Creek.

(5) Accordingly, the Court will assess responsibility for claimants' damages from the flood as 60% on the part of the respondent and 40% on the part of the claimants.

DAMAGES

Claimants' damages to their dwelling were estimated by James C. Andrews at $37,500.00 based upon a sales comparison analysis wherein the land was valued at $8,500.00 and the house at $29,000.00. The Court is of the opinion that claimants are entitled to an award of $17,400.00 for the damages to their home. As to the personal property damaged or lost during the flood, the Court has reviewed the evidence and is of the opinion that much of the claimants' damages are speculative in nature. The Court has determined that the value of the personal property lost was in the amount of $4,500.00. Therefore, the Court makes an award in the amount of 42700.00 for the personalty. The Court denies any recovery for rent expenses alleged to have been incurred by the claimants or for the monetary value of the donations by the American Red Cross. The uncontroverted evidence advanced at the hearing is that the American Red Cross makes donations to flood victims with no expectation of their being required to repay the same.

In accordance with the foregoing, the Court makes a total award of $20,100.00 to the claimants.

Award of $20,100.00.

OPINION ISSUED APRIL 30, 1992

LONNIE WOODBURN
VS.
DIVISION OF HIGHWAYS
(CC-91-17)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On December 17, 1990, claimant was operating his vehicle traveling south on U.S. Route 250 in Fairmont, West Virginia, when a tree came off the west side of the bank and fell onto claimant's vehicle. Claimant's vehicle was a total loss and his young son, a passenger in the vehicle,

received personal injuries. Claimant alleges the value of his vehicle was $1,400.00, for which he brought this claim.

Respondent denied negligence and asserted that the tree which fell from the bank was not on the respondent's right-of-way.

The evidence in this claim established that the stump of the tree which had fallen onto the claimant's vehicle was approximately 57 feet from the centerline of the highway. Respondent's right-of-way is 45 feet from the centerline. It appeared to the Court at the hearing that the tree was not within respondent's right-of-way.

The Court informed the claimant at the hearing that he could obtain survey of the area if he was of the opinion that the tree was actually within the respondent's right-of-way. Thereupon, the Court granted leave to the claimant to have the area survey and the Court assumes that the claimant desires that the claim be submitted upon the transcript.

In accordance with evidence in this claim, the Court concludes that the tree which damaged claimant's vehicle was not within the respondent's right-of-way. Therefore, the claim must be denied.

Claim disallowed.

OPINION ISSUED MAY 19, 1992

EDWARD MICHAEL BOYLE
VS.
DIVISION OF HIGHWAYS
(CC-89-58)

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

PER CURIAM:

On the night of January 6, 1989, the claimant, a resident of Salem, Harrison County, was driving his 1988 Dodge Daytona on Route 50 west between Clarksburg and Salem when his vehicle crossed a huge hole in the road surface a few miles outside the western corporate limits of Clarksburg. The claimant more specifically identified the location of this road defect as situate between the Townhouse West Motel and West Milford on the Wilsonburg intersection of Route 50. The claimant described the weather that evening as mild, and no snow was present on the road. He was traveling approximately 50 miles per hour in a 55 miles per hour area when his vehicle went into

a hole in the road estimated to be two feet around and ten inches deep. The claimant testified that broken cement and steel rods from the infrastructure of the roadbed were exposed and caused three flat tires, three bent rims, a broken oil pan, and damaged a rear shock absorber. His vehicle also required an alignment. The total cost of these repairs was supported by invoices totaling $1,131.06, inclusive of a towing charge, as the vehicle could not be driven from the accident scene. The claimant had earlier on the afternoon of January 6, 1989, traveled through this area and had not noticed the hole. He testified that no warning signs were present to warn motorists of the hazard. He did not see the hole before his vehicle struck it, and it could not be avoided due to approaching traffic in the other lane. The claimant stated that his automobile insurance would initially advance him the funds to repair his vehicle, but that he would have to reimburse the insurer.

Richard Brown, a Maintenance Crew Leader for respondent responsible for and familiar with the roads in Harrison County, testified that the broken road section that the claimant encountered had been cut out and replaced with sacrete in the late fall of 1988. He further testified that the repair to the road surface was a temporary repair due to the wintertime conditions. he confirmed that the road section that caused the claimant's vehicle damage had a two foot hole, upon which a cold mix had been previously applied. This witness testified that Route 50 was being patched about every day in January 1989. Although he did not have prior notice of the particular hole that caused the claimant's vehicle damage, and was not notified of same until 11:30 p.m. on the night of the accident, he testified that broken concrete was removed from the accident and cold mix applied shortly thereafter. Under cross examination, this witness was asked whether signs had been posted warning motorists of the broken pavement. Th witness replied that, "There's no reason to put signs up." He further testified that this particular road section has had a problem with holes in the road surface.

The issue before the Court is whether the respondent had prior notice and a reasonable amount of time to correct the road defect before the claimant's accident. The facts indicate that although the respondent may not have had actual notice of the specific hole, the Court finds that respondent had constructive notice of this hazard. The burden of proof is upon the claimant to demonstrate by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect. This burden has been established through the testimony of the respondent's witness. For the respondent to he held liable for damage caused by the road defect, it must have had actual or constructive notice of the condition and a reasonable amount of time to take corrective action. Davis v. Dept. of Highways, 11 Ct.Cl. 150 (1977). It appears to

this Court that respondent had adequate notice and that appropriate maintenance measures were not timely made to prevent or otherwise warn the traveling public of the described hazard.

Accordingly, the Court makes an award to the claimant in the amount of $1,131.06.

Award of $1,131.06.

OPINION ISSUED MAY 19, 1992

FRANK L. CONN D/B/A FRANK CONN REALTY
VS.
DIVISION OF HIGHWAYS
(CC-91-197)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On or about May 26, 1990, the claimant, a resident of Boomer, Fayette County, contracted with a third party to have broken tree limbs removed from his property. After expending $300.00 for the tree trimming, the claimant learned that the tree was within the State's right-of-way, and that respondent would have removed the tree limbs at no expense to the claimant. It is uncontroverted that the location of the tree is within the State's right-of-way adjacent to U.S. Route 60, property lot 55, Smithers, Fayette County. The issue before the Court is whether the claimant, as a volunteer, may be reimbursed for the $300.00 he incurred by having the tree limbs removed.

The actions of the claimant in safeguarding the right-of-way and underlying roadway from the potential danger of falling tree limbs is admirable. However, this is not a case where the respondent failed to perform the tree work. The respondent simply was not informed of the matter. It appears from the testimony that if the respondent had been aware of the broken tree limbs, it would have responded promptly. Testimony indicates that respondent did act promptly after a storm in May of 1991 when there was damaged a tree in the same right-of-way. It was after the occurrence of that storm in May 1991 that the claimant realized that the respondent should have removed the tree limbs one year earlier for which claimant assumed the responsibility.

The Court finds that the claimant was a "volunteer" by having the broken tree limbs removed at his own expense from the right-of-way, when such removal would have been performed at no expense to the claimant by the respondent. The West Virginia Supreme Court of Appeals has ruled that one acting as a volunteer must notify the party upon which an obligation to act may be first charged before the volunteer may expect to be compensated for his/her intervention. *Hill v. Ryerson & Son, Inc.*, 165 W.Va. 22, 268 S.E.2d 296 (1980). Accordingly, a volunteer's unilateral act, albeit reasonable and undertaken in good faith, cannot bind the responsible party, without notice and an opportunity to first act. *Jennings v. U.S.*, 374 F.2d 983, 986 (4th Cir. 1967). As notice of the broken tree limbs and an opportunity to maintain these limbs was not afforded the respondent, this Court cannot award the expenses voluntarily incurred by the claimant in the removal of the tree limbs.

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

Claim disallowed.

OPINION ISSUED MAY 19, 1992

JOHN EDWARDS
VS.
DIVISION OF HIGHWAYS
(CC-91-325)

Lena S. Hill, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

STEPTOE, JUDGE:

This is a claim against the Division of Highways (hereinafter "Highways") in which the claimant, John Edwards, as next friend and father of Eva L. Edwards, a minor, alleges that two motor vehicles were damaged on December 25, 1989, as a proximate result of the negligence of Highways in maintaining Route 97, in Wyoming County, West Virginia, at a point in said road approximately 1/8 mile north of its intersection with West Virginia Secondary Route 9/5.

It appears from the evidence adduced herein on February 26, 1992, that Eva L. Edwards was married at some time after the accident and is not Eva L. Bailey, and she will henceforth be known, in this proceeding, as "Bailey".

It further appears from the evidence that the first motor vehicle damaged in the accident on December 25, 1989, was a 1986 Chevrolet Cavalier and was the separate property of John Edwards, the father of Bailey, and that the second vehicle damaged in the accident, a parked car struck in said accident by the Bailey car, was then owned by one Jeffrey Porter, who is not a party to this proceeding.

It appearing to the Court that Bailey sustained no property damage or personal injuries in the accident of December 25,1 989, and that she had no claim in her own right, and that John Edwards was the owner of the motor vehicle driven by Bailey, which sustained damage in said accident, it is ordered John Edwards be and he is hereby substituted for Bailey as claimant in this proceeding.

At or shortly before 7:00 p.m., on Christmas Day, 1989, Bailey was en route to her home, driving her father's car in a westerly direction on Route 7. It was dark and cold and a light snow was falling. bailey was some two or two and one-half car lengths behind a car operated by Clayton E. Webb, and both cars were proceeding at about 30 to 35 miles per hour. Webb's car hit ice on the road, and he touched his brake lightly, activating his taillight, but released it immediately because of the appearance of an oncoming car, and was able to maintain control of his car. Bailey, on seeing the taillight signal on Webb's car, put on her brake, and her car went out of control and hit and damaged a nearby car owned by Jeffrey Porter, parked on the south side of Route 7. There were no personal injuries. Damage to the Edwards car was $3,140.67. The evidence is not clear as to the amount of damages to the Porter car, but it was established the Edwards paid Porter $650.00 to settle Porter's claim in full. Edwards' claim, therefore, is for $3,790.67.

The claimant maintains that his car was damaged when it went out of control upon hitting ice on the highway, that the Division of Highways was negligent by reason of its failure to remove the ice, and that its negligence was the proximate cause of the accident.

Respondent alleges that it was not negligent, that Bailey was negligent, and that Bailey's negligence equaled or exceeded that of the respondent, if any.

The Court will first address the defense that Bailey's negligence equaled or exceeded that of the respondent. Such a defense would, if proven, be recognized by this Court if Bailey had been the owner of the car she was driving and if she were the claimant. She was not, however, as we have observed, the owner of the car, and is not the claimant; furthermore, her own negligence in the operation of her father's car, if any, is not to be imputed to her father, Edwards, who is now recognized in this proceeding as the claimant. *Bartz v. Wheat*, 169 W.Va. 86, 285 S.E.2d 894 (1982); see also *Prosser and Keeton on Torts* (5th ed. 1984), page 526.

We are left with two defenses; 1) that the respondent was not negligent, and 2) that the negligence of Bailey was the sole proximate cause of the accident.

The Court makes the following findings of fact on the basis of the evidence adduced by or on behalf of the parties, Edwards and the Division of Highways:

1) Snow in appreciable quantity fell in the area of the accident on December 19, and possibly on December 20, 1989;

2) According to respondent's records, respondent promptly activated its snow removal and ice control plan, and on December 19th, scrapped snow and ice from Route 97, in the area where the accident later took place, and applied abrasives to that area;

3) Respondent's records disclose that it continued snow removal and ice control on nearby secondary roads, on December 20th; no work records were produced by

respondent which would indicate that it treated Route 97, from December 19th until after 8:00 p.m. on December 25th, after the accident in which the Edwards car was damaged.

4) There was ice on the surface of Route 97 at and immediately before the accident of December 25, 1989, which had its inception in the snowfall of December 19, 1989, which had not been removed by respondent, and which at all times during said period constituted a danger at persons using said public road and which the respondent had a continuing duty to remove or otherwise neutralize;

5) There is testimony of a hearsay nature, to which respondent did not object, that unidentified individuals living in the immediate vicinity of the accident had called respondent's agents and reported the icy condition of the highway; respondent had no record of such calls; Route 97 was and is a primary road in Wyoming County, West Virginia, must traveled by automobile and commercial vehicles;

6) The accident in question would not have occurred if there had been no ice on the road at the time and place of the accident;

7) At the time of the accident, Edwards had a liability insurance policy on the car operated by Bailey, which would have covered the loss sustained by Porter in the amount of $650.00.

The Court makes the following conclusions of law:

1) Respondent was negligent in failing to remove from a primary public road a traffic hazard known to it or which should have been known to it over a period of six days;

2) Respondent's negligence was a proximate cause of the damage sustained to Edwards' motor vehicle, if not the sole proximate cause thereof;

3) Claimant Edwards is entitled to recover $3,140.67 from respondent, for damage to claimant's motor vehicle; and

4) No award will be made to Edwards on account of the damage to the Porter vehicle, because of the Court's consistent view that no moral obligation lies on the State to indemnify a person who can be indemnified under a policy of insurance which he owns.

Award of $3,140.67 to John Edwards.

OPINION ISSUED MAY 19, 1992

ERNEST A. JOHNSON, JR.
VS.
DIVISION OF HIGHWAYS
(CC-91-100)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

During the month of February 1991, claimant was traveling on Route 73, also known as Saltwell Road, in Marion County, West Virginia, when his vehicle struck a large crack in the road where the blacktop had split. Claimant's vehicle, a 1977 Datsun, sustained damaged to a tire, a wheel, a shock, the steering wheel, and the bottom of the vehicle was pushed up against the door. The cost of repair to the vehicle was $703.10 and claimant sustained a back injury. The claim was submitted to the Court upon the issue of liability only.

Respondent denies negligence as it alleges that it did not have notice of the defect in the road on the date of claimant's accident.

Claimant testified that he lives in Shinnston, West Virginia, and he was to take as a trip to North Carolina. It was approximately 8:30 p.m. and it was dark. Claimant was driving 35 miles per hour when he came over a knoll in the road and his automobile passed over a groove or split in the blacktop. Claimant was aware that the surface of the roadway was in a wavy condition, but he was not aware that a slip had occurred.

William H. Wyckoff, respondent's assistant county maintenance supervisor for Harrison County, testified that a slip had occurred at the site of claimant's accident. He stated that there was water underneath the paved portion of the road which caused waviness and then the pavement broke. The area was stabilized with stone and penetrated with tar to smooth out the road. He stated that this worked temporarily, but that the road kept falling in. Permanent repairs required that Pile be driven and this was done in the spring 1991. He further stated that the road

was rough in this area and that there were no warning signs placed in the area prior to the actual crack appearing in the road. Signs were placed after claimant's accident.

The issue before the Court is whether the respondent had prior notice of the potential for a slip to occur at the site of this accident and a reasonable amount of time to warn the traveling public. The facts indicate that the respondent did have prior notice of a defect in the road and that respondent failed to take the appropriate measures to warn the traveling public of the hazard. As the record establishes that the respondent had actual notice of the road defect, the Court finds that

respondent was negligent is its maintenance of the road. It is the opinion of the Court that respondent had sufficient notice of the potential for a major slip to occur in the surface of the road and failed to take measures to protect the traveling public.

Accordingly, the Court is of the opinion to make an award to the claimant and directs the Clerk of the Court to set this claim for hearing upon the issue damages if the damages cannot be agreed to by the parties and submitted to the Court in a stipulation.

OPINION ISSUED MAY 19, 1992

MARCEL LAZARE, JR.
VS.
DIVISION OF HIGHWAYS
(CC-91-202)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

The claimant, a resident of South Charleston, Kanawha County, was driving his 1990 Harley-Davidson Electraglide FLHTC Ultra motorcycle south on Star Route 4 on June 16, 1991, when he noticed what appeared to be water puddles ahead in the road as he entered the town of Gassaway in Braxton County. The claimant testified that he slowed his speed of travel to fifteen miles an hour to go through the water and avoid the splash that results. The puddles however obscured holes in the road, and the claimant lost control of the motorcycle as he crossed the first puddle. The front tire of the motorcycle struck the hole and threw the bike over according to the claimant. The claimant suffered abrasions to his elbow and arm and his passenger suffered scrapes to her knee. Neither was seriously injured. The motorcycle was driven from the accident scene. The damage consisted of a broken crash guard, broken left fairing, and destruction of the left saddle bag lid and saddle bag. The claimant elected not to repair the motorcycle and, instead, he traded the motorcycle for a newer model, and $801.17 was deducted from the trade-in value. The claimant contacted his insurer, but opted not to file a claim with the insurer pending the disposition of this matter before the court. His insurance policy has a $250.00 deductible.

The claimant testified that he had traveled Route 4 before and that he was somewhat familiar with the area of the accident. He did not observe rough road or similar warning signs in the area, and he does not believe that there were signs present on the date of the accident. He stated that he believes a sewer line recently had been constructed across Route 4 in the vicinity of the accident. He described the hole struck by his motorcycle as seven to eight inches deep with an unidentified

width.

The claimant's passenger, Ms. Gina Rose, testified that she observed puddles all across Route 4 as they entered the town of Gassaway. She stated that it had been raining throughout the day.

Ralph Donald Parks, a utility supervisor for the respondent's District 7 Office in West, testified that Dave Sugar, Incorporated, had installed a sewer line across Route 4 in the vicinity of the claimant's accident on or about March 25, 1991. He further testified that this contractor had not completed the resurfacing of Route 4 when the claimant's accident occurred. Accordingly, he opined that the contractor had failed properly to mark the area as a construction hazard as required by its permit issued by the Flatwoods Canoe Run Public Service District in Sutton. The respondent also denies responsibility for not conducting more frequent inspections and monitoring of the contractor's construction activities.

The claimant stated that he contacted Dave Sugar, Incorporated, which disavowed any responsibility for the road condition.

The Court concludes that the claimant may desire to reconsider a claim against the company which may be responsible for providing warning signs on Route 4 and the construction activities that proximately caused the claimant's accident. The Court further holds that the liability of the respondent in this matter has not been proven by a preponderance of the evidence, and, nevertheless, the amount of recovery would be limited to the value of the claimant's insurance deductible of $250.00, had such a showing of negligence been established.

In view of the foregoing, the Court must deny this claim.

Claim disallowed.

OPINION ISSUED MAY 19, 1992

KIMBERLY GAIL MYERS
VS.
DIVISION OF HIGHWAYS
(CC-91-108)

Claimant represents self.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

The claimant, a resident of Crawley, Greenbrier County, was driving her 1988 Chevrolet Beretta along Interstate 64 on January 26, 1991, when a rock fell from an adjoining ledge in the area of the Alta exit in the west bound lane of the interstate. The rock bounded up from the road striking the passenger side of her vehicle and causing damage. The claimant was traveling 65 miles an hour and was unable to avoid the rock. The rock was described by the claimant as eight to ten inches in diameter. The claimant travels this section of interstate between Lewisburg and Sam Black daily and she had observed falling rocks on previous occasions. She testified that there were no rock slide warnings posted in the area. She also stated that she had not notified the respondent of any of the previous rock slides. Her vehicle damage was estimated in the amount of $212.64. The vehicle has not been repaired. The claimant has a $250.00 deductible on her automobile insurance; therefore, she has not submitted this claim to the insurer. She did not file an accident report.

The respondent alleges that the claimant's accident was caused by an act of nature over which it has no control.

The case law governing liability for rock falls permits a finding of negligence on the part of the respondent when it has been demonstrated that the respondent knew or should have known that a particular area of highway was dangerous because of frequent rock slides, and adequate precautions to ameliorate the hazard or warn motorists of the peril were not taken. *Hammond v. Dept. of Highway,* 11 Ct.Cl. 234 (1977). This court has held in prior claims that the lack of falling rock signs does not render the State liable without convincing evidence of such a hazard. *Jude v. Dept. of Highways,* 13 Ct.Cl. 28 (1979). The Court is of the opinion that the claimant herein has not established negligence on the part of the respondent. The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947).

Accordingly, the Court must deny this claim

Claim disallowed.

OPINION ISSUED MAY 19, 1992

MARY E. PARKER
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-90-396)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

This is a claim brought to recover back wages that were withheld by Welch Emergency Hospital, a facility of the respondent, after a reclassification of the claimant's position at the facility. It appears uncontroverted that the claimant was performing the duties of a Procurement Officer, while inappropriately receiving compensation at a lesser grade and title classification. The claimant seeks to recover the underpayments that resulted from the misclassification retroactively from October 1, 1984 to September 16, 1990.

The claimant timely filed a grievance pursuant to the Education and State Employees Grievance Procedure, in accordance with the provisions of W.Va. Code Chapter 29, Article 6A, Section 4(a), to recover same on October 1, 1990. A representative of the respondent, David Gresham, advised the claimant by letter dated October 10, 1990, that back wage grievances could not be paid beyond July 1, 1988, consistent with the current case precedent as cited below. By an Agreement between the claimant and the respondent, dated October 11, 1990, the claimant received an aggregate back wage payment of $3,494.89, representing the underpayment of wages from the misclassification during the period of her employment by the respondent from July 1, 1988, up to and including September 15, 1990.

The issue of unpaid back wages from the period of October 1, 1984, to July 1, 1988, remains unresolved and is the subject of the present claim before this Court. The claimant alleges that the agreement for partial repayment of back wages dated October 11, 1990, did not preclude her from not attempting to recover the remaining unpaid wages in the amount of $5,934.60.

The respondent contends that it is unable to make the requested payment for the period of October 1, 1984, to July 1, 1988. The respondent cites as its authority for their action the holding of *AFSCME v. W.Va. Civil Service Comm.*, _181 W.Va.8, 380 S.E.2d 43, wherein the W.Va. Supreme Court of Appeals established a 90 day period for claimants to initiate grievances to recover back wages for claims arising prior to July 1, 1988. The 90 day filing period began on March 28, 1989, the date of the *AFSCME* decision and expired June 28, 1989. The claimant missed this filing period. The respondent, however, suggests that the claimant may still have recourse for obtaining her back wages by pursing a grievance with the Education and State Employees Grievance Board since the agreement for partial back wages may be interpreted to grant such consideration.

The Court is of the opinion that grievances involving misclassification are the exclusive province of the Education and State Employees Grievance Board. As the claimant has not exhausted her administrative remedies, this Court has no jurisdiction to substitute its judgement for that of the Grievance Board, nor to make findings of fact and conclusions of law in such wage matters. The basic rule of exhaustion of remedies is found in *Meyers v. Bethlehem Shipping Corporation*, 303 U.S. 41 (1938), wherein the U.S. Supreme Court held that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." In other words, a reviewing court does not have jurisdiction over a matter until an

agency has acted "finally." The claimant has not exhausted her administrative remedies of the W.Va. Code. The basis for the exhaustion of remedies rule has been summarized by the U.S. Supreme Court in *McKart v. U.S.*, 395 U.S. 185 (1969) and followed by the W.Va. Supreme Court of Appeals for the following reasons:

It permits full development of the facts prior to judicial review;

It gives the agency a chance to employ the discretion or expertise expected of it by the Legislative body;

It is generally more efficient to exhaust the administrative process without premature interruptions;

The appellant might succeed before the agency, making judicial review unnecessary;

Constant resort to judicial review could weaker the agency; and,

The exhaustion of remedies rule recognizes the autonomy and primacy of the agency to make findings of fact without undue influence and interference.

For the foregoing reasons, the Court must deny this claim in order for claimant to pursue and exhaust the administrative remedies available to her.

Claim disallowed.

OPINION ISSUED MAY 19, 1992

RICHARD SHORT
VS.
DIVISION OF HIGHWAYS
(CC-91-128)

Claim represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

The claimant, a resident of Lesage, Cabell County, seeks to recover the amount of $64.61 for the replacement of a tire to his 1983 Chevrolet Blazer which was damaged on March 22, 1991, when his wife was driving the vehicle. One of the tires of the vehicle passed over a glass bottle on County Route 7, approximately eight-tenths of a mile from the State Route 2 intersection

near Huntington in Cabell County. The tire that was damaged could not be repaired. The claimant alleges that debris was permitted to accumulate on the road surface due to the absence of a ditch line, or alternate drainage provision.

The claimant testified that he had previously notified respondent of debris washing upon the road surface on County Route 7. He stated that the source of the debris is an unidentified, privately owned garbage dump site, located in close proximity to the accident. He testified that he had notified the Department of Natural Resources of this problem, and the owner(s) of the property have made some attempt to clean up the area. However, the claimant says that with every rain, debris continues to wash upon the road. He explained that only bed springs held up with posts hold back the garbage. The garbage dump has been operated in the hollow adjoining the road some two years before this claim occurred. He stated that he has made several complaints concerning the debris washing upon the road, and he filed a formal, written complaint on March 28, 1990, with the respondent, one year prior to this incident. A copy of this complaint was introduced into evidence and appears to describe two hazards, chickens running free in the road, and the road debris that is the subject of this claim. The claimant is an employee of the respondent and he stated that he informally discussed the matter with his supervisor both before and after the accident herein.

The claimant's wife, Carol Short, testified that she too has witnessed the debris on the road. She was driving the Chevrolet Blazer when the tire was damaged by the glass bottle in the road.

The law is well settled that the creator of a nuisance is liable for economic loss. However, this claim is not against the owner of the garbage dump for causing the debris, but against the respondent for an act of omission in failing to install adequate drainage and failing to maintain the road free of surface debris. The issue then is whether the respondent had committed negligence independent of the private landowner who operates the garbage site, or as the respondent avers, whether the road debris is a superseding and intervening act of the garbage site or other causes, thus relieving the respondent of liability.

The Second Restatement of Torts §440 defines a superseding cause as:

> An act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.

An intervening cause is defined by the Second Restatement of Torts §441, as:

> An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.

The issue thus presented by the respondent's defense of a superseding and intervening act is whether the respondent is to be liable for a later cause of independent origin, namely the bottle

washing up and remaining upon the road, proximately caused by an alleged failure of the respondent to provide adequate drainage and road maintenance on Route 7.

The Court finds that but for the bottle on the road surface this accident would not have occurred. The respondent was on notice that debris would accumulate upon the road. Accordingly, the defense of a superseding and intervening cause is unpersuasive.

However, the issue of whether a drainage ditch should have been installed to ameliorate the debris problem is controlled by the decision of W.Va. Supreme Court of Appeals in *Adkins v. Sims,* 130 W.Va. 646 (1947), 46 S.E.2d 81 (1947), in which the Supreme Court held that the failure of the state road commissioner, in the discretion vested in him to expend limited public moneys for the construction, maintenance and repair of the public highways, does not create a moral obligation on the part of the State to compensate a person injured on such highway, allegedly resulting from such failure. The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. It is the opinion of that the respondent is not negligent for failing to have constructed a drainage structure for the debris spilling onto Route 7 from the garbage dump.

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

Claim disallowed.

OPINION ISSUED MAY 19, 1992

STATE FARM INSURANCE AS SUBROGEE OF DAVID HIMMELRICK
VS.
DIVISION OF HIGHWAYS
(CC-90-10)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On October 9, 1989, the claimant's son, Norman Himmelrick, a resident of Weirton, Hancock County, was driving his father's eleven month old truck on Route 105, more commonly identified as Pennsylvania Avenue, within the municipal boundaries of Weirton. At approximately 2:00 p.m. on that date, the claimant's son was involved in a three vehicle accident on Pennsylvania Avenue near the intersection of Woodlawn Estates. The claimant's son was directed by a Weirton Police Officer, Danny King, to pull the truck onto the berm while an accident investigation was

conducted. The claimant's son did as he was instructed, only to discovered he had parked the truck on an exposed culvert. The right front tire dropped into the culvert and the front running board was damaged as well as the right front hubcap. The claimant's insurance paid for the estimated $600.00 damage, and this claim is brought to recover the $250.00 deductible.

Donnie Kimble, who is employed as a highway maintenance foreman for the respondent in Hancock County, testified that he investigated this claim. It is his opinion and the respondent's position that the culvert involved is not within the respondent's right-of-way on Route 105. The respondent therefore argues that the culvert is the responsibility of the property owner, and the failure of the unidentified property owner to properly maintain a grate over the culvert is not negligence on the part of the respondent. Mr. Kimble provided the Court with sufficient measurements to indicate the culvert was privately installed without the respondent's knowledge or permit.

The burden of proof is upon the claimant to demonstrate with a preponderance of the evidence that the respondent is responsible for the culvert. That burden has not been established. The claimant has not provided evidence such as surveys or plats indicating that the respondent installed, permitted, or otherwise is responsible for the culvert and its maintenance. As the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, the Court must deny this claim. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947).

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

Claim disallowed.

OPINION ISSUED JUNE 30, 1992

SINDY L. BALL
VS.
DIVISION OF HIGHWAYS
(CC-92-98)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On February 20, 1992, the claimant, a resident of St. Albans, Kanawha County, was traveling east on Interstate 64 at approximately 7:50 a.m. on this clear and dry morning, when she drover her 1980 Oldsmobile over a metal ladder left lying in the center lane of the Interstate, near the State Capitol exit within the City of Charleston, Kanawha County. The claimant testified that

the car-twenty-five feet in front of her swerved and avoided the ladder, but the claimant was unable to do likewise. The impact with the ladder damaged the front shocks and front springs of the claimant's vehicle and severed a fan belt. An alignment was subsequently required. The claimant documented repair expenditures totaling $246.83. She testified that her automobile insurance company was notified of the accident, but it declined to honor the claim as this risk was not covered.

The issue before the Court is whether the respondent had prior notice and a reasonable amount of time to remove the road debris before the claimant's accident. The burden of proof is upon the claimant to demonstrate with a preponderance of the evidence that the respondent had actual or constructive notice of the road hazard. That burden has not been established. As the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, the Court must deny this claim. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be liable for damage caused by road debris, it must have had actual or constructive notice of the condition and a reasonable amount of time to take corrective action. *Davis v. Dept. of Highways,* 11 Ct.Cl. 150 (1977). It is the finding of this Court that the requisite notice was not available to the respondent.

In accordance with the finding of facts and conclusions of law as indicated herein above, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED JUNE 30, 1992

CYNTHIA J. MAHAFKEY
VS.
DIVISION OF HIGHWAYS
(CC-92-73)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On January 1,2 1992, the claimant, a resident of Dunbar in Kanawha County, was traveling east on Interstate 64 at approximately 6:45 a.m. when her vehicle went over rocks and debris scattered upon the center lane of the interstate near the Oakwood exit within the city of Charleston. The claimant testified that she noticed the rocks and debris within her headlights range only some 20 feet before impact due to the early morning darkness. She further testified that falling rock and related warning signs were not present in the area. Parallel traffic prevented the claimant

from changing lanes to avoid the rocks and debris. When her vehicle, a 1988 Chevrolet Cavalier collided with the fallen material, it sustained substantial damage to the suspension system. The vehicle has been repaired at a cost of $1,185.09. This claim was brought in the amount of $1,251.76, which includes a towing charge of $66.67. The claimant maintains only liability automobile insurance.

The respondent contends that the claimant's accident was caused by an act of nature over which it has no control. Mancie Legg, whose responsibilities for respondent include interstate maintenance supervision within the Charleston District, testified that he was unaware of the claimant's accident and that no rock fall response activity is noted on the time sheets (also referred to as the DOH-12s) for January 12, 1992. However, he stated that there have been complaints of rock falls in this area at a rate of "a couple of months or so" depending upon the weather. He further stated that there are no falling rock signs in the area.

The case law governing liability for rock falls bases a finding of negligence on the part of the respondent when it has been demonstrated that the respondent knew or should have known that a particular area of highway was dangerous because of frequent rock slides, and adequate precautions to ameliorate the hazard or warn motorists of the peril were not taken. Hammond v. Dept. of Highways, 11 Ct. Cl. 234 (1977). This Court has held in prior claims that the lack of falling rock signs does not render the State liable without convincing evidence of such a hazard. Jude v. Dept. of Highways, 13 Ct. Cl. 28 (1979). The testimony in the instant claim establishes that respondent had constructive notice of the existence of a rock fall hazard within the described accident area, and that precautions were not taken to ameliorate this hazard. The Court is of the opinion that the negligence on the part of the respondent resulted in the damages to claimant's vehicle.

In accordance with the findings of fact and conclusions of law as stated herein above, the Court makes an award to the claimant in the amount of $1,251.76.

Award of $1,251.76.

OPINION ISSUED JUNE 30, 1992

LARAW MARSHALL
VS.
DIVISION OF HIGHWAY
(CC-91-266)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On July 16, 1991, the claimant, a resident of Triadelphia, Ohio County, was driving her vehicle on Route 40/3, also known as Gashell Run Road in Triadelphia. At the time of the accident, this single lane road had a dirt and gravel surface. The claimant asserts that the gravel on the road was six inches deep and this condition proximately caused damage to the exhaust system of her vehicle. The claimant alleges that her exhaust was torn off when her vehicle sank into the gravel and that if the road had been properly graded by respondent, the described damage may not have occurred. The claim is brought to recover $38.12 incurred by the claimant to repair the muffler.

Joseph Louis Reed, Ohio County Road Maintenance Supervisor for respondent, testified that Route 40/3 was being prepared for a tar and chip paving operation to take place on or about July 15, 1991. He stated that "Men Working" signs were posted to warn the traveling public of this construction activity. He recalled that the claimant's husband, Gary Marshall, had complained about the road on July 17, 1991, and that road maintenance personnel were dispatched to investigate. The witness testified that the road was found to be passable, but rough. By July 18, 1991, the tar and chip paving was completed.

The issue before the Court is whether the respondent had prior notice and a reasonable amount of time to correct the road defect before the claimant's accident. The evidence indicates that the respondent was preparing the road surface for a tar and chip operation. After receiving the complaint from the claimant, respondent's supervisor went to the location and experimented with different vehicles. A pickup truck and a smaller vehicle were both driven up the steep hill and neither vehicle appeared to be hampered by the thickness of the gravel.

The Court is of the opinion that the respondent did not create a hazardous condition by placing the gravel on the road. As the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, the Court must deny this claim. *Adkins v. Sims,* 130 W.VA. 645, 46 S.E.2d 81 (1947).

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

Claim disallowed.

OPINION ISSUED JUNE 30, 1992

MARK A. METZ

VS.
DIVISION OF FORESTRY
(CC-92-99)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks unpaid overtime, as determined by the United States Department of Labor, Wage and Hour Division, Charleston, by audits dated October 24, 1990, October 26, 1990, October 30, 1990, November 5, 1990, and November 19, 1990, respectively. The audits resulted in a determination that the employee has not been compensated for overtime as the law requires. Specifically, the audits established that neither Rangers or Service Foresters are in exempt positions since they spend more than 20% of their time in "routine activities". The respondent has not paid the requisite overtime, although respondent admits the validity and the amount of the claim. Respondent states that it does not have a fiscal method to pay the claim.

In view of the foregoing, the Court makes an award to the claimant in the amount of $1,245.68.

Award of $1,245.68.

OPINION ISSUED JUNE 30, 1992

EUGENE R. WALTON
VS.
DIVISION OF HIGHWAYS
(CC-91-189)

Paul M. Cowgill, Jr., Attorney at Law, for claimant.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

On June 11, 1990, around 4:00 p.m., the claimant, a resident of Clarksburg, Harrison County, was driving his 1984 Mercury Marquis station wagon on U.S. Route 50 west when his vehicle passed over a broken section of payment near the Sun Valley exit and sustained damage to

the undercarriage of his vehicle, including the catalytic converter. An estimate for repairs in the amount of $1,130.53 was submitted by the claimant and stipulated by the respondent. An additional unstipulated sum was sought for car rental and work loss for a total claim brought in the amount of $2,500.00. The claimant was not injured in the accident. Claimant's automobile insurance reimbursed him in the amount of $1,030.53. The claimant ha a $100.00 deductible provision in his policy.

Claimant testified that his vehicle struck broken concrete standing about 12 to 16 inches high in his lane of travel. He had just passed a slower vehicle on this four lane highway when suddenly a broken concrete block appeared in front of the path of his vehicle. He was unable to avoid the obstruction of the highway by stopping or steering around it. Ric hard Alan Brown, a maintenance crew leader for respondent who was responsible for U.S. Route 50 within Harrison County, testified that he was advised of the broken section of concrete around 5:15 p.m., and promptly initiated repairs.

James Beer, area maintenance engineer for respondent, explained that the pavement on this particular highway experiences thermal expansion during periods of dry, hot days which causes the concrete pavement to fracture. The highway was constructed in the early 1970's under a continuous concrete pour technology. This method of construction has been discontinued as a construction practice. Expansion joints have been installed in an attempt to reduce the problems of thermal expansion and to protect against the resulting road destruction. The only permanent remedy is to break all of the concrete to relieve the stress and then to resurface over the concrete. This would be a rebuilding of the road using the old concrete as the base of the road surface.

Claims brought upon a theory of faulty design are not justiciable in the Court of Claims if the highways was constructed more than ten years prior to the incident which brought about the claim as there is a ten year Statute of Repose which has been construed to apply to the respondent Division of Highways by the W.Va. Supreme Court of Appeals in the matter of *Gibson v. W.Va. Dept. of Highways,* et. al., 185 W.Va. 214, 406 S.E.2d 440, (1991). Accordingly, counsel for the claimant argues that this accident was not the result of negligent design, but due to negligent maintenance.

The issue before the Court in determining negligent maintenance in the instant claim is whether the respondent had prior notice and a reasonable amount of time to correct the road defect before the claimant's accident. The facts establish that the respondent did not have prior notice, and the claimant has failed to prove otherwise. The burden of proof is upon the claimant to demonstrate with a preponderance of the evidence that the respondent had actual or constructive notice of the road defect. The occurrence of thermal expansion on a highway cannot be predicted by respondent. As the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, the Court msut deny this claim. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by the road defect, it must have had actual or constructive notice of the condition and a reasonable amount of time to take corrective action. *Davis v. Dept. of Highways,* 11 Ct. cl. 150 (1977). It is the opinion of the Court that the respondent did not

have adequate notice of the broken concrete to repair the same nor sufficient time in which to warn the traveling public of the hazard.

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

Claim disallowed.

OPINION ISSUED JULY 22, 1992

LISA CURTIS
VS.
DIVISION OF HIGHWAYS
(CC-90-331)

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

PER CURIAM:

On the evening of July 3, 1990, the claimant, a resident of Ashland, Kentucky, was driving her dark blue Pontiac Sunbird on Interstate 64 west between Huntington and Ashland when she crossed a white paint spill extending across the center lane of the interstate nerar the Harvey Town Mile Marker. The claimant testified that she noticed a five-gallon paint bucket in the center lane which she was able to drive around. However, she was unable to avoid the paint and her vehicle was splattered when it passed over the paint. The claimant alleges that most of the resulting paint spray on her vehicle cannot be removed proerly without repainting the entire vehicel. She further allegest aht two tires are permanently stained by this paint. The claimant requests an award in the amount of $1,000.00 for the cost of repainting her car. No written estimate(s) were provided by the claimant to document the cost of repaintint the vehicle or removing the paint spray. the claimant testified she did not notify her automobile insurer of this incident.

The respondent contends that it did not have prior notice of the paint spill nor did it have knowledge of its origin. The respondent further contends that the paint bucket may have fallen from a passing vehicle not owned or operated by the respondent.

The issue before the Court is whether the respondent had prior notice and a reasonable amount of time to remove the road hazard before the claimant's accident. The evidence indicates that the respondent did not have prior notice, and the claimant has failed to prove otherwise. The burden of proof is upon the claimant to demonstrate with a preponderance of the evidence that the responden had actual or cosntructive notice of the paint in the road. That burden

has not been met. The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by this paint spill, it must have had acutal or constructive notie of the condition and a reasonable amount of time to take corrective action. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1977). It is the finding of this Court that the requisite notice was not available to the respondent.

In accordance with the findings of fact and conclusions of law as indicated hereinabove, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED JULY 22, 1992

SCOTT CATHERWOOD
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY OF WEST VIRGINIA
(CC-92-135)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $305.00 for damage sustained to personal items when a steam pipe burst in a housing facility of the respondent located at West Virginia University. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $305.00.

Award of $305.00.

OPINION ISSUED JULY 22, 1992

LEONARD GOLDEN

VS.
DIVISION OF HIGHWAYS
(CC-91-365)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On November 15, 1991, the claimant, a resident of Buckhannon, Upshur County, was driving his 1965 Chevrolet truck south on State Route 20, near the Old Ligget Road Addition outside Buckhannon, when he stopped on the side of the road to meet a friend and check his load. The claimant testified that his truck was approximately five feet onto the berm when he realized both the front and rear passenger side tires had gone flat. Upon inspection he discovered that the tires were punctured by the stub of what he thought was once a stop sign pole or similar sign post located at the intersection of the now closed Old Ligget Road Addition. The metal post protruded approximately six inches above the ground, but it was not readily visible from the road. The claimant replaced the damaged tires at a cost of $192.00. No claim was filed with his vehicle insurer a this hazard was not covered by his insurance.

Hayes Cutwright, an Upshur County road maintenance supervisor, testified that a steel stake sign post, about six inches above the ground was observed eight feet from the side of Route 20 on the berm where the claimant's tires were punctured. He further testified that this post was left in the ground after the "speed zone ahead" sign it supported was knocked down. A new post and sign were subsequently installed about 30 inches away from the post.

It is uncontroverted that the post should have been removed. But for the exposed and unprotected presence of the post, the claimant's damages to his truck would not have occurred. The court is of the opinion that the negligence on the part of the respondent proximately caused the damages to the claimant's vehicle.

In accordance with the findings of fact and conclusions of law as stated hereinabove, the Court is of the opinion to and does award the claimant the amount of $192.00.

Award of $192.00.

OPINION ISSUED JULY 22, 1992

DAVE WATERMAN

VS.
DIVISION OF CORRECTIONS
(CC-90-21)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover the loss of personal books, which loss occurred at the West Virginia State Penitentiary, a facility of the respondent. The books were removed from the claimant's office when the program for which he was employed terminated at the Penitentiary. The books were removed from an office and placed in the main lobby of the prison. When the claimant was able to return to retrieve the books, there were several books missing from his collection.

At the hearing of this claim on December 3, 1991, the Court requested that the claimant provide a list of the missing books including the alleged values which claimant placed upon each book and verified statement from Colonel Eisenhower, an employee of the respondent at the Penitentiary, as to his knowledge of this situation. As of July 1992, the claimant has failed to provide the requested information. Therefore, the Court does not have proof required to render a determination of this claim.

In view of the foregoing, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED AUGUST 17, 1992

JOE PANNELL
VS.
DIVISION OF HIGHWAYS
(CC-88-321)

J. Franklin Long, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

BAKER, JUDGE:

On the evening of November 7, 1986, the claimant, now a resident of Plant City, Florida, was seriously injured when the automobile in which he was a passenger left the road and

rolled over an embankment. The automobile was driven by Drema Byrd, a friend of the claimant. The accident occurred in mercer County in the vicinity of Montcalm on State Secondary Route 11/6, more commonly known as Happy Hollow Road. The claimant alleges that his injuries were the result of the negligence on the part of the respondent in failing properly to maintain the shoulder of Route 11/6. Claimant contends that Drema Byrd drove her vehicle onto the shoulder to permit an approaching truck to pass her vehicle and the soft shoulder was inadequate for the purpose of supporting the weight of the Byrd vehicle. The shoulder is alleged to have been eroded by uncontrolled and improperly maintained drainage from the ditch line on the north side of the orad. The claimant asserts that but for this drainage problem the shoulder would not have collapsed. The claimant further alleges that respondent was negligent for failing to place warning signs to alert motorists of a soft shoulder hazard. The claimant suffered severe personal injuries from this accident causing partial paralysis.

The respondent avers that the eroded shoulder alleged by the claimant does not exist and did not exist when this accident happened.

The claimant and driver of the vehicle had been together prior to the accident at claimant's brother's house in Falls Mills, Virginia, where the claimant had gone to sell a transmission. They had driven to Blue Well, West Virginia, to meet with a potential buyer for the transmission. The buyer did not show up so the claimant and Drema Byrd drove through Montcalm to Happy Hollow Road where claimant lived. Mrs. Byrd was taking the claimant to his place of residence. He testified that he and Drema Byrd were starting up Happy Hollow Road when there was an approaching vehicle, and that Dream Byrd drove the vehicle over to the right and stopped. He was looking behind their vehicle for vehicles coming upon them. He then felt the ground give way and the car started rolling over the right side. He remembered flying through the air and when he awoke he realized that he was lying in the creek with the vehicle on top of him. He was aware that someone was holding his head out of the water and he blacked out. When he awoke, he was in the hospital. He suffered a severed spinal cord as a result of the accident.

Claimant's brother, Charles Pannell, went to the scene of the accident on November 9, 1986. He testified that he observed the area of the bank that looked like it had given way. He also observed the shrubbery and parts of chrome off of the vehicle and glass over the bank. One of his sons saw the claimant's hat which Mr. Pannell retrieved for his brother. He stated that "the bank looked like a piece of concrete, like sidewalk that you'd broke half of it off...[T]hat's the way the bank right there at the edge of the road looked."

Bobby Watkins, a resident of Happy Hollow Road having lived there for 30 years, testified there has been a drainage problem with water accumulating in the ditch line on the north side as there is a "swag" area in the road near the accident scene. There was dirt, gravel, and debris in the ditch line causing water to accumulate in the ditch line. The water would fill the ditch line and during a "real hard rain," the water would flow across the road and over the shoulder bank causing erosion to the bank on the south side of the road. He further testified that there were slips along the south side of the road and that the respondent repaired the area during the summer of 1988 by

removing a portion of the bank on the north side with an enloader and placing the dirt on the south side to widen the road by approximately three to four feet. The accident in the instant claim occurred prior to this repair in November 1986. He further testified that residents in the area would place stakes at the edge of the road to mark slip areas, but there were no stakes at the accident scene.

James S. O'Donnell, a resident of Happy Hallow Road, described the road with the hillside on the north and the bank on the south side being just straight down the mountain. There were no warning signs along the road nor were there any lights for motorists. It was very dark at night. He also testified as to the problems with the ditch line and the water flowing across the road and over the bank causing slips to occur. He stated that respondent would clean the ditch line about two or three times a year. He explained that the water could be seen by motorists and that ice would from during the winter months in the are but there was no ice on the date of the accident. Another resident of this road, Richard Spaulding, corroborated the testimony of both Mr. Watkins and Mr. O'Donnell.

Douglas N. Gills, a Happy Hollow resident for 55 year who lived across the road from the accident scene, testified that he had not noticed any movement or change in the shoulder or the road bank where the accident occurred. The Gills family owned the property on both sides of the road at the scene of the accident, and Mr. Gills was on the property regularly running his trap lines. In fact, he was preparing trap lines on the night of the accident. He stated that he was in his yard when the accident occurred and he heard a woman yelling. He went to the edge of the road and observed the vehicle lights below the road on the river bank. He heard the claimant groaning and approached the claimant to provide assistance until ambulance personnel arrived. His involvement with this accident establishes his knowledge of the scene of the accident. It was his opinion that the vehicle had brushed a tree as indicated by tire marks where it went over the hillside and marks on the tree. This location is not the narrow spot in the road where the claimant opines that the vehicle went off the road. Photographic evidence does not reveal an eroded shoulder in the area where the vehicle went off the road as established by witness Gills.

Deputies with the Mercer County Sheriff's Department, Randall Hill and Randall Earnest, who investigated the claimant's accident concluded that there was no evidence that the shoulder bank collapsed. Deputy Hill testified that Drema Byrd gave him a statement after the accident and she wrote that she "was driving up Happy Hollow and a truck was coming down. I tried to get over and the car went over the bank and flipped." It was his opinion that Drema Byrd drove her vehicle off the edge of the road and the vehicle then rolled down the hill.

An accident reconstructionist, Dr. William Berg, visited he scene of the accident on November 3, 1988, or two years after the accident. He testified that Happy Hollow Road constituted an unpaved, local, rural road. The area of the accident was very narrow allowing only one vehicle to pass through the area at a very steep drop-off down an embankment into a creek bottom. The embankment was so steep that a vehicle would roll over rather than traverse the slop down to the creek. It was his opinion that a warning sign and post-mounted delineators or object markers would have warned motorists of the unusually narrow section of the road an delineators would identify the

edge of the road beyond which motorists should not drive. He also testified that the formation of a windrow at the edge of the road forming a curb-like structure would provide a warning to drivers as to the closeness of their vehicle indicated to him that this vehicle had rolled over. He was of the opinion that this would occur either through a combination of slope failure due to the weight of the vehicle on an unstable slope, or the fact that the driver simply got so close to the slope that the vehicle was at an angle such that it became unstable and rolled over.

The evidence established that respondent maintained this road int he usual manner for an unpaved road. Melvin Blankenship, a crew leader supervisor for respondent in Mercer County, testified that respondent maintained Happy Hollow Road in the usual and customary manner by using a grader and dump truck to pull the ditch line and grade the road. The dirt would be placed on the south side where "it went on over the hill." He stated that there was no shoulder on the south side of the road because dirt roads do not have shoulders. He also described the accident scene as a very narrow area. He testified that the ditch line would fill with water, but it would flow across the road and over the hill side only after heavy rains. He further stated that the road had not been widened at any time after this accident and that the curve (the narrow spot in the road) had been that way for years.

The issue of warning sings for soft shoulders was addressed by William R. Bennett, a maintenance engineer for respondent. He explained that soft shoulder signs are paved in accordance with respondent's "Manuel on Uniform Traffic Control Devices". The signs are ordered by the traffic engineering department. The traffic engineering department investigates an area to determine if it meets the criteria set forth in the Manual. Provisions in the Manual also instruct employees as to grading and ditching operations specifically providing that no surplus material be placed to form a windrow at the edge of the road as this will be a hazard to traffic and will also form a dam that would tend to cause the ponding of water on the roadway surface. He testified that it is respondent's policy to blade roads in such a manner as to avoid the formation of windrows or curbs of excess material as it is a traffic hazard.

The issue before the Court is whether there was a defective condition existing on Happy Hollow Road on the night of November 7, 1986; whether respondent had prior notice and a reasonable amount of time to correct the defective condition; and whether respondent failed in its duty to warn motorists of the defective condition, i.e., the narrowed area on the south side or mountain side of Happy Hollow Road. The evidence indicates that the respondent did not have prior notice of any erosion to the shoulder of Happy Hollow Road at the scene of this accident. The claimant has not established by a preponderance of the evidence that the road gave way under the wight of the Drema Byrd vehicle, or that she had come to a stop. In her statement given to the investigating officer, Mrs. Byrd would have made mention of her coming to a complete stop if, in fact, she had. The burden of proof of the evidence that the respondent had actual or constructive notice of the road defect. The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E. 2d 81 (1947). For the respondent to be held liable for damage caused by a road defect, it must have had actual or constructive notice of the condition and a reasonable amount of time to take corrective action. *Davis v. Dept. of*

Highways, 11 Ct.Cl. 150 (1977).

The Court is of the opinion that the accident herein occurred when Drema Byrd drove her vehicle too far over the bank in an attempt to avoid the oncoming truck. Her action caused the vehicle to very too far off the shoulder of the road and it then went over the mountain side on its own momentum. The claimant himself was familiar with the road and the nature of the steep drop-off on the south side of the road. He must have realized that the road was narrow and dark. The road may have posed a hazard to an unfamiliar driver and, as a reasonably prudent person, he should have cautioned her accordingly. The testimony in this claim is conflicting as to exactly where the vehicle actually went over the bank. It would require speculation on the part of the Court to hold that the vehicle went off the narrow part of the road in the vicinity of this accident. This Court will not resort to such speculation.

The Court is of the further opinion that respondent maintained this road in the usual and customary manner by cleaning the ditch lines on a regular basis. There are many narrow, curvy dirt roads throughout West Virginia which respondent maintains. For this Court to require more than the ordinary standard of care would place an undue burden upon respondent and its economic resources.

The Court wishes to acknowledge that the claimant was well represented by his attorney. The evidence was presented in a thorough manner and the briefs on behalf of the claimant were comprehensive. The Court is aware of the serious nature of the injuries claimant received in this unfortunate accident; however, the Court is constrained by the findings of fact and conclusions of law as indicated hereinabove and must deny this claim.

Claim disallowed.

OPINION ISSUED AUGUST 17, 1992

LETHA A. REYNOLDS
VS.
DIVISION OF HIGHWAYS
(CC-91-378)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On October 15, 1991, the claimant, a resident of Hico, Fayette County, had parked her 1976 Chevrolet Nova on a private lot adjoining the Fayette Medical Clinic in the town of

Lochgelly. The claimant alleges that a stop sign situate at the corner of the parking lot on Lochgelly Road fell upon her automobile. She testified that the falling sign tore the vinyl cover of the roof of her automobile and scratched and dented the right rear quarter panel. She submitted separate estimates for the vinyl roof repair in the amount of $265.00 and the paint and body work in the amount of $296.80. Her claim is for the combined amount of $561.80.

The respondent acknowledged ownership of the stop sign, but contends that either a prior accident had dislodged the sign or that a rain and wind storm occurring on the date of the claimant's accident may have caused the sign to fall upon her vehicle. However, John Zimmerman, a road maintenance crew leader for respondent in Fayette County, testified that upon inspecting the stop sign immediately after the claimant's accident he discovered that the sign did not have an anchor post. He further testified that this particular sign had a history of trouble, including vandalism and occasionally being struck by other vehicles.

The Court is of the opinion that the respondent knew or should have known that the stop sign was inadequately mounted. Accordingly, the Court holds that the respondent had constructive, if not actual, notice of the potential hazard, and this hazard proximately caused damage to claimant's automobile. An award in the amount of $300.00 is considered by the Court as a fair and reasonable assessment of the damages sustained by the claimant's 16-year-old automobile, and this amount is so awarded.

Award of $300.00.

OPINION ISSUED AUGUST 17, 1992

BERNARD D. HENLINE
VS.
DIVISION OF HIGHWAYS

(CC-92-90)

Claimant represents self.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

The Court has received the following stipulation of facts by and between claimant and respondent in the above-styled claim: That Bernard Doyle Henline is employed by the State of West Virginia, Department of Transportation, Division of Highways and that on or about February 26,1 992, Mr. Henline filed a claim in the Court of Claims to recover increment pay which he earned as an employee of the State of West Virginia, but which he did not receive. A copy of Mr. Henline's

claim was forwarded to Mr. William Feazelle, Director of the Division of Highways Finance Division, for a determination of the merits of Mr. Henline's claim. In reply to a West Virginia Division of Highways Legal Division request for information on the merits of Mr. Henline's claim, Mr. Feazelle did respond with the following:

In reply to your March 4, 1992, memorandum Mr. Henline has a valid claim. During the fiscal year 1989-1990, he was paid an additional increment amount of $144.00 for the four years that he was on military duty. Respondent was unable to pay him for any years prior to 1989-1990 as the State's spending authority expires at the end of each fiscal year.

As a result of the investigation, the respondent determined that the amount owed to Mr. Henline is a total of Five Hundred Seventy-six Dollars ($576.00); or One Hundred Forty-Four dollars ($144.00) per year for the fiscal years 1985-1986, 1986-1987, 1987-1988, 1988-1989. The respondent is compelled by a moral obligation to stipulate that Five Hundred Seventy-Six Dollars ($576.00) represents the reasonable and necessary amount of damages as claimed by the claimant.

The parties hereto have agreed that full and just compensation for all damages claimed is Five Hundred Seventy-Six Dollars ($576.00).

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

Award of $576.00.

OPINION ISSUED AUGUST 17, 1992

CHARLES R. ROBERTS, JR.
VS.
PUBLIC SERVICE COMMISSION
(CC-91-230)

Joan G. Hill, Attorney at Law, for claimant.
Richard E. Hitt, Attorney at Law, for respondent.

PER CURIAM:

This case was brought to recover monetary compensation for nonpaid accrued compensatory time. The following facts are stipulated by the parties.

Charles E. Roberts, Jr. was employed as a Utility Engineer I by the Public Service Commission (PSC) from May 4, 1987 through June 30, 1989, at which time he resigned his employment. Mr. Roberts performed work as a professional engineer for the PSC in the County Plan Section which involved preparation of studies concerning state public service districts. In order to

complete the work on the schedule established by Mr. Robert's supervisor, he was required to work in excess of the prescribed working hours. The normal work week for the PSC employees is thirty-five (35) hours. At the time of his employment, Mr. Roberts was paid a salary of $28,896.00 per year. Mr. Roberts received various pay increases during his employment; at the time of his resignation, he earned $30,940.80 per year.

At the time of his resignation, Mr. Roberts had accrued over eight hundred (800) hours of compensatory time which he was unable to use and for which he was not paid. The only written policy from the Public Service Commission which prohibited monetary compensation for compensatory time accumulated by salaried professionals is a Memorandum dated March 9, 1990.

The West Virginia Division of Personnel Regulation 16.07 provides that the PSC "may require an employee to work in excess of the prescribed working hours or on holidays when such work is deemed necessary to the public interest." Compensation for such work is to be made in accordance with the Fair Labor Standards Act of 1986.

The central issue before this Court in this matter is whether the claimant is eligible for payment for the unused compensatory time he accrued while employed by the respondent. This claim was brought pursuant to the provisions of the West Virginia Code, Chapter 21, Article 5C, Section 1, et.seq., titled Minimum Wage and Maximum Hours-Standards For Employees, and is more commonly known as the West Virginia Wage and Hour Act. The Court must hold as a matter of law that the rights and remedies of the State Wage and Hour Provisions relied upon by the claimant and asserted in his Notice of Claim at paragraph 3 are not applicable to the claimant's action, since it is uncontroverted that the claimant is a professional employee, a professional engineer, and is thereby excluded from the provisions of this legislation. W.Va. Code §21-5C-1(f)(5) precludes by definition "any individual employed in a bona fide professional, executive or administrative capacity" from the provisions of W.Va. Code §21-5C-1(e). In Interpreting and applying the State Wage and Hour Provisions, §21-5C-1(f)(e) must be considered together (pari materia) with §21-5C-1(f)(6). It is not sufficient for the claimant to assert that the respondent is governed by the State Wage and Hour Act without reference to an exculpatory definition removing professional employees from same. Accordingly, in *Rohrbaugh v. Crabtree,* the W.Va. Supreme Court of Appeals affirmed that a "professional employee" is excluded from coverage under the State Wage and Hour Act. See 266 S.E.2d 914.

The Court recognizes that an underlying theory of the claimant's case is founded upon an equitable estoppel argument. However, the essential elements of equitable estoppel as set out in *District 17, District 29 v. Allied, et. al*., 735 F.2d 121 (4th Cir., 1984), and enumerated below, have not been satisfied by the claimant's case in chief sufficiently for the Court to invoke or fashion an equitable remedy:

> (1) there must be conduct, acts, language or silence amounting to a representation or a concealment of material facts; (2) those facts must

> be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him; (3) the truth concerning those facts must be unknown to the other party claiming the benefit of the estoppel at the time when such conduct was done, and at the time when it was acted upon by him; (4) the conduct must be done with expectation that it will be acted upon by the other party, or under such circumstances that it will be so acted upon; (5) the conduct must be relied upon by the other party, and thus relying, he must be lead to act upon it; (6) he must in fact act upon it in such a manner as to change his position for the worse.

The claimant's equitable estoppel request is premised upon the belief that an agreement existed by and between the parties that the claimant's work in excess of his customary seven hours per/day would be compensated with accumulated time off. However, it appears uncontroverted that both parties understood that the accumulated time off would not be monetarily paid. See Claimant's Initial Brief at page 4. It was further understood that overtime was not available to the overtime was not available to the claimant as he was a professional salaried employee. See W.Va. code §21-5C-1(f)(6). Accordingly, the accumulated time off was to be expended at some future date, and prior to the claimant's departure or separation from respondent's employment. The claimant voluntarily terminated his employment with the respondent without availing himself of the use of his accumulated time off. It therefore appears to this Court that the practice of accumulating time off was not misrepresented to the claimant, nor did the acts or conduct of the respondent serve to misguide or conceal the manner in which said time could be expended. It further appears to this Court that the claimant did not change his position for the worse in reliance upon the accumulation of the time off. Accordingly, the request for equitable estoppel has not been established and the claimant's demand for said relief may not be granted.

The Court, however, finds that during the claimant's employment by the respondent, a timely request was made on or about December 2, 1988, by the claimant for one week of vacation time beginning December 23, 1988, and ending December 30, 1988. The request was granted by the respondent, but was charged against annual leave, rather than the accumulated compensatory time. The Court is of the opinion to and does award to the claimant the sum of $520.80. This amount is calculated upon the claimant's prevailing wage rate of
$14.88 per/hour x five days of otherwise compensable annual leave. In arriving at this amount, the Court holds that the claimant's accumulated compensatory time should have been charged for this period of vacation rather than his annual leave for which he would have been compensated upon his termination.

Accordingly, the Court makes an award in the amount of $520.80 to the claimant as a moral obligation of the State.

Award of $520.80.

OPINION ISSUED AUGUST 17, 1992

EDWARD AND BOBBY WEBB
VS.
DIVISION OF HIGHWAYS
(CC-90-87)

John R. Mitchell, Sr., Attorney at Law, for claimants.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action to recover for personal injuries and, in the case of Edward Webb, for loss of earnings, resulting from a one-car automobile accident which took place at approximately 3:10 p.m. on December 14, 1988, on West Virginia Route 305, an asphalt-surfaced public road, in Raleigh County, West Virginia, about 0.7 mile north of its intersection with West Virginia Route 54, and about 0.3 mile north of the Lester Volunteer Fire Department building.

At the time and place of the accident the weather was clear, but the road surface, although apparently free of snow and ice resulting from precipitation during the previous night, was still wet. There were no traffic control signs in the immediate vicinity of the scene of the accident. During the previous night, when snow was falling and ice developing on the road surface, the respondent had treated the road with a standard highway surfactant consisting of one part of salt and three parts of limestone gravel, to melt the snow and ice and to provide additional traction for motor vehicles.

At and immediately before the accident, claimant Edward Webb was operating and claimant Bobby Webb was a front seat passenger in a motor vehicle owned by their mother, and the claimants were proceeding northward on Route 305 when he driver saw what he inadequately described but identified as sand and gravel on the pavement, more concentrated in some places than in others, and took measures to control his speed by applying his brakes. The vehicle went out of control and skidded somewhat sideways across the lane used by southbound traffic and across the berm on the westerly side of the road, and struck a projecting two-foot rock about six to eight feet from the pavement, plunging over an embankment and coming to rest on its top some thirty-five feet below the road surface. Complainants undoubtedly received severe personal injuries as a result of the accident.

In their notice of claim Edward Webb and Bobby Webb do not allege that the respondent was negligent, but it is clear from their attorney's opening statement and the evidence produced in their behalf that they contend that respondent was negligent in permitting hazardous material to accumulate on the highway and that the rock struck their car should not have been

permitted by the respondent to remain where it was.

The respondent maintains that it was not negligent, that other and superseding causes produced the incident, and that the negligence of the complainants equaled or exceeded that of the respondent.

"Actionable negligence" is defined as the breach or nonperformance of a legal duty, through neglect or carelessness, resulting in damage or injury to another. *Black's Law Dictionary*, 4th ed. 1951.

Respondent has a qualified duty to use reasonable care and diligence in the maintenance of a highway under all circumstances, but the user of a highway travels at his own risk, and the State does not and cannot assure him a safe journey *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947).

On the record it is uncontradicted that because of snow and ice on the roads in Raleigh County on December 13 and 14, 1988, respondent activated its special crews to treat the road surfaces as necessary, to melt snow and ice, for the protection of travelers, and to keep the roads open for vehicular traffic. The surfactant previously described was spread from trucks in accordance with standard practice, along a number of roads, including West Virginia Route 305 at the scene of the accident, during the night of December 13 and 14 and during the morning of December 14. The last such application at the scene of the accident was made probably not later than 0600 hours on the 14th. Apparently, the pavement remained wet until the time of the accident, probably as the combined effect of precipitation of melting snow and ice. Any accumulation of the surfactant, of the nature surfactant described by the claimants, may be primarily attributed to 1) the movement of the surfactant by melted ice and snow, and 2) the displacement of the surfactant by motor vehicles passing over the treated pavement, over neither of which forces respondent had control and both of which forces claimants, in the exercise of ordinary prudence, might have anticipated. Furthermore, it was not established by the claimants that the respondent was on notice of a dangerous condition on the highway (if any there was), in the absence of which notice, actual or constructive, negligence is not actionable.

The mere application of the surfactant cannot be actionable, because it was the discretionary duty of the respondent to take such measures for the protection of travelers and to keep roads open. *State v. Horner*, 121 W.Va. 75, 1 S.E.2d 489, (1934). *Adkins v. Sims*, supra.

Claimants maintain that the rock struck by their vehicle when it was out of control was a cause of their injuries, but in our view the rock was no more of a cause of the accident and the injuries than the nearby trees which the car did not strike. There was no showing that the rock was on the State's right-of-way, or that anybody had ever requested that it be removed.

Finally, it is contended that respondent was negligent in failing to provide a guardrail along West Virginia Route 305, at the point where the claimants' vehicle went over the embankment.

The duty of the respondent to erect and maintain guardrails is a discretionary one. *Adkins v. Sims*, supra, pt. 3 of syllabus by the Court, in the *Adkins* case, the Court said:

> "In the very nature of things, the road commissioner must be permitted a discretion as to where the public money, entrusted to him for road purposes, should be expended, and at what points guardrails, danger signals, and center lines should be provided, and the honest exercise of that discretion cannot be negligence."

It having been determined by the Court that the respondent committed no act of actionable negligence, no award will be made.

Claim disallowed.

OPINION ISSUED OCTOBER 1, 1992

EUGENE BOICE
VS.
DIVISION OF HIGHWAYS
(CC-92-53)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On December 13, 1991, the claimant's son, Edward Boice, a resident of Mineral Wells in Wood County, was driving the claimant's 1986 GMC half ton pick-up truck west along Butcher Bend Road when he entered a right-hand turn after a knoll in the road and collided with a fallen tree and a downed unidentified utility line. The claimant estimated his speed of travel to be about 25 miles per hour, at 5:25 a.m., when this accident occurred. He described the weather as raining and windy. The fallen tree was partially in his lane of travel according to the claimant and no other traffic was present on the two lane road when he struck the tree. Although he was able to maneuver his vehicle so as to avoid the tree, he was unable to drive the vehicle around a protruding limb that caught the right front fender of the truck and damaged both the fender and the right headlight. The damage to the truck resulting from the collision with the limb was in the amount of $488.21. The claimant maintains full vehicle insurance with Nationwide Insurance. His deductible is $200.00. A claim has been submitted to the insurer for the described damage. The claimant alleges that the fallen tree was within the respondent's right-of-way and that the respondent should be responsible for the damage it caused.

The respondent contends that the damage to claimant's truck was the result of an act of nature, i.e. a storm, over which it has no control.

Normus Vincent, a Wood County road maintenance foreman, testified that the first notice of the fallen tree received by respondent was at approximately 5:30 a.m. on the morning of the claimant's accident. The tree was removed shortly thereafter. This witness had no prior notice of fallen trees in the accident area during his four years with the respondent. He testified that the State's right-of-way is 30 feet, extending 15 feet from the center line on each side.

The claimant testified that he understood the right-of-way on this roadway to be 40 feet, extending 20 feet on each side. The claimant measured the fallen tree from the center line to the tree stump. He concluded that the tree stump was 20 feet from the center line.

The Court is unable to determine whether the tree was or was not on the State's right-of-way based upon the testimony in this claim. The burden of proof is upon the claimant to show by a preponderance of the evidence that the tree was within the State's right-of-way, and that the tree was close enough to present a road hazard. Furthermore, the claimant must show that the respondent was aware of the hazard and failed to take corrective action. *Wolford v. Dept. of Highways,* 13 Ct.Cl. 348 (1981).

The Court is of the opinion that the claimant herein has not established negligence on the part of the respondent. The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947).

In accordance with the findings of fact and conclusions of law stated hereinabove, the Court must deny this claim.

Claim disallowed.

OPINION ISSUED OCTOBER 1, 1992

KAREN BURDETTE AND CONNIE GIVEN
VS.
DIVISION OF HIGHWAYS
(CC-91-328)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On October 16, 1991, Karen Burdette, a resident of Sissonville, Kanawha County, was driving a 1988 Ford Crown Victoria owned by her mother, Connie Given. As she traveled under the northbound Interstate 77 Fairplane Interchange bridge on State Route 21 in Jackson County at 3:05 p.m., her automobile struck a broken four inch piece of concrete that she alleges fell from the overhead bridge. Karen Burdette testified that she could not dodge the fallen concrete pieces as they covered her entire lane of travel on Route 21. She further testified that upon seeing the broken concrete in the road she slowed down to 30 miles an hour, but could not avoid the collision. Upon impact with the broken concrete rock, the front driver's side tire ruptured. this claim was brought in the amount of $106.00 to recover the cost of replacing the damaged tire. The Court on its own motion amends the style of the claim to reflect the titled owner of the vehicle, Connie Given.

The State is neither an insurer nor a guarantor of the safety of motorists traveling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). However, the respondent has a duty to use reasonable care in its maintenance of the streets and bridges. This Court previously granted an award in a claim wherein the claimant's vehicle was damaged by concrete which fell from a bridge owned and maintained by the respondent. See *Lynch v. Dept. of Highways*, 13 Ct.Cl. 187 (1980). In the instant claim, the Court is of the opinion that the respondent has not met its duty of care required in the maintenance of the bridge over I-77. Respondent had constructive, if not actual, notice of the deteriorated bridge deck. For this reason the Court has determined that respondent was negligent.

The Court is of the opinion to and does make an award in the amount of $106.00 to the claimant for the damages to her automobile.

Award of $106.00.

OPINION ISSUED OCTOBER 1, 1992

WEBSTER COUNTY BOARD OF EDUCATION
VS.
DEPARTMENT OF EDUCATION
(CC-92-34)

Jack Alsop, Attorney at Law, and Ernest V. Morton, Prosecuting Attorney of Webster County, for claimant.
Basil R. Legg, Special Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, the Webster County Board of Education, brought this action to recover its proper share of State Aid to Education which it did not receive when property assessments made by the County during certain years were Ordered by the Circuit Court of Webster County

to be repaid by the County and the County Board of Education thus became liable for its proportionate share.

The parties entered into a stipulation setting forth the facts and the amount of the claim.

During certain years, the assessor of Webster County assessed certain coal companies at rates which were later determined to be excessive. As a result, the County has been required by Order of the Circuit Court of Webster County to pay specific amounts to one coal company, and to give credit for taxes due to another coal company. As a result of this assessment problem, the State Aid to Education calculated at the State level was not at the appropriate funding levels during the years of the wrongful assessments.

Thus, the Webster County Board of Education did not receive the sum of $1,376,729.00, which the parties have agreed in equity and good conscience should be paid to the Webster County Board of Education.

The Court has reviewed the stipulation and has also reviewed Senate Bill NO. 20 and the Budget Bill for the 1992-1993 Fiscal Year. Page 47 of the Budget Bill contains a line item for "Local School Boards' Technical Corrections Refund" in the amount of $500,000,00. The Budget Digest for Fiscal Year 1993 is the legislative document which states the legislative intent for the various line items in the Budget Bill. The Budget Digest for Fiscal Year 1993 provides an explanation for this particular line item on page 140 as follows:

LOCAL SCHOOL BOARDS

> It is the intent of Legislature that from the Local School Boards' Technical Corrections Refund Account line item above that the funds be distributed proportionally among the Wetzel county, Webster County and Raleigh County Boards o education based upon their relative losses in allocated state aid share of revenues during fiscal years 1991-1992: Provided, That for the purposes of the pro-rata distribution of the funds, each of the above counties is to be entitled to it proportionate share of the funds available only to the extent that the county has not already received reimbursement for lost local property tax revenues in the form of a payment in lieu of property taxes or some other form of reimbursement for lost local property tax revenues in the form of a payment in lieu of property taxes or some other form of reimbursement. It is the further intent of the Legislature

> that the payments received by counties pursuant to the appropriation to the Local School Boards' Technical Corrections Refund Account **be the sole and exclusive payment from the state for all losses incurred by any county due to improper property taxation or improper property valuations which subsequently caused a decrease in the allocation of state aid** to the effected [sic] counties.
>
> If any amounts which are initially disbursed are returned due to the fact that other forms of reimbursement have been received by a county, then the other named counties may receive those amounts returned. These returned amounts shall be distributed to the remaining counties on a pro-rata basis. However, no county may receive more than the original amount in dispute which is as follows: (Emphasis added.)
>
> Raleigh County $128,360
> Webster County $270,000
> Wetzel County $333,186

It appears to the Court that the Legislature intended to compensate the Webster County Board of Education for the improper valuations and subsequent loss of State Aid funds by providing a sum certain through the Budget Bill. The Webster County Board of Education has received $184,541.00 as its proportionate share of the $500,000.00 line item in the Budget Bill.

The Court is of the opinion that the Legislature intended Webster County Board of Education's loss of funds to be paid and satisfied through this appropriation. Although there is no dispute that the Webster County Board of Education experienced a loss far greater than the amount provided in the Budget Bill, this Court may not disregard the legislative intent as stated in the Budget Digest for Fiscal Year 1993.

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

Claim disallowed.

OPINION ISSUED OCTOBER 1, 1992

GAI CONSULTANTS, INC.
VS.
PUBLIC SERVICE COMMISSION
(CC-92-124)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $12,359.33 for engineering services provided respondent. The invoices for the services were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $12,359.33.

Award of $12,359.33.

OPINION ISSUED OCTOBER 1, 1992

RALPH HUGH JOHNSON, JR.
VS.
DEPARTMENT OF EDUCATION
(CC-92-189)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks reimbursement of $203.00 for a course taken to renew his teaching certificate and $30.00 for the book used for the course. The invoice for the course was not processed for payment int he proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity of the claim in the amount of $203.00, but denies the sum of $30.00 for a book as this is not subject to reimbursement. Respondent further states that here were sufficient funds expired in the appropriate fiscal year with which the claim would have been paid.

In view of the foregoing, the Court makes an award in the amount of $203.00.

Award of $203.00.

OPINION ISSUED OCTOBER 1, 1992

NICHOLAS COUNTY COMMISSION
VS.
OFFICE OF THE GOVERNOR
(CC-91-248)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $11,855.77 for the extradition of prisoners. The invoices for the services were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $11,855.77.

Award of $11,855.77.

OPINION ISSUED OCTOBER 1, 1992

SECURITY AMERICA, INC.
VS.
DEPARTMENT OF ADMINISTRATION

(CC-92-115)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $82.68 for mileage expenses incurred as part of a contract with the respondent. The invoice for the mileage expenses was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could not have been paid.

In view of the foregoing, the Court makes an award in the amount of $82.68.

Award of $82.68.

OPINION ISSUED OCTOBER 28, 1992

JANET Y. RICHMOND
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-92-44 a and b)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

These claim were submitted for decision based upon the allegations in the Notice of Claims and the respondent's Answers.

Claimant seeks $290.95 for eyeglasses and an eye examination. Claimant's eyeglasses were damaged during an altercation at the Southern Regional Juvenile Detention Center, a facility of the respondent. The respondent admits the validity and amount of the claims and states that the amount of the claims are fair and reasonable. Respondent does not have a fiscal method to pay these claims.

In view of the foregoing, the Court makes an award in the amount of $290.95.

Award of $290.95.

OPINION ISSUED OCTOBER 28, 1992

BEN SPIELMAN
VS.
BOARD OF DIRECTORS OF THE STATE COLLEGE SYSTEM
(CC-92-143)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $150.00 for a pair of boots that were sent by his parents to Concord College, a facility of the respondent. The boots were placed on a loading dock and a student worker signed for the package. However, when the a college employee went to retrieve the package, it was missing. The respondent admits the validity and that the amount of the claim is fair and reasonable. Respondent does not have a fiscal method to pay this claim.

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

Award of $150.00.

OPINION ISSUED OCTOBER 28, 1992

FANNING FUNERAL HOME
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-92-273)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $325.00 for funeral services provided a client of the respondent State agency.

Respondent, in its Answer, admits the validity of the claim, but states that there were sufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED OCTOBER 28, 1992

ELSIE S. PATTERSON
VS.
WEST VIRGINIA STATE BOARD OF EXAMINERS FOR LPN
(CC-92-229)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $612.00 for increment pay for fiscal years 1989-1990 which was based upon an incorrect calculation of years of service.

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

In view of the foregoing, the Court makes an award in the amount of $612.00.

Award of $612.00.

OPINION ISSUED NOVEMBER 18, 1992

VECELLIO & GROGAN, INC.
VS.
DIVISION OF HIGHWAYS
(CC-91-243)

Warren H. Britt and Stephen A. Weber, Attorneys at Law, for claimant.
Robert F. Bible, Attorney at Law, for respondent.

PER CURIAM:

Vecellio & Grogan, Inc., a West Virginia corporation (hereinafter "V & G", brings this action against the West Virginia Division of Highways (hereinafter "D/H") for damages resulting for an alleged breach of a highway construction contract between them, which called for excavation and construction on Project ID-77-2(50)77 at the Sharon Interchange of the former West Virginia Turnpike but now Interstate 77, in Kanawha County, West Virginia.

The contract, dated 31 May 1993 is divisible, one part relating to excavation and removal of unclassified material, and one part relating to new road construction. Performance by V & G was to be complete by 13 July 1986, without intermediate completion dates as to either part. The construction part of the whole contract is otherwise irrelevant to this proceeding.

By the terms of the excavation contract, V & G was to remove an estimated 1,469,926 cubic yards of unclassified material, consisting of rock, shale, and dirt, from its place in nature along the easterly side of the Turnpike, a two-lane road, to the end that the planned Interstate highway would be wide enough to accommodate two lanes of traffic in each direction.

In preparing its bid of $4.25 per cubic yard of material excavated and removed, V & G took into consideration the fact that the cost of excavating rock and shale, the greater part of the mass to be removed, was appreciably higher than the cost of removing dirt, but the bid price, accepted by D/H represented a blend of costs for all materials.

It was necessary for D/H to maintain the flow of traffic over the Turnpike during the period of construction, and it was provided in the contract that V & G should not have the right, in removing excavated material, to go upon or cross the Turnpike with its hauling trucks. Accordingly, V & G devised and put into operation a system for material, under which it started excavation operations at the southerly end of its excavation sector, removed the excavated material by trucks in a southerly direction, and, as the face of the excavation operations advanced in a northerly direction, the newly excavated material was removed by trucks over the already excavated area, southward.

The northerly end of the sector awarded to V & G for excavation abutted upon a sector designated as Project ID-77-2(51)80, upon which the Nello L. Teer Company (hereinafter "Teer") was to perform excavation and construction under a contract dated 17 June 1983.

Apparently, by mistake, the northerly end of V & G's area of responsibility was also included in the Teer contract, although it had already been awarded to V & G. Teer was informed by D/H, by letter dated 5 August 1983, that excavation of the "overlap" area would be performed by V & G, and Teer's contract was amended to reflect the deletion.

V & G conducted excavation operations in 1983 until weather conditions forced it to suspend operations until the following spring. By 18 September 1984 it had completed more than two-thirds of its excavation work and was then moving northward through rock, which it had to excavate and remove in order to gain access to the northern area of its excavation responsibility, the "overlap" area. Supervisory personnel of V & G testified that they then estimated that, at the rate work was proceeding, V & G would reach the "overlap" area in November 1984, and that thereafter the unclassified material, which was stipulated to be mainly dirt, and containing 62,745 cubic yards, could have been removed at the rate of 3,00 cubic yards per working day, or about 21 working days.

On 18 September 1984, at a meeting convened by D/H and attended by representatives of V & G then present, was asked by a representative of V & G then present, was asked by a representative of D/H weather V & G could then move the material in the "overlap" area, and Smith's reply was that V & G could not do so at the time, as it was obvious that V & G had not yet reached the area by excavating in that direction. Thereupon, on the same day D/H took the "overlap" area from V & G and awarded it to Teer excavation, over the protest of V & G. Teer thereafter proceeded to excavate and remove the dirt from the "overlap" area, completing the work well before the end of 1984.

D/H attempted to justify its decision to take the work from V & G and award it to Teer, by asserting a right to do so under the provisions of Sec. 104.2 of the Standard Specifications for Roads and Bridges, made part of the contract and providing in pertinent part as follows:

> "104.2 - Altercation of Plans or Character of Work.
>
> The Department reserves the right to make alterations in the Plans or in the quantities of work as may be necessary or desirable at any time either before or during the work under the Contract. Such altercations shall not be considered as a waiver of any conditions of the Contract nor shall they invalidate any of the provisions thereof, except as provided herein. ...."
>
> The Department may omit any item or items in the Contract, provided that notice of intent to omit such item or items is given to the Contractor before any material has been purchased or labor involved has been performed, and such omission shall not constitute grounds for any claim for damages or loss of anticipated profits. The Department may omit any item or items shown in the Proposal, at any time, by agreeing to compensate the Contractor for the reasonable

> expense already incurred and to take over at actual cost any unused material purchase in good faith for use for the item or items omitted. ..."

We do not agree with the construction sought by D/H for the word "omit", for the following reasons:

> (a) the language of the specifications is plain and unambiguous, the word "omit" being commonly understood to refer to something deleted and not to something taken from one's contract and handed to another for performance; see *Burke v. Board of Improvement Paving District No. Five*, 179 S. W. 654, (Ark.1915); and *Gallagher v. Hirsh*, 61 N.Y. S. 609 (App. Div. 1899);
>
> (b) from the record it is quite clear that V & G was well advanced in its performance and that it received no notice from the D/H of the latter's intent to take the work from V & G;
>
> (c) were the interpretation sought by D/H to be accepted generally, building contracts would be so uncertain and risky, not to mention litigious, as to create unsettled contracts and an unmanageable condition in the industry.

We conclude that the excavation contract of 31 May 1983, between D/H and V & G was unjustifiable breached, in part, by D/H, by its making further performance by V & G impossible, and that V & G is entitled to such damages as were caused by the breach of contract. We proceed to a consideration of the proper measure of damages.

In Restatement, Contracts 2d, it is provided in pertinent part:

Sec. 344. Purposes of Remedies

> Judicial remedies under the rules of this Reinstatement serve to protect one or more of the following interests of the promisee:
>
> (a) his "expectation interest," which is his interest in having the profit of his bargain by being put in as good a position as he would have been had the contract been performed;
> (b) his "reliance interest," which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract been performed; or

(c) . . . .

In Restatement, Contracts 2d, it is provided in pertinent part:

Sec. 347, Measure of Damages in General

> Subject to the limitations stated in Secs. 350-53, the injured party has a right to damages based on his expectation interest as measured by:
>
> (a) the loss of in value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) any other loss, including incidental or consequential loss, caused by the breach; less
>
> (c) the cost or other loss that he has avoided by not having to perform.

The Restatement makes the comment that Sec. 347 attempts to put the injured party in as good a position as he would have been in had the contract been performed, that is, had there been no breach.

Consistent with the Restatement, Contracts 2d, Secs. 344 and 347, are the following decisions of the Supreme Court of Appeals in West Virginia:

> *Polino v. Kech*, 80 W.Va. 426, 96 S.E. 665 (1917);
> *Berry v. Huntington Masonic Temple Ass'n*., 80 W.Va. 342, 93 S.E. 355 (1917); and
> *Franklin v. Pence, 128 W.Va*. 353, 36 S.E.2d 505 (1945).
> See also 22 Am. Jur. 2d 692, Damages Sec. 63.

Applying the rules of said authorities to the facts of this case, we find and conclude that:

> (1) D/H unjustifiably refused to permit V & G to perform that portion of their contract for excavation dated 31 May 1983, which related to the unclassified material in the "overlap" area.
>
> (2) as a result of the breach of contract aforesaid, by D/H, V & G sustained damages measured by the sum which it would have been entitled to receive if it had been permitted to perform the excavation in accordance with the contract, less the cost it could have avoided by not having to perform;
>
> (3) V & G would have received the sum of $266,666.25 from D/H completion of excavation of the "overlap" area, a sum which is realized by multiplying $4.25 (the

amount agreed to be paid per cubic yard of unclassified material removed) by 62,745 (the number of cubic yards removed from the "overlap" area);

(4) against the sum of $266,666.25 which V & G would have earned had it been permitted to perform, D/H is entitled to an offset of $2.066 per cubic yard, representing the sum of costs of performance by V & G had it been permitted to perform, stated in amounts per cubic yard, for the following:

(a) payroll labor	$0.375
(b) payroll taxes	0.129
(c) support personnel, greasers, mechanics, et al.	0.280
(d) depreciation of company-owned equip.	0.268
(e) fuels and lubrication	0.137
(f) tires and tubes	0.019
(g) supplies	0.071
(h) rental equipment	0. 061
(i) field supervisory personnel	0.296
(j) business and occupation tax	0.083
(k) contingencies	0.248
Total	$2.066

Items of performance cost (a) to (g), above, are taken from V & G's Exhibit 30, to the admission of which D/H did not object to which d/H offered no countervailing evidence. Items (j) and (k) are taken from other portions of the record.

(5) The cost of performance of & G, therefore, in excavating the over-lap" area would have been the product of multiplying the composite cost per cubic yard, $2.066, by the number of cubic yards stipulated to have been removed, and that product is $129,631.17;

(6) The damages sustained in this case, by V & G, the injured party, consist of the difference between its contractual expectancy, $255,666.25, and its costs of performance of that portion of the contract which it was prevented from performing, or $129,631.17, and that difference is $137,035.08.

Damages of $137,035.08 will put V & G in as good a position as it would have been in had the contract of 31 May 1983 been performed, that is, had there been no partial breach of that contract.

The Court is of the opinion that §109.8 of the Specifications does not apply as the instant claim is based upon a breach of contract rather than upon worked performed. Therefore, V

& G recover interest on $137,035.08 in accordance with the provisions of W.Va. Code §14-3-1, in effect at the time of the making of the contract by the parties. V & G may recover interest at 6% per annum from the 151st day after 15 March 1988, through 18 November 1992, the issue date of this opinion. Award of $137,035.08, plus interest in the amount of $35,095.24, for a total award of $172,130.32.

Award of $137,035.08, plus interest in the amount of $35,095.24, for a total award of $172,130.32.

Award of $172,130.32.

OPINION ISSUED NOVEMBER 25, 1992

ISABEL N. GORDON
VS.
DIVISION OF HIGHWAYS
(CC-92-216)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover for damages to her vehicle which occurred on or about July 10, 1992. Claimant was driving her vehicle from a shopping mall proceeding to her home in Bluefield, Mercer County. As claimant approached a construction area where work by respondent was being completed, she attempted to drive around certain barrels and avoid yellow lines which recently had been painted on the pavement. Claimant failed to notice that there was a paint spill in the middle of the road and paint splashed upon her automobile when she drove through the paint spill. The damages to claimant's automobile total $250.88.

Respondent alleged that the incident could not have occurred in July 1992 as the painting was performed by respondent in June 1992.

The Court has determined that there may be confusion as to the date of the incident, but the damage to the claimant's automobile was corroborated during a view taken by the Court on the date of the hearing. There was evidence of yellow paint on claimant's vehicle, a black 1980 Cadillac Roadster. The Court is of the opinion that respondent was negligent in allowing spilled paint to be left on the pavement without providing any warning devices to the traveling public of the hazard.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $250.88.

Award of $250.88.

WILLIAM R. CORDLE, ET AL.,
Claimants,
VS.
DEPARTMENT OF PUBLIC SAFETY,
Respondent.
(CC-92-192)

ORDER

This claim came before the Court for consideration upon the Petition, Answer, the Findings of Fact, Conclusions of Law, and Order of the Circuit Court of Kanawha County, West Virginia, in Civil Action No. 83-P-Misc. 662, made and entered on, to-wit, the 31st day of December, 1988, and two subsequent Orders of the Circuit Court of Kanawha County, West Virginia, made and entered on, to-wit, the 6th day of March, 1992, and the 20th day of November 1992, and the Court, having duly considered the matter, is of the opinion that the claimants are

entitled to the agreed awards which total $3,501,501.35 and attorney fees which total $23,073.10 in accordance with said Orders of the Circuit Court of Kanawha County, West Virginia.

And the Court hereby ORDERS that awards in the total amount of $3,524,574.45 be and the same are granted, as set forth on the schedule attached hereto and made a part hereof as if fully set forth herein.

ENTERED: December 10, 1992

David G. Hanlon
PRESIDING JUDGE

Robert M. Steptoe
JUDGE

David W. Baker
JUDGE

OPINION ISSUED NOVEMBER 15, 1992

WILLIAM R. HUTTON
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-92-56)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

STEPTOE, JUDGE:

On July 28, 1991, claimant Hutton was a substance abuse therapist employed at Huntington State Hospital by respondent, Department of Health and Human Resources.

It appears from the record (consisting of the notice of claim, respondent's Answer, and the statement of respondent's counsel in open Court)that:

> 1. Claimant was on duty at the Hospital on July 28,1992, when he was engaged in conversation by a male visitor to the hospital, one Thomas Russell, who was accompanied by a four-year-old girl, the daughter of Russell and of a female patient. Claimant advised Russell that he (Hutton) was not permitted to talk about the patient's case without her consent. Russell asserted that the child could see her mother at any time, but claimant said a visit might take place only during visiting hours; whereupon Russell suggested he might take the patient out of the Hospital, to which suggestion claimant replied that Russell had no right to do so, and asked Russell to leave and, in the course of escorting Russell to the door, touched Russell on the shoulder. Russell became hostile and abusive and on the way out threatened to file a criminal action against claimant.
>
> 2. In fact, Russell did file a battery charge against claimant in the Magistrate Court of Cabell County, and the magistrate found against claimant. Claimant appealed to the Circuit Court of Cabell County which dismissed the criminal action. Claimant seeks to be indemnified to the extent of $1,500 for legal fees incurred by him in and about his defense to the criminal charge.
>
> 3. At the time of the incident aforesaid, claimant was performing his duty in accordance with the hospital protocol, and acted in good faith to carry out instructions for handling such a situation. The respondent admits that as a result of the incident and criminal charges an internal

> agency investigation of the incident was convened and concluded that claimant acted within the scope and authority of his duties, as well as in conformity with applicable hospital procedures.

So, we come to the question: does respondent have a duty to indemnify claimant for reasonable attorney fees:

> "As a general rule, the employer is bound to indemnify his employee for all loss or injury sustained by his employment...In order than recovery may be sustained it must be made to appear that the plaintiff, at the time complained of, was acting for and in place of his master in accordance with and representing his master's will and not his own, and that the business she was doing is strictly that of his master and not in any respect his own." 53 *Am. Jr. 2d* 200, *Master and Servant* §132.

> "A contract of indemnity need not to express; indemnity may be recovered if the evidence establishes an implied contract...."
> 41 *Am. Jur. 2d* 705, Indemnity §19

> "The rules governing whether a public official is entitled to indemnification for attorneys' fees are the same in both the civil and criminal context. In order to justify indemnification from public funds, the underlying action must arise from the discharge of an official duty in which the government has an interest; the official must have acted in good faith; and the agency seeking to indemnify the officer must have either the express or implied authority to do so."

> 3rd point, syl. by Court in *Powers v. Goodwin*, 291 S.E.2d 466 (W.Va. 1982).

It is apparent to the Court that in causing Russell to leave the hospital the claimant was acting strictly in the line of duty, in accordance with the spirit and letter of the instructions promulgated by the State for its own benefit. There is no evidence of personal motivation or interest on the part of the claimant, and we find that he acted in good faith throughout the incident.

As Powers holds, the agency seeking to indemnify the officer must have either the express or implied authority to do so. We are cited no statute of general application conferring authority to indemnify State personnel charged with criminal acts committed in the performance of their duties or responsibilities for attorneys' fees, but W.Va. Code §20-1-13 has, for more than fifty years, authorized the director of conservation to pay for legal services rendered or to be rendered to his personnel in defense of criminal charges involving their action performed int the line of duty; by enactment of this statute, the Legislature has implicitly embraced the principle of indemnification.

If the civil sector has generally accepted indemnification, and the State has, by implication, accepted it, why should there not be a moral obligation on the part of the State to indemnify this claimant, who has necessarily employed an attorney to defend him for an act directed by the State for its own interest?

Since the Legislature, in enacting W.Va. Code §20-1-13, limited indemnification to $500.00, we feel constrained, also, to do so, and award the sum of $500.00 to the claimant.

Award of $500.00.

KEYSTONE HELICOPTER CORPORATION,
Claimant,
VS.
DEPARTMENT OF PUBLIC SAFETY,
Respondent,
(CC-92-49)

ORDER

On this date this claim came before the Court upon a Stipulation filed by the parties as follows:

1. On or about January 28, 1992, Keystone filed with the Court of Claims its Notice of Claim against the Department.

2. The nature of Keystone's claim concerns certain maintenance and service performed by Keystone on the State of West Virginia's Bell 222U model helicopter. The nature and scope of this maintenance and service is set forth in certain documents referenced in Keystone's Notice of Claim, and attached as exhibits thereto, namely Keystone's Quotation NO. 111B, the Department's Purchase Order No. DPS19 and Keystone's Invoice No. 95872.

3. On or about March 3, 1992, the Department answered Keystone's Notice of Claim.

4. After undertaking discussions concerning the nature of Keystone's claim, the benefits derived by the Department from the maintenance and services provided by Keystone, and other issues attendant to the circumstances surrounding the matter, the Department and Keystone have reached an agreement as to the amount of an award which represents fair consideration for the maintenance and services provided by Keystone and the benefits therefrom received by the

Department.

5. It is the agreement of the parties that Keystone be awarded the amount $95,000.00 as satisfaction for its claim now pending before the West Virginia Court of Claims. The parties further stipulate that this amount represents a percentage discount on the whole of the items which comprise Keystone's claim and it does not represent an item by item determination of the various components of the claim.

6. It is further agreed by and between the parties that this award is being stipulated to and agreed upon as full, fair and final compromise of Keystone's claim now pending before the Court of Claims as Claim No. CC-92-49 and that this award resolves all claims outstanding between the parties.

And the Court, having duly considered the facts stipulated and the reasonableness of the recommended award, hereby adopts the Stipulation and ORDERS that an award be made to the claimant in the amount of $95,000.00.

ENTERED: December 10, 1992

David G. Hanlon
PRESIDING JUDGE

OPINION ISSUED DECEMBER 11, 1992

SHARON BILLS
VS.
DIVISION OF HIGHWAYS
(CC-90-252)

Cynthia J. Jarrell, and Cecellia Jarrell, Attorneys at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

STEPTOE, JUDGE:

Claimant Sharon Bills seeks an award from Division of Highways for property damage and personal injuries sustained by her in a one-car accident which took place about 0300 on the 13th day of July, 1989, on West Virginia Route 44 in Logan County, West Virginia, at an unincorporated town known as Wilkinson or Lower Monitor, between the town of Omar and the City of Logan.

From the evidence adduced at the hearing on June 26, 1992, it appears that claimant was operating her car, a 1985 four-door Chevrolet Celebrity sedan, on Route 44 and lost control of the vehicle, which struck a utility pole on the westerly side of the highway and careened into the middle of the road and overturned.

The testimony of the claimant and the testimony an eyewitness to the accident, Adam Chastain, produced by the respondent, was to the effect that damage to the vehicle centered on the right front section of the car.

Claimant was thrown from the driver's seat and pinned under the car at her left hand, and was eventually taken for treatment to the Logan General Hospital.

Claimant's version of the accident was that she was traveling at a speed of 40 to 45 miles per hour from Omar toward the City of Logan, northbound on Route 44, a public road which she had used a few times in the immediate past, and that in rounding a curve to the right at Wilkinson her vehicle hit a hole in the road surface, a wheel was torn off and her car hit a utility pole and overturned.

Ms. Bills' only supporting witness, Lois Totten, confirmed that Ms. Bills had only two alcoholic drinks at the Moose Club, about seven hours before the accident.

For the respondent, Adam Chastain, age almost 19 at the time of the accident, who then made his home with his grandmother Leah Carver, on the easterly side of Route 44 and across the road from he utility pole struck by claimant's car, testified that he had returned to his home about 0300 or a little later, after having participated in a Marine Corps exercise in Charleston from 1900 to 2300 or 2400 and thereafter having eaten and socialized with his buddies; that he had taken one load of his gear from his car into his home and was returning to the car for the rest of his gear and looking in the direction of the road, when he observed a car veer to the right and strike a pole and slide on down the road before coming to a stop, apparently upside down. The testimony of this witness is a mass of contradiction, probably unintentional, as to whether Logan and Omar were north or south, and whether claimant's car was being driven north or south, but when shown a photograph (respondent's Exhibit No. 5) of the scene of the accident, his testimony was that claimant's car, immediately before the collision, was proceeding in the direction of Omar, which is south of Wilkinson, and so was proceeding southward on Route 44; and he marked the exhibit accordingly. Chastain also testified that there were no potholes in the road, but that there were two or three "off the side of the road," on the easterly side of the road at the curve just south of the accident scene. He also testified that he smelled alcoholic liquor on the claimant.

Mrs. Carver testified that she had heard the crash in front of her house but did not see it, and she did not talk to the claimant at that time. Some three months later, at the Logan General Hospital, she was present when the claimant asked Adam Chastain (both of whom were receiving therapy at the time) what she had hit (in the accident), observing after putting the question that she

had been so drunk that she did not know what she hit; apparently Adam did not reply.

Respondent called Donell Cash, Ph.D., chief toxicologist in the Office of the Chief Medical Examiner of the Bureau of Public Health of the State of West Virginia, as an expert witness, to interpret the reported results of a test of the claimant's blood taken at Logan General Hospital at 0546 on July 13, 1989, as disclosed by the hospital report, made part of the evidence as respondent's Exhibit No. 6. Dr. Cash examined the exhibit and reported that the hospital reported 141.4 milligrams of alcohol in claimant's blood per deciliter, which is the same as 0.14 percent alcohol by weight. The Court takes judicial notice of West Virginia Code §17C-502(d)1E, and §17C-2(d)(2), and finds that under that statute such a finding gives rise to a presumption of intoxication of the person whose blood was drawn.

The Court finds, as a matter of fact, that immediately before the accident, the claimant was operating her vehicle while under the influence of intoxicating liquor; that her failure to maintain control of her vehicle was the proximate cause of the damages to her vehicle and of her personal injuries; and that negligence of the respondent was not proven by a preponderance of the evidence.

Claim disallowed.

OPINION ISSUED DECEMBER 11, 1992

THE CHAFFERY COMPANY, INC.
VS.
DIVISION OF HIGHWAYS
(CC-91-295)

Stephen L. Gaylock, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant corporation brought this action to recover damages to its 1975 International truck which occurred on March 26, 1991, on County Route 21, a State maintained road in Route 21 in Roane County. Claimant corporation used the truck for hauling logs. Claimant alleges that County Route 21 was not maintained in good repair and respondent did not place warning sings for the traveling public that slip area was present.

Respondent contends that there was a slip area under repair at the scene of the accident. Respondent did place hazard paddles and there was sufficient warning to the traveling public as to the condition of the road. Respondent further contends that the driver of the claimant's

truck drove the vehicle in the move. According to the respondent, County Route 21 is a tar and chip one-lane back road.

The driver of the claimant's truck, Paul Conley, testified that he was hauling logs from Vineyard Ridge to Ripley, West Virginia. This was the first load of logs that he had driven on this route as the logging operation in this area was just beginning. As he proceeded on County Route 21, he drove up a grade to the slip which was to the left. He stated that he "held hard to the right, right at the ditch line, and when the front end went across it was all right, and then when my rear end come up, when it went down in there, it just sunk out of sight." The left rear wheel fell into the slip. He further stated that he checked this area of County Route 21 by driving across and "[I]t looked solid." There was rock and stone placed in the slip area. He further testified that he had probably seen this area of the slip when he had driven there in an automobile two or three months prior to this accident. He described County Route 21 as a one-lane road with the slip on the left and the ditch on the right. It was necessary to drive between the area of the ditch and the slip.

Donald L. Barnhouse, an employee of the claimant, performed mechanic work on equipment and was riding in a logging truck behind Paul Conley on the day of the accident. He came upon the accident within a matter of a few minutes after it happened. he had loaded the truck, which is the subject matter of this claim, with logs. There was approximately 1,200 to 1,250 board foot of oak logs being hauled by the truck which weighed between 20,000 and 22,000 pounds. This particular truck was licensed for 26,000 pounds. He later inspected the truck to determined the damages. The fame of the truck was twisted and was beyond repair. The left front axle and spindle on the left front axle was bent, and the transmission was damaged. The motor of this vehicle had just been rebuilt. The rear-end housing had to be replaced at a cost of $700.00. The repair to the front axle and steering section cost approximately $375.00. The cost of all of labor on his part and his assistant. There were many hours of labor on his part and his assistant. He estimated 350 hours of labor for repairing the truck including repairs to the frame which was not done.

Robin Lynn Walker, owner of the claimant corporation, testified that as a result of the accident claimant lost the use of the logging truck for eight days. She calculated the loss to

the corporation based upon the average gross load at $489.00 per load. The loss of use of this particular truck resulted int the loss of 5.7 loads for a total loss in the amount of $2,787.30.

The supervisor in charge of Roane County headquarters responsible for the maintenance of highways in Roane County, Clarence Boggs, testified that he was aware of the accident that had occurred on Route 21 at the slip area. There were hazard paddle signs at the edge of the slip. However, he was not aware of any soft holes or soft places on the road on the date of this accident. School buses and other traffic traversed the area and did not have problems. This slip had existed since February 22, 1991, and respondent maintained the area by placing stone in the slip.

An employee of the respondent in Roane County, Franklin D. Smith, lived on Vineyard Ridge near the scene of the accident and he drove by the slip every day. He would inform respondent when the slip "got bad" in order for respondent to place rock int the slip and use the grader on it. He explained that the slip occurred when the roadway fell over the hillside. It was his

opinion that after respondent placed rock in the slip and tar and chipped over it that "it was always solid enough for the traffic to get over it."

It is apparent to the Court that this particular slip on County Route 21 had been a problem area for respondent for at least six years. Maintenance efforts included filling the slip with rock and placing a tar and chip surface over the rock to form the travel portion of the road. Edward N. Keffer, area supervisor for maintenance in Roane County, stated that slips occur as a result of water under the road and the road when breaks off and slips over the mountain. This particular slip could not be repaired on a permanent basis due to a lack of funds. The slip are had been tarred and chipped during the summer of 1990, and respondent had not experienced any problems with the slip since that summer.

The Court is well aware that slip areas occur on the mountainous roads in West Virginia. Respondent has a duty to the traveling public to maintain such areas to the best of their ability. Respondent maintained this particular slip on County Route 21 in the same manner as any other slip area. The road surface appeared to be stable even to the claimant's own driver.

Unfortunately, neither respondent nor claimant could be forewarned that a soft spot in the road would be present on the date of this accident. Accordingly, the Court has determined that respondent was not negligent in the maintenance of this slip area.

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

Claim disallowed.

OPINION ISSUED DECEMBER 11, 1992

CITY OF GRAFTON
VS.
DIVISION OF HIGHWAYS
(CC-92-130)

Douglas Crane, Attorney at Law, for claimant.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

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

Claimant seeks $161.07 for underpayments on certain invoices and late charges

assessed on other invoices for late payments from respondent for sanitation services provided by claimant to a facility of the respondent. As certain invoices for services were not processed for payment in a timely manner, claimant may assess late charges. The respondent admits the validity of the underpaid invoices and the late charges and the amounts owed to the claimant and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $161.07.

Award of $161.07.

OPINION ISSUED DECEMBER 11, 1992

KERRY P. DILLARD AND SUSAN R. DILLARD
VS.
DIVISION OF HIGHWAYS

(CC-92-239)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action to recover damages to their 1990 Nissan van, which occurred on April 2, 1992, when claimant Susan R. Dillard was driving the van on I-64. She was proceeding eastbound on I-64 when the van struck a metal expansion joint in the right lane at the east end of the bridge at the Mall Road Exit at I-64. The expansion joint damaged the transmission fluid pan and the oil pan. Claimants incurred costs in excess of their deductible of $250.00 for the repairs to the van. The damages are limited to this amount.

Claimant Susan Dillard testified that she encountered the obstruction on the interstate at approximately 2:00 p.m. She stated that she had observed a piece of metal sticking up from the interstate but attempted to straddle it. She also saw a State highway truck on the bridge. She did not observe any warning signs or flagmen at the scene. She stopped the van and noticed something leaking from beneath the van whereupon she drove to a nearby gas station.

Respondent contends that repairs were made to the expansion joint in a timely manner. Lyle May, a crew leader for the respondent in the Huntington area, received notification of the defective expansion joint at approximately 1:20 p.m. He took two men and welding truck to the area and proceeded to cut off the expansion joint to alleviate the hazard.

The Court is of the opinion that respondent had sufficient time to at least proving warning to the traveling public at the time that claimant's van struck the expansion joint. The Court entertained two other claims involving this same expansion joint and is aware of the notice of this hazard on the interstate which was provided to respondent. The Court is of the opinion that respondent should have warned the traveling public when one of its trucks was at the scene and an employee could have at least flagged traffic around the broken expansion joint.

Accordingly, the Court makes an award to the claimants in the amount of $250.00.

Award of $250.00.

OPINION ISSUED DECEMBER 11, 1992

KATHERINE JEAN DUNN
VS.
DIVISION OF HIGHWAYS
(CC-92-26)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to her 1984 Chevrolet automobile when the vehicle struck a large rock on Route 2, between Glendale and McMechen, West Virginia. Claimant's automobile sustained damages to the oil pan and she incurred towing expenses for damages in the amount of $882.51.

Claimant testified that she did not see the rock in the road until her vehicle struck the rock and she saw small particles rolling from under the back of her vehicle. She was driving approximately 40 to 45 miles per hour. Claimant alleges that respondent should have a barrier on the berm to prevent boulders which fall from the hillside from rolling onto the highway.

Christopher Minor, Assistant Maintenance Superintendent of Marshall County, testified that respondent patrols this section of Route 2, as it is a known area for falling rocks. There is a small shoulder and ditch line of the right side proceeding north, and claimant was in the

northbound lane. There is a falling rock sign on the northbound lane approximately a mile and a half to a mile and three-quarters section of Route 2 is not considered an area for frequent rock falls, but such rock falls do occur. He further testified that this particular section of Route 2 is patrolled frequently as it is a known area for rock falls. In fact respondent testified that Division of Highways employees had driven 600 miles patrolling this 1 ½ mile section of Route 2 during the 24 hour period in which claimant's accident occurred. This area from the end of Glendale to the city limits of McMechen has been a known rock fall area since 1941.

The Court is of the opinion that the respondent has failed to take appropriate remedial action to prevent rocks from falling from the hillside and rolling onto Route 2 and this known hazard has existed for more than 50 years. The Court has determined that respondent has not protected the traveling public from this hazard, but rather has chosen to clean up the rocks after they fall rather than try to keep them from falling. As a result, respondent is liable to the claimant for the damages to her vehicle.

Accordingly, the Court makes an award to the claimant in the amount of $882.51.

Award of $882.51.

OPINION ISSUED DECEMBER 11, 1992

ELMO GREER & SONS, INC.
VS.
DIVISION OF HIGHWAYS
(CC-87-444)

Carl L. Fletcher and Timothy L. Mayo, Attorneys at Law, for claimant.
Robert F. Bible, Attorney at Law, for respondent.

HANLON, JUDGE:

Elmo Greer & Sons, Inc., hereinafter referred to as "Greer", brought this action against the Division of Highways, hereinafter referred to as "respondent", for delay damages resulting from the failure of an adjacent contractor, Green Construction Company, Inc., hereinafter referred to as "Green", to comply with its contractual obligation in the construction of its portion of an "overlap" of the two projects. Both contractors were to construct sections of Interstate 64 east of Glade Creek in Raleigh County. Greer entered into a contract with respondent for the construction of Project No. 64-4(71)123 on May 22, 1984. This contract involved major excavation and fill work, and the construction of a local service route bridge. Green had a contract with respondent to construct the adjacent project, Project No. X-341-64-123, C-2. Greer's contract provided for a scheduled completion date of June 30, 1986, and Greer completed the project on schedule.

As a part of Greer's contract, Greer was required to complete a major fill between situations 534+50 and 545+00. This landfill work could not begin until the adjacent contractor, Green, had installed a box culvert and special embankment work at the bottom elevations of the same cut. The projects overlapped at these stations. The Greer project was a very nearly "balanced project", meaning that the volume of material excavated on the project was equivalent to the amount necessary for the fills and only unsuitable material would be wasted. Since there was major rock excavation for Greer to complete and Greer could not begin the major fill portion of the project, Greer's performance was greatly impacted by the unavailability of the major cut. Greer was to place approximately 1,580,000 cubic yards of material in the fill over the box culvert and select embankment placed by Green.

Green's contract provided that a portion of its work be performed at the same stations. Green was to place a box culvert and special embankment at the lower elevations of the fill. This work was to be completed by October 31, 1984. The contracts for both parties (Greer and Green), provided that the contractors were to cooperate and coordinate with each other's work in order that each contractor would be able to complete its respective contract on schedule.

On July 5, 1984, an agreement between Greer and Green was submitted to respondent to comply with the cooperation and coordination provision of their contracts. Greer had agreed to a 30-day extension of the deadline for Green to complete its work, the new deadline being December 1, 1984. In November 1984, it was apparent to both contractors and respondent that Green would not meet its December 1, 1984, deadline, and Greer notified respondent by letter that the delay would significantly alter its completion and progress of its project. Thereafter, meetings were conducted on a monthly basis, and at each meeting respondent urged Greer to be prepared to begin its work on the fill as Green would be completing the box culvert and select embankment. Green finally completed its work in August 1985. In an attempt to cooperate with Green and with the respondent, Greer performed much of the embankment work as Green completed its work; therefore, Greer did not have full use of the fill area but did its work

piecemeal. Greer cooperated and even performed a portion of Green's contractual obligation by placing embankment in the cut.

Greer provided official notice to respondent on January 23, 1985, that it intended to file a claim for the delay of its work on this project. The claim period begins with this January date. Greer alleges damages as a result of the delay in the amount of $3,211,602.59. The basis for the calculation of its damages is §109.4 of the Standard Specifications. The damages include labor, materials, and idle equipment costs. The total cost of the project was $10,272,644.64 and Greer was paid the sum of $7,061,042.05 for a difference of $3,211.602.59 which represents the amount claimed herein. Respondent contends that Greer is not entitled to recover for delay damages as Greer did not comply with the provisions of the *Standard Specifications of Roads and Bridges* §105.7 Cooperation Between Contractors, which states as follows:

The Department reserves the right at any time to contract for and

> perform other or additional work on or near the work covered by the Contract.
>
> When separate Contracts are let within the limits of any one project, each contractor shall conduct his work so as not to interfere with or hinder the progress or completion of the work being performed by other Contractors. **Contractors working on the same project shall cooperate with each other as directed.**
>
> When separate Contracts are let within the limits of any one project, each contractor shall conduct his work so as not to interfere with or hinder the progress of completion of the work being performed by other Contractors. **Contractors working on the same project shall cooperate with each other as directed.**
>
> Each contractor involved shall assume all liability, financial or otherwise, in connection with his Contract and **shall protect and save harmless the Department from any and all damages, or claims that may arise because of inconvenience, delay, or loss experienced by him because of the presence and operations of other contractors working within the limits of the same project.**
>
> The Contractor shall arrange his work and shall place and dispose of the materials being used so as not to interfere with the operations of the other contractors within the limits of the same project. He shall join his work with that of the others in an acceptable manner and shall perform it in the proper sequence to that of the others.
>
> In the event the Engineer finds that further coordination effort is necessary, he shall call a meeting of the contractors involved. After the meeting has been held, he may notify the Contractors of the action required of each and his decision shall be final.

Respondent also contends that Greer should have been successful in litigation which it brought directly against Green in federal court. The case against Green was dismissed by the Federal District Circuit Court whereupon Greer appealed to the U.S. Circuit Court of Appeals, which appeal was denied on September 10, 1991. As to the damage issue, respondent argues that there was no extra work performed by Greer, and therefore, §109.4 of the *Standard Specifications* should not be the basis for calculating the damages which were allegedly the result of the delay on the project. Respondent contends that Greer's damages should be limited to idle equipment costs as calculated by the respondent in the amount of $228,209.76.

As a result of the failure of Green to provide the completed fill to Greer in a timely

manner, Greer encountered problems with the handling of common material and sand rock from areas on the project which required major excavation. Greer had to double handle material which would not have occurred if Greer had not been delayed on the fill at the major cut. Greer also was delayed in its construction of a small bridge as a portion of the fill had to be completed to provide sufficient area for the construction of the bridge. When Greer was able to begin its work in the major cut area, it performed the work in stages and therefore extra equipment was needed and Greer had much less space in which to perform its work. The delay also forced Greer to work material during the winter months that was unsuitable at that time of the year which necessitated the use of extra equipment. In spite of all these problems, Greer worked diligently to complete the project on schedule.

The evidence in this claim supports Greer's allegations that Green's delay in completing its work at the bottom of the overlap area delayed Greer causing an increase in its costs. Greer has established to the satisfaction of the Court that it cooperated to the best of its ability with Green. The Court also finds that Greer complied with §105.7 of the *Specifications*. It may be the responsibility of Green to "protect and save harmless the Department from any and all damages or claims that may arise because of inconvenience, delay, or loss experienced" as a result of its actions on its project. This is within the realm of possibilities for respondent to consider.

This Court is not impressed with respondent's contention that Greer's lack of success against Green in the suit brought by Greer in the Federal District Court was avoidable. It is much easier to use hindsight than foresight when reviewing actions brought by other parties. The Federal District Court and Circuit Court of Appeals appear to have dismissed Greer's action against Green on the theory that Greer did not establish its standing as a third party beneficiary as provided in West Virginia law. To suggest that amended pleadings may have overcome the issue of detrimental reliance is, at best, pure speculation. Greer did not have priority of contract with Green, but respondent certainly has. Respondent has a suit currently pending against Green in the Circuit Court of Kanawha County and it is anticipated that respondent will pursue this action once this Court has rendered its opinion in the instant claim.

As to the issue of damages incurred by Greer, the Court is of the opinion that the damages are limited to those directly and proximately cause by the delay rather than based upon the provisions in §109.4 of the Specifications. The Court agrees with respondent that the delayed work was included in the original contractual agreement. Greer was delayed in its performance of the contract, but the work was not changed in scope or manner. The Court, however, limits Greer to recover of its overtime labor required to perform its contract, to idle equipment costs incurred during the delay period including the crane, and the additional B & O taxes and performance bond expenses. The overtime labor costs for December 1, 1984, through June, 1986 incurred by Greer were in the amount of $401,521.27 with the additional costs for Health and Welfare and Pension being $41,537.38. A 40% overhead allowance of $177,223,46 is allowed for a total amount of $620,282.11.

The calculation of idle equipment costs is always speculative as the issue arises as

to whether additional equipment was really necessary on any project. The Court is satisfied with the amount that respondent has calculated for idle equipment which is the amount of $228,209.76; therefore, the Court will adopt this figure as a part of its award to Greer. The Court will also include the cost for the crane maintained on the project for construction of the bridge. The crane remained idle during a portion of the delay. The cost to Greer was $42,825.00.

Therefore, the Court makes an award to Greer in the sum of $891,316.87 for the delay.

The Court must next consider the issue of interest. The legal action brought against Green was litigated by Greer and Green for approximately three and one-half years from July 5, 1988, to December 10, 1991. It was not until the conclusion of this litigation that the action in the Court of Claims was placed upon its calendar for hearing. The Court is of the opinion that interest shall be included for this period of time. Therefore, interest based upon the provisions in W.Va. Code §14-3-1 is awarded from the 151st day after July 2, 1986, which is November 29, 1986, to the date of issue of this opinion on December 11, 1992.

Accordingly, the Court makes an award to Greer in the amount of $891,316.87 plus interest in the amount of $322,771.81 for a total award of $1,214,088.68.

Award of $1,214,088.68.

OPINION ISSUED DECEMBER 11, 1992

WADE AND GLADYS MARIE FERREBEE
VS.
DIVISION OF HIGHWAYS
(CC-92-91)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action to recover damages to their vehicle which occurred on November 10, 1991, when claimant Gladys Ferrebee was driving on Route 2 in New Martinsville, West Virginia Claimants' 1986 Ford Van struck a broken piece of curb which was in claimant Gladys Ferrebee's lane of travel. Both the right front and right rear tires and rims were damaged. The piece of concrete also flipped up and cracked the running boards of the van. Claimants incurred damages in the amount of $611.18. Their insurance policy has a $500.00 deductible clause.

Respondent has provided information to the Court that it is responsible for the maintenance of the curb and sidewalk at this particular location in New Martinsville. The curb was in need of repair at the time that claimants' van received damages.

The Court is of the opinion that claimants have established the at the curb was in a state of disrepair for at least a month prior to this incident. Respondent failed to properly maintain the curb and as a result claimants' vehicle sustained damages.

Accordingly, the Court is of the opinion to and does make an award to the claimants in the amount of $500.00, which is the amount of their deductible.

Award of $500.00.

OPINION ISSUED DECEMBER 11, 1992

ROBERT FROATS
VS.
DIVISION OF HIGHWAYS
(CC-91-356)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

On Novmber 12, 1991, claimant was operating his 1991 GMC on Lyon's Road in Hancock County when his vehicle encountered mud on the road and slid into a ditch causing damages to the vehicle. Claimant's damages were in excess of the deductible provided in his insurance policy and, therefore, the damages will be limited to $250.00, the amount of claimant's deductible.

Claimant testified that he had been bow hunting most of the day and had parked his vehicle on a dirt section of this road. When he returned to his truck later that day approximately at dark, four-to-five inches of slushy snow had fallen on the roadway and then melted creating a very muddy condition. He described the snowfall as being rain which truned into a wet snow. The road was slick because of the mud. It is his opinon that the conditon resulted from work performed by the respondent in the spring or summer when "they dug out the ditches and pushed the dirt up in the middle of the road..." When he got into his vehicle, he started at a very slow speed and then realized that there were four-to-five inches of mud on the road. His vehicle slid into the ditch, and was damaged.

Samuel J. DeCapio, Maintenance Superintendent for respondent in Hancock County, testified that Lyon's Road is County Route 11/4. Some sections of the road are dirt. Employees of the respondent had worked on the paved section of this road on the day of claimant's accident, and respondent's employees were treating the roads in the county for snow removal and ice control on that day. Although claimant testified that respondent placed slag on the dirt section of Route 11/4 on the day after the accident respondent's witnesses denied it.

The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by an alleged hazardous condition and a reasonable amount of time to take suitable corrective action. Davis v. Dept. of Highways, 11 Ct.Cl. 150 (1977). In this claim the claimant has failed to establish that respondent had notice of the muddy condition of the

road or that the condition was out of the ordinary. As the claimant did not meet this burden of proof, the claim must be denied.

Claim disallowed.

OPINION ISSUED DECEMBER 11, 1992

PAULA GILLIAM AND LUKE GILLIAM
VS.
DIVISION OF HIGHWAYS
(CC-92-48)

Belinda S. Morton, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

In this proceeding Paula Gilliam and Luke Gilliam, wife and husband, claim $1,360.93, plus medical expenses and compensation for personal injuries sustained by Paula Gilliam on 2 January, 1991, when their motor vehicle, a 1977 Ford truck driven by Paula Gilliam, went out of control on West Virginia Route 16, in Fayette County, West Virginia, and hit an embankment and was extensively damaged.

It appears from the evidence that the accident took place at about 7:45 a.m., and resulted from a skid on ice that had accumulated on the surface of the road during the preceding night, at a point where the posted speed limit was 55 miles per hour, and that Mrs. Gilliam was driving about 30 to 35 miles per hour and did not see the ice on the road in front of her until she was on it and had started to slide. The testimony of her and her brother-in-law was to the effect that

because of a partially blocked drain, surface water would from time to time escape from the roadside ditch and spread over the pavement, a fact of which Mrs. Gilliam was well aware before the accident.

From the evidence the Court concludes that the drainage ditch was partially and temporarily obstructed, that a hazardous condition existed at the point where the skid took place, of which the respondent had a least constructive notice, and which was a proximate cause of the accident.

It also appears, however, that Paula Gilliam was aware or should have been aware of the hazardous condition of the road at the time and place of the accident, and failed to see what plainly could be seen, and was operating her vehicle at a speed which was excessive in the light

of existing conditions, and that her negligence was a proximate cause of the accident, which was equal in producing the accident to that of the respondent.

Under the rule of comparative negligence, the claim is disallowed.

Claim disallowed.

OPINION ISSUED DECEMBER 11, 1992

H. STEVEN GRASS
VS.
DIVISION OF HIGHWAYS
(CC-92-338)

Claimant represents self.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action in the amount of $124.80 to recover the replacement of his eyeglasses which were lost during the performance of his duties with the respondent.

Claimant, an employee of the respondent State agency, was part of a survey crew for work being performed adjacent to the Guyandotte River. The crew was surveying cross sections for W.Va. Route 10 in Logan County. Claimant was wading in the river while operating a prism pole when he stepped into an area where water was over his head and he lost his eyeglasses in the water.

Respondent admits the facts and circumstances of the claim and that the respondent

does not have a fiscal method to pay its employee for this loss. Respondent further admits the amount owed to the claimant is $124.80.

In view of the foregoing, the Court is of the opinion to and does grant an award to the claimant in the amount of $124.80.

Award of $124.80.

OPINION ISSUED DECEMBER 11, 1992

CHARLES ROBERT MERRIAN, JR.
VS.
DIVISION OF HIGHWAYS
(CC-90-238)

Kelly Kemp, Attorney at Law, for claimant.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover expenses incurred when he suffered physical injuries in a bicycle accident that occurred on May 20, 1989, in Hinton, West Virginia. Claimant was riding his bicycle on the bridge over the Greenbrier River which connects Hinton to Bellepoint. Claimant, who was 18 at the time of the incident, and a friend were both riding their bicycles across the bridge when the front wheel of the claimant's bicycle struck or got caught by an allegedly exposed re-bar on the bridge causing claimant to fall against the concrete rail of the bridge. Claimant suffered a concussion as a result of the incident. The Court need not consider the damages at this time as the claim was heard on the issue of liability only.

Claimant testified that he and his fried, Bobby Biggs, were on their way to Bellepoint from Hinton when the accident occurred. When they approached the bridge, they both got off of their bicycles in order to lift them onto the sidewalk of the bridge. Claimant was riding approximately 20 feet in front of his friend. He testified that he was rendered unconscious when he struck his head and does not remember how the accident happened. His friend, Bobby Biggs, who was riding behind him later told him how the accident occurred. He explained to the claimant that a re-bar had struck in the spoke of the front tire of the bicycle which caused the claimant to go forward over the handle bar and flip two or three times hitting his head on the railing and the

pavement. It was common for the claimant and his friends to ride their bicycles across the bridges, as the travel portion of the bridge was narrow and vehicles experienced problems getting around bicyclists. Claimant rode his bicycle across this bridge on a daily basis. He was aware of the deteriorated condition of the sidewalk on the bridge. He and his friends normally rode their bicycles on the sidewalk rather than walk their bicycles. The claimant was not wearing a helmet when this accident occurred.

Claimant's mother, Constance Rey Tolbert, described the bridge and sidewalk. She stated that the cement was crumbling and there were places that metal bars were showing through the sidewalk itself. She was unable to describe the condition of the sidewalk at the place where the claimant had his accident.

A resident of Hinton, James Sampson, testified that he had observed many bicyclists crossing the bridge and it was common for them to use the sidewalk as there was generally heavy traffic on the travel portion of the bridge which was too narrow for two lanes of traffic and bicyclists. He had noticed that there were exposed re-bars above the concrete on the sidewalk and there was loose cement covering the re-bars. He had been driving his 1987 Chevrolet pickup truck across the bridge on the day of claimant's accident and he had seen the claimant fall, but he was not aware of the facts and circumstances of the accident.

Respondent contends that the sidewalk was in a slight state of deterioration, but the condition of the sidewalk did not present any hazards to the public. Respondent further contends that somebody riding a bicycle assumes a greater risk by riding a bicycle on the sidewalk.

Joe B. Hayes, Jr., Assistant District Engineer for bridges in District 9, testified that the sidewalk of this bridge was in fact repaired shortly after claimant's accident. He examined the sidewalk at the scene of the accident. He did not observe any tie wires sticking up although there was some exposed re-bar on the outside of the sidewalk. His physical inspection of the accident site was in some state of disrepair, there were areas where the sidewalk was two-to-three feet wide and the exposed re-bar was on the edge of the sidewalk. Respondent had planned a project for repairing the sidewalk during that summer.

The Court is of the opinion that claimant has established that respondent had allowed an unsafe condition to exist on the sidewalk of this bridge. Respondent was aware of the deteriorated cement and exposed re-bars, and this condition posed a hazard not only to bicyclists but to pedestrians using the sidewalk. It was apparently a common practice for bicyclists to use the sidewalk due to the narrow lanes for the traffic. The Court has determined that respondent was negligent in maintenance of the sidewalk. However, the Court is also of the opinion that claimant was also aware of the deteriorated condition of the sidewalk on the bridge as he testified that he crossed the bridge approximately four times every day. He had the opportunity to walk his bicycle across the bridge on the sidewalk. When he decided to ride his bicycle, his action greatly increased the risk of an accident. This was an unfortunate incident but, the Court is of the opinion that claimant's negligence is equal to or greater than that of the respondent.

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

Claim disallowed.

OPINION ISSUED DECEMBER 11, 1992

LLOYD J. MOORE
VS.
DIVISION OF HIGHWAYS
(CC-92-116)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to his 1987 Ram 50 pickup truck. Claimant's vehicle was struck by rocks coming off the hillside adjacent to Route 19, in Clarksburg, West Virginia. Claimant's accident occurred on 6 March 1992, at approximately 5:30 p.m. Claimant's truck sustained damages to the windshield, the grill, a fender, and the bug catcher. The cost of repair was approximately $500.00.

Bill Wyckoff, an employee of the respondent, testified that this area of Route 19 is a known rock fall area, and there are signs at the location of claimant's accident. The scene of the accident is approximately a mile from respondent's Harrison County maintenance headquarters. He was not aware of any complaints about rocks in the road at the time of claimant's accident. Rocks accumulate on the berm and respondent clears the ditch and berm areas at least once a year.

The Court, having reviewed the evidence in this claim, has determined that there was no negligence on the part of the claimant. The respondent, however, was on notice of the dangerous condition of accumulating rocks in the ditch and berm area. As the respondent failed to remedy a dangerous condition and this negligence resulted in damages to claimant's vehicle, the claimant may recover for these damages.

Accordingly, the Court makes an award in the amount of $500.00 to claimant for the damages to his vehicle.

Award of $500.00.

OPINION ISSUED DECEMBER 11, 1992

PRESSLEY RIDGE SCHOOL
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-92-2)

Michael J. Betts, Attorney at Law, for claimant.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

Claimant and respondent entered into a contract on or about July 1, 1990, and terminated as of June 30, 1991. Claimant operates certain facilities for youth offenders who are in the custody of the respondent State agency. A dispute arose between the parties as to the calculation of the final payment due claimant under the terms of the contract.

The contract states, in part:

> V. CONTINGENCY PLAN/GOOD FAITH EFFORT
> It is anticipated and believed that, at a minimum, thirty percent (30%) of Provider's operating expenses are for services related to the health needs of the residents. It is further believed that all or most of said services can be supported with revenue from Title XIX Medicaid and/or other third-party payments.
>
> It is, however, recognized that, unless Provider has previously been certified as a Medicaid Provider, payments from Medicaid may not be immediately forthcoming. Therefore the decreasing rates specified in Section IV of this Agreement have been designed to address the possible time lag associated with receiving Medicaid reimbursement.
>
> **In the event that at least thirty percent (30%) of aggregate costs are not reimbursable by Medicaid or other third-party payments, Department agrees to cover the short-fall up to the level of FY 1989-90 Social Service funding, PROVIDED THAT Department determines that Provider has made a good faith effort to receive Medicaid and/or other reimbursement for all services possible.** (Emphasis supplied).

The intent of this provision in the contract was further clarified in correspondence dated July 24, 1990, wherein Ruth Ann Panepinto, Ph.D., Commissioner, Bureau of Community

Support, for respondent, stated as follows:

> Enclosed is the contract between our agencies for the operation of the status offender facilities at both Laurel park and Grant Gardens for FY 1990-91. **The intent of this contract is to decrease social service funding while at the same time allowing Pressley Ridge to recover all legitimate program costs for FY 1990-91.** The Department's participation is limited to $1,048,353 even though we understand that your projected costs for these two programs is $1,308,304. We believe that revenue from Medicaid will cover the projected deficit. If income exceeds the projected $1,308,304, the contract mechanism for repayment to the Department will prevail. (Emphasis supplied).

Claimant brought this action to recover $156,297.00 which respondent refused to pay to the claimant under the terms of the contract as respondent contends that claimant is not entitled to recover its shortfall.

The Court is of the opinion that the contract is unambiguous and that the intent of the parties is clear. Respondent agreed to reimburse claimant up to a cap of $1,048,535.00. Claimant was able to obtain funding from Medicaid to cover a portion of its costs; however, claimant incurred a shortfall of $156,297.00. Respondent agrees that the amount of the shortfall is not in dispute and, further, that claimant made a good faith effort to obtain Medicaid or other reimbursement for all services rendered. Therefore, the Court has determined that the terms of the contract as quoted herein above provide that claimant is entitled to recover the amount of its shortfall.

Accordingly, the Court is of the Opinion to and does made an award to claimant in the amount of $156,297.00.

Award of $156,297.00.

OPINION ISSUED DECEMBER 11, 1992

WANDA NUNLEY RADCLIFFE
VS.
DIVISION OF HIGHWAYS
(CC-92-134)

Claimant represents self.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to her automobile a 1990 Mercedes 190E, which occurred on April 2, 1992, when claimant, an employee of the Department of Health and Human Resources, was returning from Huntington, West Virginia, where she was working that particular day. Claimant was proceeding eastbound on I-64 when her vehicle struck a metal expansion joint in the right lane at the east end of the bridge at the Mall Road Exit at I-64. The expansion joint damaged the left front tire and the right rear tire as claimant attempted to swerve around the expansion joint. Claimant incurred costs in the amount of $405.00 to replace the tires.

Claimant testified that she encountered the obstruction on the interstate at approximately 12:30 to 12:40 p.m. She telephoned the respondent and reported the incident to respondent's employee, Charlene Black. She was able to drive her automobile off the exit ramp to a gas station to have it repaired.

Charlene Black, a division management analyst for respondent at the I-64 headquarters, testified that she was on duty on April 2, 1992, and was informed of the hazard on the bridge at the Mall Road Exit and she then informed the bridge department at approximately 12:40 p.m. She received contact from an employee that the hazard had been repaired by 2:00 p.m.

Respondent contends that repairs were made to the expansion joint in a timely manner. Lyle May, a crew leader for respondent int the Huntington area, received notification of the defective expansion joint at approximately 1:20 p.m. He took two men and a welding truck to the area and proceeded to cut off the expansion joint to alleviate the hazard.

The Court is of the opinion that respondent did not have sufficient time to provide warning to the traveling public at the time that claimant's automobile struck the expansion joint. Claimant's incident apparently occurred very shortly after the expansion joint had popped up from the interstate. She provided the initial notice to the respondent as to the hazard on the interstate.

The respondent is entitled to time in which to respond to and to correct a dangerous road condition, which period may vary according to the circumstances, including availability of respondent's resources and the degree of hazard on the highway, inter alia. This Court will not place an undue burden upon respondent to react as soon as a hazard occurs on an interstate. Respondent must have sufficient notice before liability is incurred. As claimant provided the first notice to the hazard, respondent did not have the required notice. it is unfortunate that claimant's vehicle sustained damage as a result of this incident; however, respondent, although aware that expansion joints will pop up on occasion, is unable to predetermine when or where they will occur. Claimant acted in a responsible manner when she duly notified respondent after the hazard. Her notice to respondent certainly benefitted other travelers on the highway, and claimant is to be commended for her action.

In accordance with the findings of fact and conclusions of law as stated hereinabove, the Court is constrained to deny this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 11, 1992

WEST VIRGINIA REGIONAL JAIL AND
CORRECTIONAL FACILITY AUTHORITY
VS.
DIVISION OF CORRECTIONS
(CC-92-231)

Chad Cardinal, Assistant Attorney General, for claimant.
George P. Stanton, III, Assistant Attorney General, and Rita Stuart, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court upon a stipulation agreed to by the parties.

The claimant maintains the Eastern Regional Jail which provides accommodations for prisoners from several counties. Many of these prisoners have been sentenced and committed to other facilities, Huttonsville, Correctional Center and West Virginia Penitentiary, and owned and operated by respondent; however, respondent is unable to house such prisoners at such other facilities, and has caused such prisoners to be incarcerated at the Eastern Regional Jail.

Respondent has been unable to process the invoices received from the claimant during the 1991-92 fiscal year as it did not have sufficient funds within its budget for these expenses.

Claimant and respondent have agreed that claimant has incurred fair and reasonable costs in the amount of $419,456.00 for providing accommodations for these inmates.

In view of the foregoing, the Court makes an award to the claimant in the amount of $419,456.00.

Award of $419,456.00.

OPINION ISSUED DECEMBER 11, 1992

DAVID J. WILBURN, M.D.
VS.
DIVISION OF HIGHWAYS
(CC-92-148)

Charles W. Covert, Attorney at Law, for respondent.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to his vehicle which occurred on April 2, 1992. Claimant's son, Daniel Jason Wilburn, was operating his father's vehicle, a 1984 Toyota Camry, proceeding eastbound on Interstate 64 at the Mall Road Exit. He intended to exit the interstate on the exit ramp when his automobile struck an expansion joint protruding from the interstate. The expansion joint damaged both the left front and left rear tires of claimant's vehicle. The vehicle incurred damages totaling $544.30. The vehicle is registered in the name of the claimant, David J. Wilburn.

Charlene Black, the Division of Management analyst for the respondent at its I-64 headquarters, testified that she was on duty on April 2, 1992, and that she was informed of the hazard on the bridge at the Mall Road Exit. she then informed the bridge department at approximately 12:40 p.m. She received contact from another employee that the hazard had been repaired by 2:00 p.m.

Respondent contends that repairs were made to the expansion joint in a timely manner. Lyle may, a crew leader for the respondent, Division of Highways int the Huntington area, received notification of the defective expansion joint at approximately 1:20 p.m. He took two men and a welding truck to the area and proceeded to cut off the expansion joint to alleviate the hazard.

The Court is of the opinion that respondent had sufficient notice to provide a warning to the traveling public of the hazard of the expansion join on the interstate prior to the claimant's son's incident. The Court is well aware that repairs would have taken additional time, but respondent could have and should have provided proper warning to the traveling public of the existence of the hazardous expansion joint.

In accordance with the findings of fact and the conclusions of law as stated hereinabove, the Court is of the opinion to and does make an award in the amount of $544.30 to

claimant for the damages to his vehicle.

Award of $544.30.

OPINION ISSUED DECEMBER 11, 1992

DAVID SCOTT
VS.
DIVISION OF HIGHWAYS
(CC-89-387)

Billie Ruth Farley appeared for claimant.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover for damages to his 1985 pickup truck, which occurred on February 23, 1988, between 5:00 and 6:00 p.m., in Logan County. It is stipulated that the amount of damages is $500.00, which represents claimant's deductible on his insurance policy.

Claimant's employee, Billie Ruth Farley, was operating claimant's pickup truck when the vehicle went over a large metal plate covering a hole on a bridge owned and maintained by respondent. The metal plate rolled under the truck causing damage to the left front tire, the wheel, and the front axle. She was unable to drive the truck around the metal plate as there was other traffic on the bridge.

Respondent's Logan County Maintenance Supervisor, Hobert L. Adkins, testified that a four by four piece of steel, weighing in excess of 500 pounds, was placed over the hole on the bridge at approximately 2:00 p.m., on the date of this accident. The plate was laid directly over the whole which is the normal procedure.

Ms. Farley was not negligent in driving claimant's pickup truck over the steel plate which had been placed on the bridge. Respondent did not take any action to secure the plate, and, although this may be the normal procedure, the respondent is liable for damages which plates of this nature may do to vehicles if the plate raises up from the road surface and strikes a vehicle.

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

of $500.00 to claimant for damages to his pickup truck.

Award of $500.00.

OPINION ISSUED DECEMBER 11, 1992

LARRY D. AND EVELYN L. SHRIVER
VS.
DIVISION OF HIGHWAYS
(CC-92-133)

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

PER CURIAM:

Claimant Evelyn L. Shriver, a resident of Rivesville, West Virginia, was operating her automobile on West Virginia Route 17, when the vehicle struck a hole in the pavement and sustained damages. The incident occurred on or about April 22, 1992, when claimant was returning home after a two week trip to Michigan. The vehicle sustained damages to both of the left wheels. The cost of repairs to the claimants was $1,296.42; however, claimants maintain insurance on their automobile with a $100.00 deductible.

Claimant Evelyn L. Shriver testified that her automobile struck a large hole in the asphalt on West Virginia Route 17. She was driving between 30 and 35 miles per hour. The incident occurred between 9:00 and 9:30 p.m., and it was dark. She stated that there were several holes and that the holes ranged from six to eight inches in depth. She had not noticed any holes in the pavement prior to her trip to Michigan.

Dwayne Miller, the Marion County Assistant Supervisor for respondent, testified that there were pot holes on Route 17, and respondent was aware of these holes. Repairs had been made with cold mix, but respondent was unable to make permanent repairs until April 25, 1992, after claimant's accident. Respondent did not place any signs in the area to indicate the condition of the pavement.

The Court is of the opinion that respondent had notice of the defective condition of Route 17, and was aware that coal trucks used this route causing the pavement to deteriorate. As the respondent failed to warn the traveling public of the condition of the pavement, respondent was negligent.

In accordance with the findings of fact and conclusions of law as stated herein above, the Court makes an award in the amount of $100.00 to claimants for the damages to their vehicle.

Award of $100.00.

OPINION ISSUED DECEMBER 11, 1992

JOHN W. SINGLETON, JR.
VS.
DIVISION OF HIGHWAYS
(CC-91-375)

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

PER CURIAM:

John W. Singleton, Jr., a farmer in Nicholas County, West Virginia, makes this claim against the Division of Highways, in the amount of $1,264.00, for causing damage to fencing on his farm running along the northerly side of West Virginia Secondary Route 4 in Nicholas County.

It appears from the evidence that on August 17, 1991, respondent was conducting mowing and brush removal operations along said public road and adjacent to claimant's field in which cattle were grazing, and accidentally hooked into a woven wire fence, destroying or damaging two ten-foot panels.

Some of the cattle went through the opening and were exposed to wild cherry clippings, which are toxic to cattle, but none of claimant's cattle died.

Claimant acted expeditiously and purchased fencing materials and employed fellow farmers to rebuild the damaged fence, and built some 1264 feet of new fence, largely along a stretch of the road in which these appear to be few trees of any kind; he justifies replacing the fencing not damaged by arguing that it was necessary to do so to confine his cattle.

Be that as it may, the claimant's cause of action rests upon the destruction or damage to some twenty feet of the roadside fence, and his damage to some twenty feet of the roadside fence, and his damages are limited to the reasonable cost of replacing the damaged fence. His testimony, partially supported by a bill for fencing material, is to the effect that the new fence cost him about one dollar per foot. Because it costs more than that amount per foot to replace two panels, the Court is of the opinion that five dollars per running foot would be the reasonable cost of replacing twenty-

feet of damaged fencing, and, therefore, that claimant's damages are $100.00.

Award of $100.00.

OPINION ISSUED DECEMBER 11, 1992

JAMES E. SYMNS
VS.
DIVISION OF HIGHWAYS

(CC-92-213)

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

PER CURIAM:

Claimant, an employee of the respondent, was employed to run a storage lot and take care of a building belonging to respondent in Rand, West Virginia. On March 31, 1992, the office building burned down. Claimant alleges that he had personal property which was destroyed in the fire for which he has now brought this claim. The personal property included one pair of insulated boots, a clock radio, a telephone, a hot plate, and a winter jacket. The cost to replace these items is $426.00. Respondent is unable to reimburse claimant for these items of personal property. Respondent carried insurance for property belonging only to the respondent.

The origin of the fire is apparently unknown. The official fire report of the Malden Volunteer Fire Department indicates possible cause of the fire as "suspicious". It appears to the Court that claimant would need several items of the personal property in the performance of his job duties. These items include the glasses, the coveralls, the boots, and the jacket, the replacement cost of which is $402.00. As claimant needed certain of the items lost in the fire in the performance of his job duties, the Court is of the opinion that in equity and good conscience claimant should be reimbursed for his loss.

Accordingly, the Court grants an award in the amount of $402.00.

Award of $402.00.

OPINION ISSUED DECEMBER 11, 1992

CAROLYN R. TOWNSEND AND JESSE G. TOWNSEND
VS.
DIVISION OF HIGHWAYS
(CC-91-95)

Louis H. Khourey, Attorney at Law, for claimants.
James D. Terry, Attorney at Law, for respondent.

STEPTOE, JUDGE:

Carolyn R. Townsend and Jesse G. Townsend, husband and wife, of Moundsville, West Virginia, seek an award from the Division of Highways of the Department of Transportation of West Virginia, for property damage and personal injuries sustained by them in a one-car automobile accident which took place about 2035 on March 26, 1989, in Marion County, West Virginia, at Exit 132 on Interstate 79, alleging that negligence on the part of the Division of Highways was the proximate cause of the accident.

Claimants, with Jesse G. Townsend at the wheel, were proceeding northwardly along Interstate 79, en route from Shinnston to Moundsville, in their 1983 Toyota Mirage pickup truck. It was dark and had been raining, and the surface of the road was wet. The temperature was falling and was at or approaching the freezing level.

According to the testimony of Jesse G. Townsend, he had been driving about 50 to 55 miles per hour, conforming to the general speed of other cars proceeding in the same direction at the same time. He was on a slight down grade, with his foot on the accelerator, approaching a bridge overpassing U.S. Route 250, and while on the bridge hit an unobserved ice patch and felt his vehicle going out of control. He released the accelerator, but was unable to regain control northwardly and toward the easterly berm, overturning on the paved surface of the easterly berm and bouncing into the air and coming to rest on its wheels on the paved surface of the ramp designated for use by northbound traffic entering Interstate 79. According to eyewitness Eugene Kubiet, driving a car on the ramp, the claimant's vehicle, while "airborne" and at least eight feet off the ground, rotated at least three times before hitting the ground; his daughter, Susan D. Kubiet, a passenger in her father's car, testified that claimant's vehicle was much higher in the air and rotated only once. Both claimants were ejected from their vehicle and came to rest on said ramp. Claimants' motor vehicle showed greatest damage to the front, considerable damage to both sides, and little damage to the rear, and was deemed to be a total loss.

Mrs. Townsend, who suffered head injuries, testified that she had no recollection of the accident or of the events leading up to the accident. Jesse Townsend felt the truck slide and heard crashing noises, and then passed out, recovering consciousness while he was prone on the ramp. The Kubiets, father and daughter, were the only other eyewitnesses who testified.

The position of the claimants is that the respondent knew or should have known of a dangerous condition of Interstate 79 where the accident took place and, having such notice, should have taken effective remedial measures; and that respondent's failure to eliminate the ice patch on the bridge overpassing U.S. Route 250 was the sole proximate cause of said accident of March 6, 1989.

Respondent's witness testified that for maintenance duties and responsibilities, the scene of the accident was in Section 1 Interstate 79, of District 4 of the Division of Highways, said Section comprising all of Interstate 79 from the Pennsylvania state line southward to about 300 feet south of Exit 132, a distance of some 28 miles; that the personnel of Section 1 consisted of a supervisor, a clerk, a mechanic and seven workers; and that the mobile equipment allocated to Section 1, for SRIC (snow removal and ice control) consisted of two tandem trucks and two dump trucks with a spreader for each truck. It was established that the Division of Highways had a color code, classifying weather conditions on its highways, to-wit, code green for normal conditions, code blue when snow is predicted, and code yellow when it is deemed necessary to treat highways. On March 6, 1989, Section 1 went to code yellow at 1135 (Section 2 went to code yellow at 2100 on the same day), and placed its personnel on two 12-hour shifts to perform snow removal and ice control. Trucks made periodic sorties with loads of salt and cinders which were applied in places where the operators felt they were necessary, giving special attention to cuts through hills (where temperatures are lower) and to the wearing surfaces of bridges (which freeze before other surfaces do so). Apparently, there was no ice on the road during daylight hours, but temperatures dropped after sundown. A truck with abrasives left headquarters of Section 1 at 1900 and covered the thirteen of fourteen miles southward from headquarters to Section 2, patrolling two lanes on each side of the midway, applying salt and cinders as required, and returned to headquarters at 2000; the operator, who did not know of the accident until about two days before he was deposed on December 9, 1991, had little or no recollection of his performance of duties, or of the condition of the road, on March 6, 1989; he testified on the basis of respondent's records that he had made another run over the same route commencing at 2030, but he had no specific recollection of that run, either.

It appears to the Court that, as early as 1135 on the day of the accident, March 26, 1989, respondent's supervisor of maintenance for the area containing the scene of the accident, put his working force and equipment on code yellow, for snow removal and ice control (SRIC); that patrolling of Interstate 79 was instituted and continued; and that salt and cinders were applied by respondent's operative personnel as they deemed necessary from on-site inspections. A number of reasons may be advanced for the failure of respondent's personnel to know that there was ice on the bridge where claimant's slide commenced, but the Court declines to speculate.

In this case, the Court believes that respondent's personnel followed all of the procedures required of them by existing directives, and that such procedures were all that were reasonably necessary for the protection of persons using the highway at the time and place of the accident. No higher standard was alleged or proved by claimants, although they suggest that something more could have or should have been done by the respondent, but, again, the Court declines to speculate. The State (respondent) is neither an insurer nor a guarantor of the safety of

a traveler on its highway. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947).

Claim disallowed.

OPINION ISSUED JANUARY 6, 1993

ALFRED L. WHITELEY AND FRANCES L. WHITELEY
VS.
DIVISION OF HIGHWAYS
(CC-90-335)

James A. Dodrill, and Larry G. Kopelman, Attorneys at Law, for claimants.
Glen A. Murphy, Attorney at Law, for respondent.

BAKER, JUDGE:

Claimants brought this action for injuries received by claimant Alfred L. Whiteley in a single vehicle accident on September 27, 1988, on West Virginia Route 9, Berkeley County. Claimants contend that Mr. Whiteley swerved his vehicle to the right, the wheels of his vehicle traveled of the paved portion of the roadway onto the shoulder area, and, while he was attempting to bring his vehicle back onto the roadway, the defective condition of the shoulder surface, the difference in elevation between the traveled portion of the roadway and the shoulder surface, tripped his vehicle, flipped it over and caused the injuries. The claim was heard on the issue of liability only. Neither of the claimants appeared or testified. Counsel for the claimants indicated that Mr. Whiteley had no memory of the accident.

Respondent contends that there was no reason for Alfred Whiteley to leave the traveled portion of the highway to go onto conditions of the berm along Route 9, his attempt to cut back onto the road caused the accident.

The investigating officer, Trooper James Paul Corley, of the Department of Public Safety, testified that claimant Alfred Whiteley was operating his Chevy Luv pickup truck proceeding west on Route 9 when the accident occurred. After having reviewed the photographs he estimated that the difference in elevation between the berm and the paved surface of the road, at the point where he believes the vehicle first left the road, was “four maybe five inches” and not eight to ten inches as he recorded in his accident report. He estimated the depth of the berm where he believes the right front wheel re-entered the traveled portion of the road surface as “maybe an inch, almost even.” On the accident report filed by Trooper Corley he marked two blocks as contributing circumstances to this accident, the blocks “Failure to Maintain Control and “Other Roadway Defects.” He checked these boxes “for the simple reason he (claimant Alfred Whiteley) failed to

keep his vehicle on the roadway as required by law and ran off the roadway, which initiated the chain of events." He stated that there were no indications as to why Mr. Whiteley left the traveled portion of the roadway and drove onto the berm. Trooper Corley indicated that Route 9 West is a moderately traveled secondary road.

Allen E. Hewett, an expert in the field of accident reconstruction investigation, and Andrew Edward Ramisch, an expert in traffic engineering and accident analysis, testified for claimants. They agreed that the vehicle went out of control after it left the traveled portion of the road and was tripped coming back onto such traveled portion. Both experts noted the difference in elevation between the paved portion of the roadway and the shoulder, and Mr. Ramisch also noted the rutted condition of the shoulder and its softness, stressing that a highway is supposed to provide a forgiving element in the shoulder system rather than an element that would punish one who is inadvertently in that area.

Trooper Rickey E. Holley, of the Department of Public Safety, testified as an accident reconstructionist expert for the respondent, that the Whiteley vehicle was out of control when it left the traveled portion of the roadway and tripped on furrowed dirt.

Respondent's maintenance supervisor in Berkeley County, Bruce DeHaven, described the road and the ditching and blading, routine maintenance which had been performed on it on April 6, 1988, the spring prior to the Whiteley accident. He stated that there are approximately 526 miles of roads in Berkeley County, and that there were no formal complaints or requests for ditching and blading of this area of Route 9 at the site of this accident prior to the accident.

There appears to be no doubt that the condition of the shoulder of this highway at the site of the Whiteley accident was something less than the optimum as described by Mr. Ramisch.

Drop-offs, frayed edges and ruts along the borders of our highways are a way of life in West Virginia. The traveling public contends with them every day in all parts of the State. In this case there may have been a defect in the shoulder, but the question is whether the defect

was such as would support a claim of negligence and a consequent moral obligation of the State to compensate the claimants for their losses.

This Court has heard and decided many defective berm cases previously. The Court stated its position in berm claims in the claim of *Hinkle v. Div. of Highways*, Opinion issued December 10, 1991, as follows:

> This Court has, in past decisions, held that a lower standard of care and maintenance is required for the berm or shoulder of a public road, than for the regularly traveled portion of the road, this being the so-called New York rule. An exception to the rule, recognized both in New York, and West Virginia, is that the higher standard of care and

> maintenance required for traveled portion of the road will be applied for the shoulder when an emergency requires it. See *Retzel v. State*, 94 Misc.2d 562, 405 N.Y.S.2d 391 (1978). The *Retzel* Court says that not only an emergency may require the higher standard of car and maintenance, but **other circumstances** may, also, make the higher standard of care applicable. Many states, of course, do not have the double standard of care, one for the traveled portion of the road and one for berms, and indeed, in view of the many, and varied, and legitimate, intended and necessary uses made of the berms by the motoring public, it is difficult to rationalize a double standard.

In *Hinkle*, supra, claimant, the operator of a tractor was proceeding on the berm of a roadway when the right wheel struck a depression in the berm causing the tractor to flip. This Court made an award as respondent had failed to provide sufficient berm for the particular road which was the subject matter of the claim; however, the Court continues to adhere to the New York rule. In the instant claim, the reason for claimant Alfred rule. In the instant claim the reason for claimant Alfred Whiteley to drive onto the berm is speculative. A drop-off of four to five inches at the edge of a paved road in West Virginia is not an unusual occurrence. The respondent maintained the berm on County Route 9 on a regular maintenance schedule with ditching and blading being performed twice a year, once during spring and once during fall. Although the Court might prefer that the berms throughout the State be maintained at the ideal condition of one to one and a half inches difference in elevation between the paved portion and the berm, the Court must also consider the burden placed upon respondent for such maintenance standards.

Claimant Alfred Whiteley proceeded onto the berm for reasons unknown, and he, thereupon, failed to keep his vehicle under control thus avoiding an accident. The evidence in this proceeding has convinced the Court that his negligence on the part of claimant Alfred Whiteley in failing to maintain his vehicle under control when it traversed the berm was equal to or greater than that of the respondent, if any, in its maintenance of the shoulder of County Route 9 in Berkeley County.

We are further constrained to say that this case was ably tried and argued by counsel for claimants. However, we believe that our findings of fact and our view of the law of the State of West Virginia governing this case require the disallowance of these claims and, accordingly, the same are denied and dismissed.

Claim disallowed.

OPINION ISSUED FEBRUARY 5, 1993

DANNY L. ASHWORTH AND SANDRA K. ASHWORTH

VS.
DIVISION OF HIGHWAYS
(CC-92-290)

Claimant represents self.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimants own a house and property located on Austin Drive, formally U.S. Route 60. On July 31, 1992, claimants' property sustained flood damage when a ditch on the opposite side of Austin Drive overflowed across the road, down their driveway, and into their family room. Austin Drive is a road owned and maintained by respondent. Both claimants lost work as a result of having to clean their family room after the flood; personal property was damaged by the water; and, claimants incurred costs for cleaning supplies and for renting equipment to clean the flooded area of their home. The damages totaled $1,542.28.

Claimant Sandra K. Ashworth testified that their property had experienced flooding prior to the flood which occurred in July 1992. She had noticed that the drainage ditch was blocked causing water to flow towards claimants' property. She had informed respondent of the problem with the ditch and one of respondent's employees had told her that a blocked culvert would be corrected.

Claimant Danny L. Ashworth testified that the driveway to his home has a grate across the driveway at the entrance to the family room. This drainage structure is sufficient to carry off water and prevent flooding under normal circumstances.

Paul J. Lyttle, Assistant County Supervisor in Kanawha County for respondent, testified that he was aware of the flash flood on Austin Drive on July 31, 1992, as there had been extremely heavy downpours on that date. He was at the claimants' house during the flood and directed that the ditch which was blocked be unclogged. The property owner on the opposite side of Austin Drive had apparently installed two water tanks to form a culvert under a driveway. These water tanks had separated and were partially clogged.

Respondent's employee, Joseph L. Lilly, testified that he was aware that a culvert under a driveway adjacent to Austin Drive was blocked, but he was unable to clean out the pipe as a particular high-pressure truck was needed and this truck was unavailable at the time. In fact, when the high pressure tank was used in the drain, a large ball about the size of a basketball was removed and it was this object that caused the drain to be clogged.

The Court is of the opinion that respondent was negligent in the maintenance of the culvert on Austin Drive and that this negligence caused the flooding which occurred on claimants' property in July 1992. Respondent was aware of the clogged culvert and that this condition could

cause the ditch to overflow resulting in flooding in the immediate area. Although there was an unusual rainfall on the date of the flood, the Court is of the opinion that the flooding to claimants' house would not have occurred had the culvert been properly maintained. Both claimants suffered work loss which was calculated at $550.00. The property damage and cleaning expenses were in the amount of $992.28.

Accordingly, the Court makes an award to the claimants in the amount of $1,542.28.

Award of $1,542.28.

OPINION ISSUED FEBRUARY 5, 1993

BARBOUR COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-92-126, CC-92-313, and CC-92-411)

Claimant represents self.
George P. Stanton, III, Assistant Attorney General, for respondent.

PER CURIAM:

These claims were submitted for decision based upon the allegations in the Notice of Claims and the respondent's Answer.

Claimant, County Commission of Barbour County, provides and maintains a facility for the incarceration of prisoners who have committed crimes in Barbour County. Some of the prisoners held in the county facility have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. claimant brought this action to recover the costs of housing for prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the county prison facility for periods of time beyond the date of the commitment order.

The Court previously determined in the *County Comm'n. of Mineral County v. Div. of Corrections*, an unpublished opinion of the Court of Claims issued November 21, 1990, that the respondent is liable to the claimant for the cost of housing these inmates.

Pursuant to the holding int the *Mineral County* opinion, the respondent reviewed these claims to determine the number of inmate days for which respondent may be liable. Respondent then filed Answers admitting the validity of the claims and that the amount of $85,385.00 is a fair and reasonable settlement of the claims.

In view of the foregoing, the Court makes an award to claimant in the amount of $85,385.00.

Award of $85,385.00.

OPINION ISSUED FEBRUARY 5, 1993

C & L CONSTRUCTION COMPANY, INC.
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY OF WEST VIRGINIA
(CC-90-393)

Everette F. Thaxton and Charles M. Johnstone, II, Attorneys at Law, for claimant.
John G. Hackney, Jr., and Brentz Thompson, Assistant Attorney General, for respondent.

BAKER, JUDGE:

This is an action for breach of contract involving a multi-prime project for the construction of the Marshall University Fine Arts Center in Huntington, Cabell County. Marshall University is a facility under the auspices of the Board of Trustees of the University of West Virginia, respondent herein.

Although this project was first bid as a single-prime contract, the bids were rejected as too costly. The project was subsequently re-bid as seven separate prime contract. C & L Construction Company, Inc., hereinafter referred to as C & L, alleges that confusion resulted in this re-bid transformation of the plans from single to multi-prime: Questions arose as to which of the seven contractors would be responsible for specific work duplications and omissions resulted; approximately 200 change orders were made.

The claimant was responsible for the Structural Steel and Metal Decking contract. However, claimant raised questions concerning items variously referred to as spandrel lintels or spandrel beams, and catwalks or fly floor framing, claimed that such items were not a part of its work, and sought additional compensation through requested change orders, asserting that these were covered under the Miscellaneous Iron section of the General Contract. C & L also alleges that it was required to perform additional work from a redesign of the fly tower, the mislocation of anchor bolts by the general contractor, the use of leveling nuts instead of leveling plates, and its being required to grout the base plates. It seeks $750,000.00 in damages. The Court must determine whether C & L is entitled to be compensated for changes in the work which comprise this claim , and then determine the amount, if any, which C & L may recover as an award from the Court. The requested change orders will be considered by the Court, respectively, as issues:

REQUESTED CHANGE ORDERS

CHANGE ORDER NO. 5 SPANDREL LINTELS (SPANDREL BEAMS)
CHANGE ORDER NO. 6 CATWALKS (FLY-FLOOR FRAMING)
CHANGE ORDER NO. 7 FLY TOWER REDESIGN
CHANGE ORDER NO. 8 MISLOCATED ANCHOR BOLTS-SLOTTING BASE PLATES
CHANGE ORDER NO. 9 DELETION OF LEVELING PLATES; ADJUSTING LEVELING NUTS; GROUTING BASE PLATES

The respondent avers that the work covered by the requested change orders nos. 5, 6, and 9 was included in claimant's contract; that the materials included in requested change orders nos. 5 and 6 were furnished by C & L's subcontractor, Trojan Steel Company, hereinafter referred to as Trojan, under its original bid to C & L when the project was bid and that to allow C & L to recover the cost of such materials from respondent under these change orders would constitute unjust enrichment; that the amounts claimed under requested change order nos. 7 and 8 were greatly overstated; and that C & L did not provide notice to respondent of its intentions to file claims related to certain of the requested change orders in a timely manner.

Requested change orders nos. 5 and 6 both relate to a document which C & L alleges it relied upon in calculating its bid to respondent. This document was prepared by V. J. Associates and is titled as follows:

FINAL BUDGET ESTIMATE
FINE ARTS CENTER
PHASE I
MARSHALL UNIVERSITY
HUNTINGTON, WEST VIRGINIA
DECEMBER 12, 1988

This budget estimate was prepared for the architect of the Fine Arts Center by V. J. Associates to provide an estimate of costs for the construction of this project. A representative of the respondent, J. C. Kotas, provided a copy of this document to C & L prior to the bids being received by the respondent when the multi-prime contracts were being let. Mr. Kotas testified that he delivered the V. J. Associates Estimate of Jeff Moffitt, one of the owners of C & L, because there had been no representatives of C & L at meetings with other bidders. His purpose for providing this document was to ascertain the accuracy of the tonnage of steel for the project. Mr. Kotas did not discuss any of the particulars in the estimate with Jeff Moffitt. C & L contends that it relied upon portions of this document which list items to be provided by the structural steel contractor and those items to be provided by the general contractor as a part of the miscellaneous iron. In the multi-prime bidding process, the miscellaneous iron was a part of the general contractor's obligation. C & L contends that it had every right to rely upon this document based upon the fact that it was provide by the owner, respondent herein. It is necessary for the Court to address and to render its decision as to this issue before it affects the Court's consideration of requested change orders nos. 5 and 6. This

document appears to be an extraneous document provided to the contractor for limited purposes. C & L was informed at a pre-bid meeting held in May 1989 that all items on the structural drawings, S-1--S-20, were a part of the structural steel bid. In Addendum No. 3 to the contract, the questions and answers at the pre-bid conference were recited and the information was reiterated for the bidders that the structural steel bid was the work shown on the structural drawings S-1--S-20, and in the contract documents at §05300 - Metal Decking. Miscellaneous iron was stated to be a part of the general contractor's contract and was shown on the architectural drawings with reference made to three sections of the contract. The Final Budget Estimate prepared by V. J. Associates was not one of the Bid Documents. It appears to the Court that a reasonable, prudent contractor would not rely upon an extraneous document in bidding a project. In retrospect, it is regrettable that the respondent furnished the Final Budget Estimate to the claimant, but if C & L was misled by the information in the V. J. Associates Estimate to its detriment, it can only look to itself. The contract documents are controlling and the Court will base its decision upon those documents.

The Court will now consider each requested change order which constitutes a claim and its decision as to C & L's entitlement to any additional compensation for each such requested change order.

REQUESTED CHANGE ORDER NO. 5

Requested change order no. 5 is for additional work which C & L alleges twas required by it for providing and installing steel spandrel lintels. There was a disagreement between the parties as to the terms "lintel" and "spandrel beam." The American Institute of Steel Construction Code of Standard Practice for Steel Buildings and Bridges (hereinafter referred to as the AISC Code) defines Structural Steel as follows:

> §2.0 Classification of Materials
>
> 2.1 Definition of Structural Steel
> "Structural Steel," as used to define the scope of work in the contract documents, consists of the steel elements of the structural steel frame essential to support the design loads. Unless otherwise specified in the contract documents, these elements consist of material shown on the structural steel plans and descried as: (A list of items follows and includes this reference)
>
> **Lintels, if attached to the structural steel frame.** (Emphasis supplied).

As described by Gerard J. D'Huy, an expert engineer who testified for the respondent, the spandrel beams required by the contract consisted of several members including a tube section, plates, and angles. These members were delivered to the project as a unit which had to be hoisted by a crane in place between columns and then bolted to the structural steel frame by iron workers. The

description of the spandrel beams is included int the structural drawings on S-19 under the legend "SPANDREL BEAM SCHEDULE" for fabrication purposes and a note to the steel erector referring to the Architectural Drawings for determining where the beams were to be located and for information as to the length of each beam. There were also steel members referred to as hung and loose lintels which were required to be provided and installed by the general contractor as a part of miscellaneous iron. C & L contends that the references to the miscellaneous iron section of the contract through the Architectural Drawings further complicated its understanding of whether the spandrel beams were to be included in its bid. C & L contends that the references to both sets of plans for these beams created an ambiguity in the contract and it, therefore, is entitled to be compensated for supplying the steel and for the cost of erection. As indicated above in the definition from the AISC Code, lintels are structural steel if attached to the structural steel frame. If these spandrel beams are considered to be lintels as C & L contends, it is clear that these were a part of its contract as defined by the AISC Code.

The evidence also establishes that C & L subcontractor (Trojan) which fabricated the steel for C & L had included the spandrel beams in its takeoff, to work up the bid to C & L, and thus it was paid in full by C & L for the steel. In fact, Trojan did not make a claim against C & L for additional compensation for providing the steel for the spandrel beams. The Court has determined that the structural steel drawings provided sufficient notice to C & L that the spandrel beams were, in fact, a part of its contract. There does not appear to be any ambiguity in the contract documents and this is substantiated by the fact that Trojan reviewed the same drawings and included the steel members in its bid to C & L. The Court denies any claim for requested change order no. 5 in its entirety. In light of this determination the Court deems it unnecessary to consider the question of the timeliness of notice by claimant as to this claim.

REQUESTED CHANGE ORDER NO. 6

Requested change order no. 6 is a claim for the installation of an assembly identified as a catwalk or fly floor framing. C & L contends that its contract included neither the fabrication of the steel nor the installation of a catwalk in the stage area. The catwalk is depicted on S-5 in detail and is also shown on A-6. C & L contends that the catwalk was a part of the miscellaneous iron section of the contract, and, therefore, the general contractor had the responsibility to fabricate and install this section above the stage. However, S-5 provides the details for steel and refers to this item as fly floor framing, which is different from a catwalk. In general, catwalks are a part of miscellaneous iron because catwalks are hung from above. Respondent contends that this particular section of the stage area is actually fly floor framing rather than a typical catwalk, because it is a very heavy structure and must be supported from below rather than being hung in the typical catwalk manner. The fly floor framing was delivered by Trojan in large sections which were pre-bolted and the sections were set in place by C & L with the use of a crane.

C & L's position is that the contract did not contemplate that the structural erector would fabricate and construct this particular catwalk as §05500 - Metal Fabrications in the contract listed the items which were a part of the miscellaneous iron as follows:

> §2.23 Miscellaneous Items
>
> A. Catwalks and Platforms: Provide steel catwalks and platforms designed to support a live load of not less than 50 lbs. psf, complete with gratings, toe guards, railings, steel framing, bracing and support members. Comply with requirements specified for railings. Provide steel plate flooding or aluminum grating where shown.

Another section of the contract under miscellaneous iron also provided the following information to bidders:

> §3.05 Miscellaneous Items
>
> B. Catwalks and Platforms: Install catwalks and platforms as shown and to safely support design live loads.

C & L contends that the above sections in the contract indicated to the bidder that catwalks were a part of miscellaneous iron rather than structural steel. Both sets of drawings depict this steel structure. On the Structural Drawing S-5 it is referred to as "Fly Floor Framing." On the Architectural Drawing A-6 which is titled "PLAYHOUSE CATWALK LEVEL AND DETAILS," there is also a depiction of the item in question. C & L's position is that an discrepancies in the plans and specifications are resolved by looking to the specifications and it substantiates this position by citing §3.3 of the AISC Code which states as follows:

> §3.3 Discrepancies
>
> In case of discrepancies between plans and specifications for buildings, the specifications govern....

C & L raised this issue on the project site at a meeting on March 28, 1990, and advised project personnel that the fly floor framing which is referred to in the minutes of the meeting as "Fly Tower Catwalks" was not its work. C & L was later advised that it would be required to provide the steel and erect this item. C & L further contends that Trojan Steel did not include all of the steel for the fabrication the fly floor framing in its take-off to C & L during the bidding of the project. There was testimony from S. Ray Karr, one of the owners of the general contractor for this project, that the fly floor framing was confusing to him as it was depicted in both the architectural and the structural drawings. He testified that he called the architect with a question concerning Addendum No. 3 for clarification as to which contractor was responsible for the fly floor framing. He was informed that it was a part of the structural steel contract. This conversation took place pre-bid, but the information was not relayed to any of the other bidders. The Court notes that Todd Smith, an employee of Trojan, testified that all of the steel in the fly floor framing, including the crossover portion was included in its takeoff; therefore, when it was directed by C & L to fabricate the steel, Trojan did not request a change order from C & L although it did send a letter to C & L

indicating that this catwalk was not a part of structural steel. All of the steel for the fly floor framing, including the crossover portion, was delivered to the project and installed by C & L.

The Court, having reviewed the drawings and the testimony concerning this item, is of the opinion that the fly floor framing was included as a part of the structural steel contract. Structural drawing S-5 contains all of the pieces of steel for this section, and, in fact, it is labeled "fly floor framing" on the drawing. This should have alerted C & L that the item was not a catwalk. The fly floor framing does not hang from above as would a normal catwalk, rather it is supported from below by steel members. Thus, the Court denies any additional compensation to C & L for requested change order no. 6.

REQUESTED CHANGE ORDER NO. 7

Requested change order no. 7 is for the redesign of the fly tower which is located in the stage area of the building and is related to the fly floor framing referred to in requested change order no. 6. The redesign involved a column which in the original plans was abut the fly floor framing. However, the architect determined that additional bracing was necessary for the fly floor and the redesign was effected. The column involved in this claim was designed to extend below the fly floor framing with braces extending to support the fly floor framing. There is no dispute by the parties that C & L performed the work related to the redesign and that C & L is entitled to payment for any additional material and work related to the design. C & L alleges that it was necessary to provide additional temporary framing, additional guy cables, cable clamps, turnbuckles, additional labor, and additional equipment, for a total claim for $17,179.32. Respondent argues that C & L is entitled to no more than $5,000.00 for the additional work caused by the redesign of the fly tower. Both parties agree that C & L is entitled to the amount of $2,480.00 which represents the cost of an additional temporary beam required by the redesign. Respondent disputes the necessity for guy cables, cable clamps, and turnbuckles, as the original design also contemplated the use of such equipment. Section 7.9.1 of the AISC Code states that temporary support will be determined, furnished, and installed by the steel erector, and §7.9.5 states that such temporary supports are not the property of the owner. It is not material for which an owner pays a contractor as the use of such items is contemplated in the bid. Although C & L may have included the value of rent of such guy cables and other support items in its original bid, C & L has established that additional guy cables and other support items were required by the design. The Court has determined that C & L has established its entitlement to additional compensation in the redesign of the fly tower and that the amount of $14,239.46 is a fair and reasonable award for this change order.

REQUESTED CHANGE ORDER NO. 8

Requested change order no. 8 is for extra work required of C & L in slotting the base plates for the columns as a result of the general contractor having mislocated anchor boles. During the construction of the project the general contractor placed the anchor boles in the concrete for the

columns. C & L was required under the terms of the contract to survey there anchor bolts were located beyond the accepted tolerance of one-fourth inch. Each column had sets of anchor bolts in twos or fours. C & L alleges that it was necessary to use a crane for additional time and that it incurred additional labor expenses in order to perform the slotting work on the base plates prior to the placement of the columns. C & L claims additional expenses in the amount of $15,330.00 for this change order.

The Court is of the opinion that C & L is entitled to payment for the additional man hours and equipment time required to slot the base plates. This is difficult work on a project and C & L chose to use a crane to hold the columns while the base plates were slotted. As the steel erector, C & l had a choice in its mode of operation. It has been established that there were problems in at least thirteen instances which required slotting the base plates. Therefore, the Court has determined that C & l is entitled to an award for this change order and that the amount of $15,330.00 is a fair and reasonable award.

REQUESTED CHANGE ORDER NO. 9

Requested change order no. 9 involves two claims. The first part is a claim for extra time that C & L alleges it expended in setting the columns by the use of leveling nuts rather than to place them on leveling plates which it alleges was contemplated by the contract. C & L refers to a section of the contract which mentions leveling plates; however, it has been established that the general contractor also was required to use leveling plates on the project as part of the miscellaneous iron. Leveling plates were required in such areas as where staircases were installed. In Contract §05500-Metal Fabrications, §2.12 provides as follows:

> §2.12 Loose Bearing and Leveling Plates
>
> A. Provide loose bearing and leveling plates for steel items bearing on masonry or concrete construction, made flat, free from warps or twists, and of required thickness and bearing area. Drill plates to receive anchor bolts and for grouting as required. Galvanize after fabrication.

A review of the documents makes it clear to the Court that this provision did in fact relate to the miscellaneous iron portion of the work and not to the structural steel. The Court is of the opinion that the respondent has established that C & L should not have contemplated the use of leveling plates as this mode of erecting columns is not normally used in leveling columns on construction project. Structural drawing S-10 has a note that the base plates shall be set on leveling nuts and a minimum of one and one-half inches of non-shrink gout will be used. The Court is of the opinion that C &L is not entitled to any extra payment because it was required to use leveling nuts as the structural drawing provided sufficient explanation to the bidder. As an experienced steel erector, C & L should have raised a question if it could not determine whether leveling plates or leveling nuts were to be used on the project.

The second part of this requested change order is for work performed by C & L in grouting the base plates. C & L contends that this is work generally performed by the general contractor as laborers or carpenters are responsible for grouting work. This contention may be true where there is a single-bid project and the general contractor designates duties to the steel erectors and the general laborers on the project. However, this was a multi-prime contract and the Court has determined that C & L was required under the terms of the contract to grout the base plates. The contract itself requires grouting on the part of the steel erector as noted int the contract at §05120 for the structural erector and more specifically at §1.03 (a)(4) Shrinkage-resistant grout. Although there are references to grout int the other sections of the contract, these applied to the general contractor as grout is used on other areas of projects. As C & L was required to perform this work in its contract, the Court denies this claim in its entirety.

Thus, the Court has determined that C & L has established entitlement to additional compensation for requested change order nos. 7 & 8, for which the Court grants an award in the sum of $29,569.46, plus interest calculated by the Court in accordance with the provisions in W.Va. Code §14-3-1 to be $1,879.56 on the amount awarded for the work claimed under requested change order no. 7, and $2,205.00 on the amount awarded for the work claimed under requested change order no. 8, for a total award of $33,654.02.

Award of $33,654.02.

OPINION ISSUED FEBRUARY 5, 1993

CATHY A. CIESIELSKI
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY OF WEST VIRGINIA
(CC-92-60)

Claimant present in person.
John E. Shank, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Cathy A. Ciesielski, seeks an award from the Board of Trustees of the University of West Virginia for property damage sustained by wet paint in a residence hall on January 27, 1992, at Boreman Hall, West Virginia University, a facility of the respondent int the city of Morgantown.

From the evidence adduced at the hearing on October 14, 1992, it appears that the

claimant left her dormitory to attend class and, that upon returning, her jacket was ruined when wet paint in the residence hall got on the jacket. The damaged property is worth $225.00.

The claimant testified that she left for her 8:30 a.m. class and when she came back from class, she did not realize that the door frame had been painted while she was in class and she got blue paint on the leather and suede parts of her jacket. She reported the incident to the hall staff and they put a solution on the leather portion of the jacket and removed the paint, however, this solution could not be applied to the suede portion of the jacket. She testified that she did not notice any "wet paint' signs on the way into her room because there were none posted by the door that she came into to get to her room. However, there were "wet paint" signs posted by the bathroom door and by the office.

For the claimant, Marianne Adezio, roommate of the claimant, testified that anybody coming in on the girls' side of the dormitory would not have known about the paint because there were no signs posted by the door, only by the bathroom and the lounge area.

For the respondent, Sonja Atkinson, area manager for Boreman Hall, testified that it was possible that the claimant could have come into the dorm and not seen a sign indicating the "wet paint". She also testified that there had been painting ongoing in the building for at least a week.

The Court finds, as a matter of fact, that the claimant was put on notice of the possibility of painting being done on her floor due to the fact that there had been painting going on for at least one week in the building; that the claimant was negligent in failing to observe the painted area; and that the respondent was negligent in not posting "wet paint" signs where the claimant could see them. The Court is of the opinion that claimant was 30% negligent for the paint damage to her jacket under doctrine of comparative negligence.

In accordance with the findings of fact and conclusions of law as stated herein above, the Court makes an award to the claimant of $157.50.

Award of $157.50.

OPINION ISSUED FEBRUARY 5, 1993

DELLA N. COLLINS
VS.

DIVISION OF HIGHWAYS
(CC-92-170)

Linda N. Garrett, Attorney at Law, for claimant.
James D. Terry, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Della N. Collins, seeks an award from the Division of Highways for property damage sustained to her automobile in a single-vehicle accident which took place at approximately 3:00 p.m. on March 30, 1992, on 16th Street in Huntington, West Virginia.

Claimant was operating her automobile, a 1985 Ford Escort, on 16th Street when she drove her automobile onto the berm and it dropped off the side of the road, causing damage to the vehicle in the amount of $1,712.81. The damage to the vehicle was to the undercarriage and the wheels, and the car was totally destroyed.

Claimant testified that she was traveling at a speed of approximately forty-five miles per hour with her roommate, Christina Craig, from the town of Barboursville to the city of Huntington on 16th Street when she saw a vehicle in her rear view mirror that was beginning to pass her in the left driving lane. She attempted to drive to the right side of the road to give the vehicle more room to pass, when her vehicle dropped off the side of the road into a trench-like hole that was approximately 16 inches wide and 10 inches deep. When the automobile went into the hole, a strut was pushed through the hood of the vehicle, the undercarriage was damaged, and both tires on the right side were flattened. Claimant was not aware of the hole before her vehicle struck it. She stated that the hole appeared to be a dip in the road that was filled with water and that in order for her vehicle to hit the hole, she would have to have driven off the roadway. She also stated that the vehicle trying to pass her was not in her lane of traffic.

For the claimant, Officer David M. Tackett, from the Huntington Police Department, testified that he investigated the accident and he described the hole as being a "washed-out ditch" alongside the road, but not on the roadway itself.

The Court has, in past decisions, held that a lower standard of care and maintenance is required for the berm or shoulder of a public road than for the regularly traveled portion of the road, this being the so-called New York rule. An exception to the rule, recognized both in New York and West Virginia, is that the higher standard of care and maintenance required for the traveled portion of the road will be applied for the shoulder when an emergency requires it. See Retzel v. State, 94 Misc. 2d 562, 405 N.Y.S. 2d 391 (1978).

The Court finds, as a matter of fact, that the claimant was not faced with an emergency which required her to drive her vehicle off the roadway onto the berm area. It is well established in the law that a driver who proceeds onto the berm takes it as is with any defects. Thus,

claimant hereinabove onto a less than perfect berm, but the Court is constrained to deny this claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 5, 1993

SHERRY DIENGES
VS.
DIVISION OF HIGHWAYS
(CC-92-166)

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

PER CURIAM:

Claimant, Sherry Dienges, seeks an award from the Division of Highways for property damage sustained to her automobile when her son, John Carroll Dienges, was involved in a single-vehicle accident took place about 8:00 p.m. on April 23, 1992, on Norway Avenue in Cabell County, West Virginia, in the city of Huntington.

From the evidence adduced at the hearing on July 14, 1992, it appears that John Dienges was operating the claimant's vehicle, a 1979 Malibu Classic, on Norway Avenue when he drove to the right to avoid an oncoming vehicle in his lane of travel and the vehicle struck two holes in the surface of the road, causing damages to the right front and rear tires. The amount of damage to the tires was $200.00.

The claimant's son, John Dienges, testified that he was traveling on Norway Avenue when he saw holes in the surface of the road in his lane of traffic. He started to drive into the left lane of traffic in order to avoid them, but another vehicle came around a curve towards him in his lane of traffic and he had to move to the right side of the road in order to avoid hitting the vehicle. When he drove to the right, the front and rear passenger side of the vehicle struck the holes in the road. He did not lose control of his vehicle, he simply came to a stop. He stated that the holes are about five to six inches from the berm into the paved portion of the orad and the area is jagged where the road has been chipped away. He stated that the holes are about five or six inches from the berm into the paved portion of the road and the area is jagged where the road has been chipped away. He stated that his mother, the claimant, made a video tape of the holes in the road six days after the accident and that she reported the accident to the respondent. He stated that he knew about these holes prior to the accident, but that he did not report them to the respondent prior to the accident.

Claimant testified that she is the owner of the vehicle driven by her son during the

accident. She stated that the front and rear passenger-side tires needed to be replaced after the accident. She also testified that she took a video of the scene of the accident. She was aware of the holes in the road prior to the accident, but she did not report them to respondent prior to her son's accident.

For the respondent, Bill Byrd, crew maintenance supervisor employed by the respondent, testified that he was familiar with the scene of the accident and the alleged hole was actually a break in the edge of the pavement. He stated that the break did not extend very far into the travel portion of the road and that there was still nine feet of travel space on the road. He had no calls concerning the area prior to this accident, and was not aware that the condition on the berm existed.

After having viewed the video tape of the scene of the accident and having considered the evidence in the claim, the Court finds, as a matter of fact, that the berm was deteriorated, but the operator of the vehicle could have avoided the accident; that the respondent had no notice of the condition of the berm; and that the negligence of the operator of the vehicle was equal to or greater than the negligence, if any, on part of the respondent. Therefore, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 5, 1993

DOAK, CUPPETT & POLING, CERTIFIED PUBLIC ACCOUNTANTS
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-92-287)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $15,167.99 for out-of-pocket expenses for its personnel to travel to various agencies of the respondent to perform the requested services. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient

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

In view of the foregoing, the Court makes an award in the amount of $15, 167.99.

Award of $15,167.99.

OPINION ISSUED FEBRUARY 5, 1993

DANIEL W. ELLIS
VS.
DIVISION OF HIGHWAYS
(CC-92-184)

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

PER CURIAM:

Claimant Daniel Ellis seeks an award from the Division of Highways for property damage sustained by him when his vehicle struck a hole at about 2100 hours on the 31st day of March, 1992, on Interstate 79 North, Mile Marker 138, between the cities of Clarksburg and Morgantown.

From the evidence adduced at the hearing on October 15, 1992, it appears that the claimant was operating his vehicle, a 1983 BMW 320, on I-79 when he drove onto the berm and the vehicle struck a hole, causing damage thereto vehicle. The damage was to the front and rear left wheels, the strut tower, and the rear shock. The cost of repair was $585.69.

Claimant testified that he was traveling from Clarksburg to Morgantown, northbound on Interstate-79, a public road which he drives daily, and that in an attempt to move into the left lane of traffic in order to pass a slow-moving vehicle, his vehicle struck a hole at the edge of the paved portion of the highway and the berm. The vehicle sustained damage to the left side front and back wheels. He testified that the hole was one and one-half feet wide, three feet

long, and six inches deep. He also admitted that it was his fault that he was on the berm.

Respondent offered no evidence at the hearing.

This Court has, in past decisions, held that a lower standard of care and maintenance is required for the berm or shoulder of a public road, than for the regularly traveled portion of the road, this being the so-called New York rule. An exception to the rule, recognized both in New York

and West Virginia, is that the higher standard of care and maintenance required for the traveled portion of the road will be applied for the berm when an emergency requires it. See Retzel v. State, 94 Misc. 2d 562, 405 N.Y.S. 2d 391 (1978).

The Court finds, as a matter of fact, that the claimant was not forced into the berm area of the road by an emergency situation; that it was the fault of the claimant that his vehicle hit the hole; that his failure to maintain control of his vehicle was the proximate cause of the damages to his vehicle; and that negligence on the part of the respondent was not established by a preponderance of the evidence.

Claim disallowed.

OPINION ISSUED FEBRUARY 5, 1993

LORENZA L. ELLIS and JANENNE ELAINE ELLIS
VS.
DIVISION OF HIGHWAYS
(CC-92-114)

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

PER CURIAM:

Claimants Lorenza L. Ellis and Janenne Elaine Ellis seek an award from the Division of Highways for property damage sustained to their 1990 Plymouth Laser in a single-vehicle accident which took place at about 1425 hours on the 14th day of February, 1992, on Maple Drive in Monongalia County, West Virginia, in the town of Morgantown.

From the evidence adduced at the hearing on October 15, 1992, it appears that the claimant, Janenne Ellis, was operating claimants' automobile on Maple Drive when it hit two potholes which caused damage to the automobile. The cost of repair was in the amount of $125.00 for damage to the vehicle, which centered on the front passenger side tire.

Claimant, Janenne Ellis, testified that she was traveling at a speed of approximately 25 miles per hour on Maple Drive, a public road which she travels on every day, and that as she approached a narrow section of the road, another vehicle had pulled into the road and forced her towards the right side of the road, where her vehicle hit two very large holes in the road surface, and broke the hub cap and clips off the front passenger wheel and also bent the rim on the wheel. She testified that these holes were approximately four to five inches deep and eighteen to twenty-four inches in diameter; that they were visible before the accident; and, that she had noticed them prior

to that date. She also stated that three and one-half weeks after she filed this claim the holes were repaired.

For the respondent, Aaron Gibson, who has been the Supervisor for Monongalia County Division of Highways for the last three years, testified that he had received no complaints of the holes in the road prior to this accident and that respondent had not repaired the holes after the accident, but that somebody else, possibly a utility company must have made the repairs.

The Court finds, as a matter of fact, that the claimant had actual knowledge of the holes in the road surface due to the fact that she frequently traveled on that particular road; that respondent was negligent in its maintenance of the road based upon the size and depth of the holes in the road; but the Court is of the opinion that claimant's own negligence was equal to or greater than that of the respondent. Therefore, the claim will be denied under the doctrine of comparative negligence.

Claim disallowed.

OPINION ISSUED FEBRUARY 5, 1993

JANET L. GIBSON and CAROL L. HOLCOMB
VS.
DIVISION OF HIGHWAYS
(CC-89-17a)
(CC-89-17b)

William C. Garrett, Attorney at Law, for claimants.
Glen A. Murphy, Attorney at Law, for respondent.

BAKER, JUDGE:

Claimants, Janet L. Gibson Schafstall and Carol L. Holcomb, seek awards from the Division of Highways for personal injuries which they sustained in an accident which took place on December 8, 1987, on U.S. Route 19 at the intersection of West Virginia secondary 41/1 in Summersville, West Virginia. This particular intersection is commonly referred to as the "Irish Corner." These claims ere heard by the Court on the issue of liability only.

From the evidence adduced at the hearings on September 21 and 23, 1992, it appears that the claimants were guests in a vehicle, a 1980 Datsun, operated by Tommy Marling, traveling southerly on Route 19; that the claimants and Mrs. Marling were on their way to work from Clay County to the Bright of America plant located in Summersville; that Ms. Marling brought the vehicle to a stop or near stop to make a left hand turn onto a road known as Irish Corner; that Mrs. Marling proceeded to drive through the intersection to turn left just as a 1982 GMC truck, operated by James

Whitlow and owned by Fansteel, Inc., was traveling northerly on Route 19; and that the two vehicles collided with the point of impact being the passenger side of the Datsun and the front of the GMC truck. Route 19 is a four-lane highway in certain areas, but at this intersection it is a two-lane highway.

The claimants contend that the respondent is negligent for failing to place proper traffic signals at the intersection which was a hazard intersection and that the respondent had sufficient knowledge prior to the accident of the hazardous condition that would have warranted, justified, and required the use of a traffic signal and warning signs similar to ones found at other intersections in Summersville.

Respondent avers that the direct and proximate cause of the accident was the negligence of the driver of the car in which claimants were passengers and that respondent has not breached any duty of care owed to the claimants.

Both claimants testified that they remembered very little about the details of the accident. Mrs. Holcomb was in the front passenger seat and remembers seeing headlights and a turning signal on the truck before the point of impact. Mrs. Gibson Schafstall, who was in a coma for three months after the accident, remembers none of the facts of the circumstances of the accident.

The testimony of the driver of the GMC truck, James Whitlow, established that he was operating a truck loaded with steel at about 20 to 25 miles per hour. He had the flashing lights of the truck operating as he was driving slowly up a grade as he approached the intersection of Route 19. It was approximately 7:00 a.m. He observed a small car which cut in front of him and he was unable to stop the truck which then struck the car broadside with contact occurring at the right front bumper of the truck. He was sure that all of the flashers on his truck were operating properly at the time of the accident.

An eye witness to the accident, Gary B. Phillips, testified that he was driving behind the GMC truck hauling steel on the morning of the accident. He had been following the truck for about twenty miles. The truck was headed straight northbound on Route 19. He observed that the rear emergency flasher lights of the truck were flashing prior to the accident. He also observed the Marling vehicle with the left blinker blinking. He stated that "...the left blinker was blinking on the front of the car, like they were going to make a left hand turn. And I expected the car to stop, you know, because--I mean the truck was right there. But the car

didn't stop. It just turned across into the path of the truck." He saw the truck hit the car broadside.

Luther James Dempsey, Jr., a civil engineer, testified as an expert witness on behalf of the claimants. He stated that had reviewed the history of the Irish Corner intersection where the accident occurred. He examined the average daily traffic records maintained by the respondent and these revealed that the traffic had increased from an average of 3,000 vehicles daily in 1973 to an

average of 10,500 vehicles daily in 1986. He also reviewed the available traffic accident reports for 1980 through 1987 for accidents which had occurred at this intersection. He determined that 59 out of 70 reports involved accidents at the Irish Corner intersection which he contends could have been prevented if proper traffic signals had been installed at the intersection by the respondent. He also referred to section 4C-1 of the Manual of Uniform Traffic Control Devices (MUTD) which states as follows:

> §4C-1 Comprehensive investigation of traffic conditions and physical characteristics of the location is required to determine the necessity for signal installation and operation of a signal that is found to be warranted.

The Manual then refers to nine different areas where numbers and conditions are applied to determine if a signal is warranted or if further study is needed to determine if a signal is warranted in the location. He is of the opinion that his review of the plans and specifications for this highway, the plans for the future, the average traffic counts, and the number of traffic accidents at the intersection establishes that respondent knew or under reasonable care should have known that some type of traffic signal device or warning was justified at the Irish Corner intersection prior to December 7, 1987, the date of claimants' accident. He stated that the data as of the early 1980s warranted or "justified the installation or the further study to determine the best system to work at that intersection." He did not have an opinion as to what kind of traffic control device at the intersection would have prevented or cut down the likelihood of this accident.

The issues for the Court are whether respondent was negligent in failing to install traffic signal devices at the Irish Corner intersection and whether such a device would have prevented this accident. The Court is not convinced that respondent was negligent in failing to install a traffic device at the Irish Corner intersection or that such a device would have prevented this accident. It is uncontroverted that the driver of the Datsun in which the claimants were guest passengers was at fault in this accident. The investigating officer, Lieutenant Curtis Persinger of the Summersville Police Department, noted in the accident report that the contributing circumstance to the accident was turning improperly and this was based upon statements of witnesses at the scene who indicated that Mrs. Marling made a left turn in front of on-coming traffic. The accident report further indicated no improper driving on the part of the operator of the truck. Although the weather may have been overcast on the day of the accident, visibility on the part of the driver of the car should not have been a contributing factor. The testimony of the other witnesses does not include the mention of any fog problems that morning. The Court is also of the opinion that the evidence establishes that the GMC truck had its emergency flashing lights operating properly as it approached the Irish Corner intersection.

Although the Manual of Uniform Traffic Control Devices provides standards for respondent to follow to determine the necessity for traffic devices, the Manual also states that such standards "are not a substitute for engineering judgment." For the Court to hold that a traffic signal at that intersection would have prevented this accident would require this Court to substitute its

judgment for that of respondent's engineers, and, further, would require extensive speculation on the part of the Court. This Court does resort to speculation to justify a finding of negligence on the part of the respondent. The Court has concluded that the proximate cause of the accident herein was the improper driving of the operator of the car in which the claimants were passengers; that the respondent was not negligent in failing to have traffic devices or controls at this intersection; and that it would be speculative for the Court to assume that any traffic device at the intersection would have prevented this tragic accident.

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

Claims disallowed.

OPINION ISSUED FEBRUARY 5, 1993

RANDY HARRIS, SR.
VS.
DIVISION OF HIGHWAYS
(CC-92-150)

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

PER CURIAM:

Claimant, Randy Harris, Sr., seeks an award from the Division of Highways for property damage sustained to his vehicle in a single-vehicle accident which took place about 7:30 p.m. on March 6, 1992, on Gardner Road which is just off an exit of Interstate 77 in Mercer County.

The claimant testified that he was driving his 1991 Accura Integra, north on I-77 towards Athens, West Virginia, when he drove off at an exit to get gasoline and to visit some friends who lived in the area. He was not familiar with the road. He was operating his automobile at approximately 40 to 50 miles per hour while traveling on Gardner Road when he came upon a curve into a fence adjacent to the road causing damages to his vehicle which included scratches, damage to the bumper, and damage to the headlight. The damages were in the amount of $1,699.26. He maintains insurance with a $500.00 deductible, but he stated that the insurance policy would have been increased by 40% for three years if he requested his insurance company to cover the damages to his automobile. The claimant then testified as to photographs showing the scene of the accident. He stated that there is a sign for traffic coming from the opposite direction which indicates a ninety degree curve in the road and a speed limit of twenty-miles per hour, but there was no sign warning of the curve int the direction from which he was traveling.

Zed B. Campbell, Jr., county maintenance supervisor for respondent in Mercer County, testified that he is familiar with the scene of the accident and that he did not know if his office was notified of any prior accidents or of the claimant's accident. He also stated that he did not know whether or not there were any signs down at the time of claimant's accident. He stated that a traveler could probably see the curve in the road from approximately 300 feet. He also testified that the curve in question was less than ninety degrees and that the sign warning of the ninety degree curve int the opposite direction was actually warning of a dangerous curve leading to a different road.

Curtis Whitlow, maintenance crew leader for the sign shop at Princeton, testified that there currently is a sign located at the scene of the accident warning of the ninety degree curve and giving travelers a twenty mile an hour advisory. He stated that the sign was put up the day after he was formed that the sign was not there. He was not notified prior to claimant's accident that the sign was down or that it needed to be replaced.

Finally, for the respondent, Ben Savilla, an investigator for the claims division, testified that he investigated this particular claim and that he took photographs of the area. He stated that under normal daylight conditions there is a line of sight of the curve of 800 feet. He noticed that there had been a sign in the area before, but that it was missing and he notified Mr. Whitlow that the sign was missing. He was not aware of any problems in the area until the claimant filed his claim with the Court of Claims. He also stated that the curve was not a ninety degree curve, but might be a fifty or sixty degree curve.

The Court finds that the respondent did not have any actual or constructive notice of the absence of the road sign prior to the accident and that after the respondent received notice after claimant's accident it acted in a timely manner to replace the missing sing. The Court is of the opinion that the State is neither an insurer nor a guarantor of the safety of person traveling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by a defect of this sort, it must have had either actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1977).

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

Claim disallowed.

OPINION ISSUED FEBRUARY 5, 1993

JAMES AND DOROTHY HOLMES
VS.
DIVISION OF HIGHWAYS
(CC-91-345)

Claimants appeared in their own behalf.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

On the evening of October 14, 1991, the claimant, James Holmes a resident of Red House, Putnam County, was operating his 1977 GMC 6500 truck laden with an unspecified quantity of logs upon Route 30/1, more commonly identified as Five and Twenty Hill Road, when he pulled off the single lane gravel road to permit an approaching automobile to pass. The claimant alleges that as he awaited the on-coming automobile, the edge of the road bank gave way and his truck rolled over the hill. The claimant stated that he suffered three broken ribs and lacerations in the accident, but he had refused medical attention. His claim is for property damage only. The truck was declared a total loss by a Body Shop Manager, David Rollins, of General Truck, Inc., a South Charleston GMC truck dealership; since the truck's estimated repair was n excess of $10,000 and its current book value was $5,790.

Claimant testified that it is his opinion that the reason the bank gave way that his truck was positioned over a corrugated metal pipe culvert that extends 15 to 20 feet across the road. Although the culvert pipe is two feet below the road surface, the claimant is of the opinion that the pipe had undermined the integrity of the road shoulder. He described the culvert pipe at the edge of the road as obscured by overgrown weeds. There were no warning sings to indicate the presence of a soft shoulder. The claimant testified he is familiar with the road and regularly travels upon it to perform logging.

An employee of the respondent, Delmer Black, testified that he is assigned to the District responsible for the road in question and that to his knowledge no previous accidents had occurred where the claimant's truck rolled over the hill. This witness further stated that he is very familiar with the accident area since his family owns land and pasture nearby. He estimated the width of the road around 20 feet, and considered it adequate for vehicle use.

Another employee for the respondent, Ben Savilla, testified that he is a Claim investigator and visited the accident site. He concluded that claimant's truck was three feet off the main travel portion of the road and the bank simply could not support the load bearing weight of the fully loaded logging truck.

The issue before the Court is whether the respondent had prior notice of the alleged berm defect before the claimant's accident. In the instant claim it appears that claimant drove his

vehicle too far off the travel portion. Although the actual berm area was stable, claimant's truck was onto a portion of the bank adjacent to the berm which could not support the weight of the truck and the logs. The burden of proof is upon the claimant to demonstrate with a preponderance of the evidence that the respondent had actual or constructive notice of the alleged defect. As the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, the Court must deny this claim. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). It is the finding of this Court that notice was not provided to the respondent.

In accordance with the finding of facts and conclusions of law as indicated herein above, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 5, 1993

GARY LEE KEFFER
VS.
DIVISION OF HIGHWAYS
(CC-92-203)

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

PER CURIAM:

Claimant, Gary Lee Keffer, seeks an award from respondent for property damage sustained by his vehicle in a single-vehicle accident which took place about 9:3- p.m. on July 11, 1992, on West Virginia Route 29/3 in Roane County, at Granny's Creek.

From the evidence adduced at the hearing on October 8, 1992, it appears that the claimant was operating his vehicle, a 1977 Chevrolet van, on West Virginia Route 29/3, when he crossed over a bridge and his vehicle hit a piece of rebar on the bridge which flattened his tire. The cost of repairing his vehicle is $170.61.

The claimant testified that there was a piece of steel sticking out of a slab on the bridge and that it tore the tire on his van as he drove across the bridge. He stated that he traveled this road frequently during the week and on weekends and that the bridge had been in this defective condition for approximately one year prior to this accident. He had the defective condition reported to the respondent in June of 1992. For the claimant, Elizabeth Ballard testified that in early June, she had called the respondent on behalf of the claimant regarding the condition of the bridge and that she had called the respondent on behalf of the claimant regarding the condition of the bridge and that

she had spoken to Clarence Boggs. She stated that Mr. Boggs indicated that he was aware of the condition of the bridge and that he had received a call prior to that time by a man named Mr. Jett regarding the same bridge. She stated that on the night of the incident she was a passenger in the claimant's van and that there was no way that the claimant could have avoided the damage to the van. She wrote a letter to Mr. Boggs two days after the incident to thank him for repairing the bridge after the incident, but she also informed him that the repairs were not adequate and would not last. The bridge was repaired a second time.

For the respondent, Clarence Boggs, area supervisor for Roane County, employed by the respondent, testified that he is familiar with the road upon which the incident occurred and that the road is a low priority road due to a low amount of traffic. He stated that he did speak with Mrs. Ballard regarding the bridge and that repairs were made in July of 1992 and on August 5, 1992. He stated that he had previous complaints about the bridge possibly in February or March of 1992.

For the respondent, Edward Neil Keffer, Roane County Assistant Supervisor employed by the respondent, testified that he was contacted by Mr. Boggs to inspect the bridge and that he had seen the bridge prior to the incident and that a flood had washed the ends out from under the bridge and that the bridge was on a low priority road. He stated that he had driven across the bridge in a one-ton truck, but indicated that driving in a one-ton truck is different than driving across it in a car or a van.

The Court finds, as a matter of fact, that the respondent did have actual or constructive notice of the defective condition of the bridge. However, this was a low priority road for the respondent to maintain due to the fact that it is not a road that is subject to daily traffic; there are no multiple families driving upon the road on a daily basis; and, it is not considered to be a secondary road. The respondent has a significant duty of care in maintaining primary and secondary roads in this State; however, the Court will not hold the respondent to the dame standard of care in maintaining a road which actually serves as a right of way.

Accordingly, this claim shall be and the same is denied.

Claim disallowed.

OPINION ISSUED FEBRUARY 5, 1993

CLINT R. LAWSON, SR.
VS.
DIVISION OF CORRECTIONS
(CC-92-262)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover the value of personal property when a gold and diamond ring was taken from him at the West Virginia State Penitentiary, a facility of the respondent, by penitentiary personnel, and was not returned to the claimant. Claimant alleges damages in the amount of $3,665.00, his estimate of the value of the ring.

Respondent contends that this ring was mailed to the claimant's wife through the U.S. Postal Service and that the ring should have been delivered as addressed.

The evidence in this claim established that the claimant was requested to surrender his ring to employees of the respondent when he became an inmate at the West Virginia State Penitentiary. Claimant requested that the ring be insured when it was mailed to his wife. A representative of the U.S. Post Office telephoned claimant's wife to inform her that a torn envelope had arrived for her and that it was empty. She retrieved the torn envelope and mailed it to the claimant for his inspection. Claimant then filed a grievance with the warden. Since that time, claimant has been paroled.

The Court is of the opinion that respondent is liable to the claimant for the fair and reasonable value of the gold and diamond ring which was surrendered by the claimant to the respondent. Respondent was negligent in failing properly to mail valuable property belonging to the claimant and in failing to insure the contents of the package. The Court has determined that claimant is entitled to the amount of $1,500.00 as the fair and reasonable value of this ring.

For these reasons, the Court is of the opinion to and does grant an award in the amount of $1,500.00.

Award of $1,500.00.

OPINION ISSUED FEBRUARY 5, 1993

LUMBERPORT VOLUNTEER FIRE DEPT.
VS.
STATE FIRE COMMISSION
(CC-92-348)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $6,630.44 for funds which were denied from the casualty and pension fund due to an error resulting in the deletion of the claimant's name from the certified list approved by the respondent State Agency.

Respondent, in its Answer, admits the validity of the claim, but states that it expended the funds and failed to include the claimant for the amount certified as its share.

The Court believes that this is a claim which in equity and good conscience should be paid. Accordingly, the Court makes an award to the claimant in the amount of $6,630.44.

Award of $6,630.44.

OPINION ISSUED FEBRUARY 5, 1993

NANCY A. MAIHOFF, PH.D.
VS.
BOARD OF DIRECTORS OF THE STATE COLLEGE SYSTEM
(CC-93-15)

Claimant represents self.
John G. Hackney, Jr., Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, an employee of West Virginia Institute of Technology, a facility of the respondent, seeks $385.57 for a salary discrepancy. The claimant was not paid in accordance with her contract during the fiscal year 199-92. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claimant's proper salary could have been paid.

In view of the foregoing, the Court makes an award in the amount of $385.57.

Award of $385.57.

OPINION ISSUED FEBRUARY 5, 1993

JACOB C. MILLER
VS.
DIVISION OF CORRECTIONS
(CC-90-391)

Represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, an employee of the Anthony Center Education Unit, brought this action to recover back wages in the amount of $34,076.08. The Anthony Center Education Unit is part of the Anthony Center facility of the respondent in Greenbrier County. A portion of this claim was paid to claimant by the Department of Education as the claimant was at one time employed within the Department of Education although he was working at the Anthony Center.

Respondent in its Answer admitted the allegations and facts in the claim and that claimant is entitled to the sum of $30,512.79 for the back wages.

Accordingly, the Court makes an award to the claimant in the amount of $30,512.79.

Award of $30,512.79.

OPINION ISSUED FEBRUARY 5, 1993

JOSEPH F. MYERS
VS.
DIVISION OF HIGHWAYS
(CC-92-125)

Claimant represents self.

Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 1978 Toyota when claimant was driving his vehicle on Local Service Route 25/2, also known as Berry Mountain Road near Thurmond, West Virginia, on September 14, 1991. His vehicle went over a corrugated metal pipe sliced the right front tire of the vehicle. Claimant replaced the tire at a cost of $95.35. The incident occurred at approximately 2:00 p.m. when claimant was returning from a family reunion which he had been attending.

Respondent contends that this local service route is a very low priority road. Records from respondent reflect that work was performed to stabilize this road by employees of the respondent one month prior to claimant's incident. Testimony established that respondent was aware of the exposed jagged edge of the pipe and attempted to cover this defect with dirt. Respondent did not have any complaints about the condition of this particular pipe or culvert prior to claimant's accident. However, it does not appear that the maintenance performed to stabilize the road included maintenance of the culvert.

The Court has determined that respondent was negligent in the maintenance of this corrugated metal pipe or culvert. It is reasonable to assume that a jagged edge of a corrugated metal pipe may cause damage to a vehicle. Therefore, the Court is of the opinion that claimant has established a claim for the damage to his vehicle.

Accordingly, the Court grants an award to the claimant in the amount of $95.35.

Award of $95.35.

OPINION ISSUED FEBRUARY 5, 1993

RALEIGH COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-92-245)

Larry Frail, Prosecuting Attorney of Raleigh County, for claimant.

George P. Stanton, III, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for determination upon the Answer filed by the respondent and correspondence received from the claimant, wherein the claimant agreed to accept the amount stated in the Answer as settlement of the claim.

Claimant, County Commission of Raleigh County, provides and maintains a facility for the incarceration of prisoners who have committed crimes in Raleigh County. Some of the prisoners held in the county facility have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action to recover the costs of housing for prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the county prison facility for periods of time beyond the date of the commitment order.

The Court previously determined in the *County Comm'n. of Mineral County v. Div. of Corrections*, as unpublished opinion of the Court of Claims issued November 21, 1990, that the respondent is liable to the claimant for the cost of housing these inmates.

Pursuant to the holding in the *Mineral County* Opinion, the respondent reviewed this claim to determine the number of inmate days for which respondent may be liable. Respondent then filed an Answer admitting the validity of the claim and that the amount of $95,000.00 is a fair and reasonable settlement of the claim.

In view of the foregoing, the Court makes an award to claimant in the amount of $95,000.00.

Award of $95,000.00.

OPINION ISSUED FEBRUARY 5, 1993

DONNIE RINGER
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY OF WEST VIRGINIA
(CC-92-152)

Claimant present in person.

John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

Claimant, Donnie Ringer, seeks an award from the Board of Trustees of the University of West Virginia for property loss sustained by a breaking and entering which took place on March 16, 1992, at 69 Dadisman Hall, West Virginia University, a facility of the respondent located in the city of Morgantown.

From the evidence adduced at the hearing on October 15, 1992, it appears that claimant had left his dormitory for spring break when his room was vandalized and personal property was stolen. The stolen property was worth $2,120.14.

The claimant testified that he left for spring break and that the dormitories were supposed to have been shut down during that time; however, somebody forcibly broke into his room and stole his stereo equipment and compact disks.

The claimant's mother, Elaine C. Ringer, testified on behalf of the claimant that the breaking and entering had been reported to her by the security at the school. She stated that she did recover a portion of the loss for the stolen goods under her homeowners insurance policy.

For the respondent, Darryl Lewis, area manager of Dadisman Hall, testified that the breaking and entering was discovered by a custodian, but that he inspected the premises of Dadisman Hall to determine how the entry was made into the hall itself. He found no forced entry. He stated that every window and door was unlocked and that there were bars placed on the doors. He also recognized a section of a handout called "Terms, Conditions, and Regulations" which is made part of the contract for the university housing, which states that the university is not responsible for the loss of property by students.

The Court takes notice of page 10 of *Residential Living* which is part of the contract between the resident student and West Virginia University Department of Housing and Residence Life, which reads:

> West Virginia University does not assume, responsibility for personal accident, injury, or illness sustained by residents, guests, or visitors; nor for damage, theft, or loss of personal property...

The Court finds, as a matter of fact, that respondent took the necessary precautions against the breaking and entering; that respondent is not responsible for the loss of the personal property of the claimant under the above-mentioned contract section; and that the claim shall be denied due to lack of proof of negligence on the part of the respondent by a preponderance of the evidence.

Claim disallowed.

OPINION ISSUED FEBRUARY 5, 1993

BRENDALOU L. SAMUEL
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY OF WEST VIRGINIA
(CC-92-162)

Claimant present in person.
John E. Shank, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Brendalou L. Samuel, seeks an award from the respondent for property loss in a breaking and entering which took place about 3:00 a.m. on May 5, 1992, in Towers Residence Hall, West Virginia University, a facility of the respondent located in the city of Morgantown.

From the evidence adduced at the hearing on October 15, 1992, it appears that during a prank fire alarm, a camera and other camera equipment belonging to claimant was stolen. The stolen property was worth $780.00.

The claimant testified that she was awakened by a prank fire alarm in the middle of the night during finals week and she left her room, after locking her door, to exit the building. Upon returning to her room, she noticed that her door was open and that her watch was not on her desk where she had left it and her chemistry book was missing. The next day, she noticed that her camera was also missing. She reported the theft to the Department of Public Safety for the University. The stolen property has not been recovered.

Malanie J. Cook, Assistant Director for Residence Life, West Virginia University, testified that she is familiar with the normal procedures for matters surrounding fire alarms at the residence halls, and the resident assistants (RAs) are supposed to knock on the doors of the rooms and tell the students to evacuate the building. She also testified that prank fire alarms are common during finals week.

The Court takes judicial notice of page 10 of the booklet, *Residential Living*, which is part of the contract between the resident student and West Virginia University Department of Housing and Residence Life, which states:

West Virginia University does not assume responsibility for personal

accident, injury or illness sustained by residents, guests, or visitors;
nor for damage, theft, or loss of personal property...

The Court finds, as a matter of fact, that respondent is not responsible for the loss of the personal property of the claimant under the above-mentioned contract section; and the claim must be denied due to lack of proof of negligence on the part of the respondent by a preponderance of the evidence.

Claim disallowed.

OPINION ISSUED FEBRUARY 5, 1993

PHYLLIS SHUPE
VS.
DIVISION OF HIGHWAYS
(CC-92-120)

Mark Wills, Attorney at Law, for claimant.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court upon a stipulation filed by the parties.

The stipulation stated the facts as follows:

On or about March 26,1 992, claimant, Phyllis Shupe, was driving her vehicle on U.S. Route 52 in Mercer County when she "suddenly saw some rocks in the road just in front of [her]." Claimant was unable to avoid these rocks and her vehicle struck the rocks.

Respondent had prior notice of rock falls at this location. Respondent has determined that there was negligence on its part and that it is compelled by a moral obligation to stipulate to a reasonable amount of damages claimed by the claimant.

Although "Rock Falls" signs are in place, respondent was unable to determine if the signs were in place on the date of claimant's accident.

The parties agreed that full and just compensation for the damage to claimant's vehicle as a result of this incident is $500.00.

The Court, having reviewed the Stipulation of Facts, adopts the stipulation and, further, the Court has determined that $500.00 is a fair and reasonable settlement of this claim.

Accordingly, the Court makes an award of $500.00 to the claimant.

Award of $500.00.

OPINION ISSUED FEBRUARY 5, 1993

SODARO'S ELECTRONICS
VS.
BOARD OF DIRECTORS OF THE STATE COLLEGE SYSTEM
(CC-92-301)

J. Michael Ranson, Attorney at Law, for claimant.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,302.02 for a camcorder that was misplaced while in the possession of West Virginia Institute of Technology, a facility of the respondent. The invoice for the camcorder was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount $1,302.02.

Award of $1,302.02.

OPINION ISSUED FEBRUARY 5, 1993

J. H. SOMERVILLE
VS.
DIVISION OF HIGHWAYS

(CC-92-218)

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

PER CURIAM:

Claimant, J.H. Somerville, seeks an award from respondent for property damages in the amount of $2,247.26 for damages resulting from the failure of respondent to maintain a ditch on property he owns in Mason County, West Virginia, on Owl Hollow Road. Claimant alleges that respondent has failed to maintain the ditch line and it is now grown over. His claim is for the cost to clean out the ditch line, place more tile in the ditch line, and plant grass seed to cover area thus providing an area for ingress and egress on the property.

From the evidence adduced at the hearing on October 8, 1992, it appears that the claimant purchased this property twenty years ago and now wishes to build a house on this property, but these is a ditch which was placed by respondent for the purpose of draining water from a highway owned by respondent. He claims that there was an agreement with the previous owner that respondent would maintain this ditch.

The claimant testified that he purchased the property on August 17, 1972; that the prior owner had given a right of way to the State for the purpose of digging such a drainage ditch on the superintendent who had agreed on behalf of the respondent to maintain the ditch. The ditch is 280 feet long. Claimant also testified that he would like for the respondent to pay the cost of cleaning the ditch out to prepare it for bulldozing, and the cost of bulldozing the ditch to place three more tile so that he may have a way to drive into and around his property.

The Court finds, as a matter of fact, that the claimant does not have a remedy in this forum; that if the respondent has taken his property without just compensation, claimant may wish to pursue a remedy in the circuit court, seeking to compel the State to institute a condemnation action against the property; and further, that claimant has not established that the respondent has a duty to maintain the ditch which is located on his property.

As this Court lacks jurisdiction over the subject matter of this claim, the Court must deny the claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 5, 1993

LEWIS JUNIOR SWANN

VS.
DIVISION OF HIGHWAYS
(CC-92-37)

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

PER CURIAM:

Claimant, Lewis Junior Swann, seeks an award from the Division of Highways for property damage sustained in a single-vehicle accident which took place about 6:50 p.m. on December 13, 1991, on Kincheloe Road, also designated Route 35, in Harrison County, West Virginia.

From the evidence adduced at the hearing on October 14, 1992, it appears that the claimant was operating his vehicle, a 1982 Nissan four wheel drive pick-up truck, on Kincheloe Road when he met an on-coming pick-up truck and when he attempted to drive to the right side of the road, his truck hit a pile of cinders on the side of the road, causing damage to his truck in the amount of $1,457.50.

The claimant testified that he was traveling in an easterly direction on Kincheloe Road, which is a blacktop road that is 15 feet and 10 inches wide, and he noticed a truck coming in a westerly direction towards him. The road was narrow, therefore, in order to avoid hitting the truck as it passed, the claimant pulled his truck over to the side of the road where it struck a cinder pile located at the edge of the road and on the berm area of the road. This caused the truck to flip up two wheels and into an embankment, knocking out two fence posts and an old telephone pole. Claimant stated that the pile of cinders extended from a fence line onto the blacktop area of the road and the pile was approximately two feet high. He had noticed the pile the day before the accident. He also stated that the driver of the other truck, Vernon Hughes, did not force him off the road.

For the claimant, Joel Baird, who lives on Kincheloe Road, testified that he was on his way to work when he came upon the scene of the accident. He described the pile as being a ton or a ton and one-half of cinders dumped partially on the berm and partially on the pavement, with the highest point of the pile being in the berm area of the road.

For the respondent, Delbert BeBerry, area maintenance supervisor, employed by the respondent, testified that he was called to the scene of the accident on December 13, 1991. He stated that the pile of cinders was placed in that location for snow and ice control. He had not received any calls prior to the accident to inform him that the cinders were in the road.

Also for the respondent, Bill Wyckoff, assistant maintenance superintendent for Harrison County, employed by the respondent, testified that he was called to the scene of the accident with Mr. Berry and that there were a few cinders that were scattered on the road, but that

it only took two or three minutes to scrape them off with a shovel. He stated that the pile alongside the road had only been there for a couple of days before the accident.

The Court finds, as a matter of fact, that the claimant was aware that the cinder pile existed prior to the accident; that the claimant could have avoided the pile by appropriate defense driving; that the negligence of the claimant was equal to or greater than that of the respondent, if any; and that the claim shall be denied under the doctrine of comparative negligence.

Claim disallowed.

OPINION ISSUED FEBRUARY 5, 1993

JEFFREY L. WHITE
VS.
DIVISION OF HIGHWAYS
(CC-92-221)

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

PER CURIAM:

Claimant, Jeffery L. White, seeks an award from the Division of Highways for damage to his motor vehicle incurred in a one-car accident which took place on May 12, 1991, on Tom's Run Road, also designated West Virginia Route 5, in Monogalia County, near the city of Morgantown.

From the evidence adduced at the hearing on October 14, 1992, it appears that claimant's wife, Linda White, was operating the claimant's vehicle, a 1981 Buick Regal, on Tom's Run Road and drove off the side of the road, causing damage was $422.50.

For the claimant, Linda White testified that she was driving home on Tom's Run Road, traveling at a speed of approximately ten miles per hour, when a red pick-up truck met her vehicle in the road. She testified that the road was too narrow for two cars to pass at the same time so she pulled over to the side of the road in order to let the truck to pass, and claimant's vehicle then dropped off the berm of the road into a rut at the edge of the road approximately eight to twelve inches deep causing damage to the transmission of the vehicle. Mrs. White stated that she travels this road quite often going to and from her home, and that the road has been in this dangerous condition for at least two years.

Also for the claimant, Debra Lynn Hartman, sister of Mrs. White, testified that she

is familiar with the scene of the accident, and that the road is very narrow and, if a person meets another vehicle in the road, one of the drivers must stop his/her vehicle because the vehicle will receive damages if it drops off the edge of the road due to the condition of the berm.

The Court finds, as a matter of fact, that the claimant was familiar with the defective condition of the road prior to the date of the accident; that the respondent was negligent in failing to correct the long-standing hazardous condition of the road; but that the negligence of the claimant was equal to or greater than that of the respondent. Therefore, the Court is of the opinion to and does deny the claim under the doctrine of comparative negligence.

Claim disallowed.

OPINION ISSUED FEBRUARY 5, 1993

BUHONG ZHENG
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY OF WEST VIRGINIA
(CC-91-225)

Claimant represent selves.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover medical expenses for his son who was injured on a fence owned by West Virginia University, a facility of the respondent. On May 24, 1991, claimant's infant son was playing in fenced area at the apartment complex in which claimant resided with his family. Claimant's son was going for a walk with his grandmother when he approached a split rail fence which separated the apartment complex from a parking area. The fence was in deteriorated condition and claimant's son got a splinter in his hand when he put his

hand upon the fence. Claimant incurred medical expenses in the amount of $799.50 for medical treatment and hospitalization of his son as a result of an infection in the child's hand.

Claimant contends that respondent was negligent in its maintenance of a structure in an area where it was known that children living in an apartment complex played. There was a sign indicating "Caution Children Play" for the area. The respondent knew or should have known that children played near this fence.

Respondent contends that a split rail fence by its nature has splinters and that respondent makes the necessary repairs to the fence as it deteriorates.

The Court is of the opinion that the respondent, having placed a split rail fence around an apartment complex intended for families of resident students, should have maintained the fence in a more diligent manner. It was known to respondent that children would be playing near the fence and that the fence was of such a nature so as to pose a danger to them.

Accordingly, the Court makes an award to claimant for the medical expenses which he incurred on behalf of his son in the amount of $799.50.

Award of $799.50.

OPINION ISSUED FEBRUARY 24, 1993

CABELL COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-92-211)

William T. Watson, County Attorney of Cabell County, for claimant.
George P. Stanton, III, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for determination upon the Answer filed by the respondent and correspondence received from the claimant, wherein the claimant agreed to accept the amount stated in the Answer as settlement of the claim.

Claimant, County Commission of Cabell County, provides and maintains a facility for the incarceration of prisoners who have committed crimes in Cabell County. Some of the prisoners held in the county facility have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action to recover the costs of housing for prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the county prison facility for periods of time beyond the date of the commitment order.

The Court previously determined in the *County Comm'n of Mineral County v. Div. of Corrections*, an unpublished opinion of the Court of Claims issued November 21, 1990, that the respondent is liable to the claimant for the cost of housing these inmates.

Pursuant to the hold in the Mineral County Opinion, the respondent reviewed this claim to determine the number of inmate days for which respondent may be liable. Respondent then filed an Answer admitting the validity of the claim and that the amount of $160,000.00 is a fair and

reasonable settlement of the claim.

In view of the foregoing, the Court makes an award to claimant in the amount of $160,000.00.

Award of $160,000.00.

OPINION ISSUED FEBRUARY 24, 1993

JARRETT PRINTING COMPANY
VS.
WEST VIRGINIA STATE SENATE
(CC-93-49)

Claimant represents self.
Michael R. Cline, Attorney at Law, for respondent.

PER CURIAM:

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

Claimant seeks $7,920.00 for printing services on the West Virginia Blue Book under contract with respondent dated July 21, 1992. The invoice for the services can not be processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there are sufficient funds to be expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $7,920.00.

Award of $7,920.00.

OPINION ISSUED FEBRUARY 24, 1993

ERNEST A. JOHNSON, JR.
VS.
DIVISION OF HIGHWAYS

(CC-91-100)

Claimant represents self.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover for personal injuries and for damages to his vehicle which were sustained in an automobile accident during the month of February 1991, in Marion County, West Virginia.

The Court issued an opinion on May 19, 1992, determining that respondent is liable to the claimant. The parties filed a Stipulation of Damages on February 10, 1993, agreeing to an amount of $4,003.10 as full and just compensation for all damages.

The Court, having reviewed the Stipulation, is of the opinion that the medical expenses in the amount of $1,448.00; the damage to the vehicle in the amount of $710.03; and the amount of $800.00 for present and future lost wages for a total amount of $4,003.10, represent a fair and reasonable settlement of this claim.

Accordingly, the Court hereby grants an award to the claimant in the amount of $4,003.10.

Award of $4,003.10.

OPINION ISSUED FEBRUARY 24, 1993

ZANE L. METZ, SR.
VS.
ALCOHOL BEVERAGE CONTROL ADMINISTRATION
(CC-93-30)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $29.45 for an oil change and a state inspection for a vehicle belonging to the respondent. The invoice for the services was not processed for payment in the proper fiscal

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

In view of the foregoing, the Court makes an award in the amount $29.45.

Award of $29.45.

OPINION ISSUED APRIL 28, 1993

CARL BERKLEY
VS.
SUPREME COURT OF APPEALS
(CC-93-52)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,500.00 for serving as a jury commissioner for respondent State agency during fiscal years 1990 and 1991. The court order for the services could not be processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the clam and states that there were sufficient funds expired int the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,500.00.

Award of $1,500.00.

OPINION ISSUED APRIL 28, 1993

LARRY C. MCNAIR
VS.

BUREAU OF EMPLOYMENT PROGRAMS
(CC-93-44)

Claimant present in person.
Jack O. Friedman, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Larry C. McNair, seeks an award from the Bureau of Employment Programs, Employment Service Division, for loss of personal property sustained by a breaking and entering of a West Virginia State owned vehicle at 7:00 p.m. on September 29, 1992, in Cambridge, Ohio.

From the evidence adduced at the hearing on February 25, 1993, it appears that the claimant was employed by the respondent State agency as a Programmer Analyst; that he was returning to Cross Lanes, West Virginia, from Wheeling, in a State-owned vehicle; that he stopped in Cambridge, Ohio, to dine at a restaurant; that the vehicle was vandalized; and that claimant's personal property, as well as State-owned property was stolen. The damage to the vehicle and the loss of the State-owned property were reimbursed by the State's insurance; however, the claimant was not reimbursed for his personal property which was stolen. He estimated the value of his stolen belongings at $1,095.85.

This Court finds, after reviewing the record, that the claimant was required to travel as a result of his employment and that certain of the personal items which were stolen were necessary items for travel. The State, being the owner of the vehicle, had the right to control the details of the work done by the claimant, therefore, creating a master-servant relationship. *MacGregor v. Bradshaw*, 193 Va. 787, 71 S.E.2d 361 (1952). 193 Va. 787, 71 S.E.2d 361 (1952). Courts have held that once in control of the master's property, the joinder of the master's and servant's business will not relieve the master from responsibility if the deviation is not too extensive. Likewise, in the instant claim, the claimant was in control of the master's property while discharging the master's business. The fact that the claimant had personal possessions inside the master's vehicle does not relieve the master of responsibility when the claimant was acting

within the normal scope of business and the personal items of the claimant were necessary for carrying out the business of the master. cf. *Kidd v. Dewitt*, 128 Va. 438, 105 S.E. 124 (1920).

The claimant seeks an award for $1,095.85. However, after reviewing the list of items stolen, this Court finds that some of the items on the list were not necessary for the claimant's employment and denies reimbursement for such items.

Accordingly, this Court grants an award in the amount of $1,030.16.

Award of $1,030.16.

OPINION ISSUED APRIL 28, 1993

WILLIAM C. MORGAN, JR., M.D., INC.
VS.
BUREAU OF EMPLOYMENT PROGRAMS
(CC-93-54)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $450.00 for professional services rendered to the respondent State agency. The invoice for the services was not processed for payment in the proper fiscal year due to a processing error; therefore, the claimant has not been paid. The respondent admits the validity and the amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $450.00.

Award of $450.00.

OPINION ISSUED APRIL 28, 1993

MARY ANNE MULLENAX
VS.
DEPARTMENT OF EDUCATION
(CC-93-40)

Claimant represents self.

Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks reimbursement of $293.00 for a course taken to renew her teaching certificate for fiscal year 1991-92. The invoice for the course was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $293.00.

Award of $293.00.

OPINION ISSUED APRIL 28, 1993

CLARISE ROLLINS AND JOSEPH ALLEN ROLLINS
VS.
DIVISION OF HIGHWAYS
(CC-91-247)

Michael T. Clifford, Attorney at Law, for claimant.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimants, Clarise and Joseph Rollins, seek and award of $205.00 from the Division of Highways for personal injury sustained on August 12, 1989, when Joseph Rollins fell from a bridge while leaning on a guardrail in Robson, Fayette County. The claimants allege that the respondent was negligent in the maintenance of the guardrail.

From the evidence adduced at the hearing on January 21, 1993, it appears that the claimant, Joseph Rollins, was waiting for a friend on a bridge when he leaned on the guardrail which was in a defective condition and fell backward into a creek sustaining personal injury. His mother, Clarise Rollins, incurred unreimbursed medical expenses of $205.00.

The claimant, Joseph Rollins, testified that on August 12, 1989, between 5:00 and 6:00 p.m., he was waiting on the bridge for a friend when he learned on the guardrail, it gave way,

and he fell backwards into a creek. As he fell over the side of the bridge, he attempted to catch himself on the cement pier of the bridge and, in this attempt, he broke his left arm and fractured the thumb on his right hand. After he climbed up the bank of the creek, he observed that the metal guardrail post through the bolt holes. Since this accident, claimant has experienced pain in his left arm when it rains or is cold outside. His left arm gives out on him now when he attempts certain activities.

The claimant, Clarise Rollins, testified that she is the mother of Joseph Rollins; that her son was injured when he fell from the bridge; and that she incurred medical bills on behalf of her son in the amount of $205.00.

John Zimmerman, Assistant County Supervisor employed by the respondent, testified that on the date of the accident he was a general foreman for the respondent. Shortly after claimant's accident, the county office received a telephone call informing respondent that someone had fallen from the bridge. The acting county supervisor at the time, Mr. Johnson, sent a crew to replace the bolt in the defective guardrail. He stated that he inspected respondent's records to determine if there had been any complaints about the defective condition guardrail prior to claimant's accident and there were none. [In rebuttal to certain unsubstantiated testimony from Mrs. Rollins concerning activities of employees of the Governor's Summer Youth Program, Mr. Zimmerman stated that this program is not under the direction of the respondent and the director did not report to him or to the county superintendent.]

The Court finds, as a matter of fact, that the respondent had no actual or constructive notice of the defective guardrail prior to claimant's accident; and that upon receiving such notice, employees of the respondent responded in an expeditious manner to correct the defect. As the claimants failed to establish negligence on the part of the respondent by a preponderance of the evidence, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED APRIL 28, 1993

TRI-STATE ASPHALT CORPORATION
VS.
DIVISION OF HIGHWAYS
(CC-91-192)

Robert J. Samol, Attorney at Law, for claimant.
Robert F. Bible, Attorney at Law, for respondent.

STEPTOE, JUDGE:

By contract in writing dated June 28, 1990, between West Virginia Division of Highways, the respondent and hereinafter known as "Highways," and Tri-State Asphalt Corporation, claimant and hereinafter known as "Contractor," it was agreed by the parties that for a specified sum payable by Highways, Contractor would furnish labor, material and miscellaneous concomitant services to prepare for repaving and to repave 1.88 miles of a public road in and near Wheeling known as River Road and designated as West Virginia Route 2.

Plans and specifications were attached to and made part of the contract.

Contractor fully performed the work stipulated to be done, and Highways accepted the work and paid the agreed price.

On December 20, 1990, after all work had been done but before having received its final cash payment, Contractor requested additional compensation of $8,404.76 for work it had done and which Contractor alleged was outside of the scope of the work required by the contract but which it had been forced or directed to perform by representatives of Highways.

Highways refused to pay the additional sum so requested by Contractor, and Contractor thereupon filed a claim for the money in this Court.

Contractor alleges that under Section 229.01 of the contract it performed preparatory work on shoulders and ditches, which called for payment for that phase of the contract in the amount of $8,807.80, but which in fact, because of demands made upon it by representatives of Highways, for work not specified in the contract, actually cost $17,212.56, and its claim is for its additional costs.

The Court believes, after reviewing the pleadings, the evidence, arguments and post-hearing briefs of the parties, that there are three areas of disagreement between the parties, to wit:

Removal of concrete curbing;
Removal of so-called sluffage; and
Work in and around ditches,

which will be considered seriatim.

Removal of Concrete Curbing

The parties agree that Contractor was required to remove, before commencement of

repaving, concrete curbing between Station 81+25 and Station 87+70 Rt., as directed by note on Plate 24 of the Plan of Proposed Improvement incorporated into the contract.

The contract did not specify any particular method, or any particular machinery, by which the Contractor should effect removal of the concrete.

It is clear from the evidence that, in estimating its cost to remove the concrete in preparation for making its bid on the whole contract, Contractor believed that the most efficient method of removing the concrete would be by the use of a Barcomill, a mobile piece of machinery on which was mounted a cylinder with high-tensile metal spikes attached, which could, when revolved by a motor at high speed, break up concrete upon contact. In his case the Barcomill failed to do the job properly, and the Contractor, preforce, resorted to the use of a jackhammer powered by compressed air to do the job, at considerable additional expense.

The Court finds that the scope of work required of the Contractor was in no way enlarged, and that the Contractor's additional expense was the result of Contractor's unfortunate decisions to use the Barcomill for concrete removal and bid on the basis of that method of removal.

Removal of Sluffage

Perhaps relying upon notes on Plate 8 of the Plan aforesaid, Contractor evidently assumed in its bid preparation that it would not be required to cleanse the whole outside slope of each ditch of sluffage (also spelled sloughage i.e., detritus and trash and so forth). On the first day of work, however, Highway's representatives disabused Contractor as to that assumption, and insisted upon a cleansing of all outside slopes to ditches for the whole length of the project and on both sides of the road.

The Court finds that Highways was justified in its stance by the specific language of a Project note attached to Plate 28 of the Plan aforesaid, providing:

> Shoulder and ditch work to include removal of all sluffage from existing embankment behind existing ditch line. (Emphasis supplied).

The Court believes that the contract means just what it says. Contractor's removal of sluffage in excess of what it had anticipated was not outside the scope of work mandated in the contract.

Work In and Around Ditches

The plan of Proposed Improvement, at Plate 8, provides in material part:

> This operation is intended to be minor shaping and

> scarifying of existing shoulder material plus shaping of ditches for proper drainage without leaving ditch soil on the shoulder area. This operation also includes cleaning of existing structure outlets and inlets.

Plate 28 contains a project note providing:

> New ditch line to be established from Sta. 9+62 to Sta. 11+60 Rt. Centerline of new ditch line to be approximately 7' from E.P. Payment to be included in Item No. 229-01.

Plate 24 contains a note providing:

> Sta. 85+00 to Sta. 99+60 Lt. Place swale 6' from E.P. Reshape to drain to inlets.

In fact, therefore, Contractor was required to do some ditch construction as well as ditch shaping, and such ditch construction cannot be considered to be outside the scope of required work to justify additional compensation.

On Saturday, October 13, 1990, Contractor had a crew, with machinery and trucks, working on ditches and a swale, in a nearly level area between Station 85+00 and Station 99+66, under the supervision of John T. McDevitt, the company engineer. By the end of day, Mr. McDevitt felt that the water was flowing through the swale in the area, properly, and at the hearing he testified that Highway's Inspector, Richard Dean Fordyce, indicated that there was no problem with the work. Accordingly, Mr. McDevitt caused the machinery to be moved to a company project in Weirton. Later in the day Mr. Fordyce wrote his daily report to his superiors and in it advised that he was displeased with the work, which he said needed correction. On the following Monday, October 15, 1990, Mr. Fordyce's superiors made an on-the-site inspection of the swale and directed Contractor to return to the site and do what had to be done to make water run through the swale. Contractor did so the same week, but now seeks additional compensation for having worked the extra days, inferring that the work was satisfactorily done on October 13th. Accordingly, we find that the additional work performed by the Contractor during the week commencing October 14th was corrective in nature and, therefore, not compensable.

Claim disallowed.

REFERENCES

- BERMS
- BRIDGES
- CONTRACTS
- DAMAGES
- DRAINS and SEWERS
- FALLING ROCKS--See also Landslides
- INDEPENDENT CONTRACTORS
- LANDSLIDES
- LIMITATION OF ACTIONS
- MOTOR VEHICLES, Division of
- NEGLIGENCE--See also Motor Vehicles, Streets and Highways
- NOTICE
- PEDESTRIANS
- PRISONS AND PRISONERS
- PUBLIC EMPLOYEES
- STATE AGENCIES
- STREETS and HIGHWAYS
- TREES and TIMBER
- TRESPASS
- VENDORS
- W. VA. UNIVERSITY

BERMS

COLLINS VS. DIVISION OF HIGHWAYS (CC-92-170)

The Court disallowed a claim for damage to the undercarriage of claimant's car caused by a hole on the berm. The Court said that when claimant is not faced with an emergency and drives onto the berm voluntarily, he takes the berm as he finds it. . . . . p. 201

HINKLE VS. DIVISION OF HIGHWAYS (CC-89-97)

Claimant's decedent was killed when the right wheel of his tractor encountered a void in an unusually narrow berm on a mountain road, causing the tractor to flip off the road. The Court said the berm area was inexcusably inadequate, that claimant's decedent was 25 percent at fault, and that respondent was liable for death damages totalling $58,701. . . . . p. 22

PANNELL VS. DIVISION OF HIGHWAYS (CC-88-321)

Where claimant-passenger was familiar with the narrow unpaved road and where the shoulder area gave way allegedly due to poor drainage, the Court held that respondent had no notice of any erosion or other road hazard and was not an insurer of the safety of travelers on its roads. Where the cause of the accident was speculative, the claim will be disallowed. . . . . p. 126

WHITELEY VS. DIVISION OF HIGHWAYS (CC-90-335)

Where claimant proceeded onto the berm area for unknown reasons, and was injured when his car tripped and rolled on a berm of four to five inches in depth, the Court found that such drop-offs are not uncommon in West Virginia and that claimant's own negligence was equal to or greater than respondent's. Claim disallowed. . . . . p. 187

See also:

ELLIS, DANIEL VS. DIVISION OF HIGHWAYS (CC-92-184) . . . . . p. 204

BRIDGES

BRAKE VS. DIVISION OF HIGHWAYS (CC-89-171)

Claimant alleged that respondent was negligent in failing to warn the travelling public that a bridge over a creek had been removed. The Court held that where claimant had passed a sign saying "Road Closed to Thru Traffic," and where respondent had no notice that a barricade was not in place, that there was no negligence on the part of respondent. . . . . p. 49

COMER VS. DIVISION OF HIGHWAYS (CC-90-420)

Respondent had placed steel plates to temporarily cover a large hole on a bridge on U.S. 60. The Court held that when the plates had been knocked away, exposing the rebar of the bridge, that respondent was liable for claimant's vehicle damage for failing to adequately guard against this known hazard. . . . . p. 54

MERRIAN VS. DIVISION OF HIGHWAYS (CC-90-238)

Claimant suffered a concussion when he fell from his bicycle while riding across a bridge. The Court said the respondent was negligent because the rebar was exposed, but also found claimant was aware of the condition and could have walked his bicycle across the bridge. Claim disallowed. . . . . p. 173

CONTRACTS

BONNER VS. DIVISION OF HIGHWAYS (CC-89-202)

Claimant contractor allowed respondent to use his meadow property for waste relocation after a landslide in Tucker County, and in return, respondent agreed to regrade, contour and seed claimant's property. The Court found that respondent failed to perform and that claimant was entitled to quantum meruit award for cost of doing the work himself.
Award of $5,900. . . . . p. 65

C & L CONSTRUCTION VS. BOARD OF TRUSTEES OF THE UNIVERSITY OF WEST VIRGINIA (CC-90-393)

The Court awarded $33,654.02, in a breach of contract claim involving the Marshall University Fine Arts Center. The Court found claimant was entitled to compensation for extra manhours and redesign costs related to several change orders. . . . . p. 192

ELMO GREER & SONS VS. DIVISION OF HIGHWAYS (CC-87-444)

Claimant contractor brought an action for delay damages resulting from failure of an adjacent contractor to comply with construction of its portion of I-64 and provide fill material in a timely fashion. The Court awarded $1.2 million in increased overtime and idle equipment costs. . . . . p. 165

HOLLOWAY CONSTRUCTION VS. DIVISION OF HIGHWAYS (CC-88-312)

Claimant brought a 42-count complaint for $7.5 million in ennumerated cost overruns on Corridor G. The Court granted an award for respondent's unilateral changes in blasting schedule, traffic control, waste relocation and several other items. Award of $2.4 million. . . . . p. 35

McKINLEY ENGINEERING COMPANY VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-91-2)

The Court awarded $1,675.60 in accumulated costs after respondent cancelled a contract. . . . . p. 60

TRI-STATE ASPHALT CORP. VS. DIVISION OF HIGHWAYS (CC-91-190 and CC-91-191)

Where claimant failed to comply with a contractual 120-day deadline for filing a claim for enumerated extra ditching work and extra traffic control expense, the Court sustained motions to dismiss the claims as untimely. The Court held that the 120-day deadline is not unreasonable and is not so short as to arbitrarily abrogate a right of action. . . . . p. 16

TRI-STATE ASPHALT CORP. VS. DIVISION OF HIGHWAYS (CC-91-192)

The Court found that the scope of the contract was not enlarged regarding concrete curbing, ditch work, sluffage and other alleged extra work. Any extra work performed by claimant was corrective in nature and not compensable. Claim disallowed. . . . . p. 235

VECELLIO & GROGAN VS. DIVISION OF HIGHWAYS (CC-91-243)

The Court awarded $172,130.32 in damages and interest, where the claimant contractor alleged that respondent made performance impossible because of location of an excavation overlap. p. 147

DAMAGES

BONNER VS. DIVISION OF HIGHWAYS (CC-89-202)

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Award of $5,900. . . . . p. 65

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HUTTON VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-92-56)

Claimant, employee of Huntington State Hospital, incurred attorney fees when, acting in the course of his duties, he prevented a visitor from removing a patient from the premises. The Court awarded $500 indemnification . . . . . p. 154

McKINNEY VS. DIVISION OF HIGHWAYS (CC-87-165)

Where the evidence was that claimant had significant pre-existing back conditions, including degenerative disc disease and arthritis, and where claimant's employment status at the time of injury was in question, the Court disallowed a claim for future lost earnings resulting from claimant's vehicular accident. . . . . p. 87

DRAINS and SEWERS

ASHWORTH V. DIVISION OF HIGHWAYS (CC-92-290)

The Court awarded $1,542.28 where claimant's property was damaged by flooding due to defective and clogged culvert maintained by respondent. . . . . p. 189

RICHARDS VS. DIVISION OF HIGHWAYS (CC-89-465)

Where claimants' motorcycle went out of control after encountering pooled water on Route 19 in Monongalia County, the Court said that claimant had ample opportunity to avoid the water and instead chose to drive through it. Claim disallowed. . . . . p. 71

STALEY VS. DIVISION OF HIGHWAYS (CC-89-315)

The Court disallowed a claim for water damage to claimant's house, where claimant built the house below the road surface, did not install a basement drain, and where water damage coincided with adjacent construction of a new apartment complex, also built by claimant. . . p. 32

WILSON VS. DIVISION OF HIGHWAYS (CC-90-196)

Where claimant's property sustained substantial flood damage following a 50-year storm, the Court held that respondent was negligent in allowing a mound of dirt to block the inlet of a culvert, resulting in flooding. The Court also said claimant was partly at fault for failing to notify respondent and allowed a percentage award of 60 percent. Award of $20,100. . . . . p. 98

FALLINGS ROCKS -- See also Landslides

BARKER VS. DIVISION OF HIGHWAYS (CC-90-190)

Where the evidence was that rockfall is an ongoing problem on Route 20 near the Bluestone Dam, and where the area is not shelved, the Court found that respondent had notice and ample opportunity to repair and safeguard the area against rock hazard. Lack of federal funding is not an excuse, given this continuing hazard. Award of $1,516.12. . . . . p. 47

DUNN VS. DIVISION OF HIGHWAYS (CC-92-26)

Where the evidence was that the road area in question had been a known rock fall hazard for 50 years and the respondent's employees frequently patrolled the area for rock fall hazards, the Court said cleaning up rocks after the fact is insufficient remedial action.
Award of $882.51. . . . . p. 164

FERRELL VS. DIVISION OF HIGHWAYS (CC-90-362)

The Court disallowed a claim for rock damage, where the area was appropriately marked with falling rock signs and respondent had received no calls of rock hazard. . . . . p. 21

KEELY VS. DIVISION OF HIGHWAYS (CC-91-122)

Where the evidence is that claimant was familiar with the risk of rock fall and had not advised respondent, and where respondent had placed warning signs, the Court disallowed a claim for rockfall damage to claimant's vehicle. . . . . p. 11

MYERS VS. DIVISION OF HIGHWAYS (CC-91-108)

The Court disallowed a claim where a rock fell from a ledge damaging claimant's car, holding the rock hazard was unknown to respondent and respondent is not an insurer of traveler's safety. p. 111

REDMAN VS. DIVISION OF HIGHWAYS (CC-89-282)

Where respondent was informed of rockfall on a blind curve and a period of 15 to 40 minutes passed prior to claimant's accident, the Court found respondent 70 percent at fault for failing to act promptly to warn motorists earlier. . . . . p. 33

See also, MAHAFKEY VS. DIVISION OF HIGHWAYS (CC-92-73) p. 118; and MOORE VS. DIVISION OF HIGHWAYS (CC-92-116) p. 174.

INDEPENDENT CONTRACTORS

PRESSLEY RIDGE SCHOOL VS. DEPT. OF HEALTH AND HUMAN SERVICES (CC-92-2)

The Court awarded $156,297 to claimant, a youthful offender program, as reimbursement for loss of coverage from Medicaid, as per the terms of the contract. . . . . p. 175

LANDSLIDES -- See also Falling Rocks

BARKER VS. DIVISION OF HIGHWAYS (CC-90-190)

Where the evidence was that rockfall is an ongoing problem on Route 20 near the Bluestone Dam, and where the area is not shelved, the Court found that respondent had notice and ample opportunity to repair and safeguard the area against rock hazard. Lack of federal funding is not an excuse, given this continuing hazard. Award of $1,516.12. . . . . p. 47

FERRELL VS. DIVISION OF HIGHWAYS (CC-90-362)

The Court disallowed a claim for rock damage, where the area was appropriately marked with falling rock signs and respondent had received no calls of rock hazard. . . . . p. 21

LIMITATION OF ACTIONS

BELL VS. DIVISION OF HIGHWAYS (CC-89-159)

The Court disallowed a claim for water damage to their property on grounds that it was filed more than two years after the claim first accrued and was thus barred by the applicable statute of limitations WV Code §§ 14-2-21, 55-2-12. . . . . p. 1

TRI-STATE ASPHALT CORP. VS. DIVISION OF HIGHWAYS (CC-91-190 and CC-91-191)

Where claimant failed to comply with a contractual 120-day deadline for filing a claim for enumerated extra ditching work and extra traffic control expense, the Court sustained motions to dismiss the claims as untimely. The Court held that the 120-deadline is not unreasonable and is not so short as to arbitrarily abrogate a right of action. p.16

MOTOR VEHICLES, Division of

GRALEY VS. DIVISION OF MOTOR VEHICLES (CC-91-90)

The Court said it lacks jurisidiction to hear a claim for recovery of a sales tax refund and the claimant's proper cause of action is against manufacturer in circuit court. . . . . p. 10

NEGLIGENCE -- See also Motor Vehicles, Streets and Highways

CLAY VS. DIVISION OF HIGHWAYS (CC-91-220)

Where the claimants' vehicle collided with a guardrail extending onto the roadway, the Court found that third-party vandals had caused the guardrail to become dislodged from its mounting and that respondent was therefore not liable. . . . . p. 75

ELLIS VS. DIVISION OF HIGHWAYS (CC-86-163)

Where the evidence was that claimant was the first in a string of accidents on the road, where investigating law enforcement thought a guardrail was needed and a guardrail was, in fact, subsequently erected, the Court restated its long-standing position that placement of guardrails is discretionary and does not rise to a moral obligation. Claim disallowed. . . . . p. 8

GOLDEN, LEONARD VS. DIVISION OF HIGHWAYS (CC-91-365)

Where the claimant's tires were punctured by the short posts of a sign post that was not readily visible on the berm, the Court held that respondent was negligent in failing to remove the short posts after the signs had been removed. . . . . p. 125

RICHARDS VS. DIVISION OF HIGHWAYS (CC-89-465)

Where claimants' motorcycle went out of control after encountering pooled water on Route 19 in Monongalia County, the Court said that claimant had ample opportunity to avoid the water and instead chose to drive through it. Claim disallowed. . . . . p. 71

SALERNO BROTHERS, INC. VS. DIVISION OF HIGHWAYS (CC-89-305)

Where the claimant did not have the proper permit for transporting a mobile crane on state roads, the Court found that violation of a statute is prima facie evidence of negligence and disallowed a claim for property damage where the crane tipped over during transport and claimant alleged defective berm and guardrail conditions. . . . . p. 92

SHORT VS. DIVISION OF HIGHWAYS (CC-91-128)

Where claimant alleged that respondent was liable for failing to keep the road clear of garbage debris washing from an adjacent dump, the Court rejected the defense of intervening and superseding cause, but said the respondent is not liable for failing to build a drainage ditch to keep the road clear . . . . . p. 114

NOTICE

HARDING VS. DIVISION OF HIGHWAYS (CC-91-262)

The Court awarded $1,063 where claimant's motorcycle was damaged after encountering a sunken area in the road surface where a sewer line had been installed. The respondent's maintenance supervisor had observed the defect and had received a prior complaint, and therefore, the Court said there was actual and constructive notice. . . . . p. 83

MARSHALL VS. DIVISION OF HIGHWAYS (CC-91-266)

Where respondent's employee received a complaint of loose gravel on the road surface, which was being prepared for resurfacing, and where the respondent's employee experimented with different vehicles on the road surface to see if there was in fact a hazard, the Court disallowed a claim for vehicle damage, finding respondent did not create a hazardous condition. . . . . p. 119

RADCLIFFE, WANDA VS. DIVISION OF HIGHWAYS (CC-92-134)

Although respondent is aware that expansion joints will pop out of the road surface on occasion, the respondent is unable to predetermine when or where they will occur. Claim disallowed p. 177

PEDESTRIANS

ROLLINS VS. DIVISION OF HIGHWAYS (CC-91-247)

The claimants sought an award for personal injury to their son, who fell from a bridge when he leaned against a guardrail which then gave way. The Court disallowed the claim, as the evidence indicated that respondent had received no notice that the guardrail was defective. . . . . p. 233

PRISONS AND PRISONERS

HARRISON COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-91-64)

Consistent with its holding in Mineral County Commission vs. Div. of Corrections, Unpublished opinion issued Nov. 21, 1990, the court held that respondent is liable for cost of housing inmates sentenced to state penitentiary but which have been held in the county jail after commitment order. Award of $24,930. . . . . p. 59

See also:

BARBOUR COUNTY COMMISSION VS. DIVISION OF CORRECTIONS
(CC-92-126, CC-92-313, and CC-92-411) . . . . . p. 191

CABELL COUNTY COMMISSION VS. DIVISION OF CORRECTIONS
(CC-92-211) . . . . . p. 227

MARION COUNTY COMMISSION VS. DIVISION OF CORRECTIONS
(CC-91-398). . . . . p. 67

RALEIGH COUNTY COMMISSION VS. DIVISION OF CORRECTIONS
(CC-92-245) . . . . . p. 218

WV REGIONAL JAIL AND CORRECTIONAL AUTHORITY VS.
DIVISION OF CORRECTIONS (CC-91-235) (CC-92-231); . . . . . pp. 63, 179

LAWSON VS. DIVISION OF CORRECTIONS (CC-92-262)

The Court awarded $1,500, the estimated fair and reasonable value of a gold ring that claimant had entrusted to respondent. . . . . p. 214

MECKLEY VS. DIVISION OF CORRECTIONS (CC-90-271)

In a three-count claim for lost contact lenses, a lost pillow case and lost eye glasses, the Court said (a) there was insufficient evidence of negligence to award cost of replacement contact lenses; (b) the pillow case was a de minimus non-justiciable matter; and (c) the claim for eye glasses was a medical issue controlled by 42 USC §1983 not properly before the Court. . . . . p. 86

NOLAN VS. DIVISION OF CORRECTIONS (CC-90-372)

The Court disallowed a claim for compensation for jewelry taken from claimant upon admission to a facility of respondent, the Court said that claimant-bailor failed to carry her burden of proof and did not produce a receipt or other documentation. Claim disallowed. . . . . p. 89

WARD VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-91-204)

The Court awarded $140.95 for damage to claimant's eyeglasses during a fight at the Eastern Regional Jail. . . . . p. 20

WATERMAN VS. DIVISION OF CORRECTIONS (CC-90-21)

The Court disallowed a claim for lost books when claimant, a former employee of the respondent, was unable to provide an inventory or other evidence. . . . . p. 126

PUBLIC EMPLOYEES

BLOWER, HILL VS. EDUCATIONAL BROADCASTING AUTHORITY (CC-90-139)

Claimant's sought an award for annual leave accumulated beyond a 30-day carryover limitation specified in respondent's personnel guidelines. The Court found that where claimants had relied on respondent's custom and practice of exceeding the 30-day limitation that an award should be granted. . . . . p. 48

GRASS VS. DIVISION OF HIGHWAYS (CC-92-338)

The Court award $124.80 for cost of replacing claimant's glasses, which he lost while wading in a river in the course of his employment. . . . . p. 172

MCNAIR VS. BUREAU OF EMPLOYMENT PROGRAMS (CC-93-44)

The Court awarded $1,030.16, the value of personal property stolen from a state vehicle which claimant was using in the course of his employment. . . . . p. 231

PARKER VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-90-396)

The Court declined to hear a claim involving back wages due as a result of claimant's job misclassification. The Court said claimant must first exhaust all administrative remedies before the Education and State Employees Grievance Board. . . . . p. 112

SYMNS VS. DIVISION OF HIGHWAYS (CC-92-213)

The Court awarded $402 where property of the claimant-employee was destroyed in an office fire. p. 184

WOLFE VS. DIVISION OF VETERANS AFFAIRS (CC-91-258)

The Court disallowed a claim for life insurance coverage where claimant alleged she was misled by the respondent regarding her insurance options. . . . . p. 94

Other claims relating to salary and wages, overtime, pay increments, mileage and other expenses are:

AKERS VS. PUBLIC SERVICE COMMISSION (CC-90-406a, CC-90-406b) . . . . . pp. 44, 45

ALTIZER VS. BOARD OF TRUSTEES OF UNIVERSITY OF WEST VIRGINIA (CC-91-312) . . . . . p. 46

CORDLE, ET AL. VS. DEPT. OF PUBLIC SAFETY (CC-92-192) . . . . . p. 153

HENLINE VS. DIVISION OF HIGHWAYS (CC-92-90) . . . . . p. 131

MCCOY VS. DEPT. OF ADMINISTRATION (CC-91-19) . . . . . p. 14

METZ VS. DIVISION OF FORESTRY (CC-92-99) . . . . . p. 121

MILLER VS. DIVISION OF CORRECTIONS (CC-90-391) . . . . . p. 216

ROBERTS VS. PUBLIC SERVICE COMMISSION (CC-91-230) . . . . . p. 132

RYMER VS. ALCOHOL BEVERAGE CONTROL ADMN. (CC-91-242) . . . . . p. 15

STATE AGENCIES

CLARK VS. DEPT. OF ADMINSITRATION (CC-91-157)

The Court disallowed a claim for vehicle damage caused by strong winds which blew part of the roof off a building owned and maintained by respondent. The Court said where the wind storm was unusually strong there was no evidence of negligence by respondent. . . . . p. 74

DIVISION OF CORRECTIONS/PRISON INDUSTRIES VS. DEPT. OF TAX AND REVENUE (CC-91-215)

Where claimant sought $50,000 for forms printed for respondent, and there would have been sufficient funds in the General Revenue fund, the Court allowed the claim because the evidence was that this was not an over-expenditure but rather the result of a budget shortfall. Airkem Sales vs. Dept. of Mental Health, 8 Ct. Cl. 180 (1971). . . . . p. 56

LUMBERPORT VOLUNTEER FIRE DEPT. VS. STATE FIRE COMMISSION (CC-92-348)

The Court awarded $6,630.44 in funds which had been denied from the casualty and pension fund due to clerical error. . . . . p. 215

QUILLIN, FRANKLIN VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-90-388)

The Court awarded a dentist $2,004 in medicaid reimbursements for treatment of patients for which the respondent had not paid. . . . . p. 68

WEBSTER COUNTY BOARD OF EDUCATION VS. DEPT. OF EDUCATION (CC-92-34)

The Court disallowed a claim for reimbursement for alleged underpayment of state education funds, holding that the Legislature intended to compensate claimant through the Budget Bill. . . . p. 140

STREETS AND HIGHWAYS

ADKINS VS. DIVISION OF HIGHWAYS (CC-91-270)

The Court disallowed a claim for vehicle damage caused by a rock in the road, holding that presence of a road crew eight hours prior to the accident was insufficient evidence that respondent was responsible for a defective or hazardous road condition. . . . . p. 69

BILLS VS. DIVISION OF HIGHWAYS (CC-90-252)

Where claimant had consumed alcohol and had a blood-alcohol level of 0.14, the Court disallowed a claim against respondent alleging defective road conditions. . . . . p. 158

CHAFFERY COMPANY VS. DIVISION OF HIGHWAYS (CC-91-295)

Where respondent had not placed warning signs at the site of a slip on a tar and chip road, and where the slip area had been a problem for six years, the Court disallowed a claim for vehicle damage and lost income because the evidence was that the accident was triggered by a soft area in the road that was not foreseeable to respondent. . . . . p. 160

CLAY VS. DIVISION OF HIGHWAYS (CC-91-220)

Where the claimants' vehicle collided with a guardrail extending onto the roadway, the Court found that third-party vandals had caused the guardrail to become dislodged from its mounting and that respondent was therefore not liable. . . . . p. 75

COMER VS. DIVISION OF HIGHWAYS (CC-90-420)

Respondent had placed steel plates to temporarily cover a large hole on a bridge on U.S. 60. The Court held that when the plates had been knocked away, exposing the rebar of the bridge, that respondent was liable for claimant's vehicle damage for failing to adequately guard against this known hazard. . . . . p. 54

DAVIS VS. DIVISION OF HIGHWAYS (CC-90-260)

Where the parties stipulated that respondent was liable in the amount of $500, the court awarded same. . . . . p. 55

EDWARDS VS. DIVISION OF HIGHWAYS (CC-91-325)

Where claimant lost control and struck another vehicle after encountering ice on the road, the Court found that respondent had constructive knowledge of ice conditions for six days and awarded $3,140.67. . . . . p. 106

ELLIS VS. DIVISION OF HIGHWAYS (CC-86-163)

Where the evidence was that claimant was the first in a string of accidents on the road, where investigating law enforcement thought a guardrail was needed and a guardrail was, in fact, subsequently erected, the Court restated its long-standing position that placement of guardrails is discretionary and does not rise to a moral obligation. Claim disallowed. . . . . p. 8

FERREBEE, THOMAS VS. DIVISION OF HIGHWAYS (CC-91-292)

Where claimant's vehicle was damaged when he struck the stub portion of a missing Stop sign, the Court found that this area was newly constructed because of a new mall and that respondent did not have notice of the road defect. . . . . p. 76

FLINN VS. DIVISION OF HIGHWAYS (CC-91-277)

Where claimant's vehicle was damaged after encountering mud on the road after a rain storm, the Court said the respondent had been engaged in excavation work, had failed to place warning signs and awarded $750. . . . . p. 77

GIBSON, ET AL. VS. DIVISION OF HIGHWAYS (CC-89-17a, 17b)

The Court disallowed a claim alleging respondent was negligent in failing to install a traffic control device at the intersection of WV secondary route 41/1 in Summersville. . . . . p. 206

GOLDEN VS. DIVISION OF HIGHWAYS (CC-91-365)

The Court awarded $192.00 for tire damage, where claimant ran over a metal stump on the berm where a "Speed Zone Ahead" sign had been previously knocked off. . . . . p. 125

GREGORY VS. DIVISION OF HIGHWAYS (CC-91-93)

The Court awarded claimant replacement costs for a new tire destroyed in pothole, less 25 percent for wear on the old tire. . . . . p. 58

HARDING VS. DIVISION OF HIGHWAYS (CC-91-262)

The Court awarded $1,063 where claimant's motorcycle was damaged after encountering a sunken area in the road surface where a sewer line had been installed, and where respondent's maintenance supervisor had observed the defect and had received a prior complaint. . . . . p. 83

LOWTHER VS. DIVISION OF HIGHWAYS (CC-90-214)

The Court said respondent had no prior notice that a section of Route 19 was prone to hydro-planing. Claim disallowed. . . . . p. 96

MORTON VS. DIVISION OF HIGHWAYS (CC-87-235)
CASSADY VS. DIVISION OF HIGHWAYS (CC-87-232)

Claimants in the same car filed a claim for injuries incurred as a result of their car sliding on an unidentified oily substance (possibly hot mix) on the road surface. The Court disallowed the claims as there was insufficient evidence of any substance nor that respondent was negligent. . . . . p. 28

NORMAN VS. DIVISION OF HIGHWAYS (CC-91-127)

The Court disallowed a claim for vehicular property damage caused by a "blow-out" in the pavement resulting from freezing temperatures which crack the road surface. The Court said the respondent cannot determine when such conditions will occur. . . . . p. 90

PANNELL VS. DIVISION OF HIGHWAYS (CC-88-321)

Where claimant-passenger was familiar with the narrow unpaved road and where the shoulder area gave way allegedly due to poor drainage, the Court held that respondent had no notice of any erosion or other road hazard and was not an insurer of the safety of travelers on its roads. Where the cause of the accident was speculative, the claim will be disallowed. . . . . p. 126

REYNOLDS VS. DIVISION OF HIGHWAYS (CC-91-378)

The Court awarded $300.00 when respondent's stop sign fell on claimant's car and damaged the vinyl roof cover, when evidence was that respondent knew the sign had been struck by other vehicles previously. . . . . p. 130

RICHARDS VS. DIVISION OF HIGHWAYS (CC-89-465)

Where claimants' motorcycle went out of control after encountering pooled water on Route 19 in Monongalia County, the Court said that claimant had ample opportunity to avoid the water and instead chose to drive through it. Claim disallowed. . . . . p. 71

SINGLETON VS. DIVISION OF HIGHWAYS (CC-91-375)

The Court awarded $100 when respondent's employees damaged claimant's cattle fencing during brush removal and maintenance. . . . . p. 183

SOMERVILLE VS. DIVISION OF HIGHWAYS (CC-92-218)

Where claimant alleged that respondent had failed to maintain a ditch line along his property, the Court found that the claim is more in the nature of a condemnation action and that the Court is without jurisdiction. . . . . p. 223

STATE FARM INSURANCE AS SUBROGREE OF HIMMELRICK VS. DIVISION OF HIGHWAYS (CC-90-10)

Where claimant failed to establish that an exposed culvert pipe was on respondent's right-of-way, the Court disallowed a claim for vehicle damage on basis that the state is not an insurer of the safety of persons traveling on its highways. . . . . p. 116

WALTON VS. DIVISION OF HIGHWAYS (CC-91-189)

The Court held that thermal expansion causing breaks in road pavement cannot be predicted by respondent and disallowed the claim. . . . . p. 121

WILSON VS. DIVISION OF HIGHWAYS (CC-91-259)

The Court awarded $215 in towing costs where the evidence was that respondent's employees were responsible for red clay mud on the road. . . . . p. 64

Other claims involving road hazards, potholes, debris, ice, mud and surface irregularites are:

ANTHONY & COMPANY VS. DIVISION OF HIGHWAYS (CC-90-337) . . . . . p. 84

BALL VS. DIVSION OF HIGHWAYS (CC-92-98) . . . . . p. 117

BOYLE VS. DIVISION OF HIGHWAYS (CC-89-58) . . . . . p. 103

CURTIS VS. DIVISION OF HIGHWAYS (CC-90-331) . . . . . p. 123

DIENGES VS. DIVISION OF HIGHWAYS (CC-92-166) . . . . . p. 202

DILLARD VS. DIVISION OF HIGHWAYS (CC-92-239) . . . . . p. 163

DUNN VS. DIVISION OF HIGHWAYS (CC-92-26) . . . . . p. 164

ELLIS, LORENZA, ET AL. VS. DIVISION OF HIGHWAYS (CC-92-114) . . . . . p. 204

FERREBEE, WADE AND GLADYS MARIE VS. DIVISION OF HIGHWAYS (CC-92-91) . . . . . p. 169

FORTUNE VS. DIVISION OF HIGHWAYS (CC-90-244) . . . . . p. 78

FROATS VS. DIVISION OF HIGHWAYS (CC-91-356) . . . . . p. 170

GILLIAM VS. DIVISION OF HIGHWAYS (CC-92-48) . . . . . p. 171

GIVEN VS. DIVISION OF HIGHWAYS (CC-91-328) . . . . . p. 139

GORDON VS. DIVISION OF HIGHWAYS (CC-92-216) . . . . . p. 152

GOWER VS. DIVISION OF HIGHWAYS (CC-90-385) . . . . . p. 95

HALLEY VS. DIVISION OF HIGHWAYS (CC-90-123) . . . . . p. 79

HARRIS VS. DIVISION OF HIGHWAYS (CC-92-150) . . . . . p. 209

HOLMES VS. DIVISION OF HIGHWAYS (CC-91-345) . . . . . p. 211

JOHNSON, ERNEST VS. DIVISION OF HIGHWAYS (CC-91-100) . . . . . pp. 108, 229

KEFFER VS. DIVISION OF HIGHWAYS (CC-92-203) . . . . . p. 212

LAZARE VS. DIVISION OF HIGHWAYS (CC-91-202) . . . . . p. 110

MYERS VS. DIVISION OF HIGHWAYS (CC-92-125) . . . . . p. 217

RADCLIFFE VS. DIVISION OF HIGHWAYS (CC-92-134) . . . . . p. 177

SCOTT VS. DIVISION OF HIGHWAYS (CC-89-387) . . . . . p. 181

SHRIVER VS. DIVISION OF HIGHWAYS (CC-92-133) . . . . . p. 182

SHUPE VS. DIVISION OF HIGHWAYS (CC-92-120) . . . . . p. 221

SWANN VS. DIVISION OF HIGHWAYS (CC-92-37) . . . . . p. 224

TOWNSEND VS. DIVISION OF HIGHWAYS (CC-91-95) . . . . . p. 184

WEBB VS. DIVISION OF HIGHWAYS (CC-90-87) . . . . . p. 135

WHITE VS. DIVISION OF HIGHWAYS (CC-92-221) . . . . . p. 225

WILBURN VS. DIVISION OF HIGHWAYS (CC-92-148) . . . . . p. 179

TREES and TIMBER

BOICE VS. DIVISION OF HIGHWAYS (CC-92-53)

The Court disallowed a claim for damage to claimant's truck when he tried to drive around a fallen tree limb, where it was not clear whether the tree was on respondent's right of way and respondent did not have notice of tree hazard. . . . . p. 137

CONN VS. DIVISION OF HIGHWAYS (CC-91-197)

The Court disallowed a claim for compensation where claimant voluntarily trimmed limbs on a tree within respondent's right-of-way. The Court said claimant was a volunteer and that the work would have been done by respondent if informed earlier. . . . . p. 104

WOODBURN VS. DIVISION OF HIGHWAYS (CC-91-17)

Where claimant's car was destroyed by a fallen tree, the Court held that the tree was not within respondent's right of way and thus respondent could not be held liable.
Claim disallowed. . . . . p. 102

TRESPASS

ROHR VS. DIVISION OF NATURAL RESOURSE (CC-89-194)

Claimants sought compensation for loss of their corn crop due to marauding Canada geese. The Court said that where farming activity began three years after release of the bird's under DNR's foreign game bird program, and where DNR has only a regulatory role in same, the birds are not an instrumentality of the state. Claim disallowed. . . . . p. 30

VENDORS

KEYSTONE HELICOPTER VS. DEPT. OF PUBLIC SAFETY (CC-92-49)

The Court awarded $95,000 for maintenance work performed on respondent's helicopter. . . . . p. 156

LIFETEAM EMS VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-91-278)
The Court awarded $27 for transportation of a corpse and rejected the remainder of the amount claimed as excessive and beyond the $1 per mile rate. . . . . p. 13

PRESSLEY RIDGE SCHOOL VS. DHHR (CC-92-2)
The Court awarded $156,297 in a contract dispute between the parties regarding the shortfall of Medicaid health care funding for youthful offenders. . . . . p. 175

VENDORS *Claims admitted with sufficient funds:*

ALLEN FUNERAL HOME VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-91-146) . . . . . p. 1

AMERICAN DECAL & MFG. CO. VS. DIVISION OF MOTOR VEHICLES (CC-91-374) . . . . . p. 46

BERKLEY VS. SUPREME COURT OF APPEALS (CC-93-52) . . . . . p. 230

BRALEY & THOMPSON, INC. VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-91-280) . . . . . p. 27

CASTO TECHNICAL SERVICES VS. BOARD OF DIRECTORS OF THE STATE COLLEGE SYSTEM (CC-91-326) . . . . . p. 52

CATHERWOOD, SCOTT VS. BOARD OF TRUSTEES OF WEST VIRGINIA UNIVERSITY (CC-92-135) . . . . . p. 124

CITY OF GRAFTON VS. DIVISION OF HIGHWAYS (CC-92-130) . . . . . p. 162

CODY VS. DIVISION OF CORRECTIONS (CC-91-324) . . . . . p. 53

DOAK, CUPPETT & POLING, ET AL. VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-92-287) . . . . . p. 203

E&M PRODUCTS VS. DIVISION OF CULTURE (CC-91-154) . . . . . p. 2

EDENS VS. WORKERS' COMPENSATION FUND (CC-91-391) . . . . . p. 61

EXXON CO. VS. STATE TREASURER (CC-91-338) . . . . . p. 57

FEDERAL DEPOSIT INSURANCE CORP. VS. DIVISION OF BANKING (CC-91-389) . . . . . p. 58

GAI CONSULTANTS, INC. VS. PUBLIC SERVICE COMMISSION (CC-92-124) . . . . . p. 142

JARRETT PRINTING CO. VS. WEST VIRGINIA STATE SENATE (CC-93-49) . . . . . p. 228

JOHNSON VS. DEPT. OF EDUCATION (CC-92-189) . . . . . p. 142

LAVENDER VS. DEPT. OF PUBLIC SAFETY (CC-91-121) . . . . . p. 4

MAIHOFF VS. BOARD OF DIRECTORS OF THE STATE COLLEGE SYSTEM\
(CC-93-15) . . . . . p. 215

MOORE BUSINESS FORMS, INC., VS. STATE TREASURER (CC-91-134) . . . . . p. 4

MORGAN VS. BUREAU OF EMPLOYMENT PROGRAMS (CC-93-54) . . . . . p. 232

MULLENAX VS. DEPT. OF EDUCATION (CC-93-40) . . . . . p. 233

NICHOLAS COUNTY COMMISSION VS. OFFICE OF THE GOVERNOR
(CC-91-248) . . . . . p. 143

NICOLET INSTRUMENT CORP. VS. DEPT. OF HEALTH AND HUMAN
RESOURSE, ET AL. (CC-91-282) . . . . . p. 15

PATTERSON VS. WV STATE BOARD OF EXAMINERS FOR LPN
(CC-92-229) . . . . . p. 146

RICHMOND VS. DEPT. OF HEALTH AND HUMAN RESOURCES
(CC-92-44 a and b) . . . . . p. 144

SECURITY AMERICA VS. DEPT. OF ADMINISTRATION (CC-92-115) . . . . . p. 144

SCOTT LUMBER VS. DIVISION OF CULTURE AND HISTORY (CC-91-333) . . . . . p. 63

SODARO'S ELECTRONICS VS. BOARD OF DIRECTORS OF THE STATE
COLLEGE SYSTEM (CC-92-301) . . . . . p. 222

SPIELMAN VS. BOARD OF DIRECTORS OF THE STATE COLLEGE SYSTEM
(CC-92-143) . . . . . p. 145

UNIVERSITY OF WEST VIRGINIA (COGS) VS. SUPREME COURT
(CC-91-218) . . . . . p. 19

WHARTON, R.L. VS. DIVISION OF ENVIRONMENTAL PROTECTION
(CC-91-131a) . . . . . p. 62

XEROX VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-91-245) . . . . . p. 20

ZANE L. METZ VS. ALCOHOL BEVERAGE CONTROL COMMISSION
(CC-93-30) . . . . . p. 229

VENDORS *Denied as overexpenditure under Airkem vs. Dept. of Mental Health 8 Ct. Cl 180 (1971).*

ASSOCIATED RADIOLOGISTS, INC. VS. DIVISION OF CORRECTIONS
(CC-91-216) . . . . . p. 5

AT&T VS. DIVISION OF CORRECTIONS (CC-91-65) . . . . . p. 6

BARBOUR COUNTY SHERIFF'S DEPT. VS. DIVISION OF CORRECTIONS
(CC-91-250) . . . . . p. 6

BLAIR VS. DIVISION OF CORRECTIONS (CC-91-212) . . . . . p. 7

BRUNETTI VS. DEPT. OF EDUCATION (CC-91-301) . . . . . p. 51

CAMDEN-CLARK MEMORIAL HOSP. VS. DIVISION OF CORRECTIONS
(CC-91-223) . . . . . p. 8

FANNING FUNERAL HOME VS. DEPT. OF HEALTH AND HUMAN RESOURCES
(CC-92-273) . . . . . p. 146

GRAFTON, CITY OF VS. DIVISION OF CORRECTIONS (CC-91-330) . . . . . p. 69

W.VA. UNIVERSITY

C & L CONSTRUCTION VS. BOARD OF TRUSTEES OF THE UNIVERSITY OF WEST VIRGINIA (CC-90-393)

The Court awarded $33,654.02, in a breach of contract claim involving the Marshall University Fine Arts Center. The Court found claimant was entitled to compensation for extra manhours and redesign costs related to several change orders. . . . . p. 192

CIESIELSKI VS. BOARD OF TRUSTEES (CC-92-60)

The Court awarded $157.00 for property damage caused by wet paint, where claimant's leather jacket was damaged. . . . . p. 199

MAURANTONIO VS. BOARD OF TRUSTEES (CC-90-336)

The Court awarded $52.75 in stipulated damages for destruction of claimant's clothing in a washing machine in WVU housing. . . . . p. 13

RINGER VS. BOARD OF TRUSTEES (CC-92-152)

The Court disallowed a claim for property stolen from claimant's dormitory while claimant was away on spring break. . . . . p. 219

See also SAMUEL VS. BOARD OF TRUSTEES (CC-92-162) . . . . . p. 220

SMITH VS. BOARD OF TRUSTEES (CC-92-13)

The Court awarded $75 for property damage caused by a plumbing malfunction in a university storage facility. . . . . p. 71

TORNING VS. BOARD OF TRUSTEES (CC-91-221)

The Court awarded $35 for damage to claimant's cooking pot damaged by a stove malfunction at university housing. . . . . p. 16

ZHENG VS. BOARD OF TRUSTEES (CC-91-225)

The Court awarded $799.50 in medical expenses when claimant's son got a splinter in his hand from a split-rail fence maintained by respondent. . . . . p. 226