STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the Period from July 1, 2001

to June 30, 2003

by

CHERYLE M. HALL

CLERK

Volume XXIV

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OF THE
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HONORABLE DAVID M. BAKER . . . . . Presiding Judge

HONORABLE BENJAMIN HAYS WEBB, II . . . . . Judge

HONORABLE FRANKLIN L. GRITT, JR. . . . . Judge

CHERYLE M. HALL . . . . . Clerk

DARRELL V. MCGRAW, JR. . . . . Attorney General

FORMER JUDGES

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

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

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

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

HONORABLE JOHN B. GARDEN . . . . . July 1,1974 to December 31, 1982

HONORABLE DANIEL A. RULEY, JR. . . . . July 1, 1976 to February 28, 1983

HONORABLE GEORGE S. WALLACE, JR. . . . . February 2, 1976 to June 30, 1989

HONORABLE JAMES C. LYONS . . . . . February 17, 1983 to June 30, 1985

HONORABLE WILLIAM W. GRACEY . . . . . May 19, 1983 to December 23, 1989

HONORABLE DAVID G. HANLON . . . . . August 18, 1986 to December 31, 1992

HONORABLE ROBERT M. STEPTOE . . . . . July 1, 1989 to June 30, 2001

LETTER OF TRANSMITTAL

To His Excellency
The Honorable Robert E. Wise, Jr.
Governor of West Virginia

Sir:

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

Respectfully submitted,

CHERYLE M. HALL,
Clerk

TERMS OF COURT

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

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OPINION ISSUED AUGUST 16, 2001

BARRY M. ALFORD
VS.
DIVISION OF HIGHWAYS
(CC-00-035)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 1989 Dodge Colt Vista which occurred when his vehicle struck a large patch of ice while he was traveling south on State Route 13 at the intersection of State Route 1, in Mason County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on December 17, 1999, at 7:00 a.m. Claimant was traveling to school. It was a clear, dry, sunny day. According to the claimant, there was no water on the road at any point except where the incident occurred at the intersection of State Route 13 and State Route 1 where respondent had been working on a drainage ditch. Just north of the location of this incident State Route 13 follows a steep hill and then at the bottom of this hill there is a sharp curve. It is near this curve that claimant's vehicle slid on a large patch of ice. Claimant traveled this road twice a day almost everyday. Claimant testified that as a driver approaches the bottom of the steep hill it is difficult to see clearly the road surface at the bottom in the curve. Therefore, he testified that he could not see the ice on the road until his vehicle was upon it. Claimant was traveling approximately 30 miles per hour. The posted speed limit was 40 miles per hour. As claimant's vehicle reached the bottom of the hill and came into the curve, it slid on the ice, went out of control, and slid off the road. It slammed into the hillside on the right side of the road causing the claimant to suffer minor injuries to his knee and serious damage to his vehicle. He was treated at the hospital for minor knee injuries and was released the same day.

Claimant asserts that respondent was negligent in the way in which it performed the construction on the drainage ditch and its maintenance of the road. Claimant argues that there was no water any where else on the highway on this date, except at the location where respondent had filled in the tile at the edge of State Route 13. Claimant testified that the water which always flows from the adjacent hill normally flows beneath the road through a tile. However, due to the fact that the respondent had filled the tile in with dirt, the water had no place to run except onto the road at the location where claimant's vehicle slid. This water froze into a solid sheet

of ice during the cold December weather. Therefore, claimant contends that respondent knew or should have known that the water which ran beneath the road would run onto the road when the tile was blocked with the fill.

As a result of this incident, Mr. Alford suffered minor personal injuries. He did not have any insurance to cover the hospital or radiology bills. Mr. Alford owes St. Mary's Hospital $132.00 for medical treatment, and $31.00 to Radiology, Incorporated, of Huntington. Claimant seeks an award for these medical costs that he incurred. Claimant obtained an estimate of the repair costs to his vehicle, which amounted to $2,700.00 which is more than the NADA value of the vehicle. Therefore, claimant seeks the NADA value of the vehicle which he claims to be $2,425.00. He also seeks $40.00 for the labor costs in obtaining an estimate on the vehicle damage, $38.00 for the towing cost, less $100.00 for the salvage fee claimant obtained from the junk yard.

It is a well established principle that the State is not an insurer nor a guarantor of the safety of motorists upon its roads and highways. *Adkins v. Simms*, 46 S.E. 2d 81 (W.Va. 1947). In order to hold the respondent liable for defects of this sort, the claimant must prove that the respondent had actual or constructive notice of the road defect in question. *Pritt v. Dept. of Highways*, 16 Ct. Cl.8 (1985), *Harmon v. Dept. of Highways*, 16 Ct. Cl. 127 (1986), *Jefferies v. Dept. of Highways* 16 Ct. Cl. 79 (1986). Here, the evidence established that the respondent had notice of the fact that water would run onto State Route 13. Claimant established that on the date of this incident the weather was clear, dry, and sunny. The highway was dry in all locations except at the point of this incident, where respondent had covered up the tile beside State Route 13. Respondent knew or should have known that by completely covering up the tile at this drainage ditch with dirt would force the water which runs off of the hill to run onto State Route 13. Furthermore, respondent knew or should have known that this water would freeze in the month of December and that it would do so in a short period of time. This condition created a very serious hazard to the traveling public that could have been easily avoided by respondent. Therefore, the Court finds respondent negligent in its actions on State Route 13 for which claimant is entitled to an award.

The Court, having reviewed the NADA value of claimant's vehicle, has determined that a fair and reasonable value of the vehicle is $2,100.00, reduced by the $100.00 salvage fee, for an award of $2,000.00 for the vehicle. The Court also has reviewed claimant's medical expenses in the amount of $163.00 and $38.00 for the towing expense for a total award of $2,201.00.

Accordingly, the Court is of the opinion to and does make an award to claimant in the amount of $2,201.00.

Award of $2,201.00.

Opinion issued August 16, 2001

(B.C.) GARY H. BRAITHWAITE
VS.
DIVISION OF HIGHWAYS
(CC-00-454)

Claimant appeared *pro se*.

Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On November 7, 2000, claimant (B.C.) Gary H. Braithwaite was traveling on Winchester Street in the town of Paw Paw, Morgan County.

2. While traveling on Winchester Street, claimant's vehicle ran over a sign post approximately ten inches high and a few inches off of the edge of the road.

3. On the date in question, respondent was responsible for the maintenance of Winchester Street in Morgan County, and respondent agrees that the sign post claimant's vehicle struck belonged to it.

4. As a result of this incident, claimant's right rear tire was damaged. The sustained damage was in the amount of $119.31.

5. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Winchester Street in Morgan County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $119.31.

Award of $119.31.

Opinion issued August 16, 2001

CHARLESTON PSYCHIATRIC GROUP, INC.
VS.
DIVISION OF JUVENILE SERVICES
(CC-01-239)

Claimant appeared *pro se*.

Jendonnae L. Houdyschell, 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 $1,300.00 for medical services provided to an employee of the respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $1,300.00.

Award of $1,300.00.

OPINION ISSUED AUGUST 16, 2001

ROBERT D. CLEEK
VS.
DIVISION OF HIGHWAYS
(CC-00-026)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On the morning of January 6, 2000, claimant was traveling eastbound on I-64 near South Charleston, Kanawha County, in his 1986 BMW when his vehicle struck a large hole in the road.

2. On the date in question, respondent was responsible for the maintenance of I-64 in Kanawha County and it was aware of the hole which claimant's vehicle struck.

3. As a result of this incident, claimant's vehicle suffered serious damage and required numerous repairs, including the replacement of a wheel, realignment, replacement of the fuel system, and the replacement of the exhaust and drive shaft. The sustained damage was in the amount of $1,387.96. However, the claimant's award is limited to the amount of his insurance deductible feature of $250.00.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of I-64 in Kanawha County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $250.00.

Award of $250.00.

OPINION ISSUED AUGUST 16, 2001

JAMES D. COX
VS.
DIVISION OF HIGHWAYS
(CC-99-247)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On the morning of June 8, 1999, claimant was driving his vehicle on Yeager Airport Road and he had just passed Eagle Mountain Road when his vehicle went into a deep depression in the road where a culvert had been replaced.

2. On the date in question, respondent was responsible for the maintenance of Yeager Airport Road in Kanawha County; it was aware that the culvert had been replaced; and it also was aware that settlement could occur leaving a depressed area in the road.

3. As a result of this incident, claimant's Subaru Forester had to be realigned, and all four tires re-balanced and rotated. The sustained damage was in the amount of $91.63.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Yeager Airport Road in Kanawha County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $91.63.

Award of $91.63.

OPINION ISSUED AUGUST 16, 2001

HERBERT L. DILLARD
VS.
DIVISION OF HIGHWAYS
(CC-00-078)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage done to his 1987 GMC Sierra 1500 pickup truck, which occurred while his son was driving the vehicle and it struck a portion of guardrail head-on at the intersection of Willow Road and Route 214, also referred to as Childress Road. Respondent maintains this portion of road in Kanawha County. The Court is of the opinion to deny the claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on December 4, 1999, at approximately 11:50 p.m. The claimant's son, Anthony J. Dillard, was driving the vehicle at the time of this incident. Anthony Dillard's girlfriend Hope McCormick was

a front seat passenger. They were returning from Wal-Mart and decided to take a drive. Anthony Dillard testified that it was a dry and clear night. This was the first time he had traveled Willow road. He testified that he was traveling at approximately 35 to 40 miles per hour at the time of the incident. He was traveling up towards the crest of a hill on Willow Road. Upon reaching the crest of the hill, Anthony Dillard glanced at his speedometer and his girlfriend. Unbeknownst to him at this time, he was driving across the intersection of Childress Road whereupon he drove into the guardrail on the far side of Childress Road. Although he was not injured, Miss McCormick's head struck the windshield. Both occupants were taken by ambulance to the hospital. Claimant's vehicle was damaged. He submitted two separate estimates, both of which estimated the damage to the vehicle to be more than it was worth. Claimant testified that he had bought the vehicle six months earlier for $2,500.00. It had 92,000 miles on it. Claimant is seeking an award for the purchase price of $2,500.00.

Claimant asserts that there should have been a stop sign at the intersection of Willow Road and Childress Road. He introduced evidence at the hearing in the form of photographs and a video, which showed that there may have been a stop sign at the intersection. This evidence revealed a broken sign post on the right side of the intersection of Willow and Childress Roads. Claimant asserts that this had been a stop sign at one time and without a stop sign at the crest of this hill, a driver could not see that he was approaching an intersection. Claimant testified that the portion of guardrail his son struck was new and that the signs behind this portion of guardrail were bent over and twisted. Therefore, he was of the opinion that this was demonstrative that other vehicles had crashed into this guardrail on prior occasions and that respondent knew or should have known that a stop sign or some sort of warning sign was needed at this location to prevent an incident the same or similar to that which claimant's son suffered.

It is respondent's position that it did not have notice of a missing or downed stop sign at the location at issue and that there may never have been a stop sign there. Respondent also argues that the driver of the vehicle was negligent and that such negligence was equal to or greater than that of its own. James E. Russell testified that he has been a supervisor for the respondent's sign shop in Nitro for approximately fifteen years. He testified that he is responsible for five counties including Kanawha which includes the location of the incident at issue. One of his responsibilities is to supervise the installation of stop signs which includes the replacement of stop signs should they be removed or destroyed. He testified that all reports of missing signs are recorded and that stop signs are the number one priority. He stated that if his office is notified of a stop sign being down, it is replaced on the day of the report or the next morning. He testified that no notice was given to his office that any sign was down at the intersection of Willow Drive and Childress Road on or before December 4, 1999.

West Virginia State Trooper Todd J. Perry, the investigating officer at the scene, testified for the respondent. He stated that in his investigation he determined that a contributing cause to the accident was the driver's failure to maintain control of his vehicle. He testified that a driver who is approaching any intersection or the crest of a hill should slow down before reaching it. It was his opinion that since there were no skid marks at the scene, the driver did not apply his brakes or slow down before striking the guardrail. He also stated that it was his opinion that Anthony Dillard had bent the signs behind the guardrail over when he struck it with the claimant's vehicle. Trooper Perry testified that the reflectors on these signs should have been visible to Anthony Dillard as he crested the hill, thus warning him of the danger ahead.

It is a well established principle that the State is neither an insurer nor a

guarantor of the safety of motorists on its roads or highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). For the respondent to be held liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect in question. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). The claimant failed to produce sufficient evidence at the hearing to establish that respondent had prior notice of a missing stop sign at the intersection of Willow Drive and Childress Road on or before this incident. It is unclear whether or not there was ever a stop sign at this location. Furthermore, the Court is of the opinion that driver Anthony Dillard's negligence was the proximate cause of this incident. His testimony and that of Trooper Perry establish that he failed to maintain control of the vehicle. Therefore, the Court finds that the proximate cause of this incident was Anthony Dillard's failure to exercise due care and control of his vehicle.

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

Claim disallowed.

OPINION ISSUED AUGUST 16, 2001

DIVISION OF HIGHWAYS
VS.
ALCOHOL BEVERAGE CONTROL ADMINISTRATION
(CC-01-199)

Patricia J. Lawson, Attorney at Law, for claimant.

Joy M. Bolling, 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 $1,179.38 for providing service and repairs to numerous vehicles of the respondent's. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoices could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $1,179.38.

Award of $1,179.38.

OPINION ISSUED AUGUST 16, 2001

PATTY L. HARRINGTON AND PAUL K. HARRINGTON
VS.
DIVISION OF HIGHWAYS
(CC-99-210)

Claimant appeared *pro se*.

Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage done to their 1999 Ford Escort after it went into a hole on Route 50 just west of Romney, Hampshire County. This portion of Route 50 is maintained by the respondent in Hampshire County. The Court is of the opinion to make an award in this claim as stated more fully below.

This incident occurred on May 2, 1999, when Mrs. Harrington was driving and Mr. Harrington was in the front passenger seat. They were traveling westbound on Route 50 and were approaching South Branch when they came around a curve. Mrs. Harrington had to maneuver the vehicle to the right edge of the road due to a large oncoming logging truck crossing over the center line. The Harrington vehicle struck a large hole that was located just at the edge of the white line. Mr. Harrington testified that the pothole was approximately twenty to twenty-four inches in length, at least four inches deep, and approximately eight to ten inches wide. He testified that they were traveling at approximately 30 to 35 miles per hour. The pothole damaged the right side rim and tire. The claimant's submitted repair bills in the amount of $286.96. Mr. Harrington also testified that he had been traveling the same portion of Route 50 three months prior to this incident, and the vehicle which he was driving had struck the same pothole, but due to the fact he was driving his truck at that time, no damage was done. He stated that he reported the prior incident to the State Police in Romney. Therefore, it is the claimants' position that the respondent knew or should have known of this hole on Route 50 and made the needed repairs.

Respondent contends that it did not have notice of this hole on Route 50 and it is not responsible for the damage done to the claimants' vehicle.

In order to hold respondent liable for defects of this nature, the claimant must prove that the respondent had actual or constructive notice of the defect and a reasonable time to make repairs. *Hamon v. Dept. of Highways, 16 Ct. Cl. 127 (1986); Davis v. Dept. of Highways, 11 Ct. Cl. 150 (1977).* The evidence at the hearing established that the respondent had at least constructive notice of this hole on Route 50, and that it had a reasonable amount of time to take remedial action. Claimant Mr. Harrington had experienced problems with this same pothole three months earlier. The witness for respondent, Mr. Paul Timbrook, a foreman for the respondent in Hampshire County, testified that although he was unaware of any problems with the edge of Route 50 at the general location of this incident, he explained that respondent has had difficulty with water and the heavy logging trucks breaking off the shoulders of this portion of Route 50. He testified that he and his crew had just widened the shoulder of Route 50 in this area a few weeks before this hearing, in an attempt to keep the logging trucks from breaking off the pavement. However, at the time of this incident there was still a small berm at this location which made it more susceptible to potholes. He went on to testify on cross-examination that due to the elevated turn at the location of this incident, and the fact that logging trucks continuously run over the edge and push the dirt further out that "you're going to have water standing there and then when they hit it, it's going to make a pothole."

In view of the foregoing testimony, the Court is of the opinion that respondent, at the least, had constructive notice of this large pothole and a reasonable amount of time to make the appropriate repairs. Accordingly, the Court is of the opinion to and does make an award to claimants in the amount of $286.96 for the damage to their vehicle.

Award of $286.96.

OPINION ISSUED AUGUST 16, 2001

LEROY HIGH
VS.
DIVISION OF HIGHWAYS
(CC-00-156)

Claimant appeared pro se.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant brought this action for damage done to his 1991 Pontiac Grand Prix, which occurred when an object struck his vehicle while he was traveling northbound on Interstate 81 near the Falling Waters Exit in Berkeley County. This portion of the road is maintained by the respondent near Falling Waters. The Court is of the opinion to deny the claim as stated more fully below.

The incident giving rise to this claim occurred on April 2, 2000, at approximately 10:00 p.m. Claimant and his wife had just passed a construction site where a new bridge was being built. The claimant testified that he was traveling at approximately 60 miles per hour. He drove over a knoll on the interstate, and he was attempting to exit at the Falling Waters Exit when he observed a vehicle in front of him with its flashers on. It appeared to the claimant that an object was caught underneath the vehicle. Claimant testified that this object appeared to be "kicked up" by the other vehicle. Claimant's vehicle struck this object bursting the right front tire and punching a hole in the side door.

Claimant described this object as an approximate eight inch square block, orange in color and solid and metallic in nature. It appeared to claimant to look like "one of those boxes where they put out to check traffic, the counter". The claimant submitted a repair bill in the amount of $641.45. Claimant did not have insurance to cover any portion of this damage.

It is respondent's position that the object which struck claimant's vehicle was not a part of any of their inventory for the construction site, and that it did not have notice of any object in the road in the vicinity of this incident. Bruce Dehaven, an employee of respondent and supervisor of the area of I-81 where this incident occurred, testified that there was construction work being done on the Falling Waters Bridge overpass approximately a mile from the accident scene. He testified that there is nothing in their inventory that fit the description of a squarish eight-inch metallic object which claimant described. Mr. DeHaven also testified that there were no telephone calls made to the respondent on the evening of this incident notifying them of any objects in the road in the vicinity of this incident.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its roads or highways. Adkins v. Sims, 46 S.E.2d 811 (W.Va. 1947). For the respondent to be held liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defects in question. Pritt v. Dept. of Highways, 16 Ct. Cl. 8 (1985).

Respondent established that they did not have any objects of the nature which claimant described in their inventory, and neither did they receive any telephone calls from central dispatch or the state police notifying them of any objects in the road. This Court has consistently held that an award cannot be based on mere speculation. Mooney v. Dept. of Highways, 16 Ct. Cl. 84 (1986); Phares v. Div. of Highways, 21 Ct. Cl. 92 (1996). After a thorough review of the evidence, the Court finds that the claimant has not established that the damage to his vehicle was caused by any negligence on the part of the respondent, and, further, it would be mere speculation for the Court to render an opinion as to what this object was or where it came from. Therefore, the Court is constrained by the evidence to deny this claim.

Claim disallowed.

OPINION ISSUED AUGUST 16, 2001

WILLIAM D. KELLEY and JANET KELLEY
VS.
DIVISION OF HIGHWAYS
(CC-98-186)

Rodney S. Justice, Attorney at Law, for claimant.
Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by the claimants and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. Claimants are the owners of real and personal property located at 1972 Glenwood Road in Milton, in Cabell County.

2. Claimants' residence is located on the west side of Glenwood Road.

3. Respondent was at all times responsible herein for the maintenance of Glenwood Road. 4. Prior to September 1994, respondent had in place a box culvert beneath Glenwood Road which carried the water of the Long Branch of Mill Creek from the east side to the west side of Glenwood Road.

5. Respondent was responsible at all times herein for the maintenance of the aforementioned box culvert which was located in close proximity to claimants' property.

6. In September 1994, respondent replaced this box culvert with a sixty-inch diameter corrugated metal pipe.

7. After respondent replaced the box culvert with the corrugated pipe, claimants' property was damaged by flooding on three separate occasions on or about August 8, 1995, June 23, 1996, and July 31,1996.

8. Respondent agrees that its replacement of the box culvert with the corrugated pipe caused some restriction to the flow of the Long Branch under Glenwood Road and that this restriction contributed to the flooding of claimants' property on the three occasions referred to in the preceding paragraph.

9. Claimant agrees to settle and relinquish this claim for the amount of $39,220.00.

10. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Glenwood Road in Cabell County on the dates of the three incidents of flooding; that the negligence of respondent was the proximate cause of the damages sustained to claimants' property; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for their sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $39,220.00.

Award of $ 39,220.00.

OPINION ISSUED AUGUST 16, 2001

DELORIS L. MANNING
VS.
DIVISION OF HIGHWAYS
(CC-01-091)

Claimant appeared *pro se.*
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her vehicle which occurred when her vehicle struck a rock on a road maintained by the respondent in Hampshire County. The Court is of the opinion to deny the claim as stated more fully below.

The incident giving rise to this claim occurred on January 10, 2001, at approximately 3:00 to 4:00 p.m. The claimant was driving a 1997 Oldsmobile westbound on Springfield Grade Road just west of Capon Bridge. Although it had rained earlier in the day, at the time of the incident it was clear and sunny. Claimant testified that she was traveling up a hill when suddenly the car in front of her swerved to avoid a rock. Claimant did not see the rock in time to avoid striking it with her vehicle. Claimant testified that she could not see the rock because "the sun was shining in my eyes and it was wet, the road, it had rained, and the road was dark just about the color of the rock." The underbody of claimant's vehicle was damaged. She submitted into evidence a repair estimate in the amount of $910.94. Claimant has collision insurance coverage and she paid a deductible of $100.00 for which she is seeking an award.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads and highways. *Adkins v. Simms*, 46 S.E.2d 81 (W.Va. 1947). In order for the Court to find the respondent liable for road defects of this sort, the claimant must prove by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect in question. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). The claimant failed to produce sufficient evidence at the hearing to establish that the respondent had prior notice of this rock in the road or that respondent was negligent in any manner whatsoever with regard to this incident.

In accordance with the facts as stated herein above, the Court is of the opinion

to and does deny this claim.

Claim disallowed.

OPINION ISSUED AUGUST 16, 2001

BRENDA K. MARSHALL
VS.
DIVISION OF HIGHWAYS
(CC-99-437)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On August 29, 1999, claimant was traveling on Route 14 near Boaz, Wood County, when her vehicle struck a large hole.

2. On the date in question, respondent was responsible for the maintenance of Route14 in Wood County and it was aware of the hole which claimant's vehicle struck.

3. As a result of this incident, claimant's vehicle suffered damage requiring the replacement of the rims, tires, and hubcaps. The sustained damage was in the amount of $198.18.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 14 in Wood County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $198.18.

Award of $198.18.

OPINION ISSUED AUGUST 16, 2001

ROSE ANNA MORRIS
VS.
DIVISION OF HIGHWAYS
(CC-00-242)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to her 2000 Honda Civic which occurred when a large tree limb fell on her vehicle while it was parked on a parking lot owned and maintained by respondent at 801 Madison Avenue, Huntington, Cabell County. The Court is of the opinion to make an award in this claim as stated more fully below.

The incident giving rise to this claim occurred on June 21, 2000, approximately between 11:00 a.m. and 1:00 p.m. Claimant had taken her fifteen year old son to get his learner's permit at the office of the DMV located on the respondent's property located at 801 Madison Avenue in Huntington. Claimant was inside waiting for her son to complete his exam for approximately two hours. Once he was finished, the claimant and her son left the building to return to her vehicle when she observed that a large tree limb had fallen on the hood of her vehicle. The limb damaged the hood, the front grill, and scratched the sides of her vehicle. Claimant submitted an estimate of the repair costs which totaled $1,150.96. Claimant also testified that she had to rent a vehicle while her vehicle was being repaired, which cost $210.00. Claimant has insurance to cover the damage to her vehicle; however, she is seeking reimbursement for the deductible feature on her policy in the amount of $500.00.

It is respondent's position that it was not negligent in the maintenance of the parking lot at 801 Madison Avenue, and that the City of Huntington was responsible for maintaining the trees from which the limb fell.

Claimant testified that she was parked in a semi-circular driveway in front of respondent's building. It was a clear, sunny, warm day. There was no wind or storms on the date of this incident. Claimant's vehicle was undisputably parked on respondent's property. James H. Watts testified that he is the buildings and grounds supervisor for respondent in District II, which encompasses the location of this incident in Huntington. His job duties include the upkeep and maintenance of State buildings and grounds including the building and parking lot at 801 Madison Avenue in Huntington. He testified that the City of Huntington maintains the trees along Jackson and Madison Avenues, which includes the tree from which this limb fell. He stated if anything is needed to be done regarding the trees, then the respondent contacts the City of Huntington to take care of it. He also stated that every morning the grounds are inspected and any tree limbs on the ground are picked up by one of respondent's employees.

In cases involving falling trees or falling tree limbs, the Court has held that respondent is liable for dangerous trees or tree limbs on its property or rights-of-way. The Court has also held that in some cases that the respondent may have a duty to remove dangerous tree limbs from trees that are not on the respondent's property or right-of-way, especially where the limb is dead. *Newkirk* v. *Div. of Highways* 20 Ct. Cl. 18 (1993). Here, the evidence established that the tree from which the limb fell was not on the respondent's property or right-of-way, but on property maintained by the City of Huntington. However, the evidence adduced at the hearing clearly established that the limb which fell on claimant's vehicle was dead and that it did so on a calm, clear, sunny day. This Court has also held that if a tree is dead and poses an apparent risk, then the respondent may be held liable. *Wiles v. Div. of Highways*, 22 Ct. Cl. 170 (1999). Mr. Watts testified that in his capacity as supervisor for respondent either he or someone under his control conducts regular inspections of the grounds at 801 Madison Avenue. He also stated that such inspections do include the cleaning up of tree limbs.

For respondent to be held liable in a claim of this nature, the claimant must

prove by a preponderance of the evidence that the respondent had actual or constructive notice of the defect. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Harmon v. Dept. of Highways*, 16 Ct. Cl. 127 (1986), *Jefferies v. Dept. of Highways* 16 Ct. Cl. 79 (1986). Mr. Watts admitted that neither he nor any of his crew inspected the trees for limbs hanging over the respondent's parking lot to determine if any of the limbs were dead and whether or not they presented a hazard to the public. The Court is of the opinion that respondent was on notice of the hazard presented by the tree in question and could have avoided this situation by simply inspecting the trees for dead limbs, then removing the limbs or notifying the City of Huntington to do so.

In accordance with the finding of fact and conclusions of law as stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount $500.00.

Award of $500.00.

OPINION ISSUED AUGUST 16, 2001

JAMES A. ROBERTSON
VS.
DIVISION OF HIGHWAYS
(CC-00-025)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage done to his 1986 Honda Accord which occurred when his vehicle struck a hole on State Route 62 just west of Clifton, Mason County. This portion of State Route 62 is maintained by the respondent in Mason County. The Court is of the opinion to deny the claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on September 17, 1999, at approximately 5:40 p.m. The claimant was traveling home from work. He testified that it was a fair, overcast day and the roads were dry. He was traveling the speed limit which he recalled as being either 40 or 45 miles per hour. At this location, State Route 62 is a blacktop two-lane highway. It is 21 feet wide and each lane is 10.5 feet wide. Claimant testified that as he was traveling around a right hand curve in the road, his vehicle struck a hole. Both passenger side tires were destroyed and the rims were bent. It is claimant's position that the respondent was negligent in its maintenance of State Route 62.

Claimant testified that the hole was located on the outside edge of the blacktop and extended in toward the traveling portion of State Route 62. He indicated that the hole had taken out a portion of the outer white line as well. Claimant also testified that he did not see the hole before he struck it and that he could not have avoided it due to oncoming traffic.

Respondent maintains that it did not have notice of a hole in this portion of Route 62 and therefore was not negligent in this claim. Hamilton Ross Roush testified that he is the assistant supervisor for the respondent in Mason County. One of his

responsibilities is to supervise highway maintenance in Mason County. He testified that he is familiar and responsible for this portion of State Route 62. Mr. Roush testified that there was no notice of any hole in this portion of State Route 62 before this incident occurred. He testified that the Mason County Sheriff's Department did notify the 911 dispatcher, who then notified the respondent's crew leader that was on call on the evening of September 17, 1999, that there was a hole near Clifton that a number of vehicles had struck. The respondent produced a DOH-12 at the hearing which indicated that Greg Forbes, foreman for respondent in Mason County, responded to this call late on the evening of September 17, 1999. Mr. Roush testified that respondent did not receive notice of the hole which claimant's vehicle had struck until well after the incident.

This Court has consistently followed the principle that 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 either actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986). The evidence adduced at this hearing established that respondent did not have notice of this hole that caused damage to claimant's vehicle until after the incident. Therefore, Mr. Robertson has not established by a preponderance of the evidence that respondent was negligent in its maintenance of State Route 62. Accordingly, it is the opinion of the Court to deny this claim.

Claim disallowed.

OPINION ISSUED AUGUST 16, 2001

STATEWIDE SERVICE, INC.
VS.
DIVISION OF CORRECTIONS
(CC-01-184)

Claimant appeared *pro se*.
Jendonnae L. Houdyschell, 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 $1,738.39 for repairing and installing necessary parts on equipment at Anthony Correctional Center, a facility of the respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $1,738.39.

Award of $1,738.39.

OPINION ISSUED AUGUST 16, 2001

CONWAY WRIGHT AND KAREN WRIGHT
VS.
DIVISION OF HIGHWAYS
(CC-00-440)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage done to their 1999 Toyota Corolla. The damage occurred on November 11, 2000, sometime between 6:30 p.m. and 8:00p.m., while the claimants' daughter Rorena Wright was driving westbound on Route 220 near Petersburg, Grant County. Rorena Wright was approaching a stop light, where respondent was conducting construction work. She testified that as she was slowing her vehicle down for the construction zone, she saw a rock falling off the hill. She maneuvered her vehicle in an attempt to avoid the rock, but was unable to do so. The rock damaged the passenger side door and part of the fender. The claimants' had insurance coverage for this damage. The total damages were $1,090.05. The insurance deductible was $250.00, which claimants are seeking to recover.

Claimants contend that the respondent failed to provide adequate warning that this section of Route 220 was a rock fall hazard and that respondent was negligent in its maintenance of the hillside along route 220. Rorena Wright testified that she did not pass any "falling rock" signs on Route 220. She testified that there is only a sign warning drivers to reduce their speed for the signal light ahead. Rorena Wright also testified that there was construction work being done in the area of this incident.

It is respondent's position that they did have the proper "falling rock" warning signs in place and that this was a known rock fall area, and that the construction being done in this area did not contribute to this incident.

Roy Bobo, foreman for the respondent in Grant County, testified that there are "falling rock" signs for both lanes of traffic in the area where this incident occurred. He testified that there was a sign approximately 700 to 800 feet from where this rock struck claimant's vehicle, and that Rorena Wright would have passed it as she was traveling towards Petersburg. He testified that the sign had been in place in that same location since 1972. Mr. Bobo testified that the construction in the area involved the placement of piling along the river, but this construction would not have caused a rock to fall from the opposite hillside. It is a well established principle that the State is neither an insurer or guarantor of the safety of motorists upon its roads. *Adkins v. Simms* 46 S.E.2d 81 (W.Va. 1947). In order to hold the respondent liable for road defects, this Court has held that claimants must prove that the respondent had actual or constructive notice and an opportunity to take reasonable remedial steps. *Hamon v. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The general rule that this Court has adopted is that the unexplained falling of a rock onto a road, without an affirmative showing of negligence on the part of the respondent is insufficient evidence to justify an award. *Coburn v. Dept. of highways*, 16 Ct. Cl. 68 (1985). In rare decisions where the Court has found that the respondent liable for rock fall damages, the Court found that the remedial steps taken by the respondent were either inadequate or nonexistent in response to known rock fall hazards.

In the present case, the evidence established that the respondent was aware that this was a known rock fall area and that they had in place adequate "rock fall" warning signs since 1972 to warn both lanes of traffic on this portion of Route 220 that this was a rock fall area. This Court has held that "rock fall" warning signs are reasonable remedial measures in such instances as this claim. *Atkins v. Division of Highways* 22 Ct. Cl. 138 (1998). While sympathetic to the claimants' situation, the Court is of the opinion that the respondent took reasonable steps to ensure the safety of traveling motorists and that there is insufficient evidence of negligence upon which to make an award. In view of the foregoing, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED OCTOBER 24, 2001

BARBOUR COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-01-186)

Claimant appeared *pro se.*

Jendonnae L. Houdyschell, 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, Barbour County Commission, is responsible for the incarceration of prisoners who have committed crimes in Barbour County, but have been sentenced to facilities owned and maintained by respondent, Division of Corrections. Claimant brought this action to recover $7,189.00 in costs for providing housing to a prisoner who has been sentenced to a State penal institution, but due to circumstances beyond the control of the county, the prisoner has had to remain in the custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in *County Comm'n. of Mineral County vs. Div. of Corrections*, 18 Ct. Cl. 88 (1990), that respondent is liable to claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $7,189.00. Claimant agrees that this is the correct amount to which it is entitled.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $7,189.00.

Award of $7,189.00.

OPINION ISSUED OCTOBER 24, 2001

TAMMY JO CARPENTER

VS.
DIVISION OF HIGHWAYS
(CC-01-090)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. Claimant was traveling on Meadowbrook Road between Bridgeport and Shinnston, Harrison County, when her vehicle struck a large hole in the road damaging a rim and a wheel cover.

2. Respondent was responsible for the maintenance of Meadowbrook Road at this location in Harrison County and respondent failed properly to maintain Meadowbrook Road on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $237.13.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim as stated in the stipulation and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of Meadowbrook Road in Harrison County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $237.13.

Award of $237.13.

OPINION ISSUED OCTOBER 24, 2001

RONALD COLPO, SR.
VS.
DIVISION OF HIGHWAYS
(CC-01-016)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On January 5, 2001, claimant was driving his vehicle on Route 22 eastbound

at the Colliers Way exit near Weirton, Hancock County, when he maneuvered his vehicle to the berm of the road to thank State employees who were working in the area. At this location, his vehicle struck a broken metal reflector post which destroyed two tires.

2. Respondent was responsible for the maintenance of the berm of the road at this location in Hancock County.

3. Respondent failed properly to maintain the berm of the road at Colliers Way Exit on the date of this incident.

4. As a result of this incident, claimant's vehicle sustained damage in the amount of $264.00.

5. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim as stated in the stipulation and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of the berm of the road at the Colliers Way exit in Hancock County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $264.00.

Award of $264.00.

OPINION ISSUED OCTOBER 24, 2001

CHARLESTON AREA MEDICAL CENTER
VS.
DIVISION OF CORRECTIONS
(CC-01-303)

F. Chris Gall, Attorney at Law, for claimant.
Jendonnae L. Houdyschell, 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 payment in the amount of $31,030.77 for medical services rendered to an inmate in the custody of respondent at Mt. Olive Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 24, 2001

NANCY L. FAULKNER
VS.
DIVISION OF HIGHWAYS
(CC-01-312)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On June 26, 2001, claimant was driving across a bridge on Route 250 near Belton, Marshall County, when her vehicle struck a portion of guardrail which was protruding into the travel portion of the north end of the bridge causing damage to the vehicle's right rear tire and rim.

2. Respondent was responsible for the maintenance of this bridge on Route 250 in Marshall County on the date of this incident and respondent failed properly to maintain this portion of Route 250.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $290.31.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 250 in Marshall County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $290.31.

Award of $290.31.

OPINION ISSUED OCTOBER 24, 2001

PETER D. HOPPER and KATHLEEN F. HOPPER
VS.
DIVISION OF HIGHWAYS
(CC-01-100)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered

into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. Claimant, Peter Hopper, was traveling on Route 22 in Sardis, Harrison County, when the oil pan on his vehicle struck a very high center of pavement in the road causing the oil pan to rupture.

2. Respondent was responsible for the maintenance of Route 22 at this location in Harrison County and respondent failed to maintain Route 22 in proper condition on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $272.39.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim as stated in the stipulation and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of Route 22 in Sardis, Taylor County, on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $272.39.

Award of $272.39.

OPINION ISSUED OCTOBER 24, 2001

ARTHUR J. KARLEN, JR.
VS.
DIVISION OF HIGHWAYS
(CC-01-028)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. Claimant was traveling on Route 33 near Weston, Lewis County, when his front tire struck a large hole in the road.

2. Respondent was responsible for the maintenance of Route 33 near Weston, Lewis County, and respondent failed to maintain this portion of Route 33 in proper condition on the date of this incident and failed to provide warning devices at the location of the hole for the traveling public.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $347.36.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim as stated in the stipulation, and

adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of Route 33 near Weston in Lewis County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $347.36.

Award of $347.36.

OPINION ISSUED OCTOBER 24, 2001

STEVEN D. LEFTWICH
VS.
DIVISION OF HIGHWAYS
(CC-00-260)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. Claimant's residence is located at 417 Skyline Drive, Charleston, in Kanawha County. Respondent has a storm drain on its right of way in front of claimant's residence.

2. Respondent is responsible for the maintenance of the storm drain at this location.

3. The storm drain directs water flow under the road in front of claimant's residence and down a hill onto claimant's property. In June 1999, claimant's basement was flooded. He immediately contacted respondent in an effort to resolve the flooding problem, but no remedial action was taken by respondent.

4. Claimant purchased dye tablets to place in the storm drain to determine if it was the source of the water flooding his basement, at a cost of $67.84. The dye did flow into his basement during the next flooding. However, respondent did not take the necessary action to remedy the problem.

5. Claimant's basement was flooded again on February 18, 2000, during a severe rainstorm. Claimant informed respondent of the incident and respondent scheduled a camera investigation for February 20, 2000, to determine whether the water in claimant's basement was coming from its storm drain.

6. The respondent subsequently canceled this investigation. Claimant hired a company to do a camera investigation at a cost of $272.00, which disclosed numerous defects within portions of respondent's drainage system.

7. Respondent admits that its pipe was defective and it subsequently remedied the condition.

8. Claimant seeks reimbursement for the cost of the fluorescein dye at $67.84

and reimbursement for the cost of the camera investigation at $272.00.

9. Respondent agrees that the amount claimed as damages is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of the storm drain and pipe on Skyline Drive in Charleston, Kanawha County, on the date of this incident; that respondent's negligence proximately caused claimant to incur certain expenses; and that the expenses are fair and reasonable. Thus, claimant may make a recovery for his sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $339.84.

Award of $339.84.

OPINION ISSUED OCTOBER 24, 2001

DAVID JOSEPH MARINO
VS.
DIVISION OF HIGHWAYS
(CC-01-122)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. Claimant was traveling north on Route 73 near Morgantown, Monongalia County, when his vehicle struck a large hole in the road damaging the passenger side tires and rims.

2. Respondent was responsible for the maintenance of Route 73 in Monongalia County and respondent failed properly to maintain Route 73 at the location at issue on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $182.27.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim as stated in the stipulation and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of Route 73 in Monongalia County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $182.27.

Award of $182.27.

OPINION ISSUED OCTOBER 24, 2001

MASON COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-01-176)

Claimant appeared *Pro se.*
Jendonnae L. Houdyschell, 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, Mason County Commission, is responsible for the incarceration of prisoners who have committed crimes in Mason County, but have been sentenced to facilities owned and maintained by respondent, Division of Corrections. Claimant brought this action to recover $1,175.00 in costs for providing housing to 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 custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in *County Comm'n. of Mineral County vs. Div. of Corrections*, 18 Ct. Cl. 88 (1990), that respondent is liable to claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim and the amount of $1,175.00.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $1,175.00.

Award of $1,175.00.

OPINION ISSUED OCTOBER 24, 2001

MYRA K. RINE
VS.
DIVISION OF MOTOR VEHICLES
(CC-01-306)

Claimant appeared *pro se*.
Joy M. Bolling, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. Claimant purchased a vehicle in 1992 at which time she paid the proper

vehicle taxes and she obtained her title in West Virginia. Subsequently, she moved to Delaware in1997 and then returned to West Virginia in April 1999, at which time she again paid the same tax on the same vehicle in the amount of $120.00.

2. Claimant did not become aware of the fact that she was not obligated to pay the vehicle taxes a second time on this vehicle until July 2001. Claimant now seeks reimbursement of the $120.00 for which she was wrongly charged by the respondent.

3. Respondent admits that it wrongly charged the claimant, and further, respondent admits the validity of this claim in the amount of $120.00.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent for requiring claimant to pay taxes for the same automobile twice; that the negligence of respondent was the proximate cause of the damages sustained by the claimant; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $120.00.

Award of $120.00.

OPINION ISSUED OCTOBER 24, 2001

JON SCRAGG
VS.
HIGHER EDUCATION POLICY COMMISSION
(CC-01-026)

Claimant appeared *pro se*.

Samuel R. Spatafore, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. Claimant, as a student at West Virginia University, a facility of the respondent, was a tenant at Brooke Towers in Room No. 4312 in Morgantown, Monongalia County.

2. Respondent owns and is responsible for the maintenance and upkeep of Brooke Towers in Morgantown.

3. In January 2001, the central air conditioner in Brooke Towers leaked a significant amount of water and flooded claimant's room causing damage to his personal computer in the amount of $300.00.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Brooke Towers on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's property; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the

amount of $300.00.

Award of $300.00.

OPINION ISSUED OCTOBER 24, 2001

MINDY WEASENFORTH
VS.
DIVISION OF HIGHWAYS
(CC-01-175)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. Claimant was traveling Route 50 East in Clarksburg, Harrison County, when her vehicle struck a broken road reflector causing substantial damage to her vehicle.

2. Respondent was responsible for the maintenance of this portion of Route 50 in Clarksburg, Harrison County, and respondent failed properly to maintain Route 50 at this location in Harrison County on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $858.44.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim as stated in the stipulation and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of Route 50 in Clarksburg, Harrison County, on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $858.44.

Award of $858.44.

OPINION ISSUED DECEMBER 10, 2001

DENNIS ALBRIGHT AND ELIZABETH BROOKS
VS.
DIVISION OF HIGHWAYS
(CC-00-264)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to their 1995 Oldsmobile Cutlass which occurred when claimant Elizabeth Brooks was driving their vehicle and it struck a hole in the road on WV Route 75 in Lavalette, Wayne County. This portion of WV Route 75 is maintained by the respondent in Wayne County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on May 17, 2000, at approximately 4:00 p.m. Mrs. Brooks was driving from work to her home in Lavalette on WV Route 75. It was a warm, dry, sunny day. Mrs. Brooks testified that there was heavy traffic on the road in both directions. She was traveling at approximately forty miles per hour which is within the posted speed limit. She drove around a curve when suddenly her vehicle struck a large hole. She testified that she saw the hole just before her vehicle struck it. She did not have adequate time to avoid striking it. She could neither maneuver into the other lane due to oncoming traffic nor could she maneuver onto the berm due to the size of the hole. The force of the impact damaged both the tire and the rim and knocked the vehicle out of alignment. Ms. Brooks submitted into evidence photographs which demonstrated that the hole extended into the travel portion of the road and totally covered the white line. The hole was approximately six feet in length and five and one-half inches deep. Claimants assert that respondent knew or should have known of this hole and that it presented a hazard to the traveling public. Claimants submitted repair bills totaling $577.02 in damages; however, they had insurance coverage with a $250.00 deductible which constitutes the limit of any recovery in this action.

Respondent asserts that it did not have notice of this particular hole nor a reasonable amount of time to make repairs. John M. Sammons testified that he has been employed by the respondent for approximately thirty years. He is currently the County Maintenance Supervisor in Wayne County. At the time of the incident at issue, he was a Permit Supervisor. He testified that he is very familiar with WV Route 75 in Lavalette. He stated that WV Route 75 has an average daily traffic rate of about 15,000 vehicles and that it is a heavily traveled road. He also testified that the condition of the road requires a lot of paving and his crew patched it twice by August 2001. Mr. Sammons stated that the portion of WV Route 75 he is responsible for maintaining has some edge failures where the road breaks away along the white line. Mr. Sammons inspected the records of complaints for the last six years regarding this portion of WV Route 75 and did not find any complaints regarding the particular location where this incident occurred. However, Mr. Sammons admitted that he travels this road daily, he passed this hole on numerous occasions, but he did not report it to his superiors.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). For the respondent to be held liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect in question and a reasonable time to make adequate repairs. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). Although there was not actual notice of this particular hole according to the respondent's records, there was certainly constructive notice. Claimant established the size of this hole and its location in the roadway. The Court, having reviewed the evidence in this claim is of the opinion that this particular hole on WV Route 75 presented a hazard to the traveling public.

Accordingly, the Court makes an award in this claim in the amount of $250.00, which is the amount of the claimants' insurance deductible.

Award of $250.00.

OPINION ISSUED DECEMBER 10, 2001

ALLEGHENY VOICE & DATA, INC.
VS.
PUBLIC SERVICE COMMISSION
(CC-01-283)

Claimant appeared *pro se.*
Joy M. Bolling, 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 payment in the amount of $831.55 for providing technical labor and services for the installation of fax lines to the respondent State agency. Respondent, in its Answer filed on August 21, 2001, admitted the validity of the claim, and further stated that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim. Thereafter an opinion was issued by the Court denying the claim based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health,* 8 Ct. Cl. 180 (1971).

On October 29, 2001, the Court received and filed an Amended Answer from respondent wherein respondent indicates that it had sufficient funds in the proper fiscal year with which it could have paid the invoices which are the subject matter of the claim; therefore, the Court amends its previous opinion and makes an award to claimant in the amount of $831.55.

Award of $831.55.

OPINION ISSUED DECEMBER 10, 2001

ALLTEL CORPORATION
VS.
DIVISION OF CORRECTIONS
(CC-01-048)

Claimant appeared *pro se*.
Daynus Jividen, Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,181.36 for providing telephone services to respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim, but states that the correct amount owed to claimant is $386.35. Respondent further states that there were sufficient funds expired in the appropriate

fiscal year from which the invoices could have been paid. Claimant and respondent reviewed the Answer of the respondent and the parties now agree that the correct amount owed to claimant is $600.00 which agreement was memorialized in correspondence to this Court. The claim is considered submitted for decision upon that correspondence.

Accordingly, the Court makes an award to claimant in the amount of $600.00.

Award of $600.00.

OPINION ISSUED DECEMBER 10, 2001

JOHN BETTEM, III
VS.
DIVISION OF HIGHWAYS
(CC-01-226)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 2000 Pontiac Sunfire GT. The incident occurred on State Route 7 between Wileyville and New Martinsville, Wetzel County, when his vehicle struck a large hole in the road. This portion of road is maintained by the respondent in Wetzel County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on January 15, 2001, at approximately 5:15 a.m. The claimant testified that his former wife was driving his vehicle. She was on her way to work at a Morgantown hospital from their home in Paden City. Although the claimant was not with his wife when the incident occurred, he did come to the scene after the incident and observed the hole. Since the date of this incident, Mr. Bettem and his wife have divorced. She was unwilling to be present at the hearing of this matter. Therefore, Mr. Bettem was the only person present to testify at the hearing.

Claimant testified that he travels this portion of State Route 7 a few times each year. He stated that his former wife traveled this portion of road often on her way to and from work. He testified that prior to the incident on January 15, 2001, she had not traveled this route for three days. According to Mr. Bettem, he believed that the hole was there the last time his former wife had traveled this portion of State Route 7. He testified that his wife told him that she was traveling at approximately forty-five to fifty miles per hour. The speed limit at this location is fifty-five miles per hour. Mr. Bettem admitted on cross-examination that he could not verify this for certain since he was not there. However, he stated that he believes that she was not traveling over fifty miles per hour due to the nature of the road. He described the area of State Route 7 just prior to where the incident occurred as having a very sharp left turn and then a moderate right turn. Given the nature of the road and the fact that it was dark, he does not believe she would have been traveling any faster than the speed she related to him. The claimant's vehicle suffered damage to the wheel and tire. Claimant submitted a repair estimate in the amount of $482.51.

Claimant contends that the respondent knew or should have known of such a

large hole on State Route 7and that it should have taken adequate measures to repair this hole. Claimant introduced photographs which depict a large hole extending from the berm area and into the travel portion of State Route 7. One of the photographs also establishes that this hole was approximately seven inches deep from the top of the pavement to the bottom portion of the hole. Claimant asserts that the width and depth of this hole coupled with its location on State Route 7 is indicative of the fact that it has been present long enough that the respondent should have known of its existence and repaired it.

Respondent's position is that it did not have notice of this hole and that it did not have time to make adequate repairs prior to the incident. Jack Mason, an employee of the respondent and a crew leader responsible for this portion of State Route 7 in Wetzel County, testified that State Route 7 is a high priority two-lane road. He is familiar with this portion of State Route 7 and frequently travels it. Mr. Mason testified that neither he nor his crew were aware of this hole until he was notified to testify at the hearing of this matter. He also testified, according to his records that six to eight days prior to the January 15, 2001 incident, he supervised a crew which patched holes in the road in the section of State Route 7 where this incident occurred. He stated that the hole at issue would have been within the section that was patched, but that he could not say whether or not the hole was there on January 15, 2001. He testified, due to the fact that his crew had to use cold mix to patch State Route 7 and that tractor-trailers tend to "take it out", that the hole could have developed between the time it was patched and the date of the incident. However, Mr. Mason admitted that he could not state for certain whether or not the hole which damaged the claimant's vehicle was present or patched at the time he and his crew were working on State Route 7.

The law is well established in this State that the respondent is neither an insurer nor a guarantor of the safety of motorists on its roads or highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va. 1947). For the respondent to be held liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defects at issue and a reasonable amount of time to make adequate repairs. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). In this claim, the claimant established by a preponderance of the evidence that the respondent had at least constructive, if not actual, notice of this hole. The fact that claimant was not present when this incident occurred and that he testified as to statements that his former wife made to him regarding how this incident occurred as well as the nature, condition, and location of the hole falls under the hearsay exception, Rule 804(5) of the West Virginia Rules of Evidence. This Rule states in part that a declarant of a statement is unavailable when the declarant is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means. Therefore, she qualifies as unavailable and the testimony of Mr. Bettem regarding what his former wife told him qualifies as an exception to the hearsay rule and is admissible.

The Court is of the opinion that the size of the hole and the fact that it extended well into the travel portion of State Route 7 created a hazardous condition especially for drivers traveling this road in the dark. The size of the hole, its location, and the fact that the respondent had just patched this portion of the road leads the Court to conclude that the hole had been in existence for a long enough period of time that adequate repairs should have been made or at least provide a warning device for drivers. Thus, the Court finds negligence on the part of the respondent in this claim.

Accordingly, the Court makes an award to claimant in the amount of $482.51.

Award of $482.51.

OPINION ISSUED DECEMBER 10, 2001

KELLIE M. BETTINGER
VS.
DIVISION OF HIGHWAYS
(CC-00-239)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to her 1987 Chevrolet Corsica. The incident occurred on County Route 50/5 also referred to as Winding Road, near Waverly, Wood County, when a portion of the road slipped and gave way. This portion of road is maintained by the respondent. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on June 5, 2000, at approximately 5:00 p.m. It was a nice, warm, sunny day. Claimant was traveling County Route 50/5 from her home to the store with her two young children in the car with her. She was approximately five miles from her home when she approached an oncoming car. She drove her vehicle toward the edge of the road far enough to allow room for the other vehicle to pass safely. Although her right side tires were partially off the road, she testified that most of the right side tires remained on the road. Her vehicle was completely stopped for a few seconds. Once the other vehicle passed, Ms. Bettinger tried to maneuver her vehicle back into the driving portion of the road, when suddenly she felt a bump and the car shaking. Suddenly, the edge and the berm of the road slipped and gave way. The vehicle flipped over onto the passenger side in a ditch approximately five feet deep. The bottom of the ditch was made up of large rocks. Ms. Bettinger and her two young children escaped from the vehicle by climbing out the driver's side window. The force of the impact totaled claimant's vehicle which she purchased in 1998 at a cost of $1,200.00. Claimant also submitted a tow bill in the amount of $80.00. However, claimant had insurance in place which paid $50.00 on the tow bill, limiting her to a recovery of $30.00. It is claimant's position that the respondent is liable in this claim for failing to provide adequate warning to the traveling public of a hazardous condition.

The testimony and photographs introduced by the claimant indicate that the edge of Route 50/5 as well as part of the berm slipped and gave way beneath the right side tires causing the vehicle to flip over into the ditch. Evidence also established that high weeds and brush at this location prevent approaching traffic from seeing the deep hole just off the edge of the road, and that there was no warning sign in place.

Respondent asserts that it did not have notice of this particular hazard and that it did have a warning sign at this location at one time; however, the warning sign apparently had been removed unbeknownst to the respondent. Lowell Bumgard, Transportation Crew Supervisor for the respondent in Wood County, testified that he is responsible for the maintenance of Route 50/5. He is familiar with Route 50/5. He testified that this route is a secondary route and he described it as being curvy and narrow. At the location of this incident, the road is only twelve feet wide. Mr. Bumgard stated that the berm of the road varies from one to four feet at various

locations. He also testified that respondent has a pipe crossing in place at the location where claimant's vehicle flipped over. He described it as a metal pipe approximately forty-eight inches in diameter. He also stated that there is no concrete at this location, either on the road or supporting the pipe. He stated that the head wall built on the pipe may appear to resemble concrete but it is only rocks. This pipe is located in this area for the purpose of draining a creek that flows through the area.

Mr. Bumgard testified that he did not have any complaints on record regarding the condition of the road near the location at issue, nor did he have any notice that the warning sign also referred to as a hazard paddle was missing, until after the incident. He stated that there had been a hazard paddle at the location at one time, but it was missing at the time this incident occurred. He stated that he and the crew he supervises try to keep hazard paddles up at narrow spots in the road where there are pipe crossings. This is intended to warn motorist of a hazard. However, he also stated that these hazard paddles often come up missing and that it takes time to notice this and to replace them. He testified that it is his job to inspect every route in his area at least once per month.

The law is well established that the State is neither an insurer nor guarantor of the safety of persons traveling on its highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va. 1947). For 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. Division of Highways*, 11 Ct. Cl. 150 (1977); *Chapman v. Division of Highways*, 16 Ct. Cl. 103 (1986). In the present claim, the evidence demonstrated that respondent at least had constructive notice of the hazard. Respondent is aware that Route 50/5 is a narrow road and that at many locations vehicles must necessarily need to use the berm of the road to allow oncoming traffic to pass. Respondent is also aware that there are a number of pipe crossings on this road including the one at issue in this claim and that these present a hazard to the traveling public. Hazard paddles are placed at these locations to warn the public of the danger of maneuvering their vehicles to the edge of the road. However, there was no hazard paddle present at the pipe crossing where the claimant's vehicle was totaled. Given the hazardous condition of this pipe crossing and the narrow nature of the road, respondent should have been more diligent in observing that the hazard paddle was missing and replaced it in a timely manner. Therefore, the Court has determined that respondent failed to provide adequate warning to the traveling public of a hidden danger which was the proximate cause of the damages to claimant's vehicle.

Accordingly, the Court makes an award in this claim in the amount of $1,060.00 which is the amount of the vehicle depreciated to its value at the date of the accident plus the towing expense.

Award of $1,060.00.

OPINION ISSUED DECEMBER 10, 2001

CARLENE BRAGG
VS.
DIVISION OF HIGHWAYS
(CC-00-267)

Claimant appeared *pro se*.

Andrew Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On July 21, 2000, claimant was traveling on WV Route 3 also known as Upper Mud River Road in Sias, Lincoln County, when she came upon an area where the road was broken off, and her vehicle struck the hole. There was a deep hole approximately one foot wide, eight feet long, and one foot deep at the edge of the road.

2. Respondent was responsible for the maintenance of WV Route 3 in Lincoln County and respondent failed to maintain this road in proper condition for the traveling public on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $89.50.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of WV Route 3 in Lincoln County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $89.50.

Award of $89.50.

OPINION ISSUED DECEMBER 10, 2001

DOTTIE CARPENTER
VS.
DIVISION OF HIGHWAYS
(CC-01-190)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to her 1998 Ford which occurred when gravel and blacktop blew onto her vehicle while it was parked in front of her home on Top Street, Farmington, Marion County. This portion of the road is maintained by the respondent in Marion County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred during the night of April 4, 2000. Claimant Dottie Carpenter went to work on the morning of April 4, 2000. From approximately 9:30 a.m. until 1:00 p.m. respondent performed work on Top Street, also designated as County Route 218/81, while the claimant was at work. Claimant returned to her residence at Top Street after work that evening and parked her car in her driveway. Her residence is located at the end of Top Street, and her vehicle is parked

along the road. She testified that she did notice that respondent had performed patch work on Top Street and that when she drove through the patched area there was no damage done to her vehicle. She also stated that she did not move her vehicle after returning home from work on April 4, 2000. During the night, there was a heavy rain and wind storm. When claimant came out of her house to go to work the next morning, she noticed that there were large rocks and gravel coated with an asphalt like substance all over her vehicle. There were large chunks of rock on her hood, and a large amount of debris in her windshield wiper area. In addition, there were rocks laying on top of the vehicle, the trunk, and some on the side windows as well. The rocks damaged the paint on claimant's vehicle for which she obtained an estimate from Corwin Ford. The estimate she submitted was in the amount of $2,227.59, which includes the cost of a full paint job and clear coat. Claimant had insurance to cover the damage to her vehicle at the time of this incident. Therefore, she is limited in her recovery to the deductible feature on her insurance policy in the amount of $250.00.

Claimant asserts that respondent was negligent for failing to remove the excess rock and gravel properly and adequately from the area it had blacktopped. Claimant also asserts that this excess rock and gravel was picked up by the heavy wind and rain storm and blown onto claimant's vehicle.

Respondent's position is that it adequately sealed the blacktop patchwork it performed and that it did not leave excessive rock or gravel that would cause damage to claimant's vehicle. Billy Lane, respondent's foreman at the Mannington Substation in Marion County, testified that he was responsible for the repair work performed on Top Street on the date at issue. Mr. Lane testified that Top Street is a secondary road approximately ten feet in width and two or three miles long. Mr. Lane supervised the crew that repaired Top Street. The repairs were made to the entrance and edges of Top Street which had been broken off in places due to school buses which make frequent stops for children. The holes in the road were also filed with hot "pre-mix" blacktop. His testimony established that the blacktop was applied to the holes, then rolled and compacted. Mr. Lane stated that the blacktop in these holes should stay in place as long as there is a good edge to hold it in place. He also stated that excess blacktop residue is always present after a resurfacing job, but that he does not believe that there was enough residue left on the road to cause damage to claimant's vehicle. Although possible, he stated that he did not believe the storm on the night of April 4, 2000, could have caused this much gravel and rock to accumulate on claimant's vehicle. However, Mr. Lane could not answer whether or not there was excess rock and gravel at the end of the road where claimant's home is located or where the road met the grass because he had not checked this location.

It is undisputed that claimant's vehicle did have rock and gravel on it and that it was damaged as a result. Testimony established that respondent had just finished using blacktop to make repairs on Top Street where claimant parked her vehicle. The explanation that the heavy winds and rain picked up the excess rock and gravel and blew it onto claimant's vehicle appears to be quite plausible. The fact that claimant's vehicle was parked at the end of the street where Mr. Lane and his crew did not check for excess rock and gravel leads the Court to conclude that claimant's vehicle was damaged by this excess rock and gravel at this location.

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

Award of $250.00.

OPINION ISSUED DECEMBER 10, 2001

CHARLESTON AREA MEDICAL CENTER
VS.
DIVISION OF CORRECTIONS
(CC-01-300)

F. Chris Gall, Attorney at Law, for Claimant.
Daynus Jividen, Senior 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 payment in the amount of $35,534.37 on invoices which total $36,034.37 for medical services rendered to an inmate in the custody of respondent at Mt. Olive Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, that the correct amount owed claimant is $35,534.37, and further, 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 DECEMBER 10, 2001

CITIZENS COMMUNICATIONS CO. OF WEST VIRGINIA
VS.
DEPARTMENT OF ADMINISTRATION
(CC-01-281)

John Philip Melick, Attorney at Law, for claimant.
John T. Poffenbarger, General Counsel, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein the facts and circumstances of the claim were agreed to as follows:

1. Claimant provided telecommunications services to various State agencies during fiscal years 1998,1999, and 2000 for which claimant has not received reimbursement.

2. Respondent was responsible for the processing of the invoices submitted by claimant and the State agencies failed to reimburse claimant upon receipt of the

invoices for telecommunication services.

3. As a result of the failure of respondent to pay for the services rendered to the various State agencies, claimant sustained a loss in the amount of $821,053.59.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent has a legal and moral obligation to compensate claimant in the amount of $821,053.59 for services rendered to the State of West Virginia; therefore, claimant may make a recovery in this claim.

Accordingly, the Court is of the opinion to and does make an award to claimant in the amount of $821,053.59.

Award of $821,053.59.

OPINION ISSUED DECEMBER 10, 2001

AMANDA D. CROSS
VS.
DIVISION OF HIGHWAYS
(CC-00-195)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. That claimant, Amanda D. Cross, was traveling Route 119 across Webster Bridge, Taylor County, when both passenger side tires struck a large hole on the bridge.

2. Respondent was responsible for the maintenance of Webster Bridge, Taylor County.

3. Respondent failed to maintain properly Webster Bridge on the date of this incident and failed to provide warning devices at the location of the hole for the traveling public.

4. As a result of this incident, claimant's vehicle sustained damage to two wheels in the amount of $631.76. Claimant did not have insurance coverage available to cover these damages.

5. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim as stated in the stipulation and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of Route 119 Webster Bridge in Taylor County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her sustained

loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $631.76.

Award of $631.76.

OPINION ISSUED DECEMBER 10, 2001

EURO SUITES HOTEL
VS.
ATTORNEY GENERAL
(CC-01-398)

Claimant appeared *pro se*.
Joy M. Bolling, 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 $225.00 for providing hotel services to an employee of the respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $225.00.

Award of $225.00.

OPINION ISSUED DECEMBER 10, 2001

JOHN F. GODBEY
VS.
DIVISION OF HIGHWAYS
(CC-00-272)

Claimant appeared *pro se*.
Andrew Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On June 29, 2000, claimant and his wife were in their vehicle and they were entering the West Virginia Turnpike proceeding southbound from Charleston, Kanawha

County, when their vehicle struck a hole in the bridge pavement created by a missing piece of metal from a broken expansion joint.

2. Respondent was responsible for the maintenance of this bridge at the entrance to the West Virginia Turnpike in Kanawha County and respondent failed to maintain properly the expansion joint on the bridge on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $106.00.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of the expansion joint on this particular bridge on the date of this incident; that respondent had notice of the defective condition and an opportunity to effect the necessary repairs; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $106.00.

Award of $106.00.

OPINION ISSUED DECEMBER 10, 2001

TONY L. JEFFREY
VS.
DIVISION OF HIGHWAYS
(CC-00-168)

Claimant appeared *pro se*.

Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

PER CURIAM:

Claimant seeks an award of $225.00 for damage to his vehicle which occurred the afternoon of April 19, 2000, when he was traveling on Alternate Route 10 near the junction of Route 60 at "Holly Court" near Barboursville, Cabell County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

Claimant, while traveling on Alternate Route 10 decided to stop his vehicle so he could speak to Paul Thompson, a friend of his, at the junction of Alternate Route 10 and Route 60. As claimant drove his dual-tire truck completely off the road and onto the berm of Alternate Route 10 to speak to Mr. Thompson, he began to back his truck up when a piece of an iron sign post approximately six to eighteen inches above the ground punctured his vehicle's inner left side dual tire and tore off the mud flap.

Claimant testified that the sign post was located approximately two feet from the edge of the roadway on the berm of Alternate Route 10. The sign post was hidden by high grass and he described the sign post as an "angle iron of some type", and that it had holes from the bottom to the top of the post. Paul Thompson also testified that

he saw the sign post both after this incident and prior to it. He described the sign post as being covered up by grass. He testified that he had seen the sign post prior to this occasion when an adjacent property owner was cutting the grass in the area and the sign post was clearly exposed. Claimant asserts that respondent knew or should have known that this hazard existed and that it failed to take proper remedial action.

Respondent contends that it did not have notice of any sign post at this location and it did not believe that this post was one of its sign posts. Charles King a maintenance crew supervisor for respondent works in this area. One of his responsibilities is to assign crews to tasks, and to follow up on complaints regarding the highways. He testified that he did not recall any signage that had ever been in the area where claimant's vehicle was damaged and he did not have any personal knowledge of this particular post. Mr. King did testify that this sign post which claimant's vehicle struck was probably within the respondent's right of way and that this particular sign post was consistent with the breakaway sign post that the respondent normally uses. However, he did not believe that such a sign would be as close to the road as this particular sign was located.

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). However, respondent has a duty to maintain the berm of a highway in a reasonably safe condition for use when the occasion requires. *Ginger B. Compton v. Division of Highways*, 21 Ct. Cl. 18 (1995). Liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway and it fails. *Sweda v. Dept. of Highways*, 13 Ct. Cl. 249 (1980).

In the present claim, Alternate Route 10 is a first priority road in Cabell County. The evidence establishes that there is adequate space along the edge of Alternate Route 10 for a berm. Furthermore, the sign post claimant's vehicle struck was on respondent's right of way. Claimant's use of the berm appears to have been reasonable. Therefore, the issue is whether or not the respondent knew or should have known of this piece of sign post. This piece of sign post was similar to the type of sign that respondent uses. Given this evidence as well as the fact that this is a first priority road, respondent should have been aware that this broken sign post was present and presented a hazard to the traveling public. The Court has determined that respondent was negligent in its maintenance of the berm of Alternate Route 10 on the date of claimant's incident and that this negligence was the proximate cause of claimant's damages.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $225.00.

Award of $225.00.

OPINION ISSUED DECEMBER 10, 2001

JOHNSON CONTROLS, INC.
VS.
PUBLIC SERVICE COMMISSION
(CC-01-356)

Claimant appeared *pro se*.
Joy M. Bolling, 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 $2,504.25 for providing heating, air conditioning, and ventilation services to respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Amended Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $2,504.25.

Award of $2,504.25.

OPINION ISSUED DECEMBER 10, 2001

DAVID RYAN MICK
VS.
DIVISION OF HIGHWAYS
(CC-00-418)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 1996 Pontiac Grand Am. The incident occurred on County Route 11 near Reynoldsville, Harrison County, when claimant's vehicle struck a large hole on the edge of the road. This portion of road is maintained by the respondent in Harrison County. The Court is of the opinion to make a comparative award for the reasons stated more fully below.

County Route 11is a second priority two-lane blacktop road with double yellow lines and white edge lines. It is approximately sixteen to eighteen feet wide. The incident giving rise to this action occurred on July 28, 2000, at approximately 12:00 p.m. The claimant was traveling from his home in Reynoldsville to a friend's home. He was driving his vehicle between thirty-five to forty-five miles per hour. The speed limit at this location is thirty-five miles per hour. Claimant was topping a small hill when an oncoming vehicle approached him with its high beam lights on. The oncoming vehicle crossed the center line forcing the claimant to maneuver his vehicle to the right and partially onto the berm of the road. The right side tires struck the hole causing significant damage. Claimant was familiar with the road and testified that he traveled it almost daily. He knew the hole was present, but due to the oncoming vehicle's high beams he was not able to see its exact location. He also had to react quickly to avoid the oncoming vehicle. As a result, claimant's vehicle sustained damage to the right front tire, rim, wheel bearing, the front strut assembly, and the right side control arm.

Claimant submitted a repair estimate in the amount of $1,319.27. However, not all repairs were made by the dealership which provided the estimate. Claimant testified that he did not have the left control arm repaired which was estimated at a cost of $127.75, but he did replace the right control arm at a cost of $125.00. He also purchased a right front wheel bearing at a cost of $80.00 instead of the $290.85 which was the estimated amount. Therefore, claimant seeks to recover his out-of-pocket expenses of $1,078.37. The claimant carried liability insurance only.

Claimant contends that respondent knew or should have known of such a large hole on County Route 11 and that it should have taken adequate measures to repair this hole. Claimant submitted photographs in evidence which depict a large hole extending from the berm area and slightly onto the white line. These photographs also establish that the hole was approximately six inches deep and at least five feet in length. Claimant asserts that these facts are indicative that the hole has been present long enough that the respondent should have made adequate repairs.

Respondent's position is that it did not have notice of this hole nor did it have adequate time to make repairs. Respondent also asserts that the claimant knew of this hole and was familiar with the road, and, therefore, he should have been able to avoid it.

William H. Wyckoff, Assistant Superintendent of Highway Maintenance in Harrison County, is responsible for the maintenance of highways in Harrison County. He testified that he had no complaints about this particular hole until after the incident which is the subject of this claim. Mr. Wyckoff stated that berms are repaired with "berm rock". It is his opinion that this particular hole was probably caused by traffic coming in and out of the parking lot located to the right of the damaged berm. He stated that traffic will kick the rock back out when vehicles pull in and out of the driveway. However, Mr. Wyckoff admitted that this hole was clearly within the State's right of way. He or a member of his crew travel this portion of County Route 11at least twice a week. He also admitted that in traveling this road it is probable that one of his employees was likely to see this hole. He stated that the hole is not very visible until a driver is right upon it due to the fact that it is located on the crest of a hill.

The law is well established in this State that the respondent is neither an insurer nor a guarantor of the safety of motorists on its roads or highways. *Adkins v. Simms*, 46 S.E.2d 811 (W.Va. 1947). To hold the respondent liable for a road defect of this nature, the claimant must prove by a preponderance of the evidence that the respondent had actual or constructive notice of the defect and a reasonable amount of time to make repairs. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). *Hamon v. Dept. of Highways*, 16 Ct. Cl. 127 (1986), The Court is of the opinion that a hole of this size would develop over a significant period of time, especially given the fact that this incident occurred late in the summer. Furthermore, respondent's employees travel this portion of road and pass the hole at least twice a week and should have made adequate repairs. The Court is of the opinion that respondent had constructive notice of this hazard and a reasonable amount of time to make repairs. However, the Court is also of the opinion that the claimant was 20 percent at fault in failing to exercise due care as he was driving too fast for the conditions then and there existing at the time of this incident.

In accordance with the above, the Court hereby makes an award in the amount of $862.70 reflecting 80 percent of the claimant's damages.

Award of $862.70.

OPINION ISSUED DECEMBER 10, 2001

STANLEY D. MILLER
VS.
DIVISION OF HIGHWAYS
(CC-01-238)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 2000 Cavalier which occurred when his vehicle struck a pile of cold mix on Route 250 in Marshall County. The respondent stipulates as to liability in this claim. Therefore, the only issue to be considered is that of damages. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on February 28, 2001. The claimant was traveling on Route 250 when his vehicle struck a pile of cold mix in the road causing damage to the left strut and a front deflector. The claimant had insurance coverage for the damaged strut, but not for the damaged deflector. The cost of the deflector plus tax is $22.43.

Claimant also incurred an additional expense of $45.00 in pursuing this claim when he was informed by a representative of the respondent to file a claim in the "small claims court" in Marshall County. Claimant testified that when trying to pursue this claim he called the respondent's office in Charleston and that the person he spoke to informed him to file a claim in "small claims court". He testified that the individual he spoke with did not inform him to file in the Court of Claims. Therefore, he filed a claim in Marshall County Magistrate Court and paid a non-refundable $45.00 filing fee. However, the claim was dismissed due to the fact that claimant filed his claim in the wrong court. Mr. Miller testified that he believed that "small claims court" was the same court as magistrate court.

This Court normally does not award damages for costs incurred by claimants in pursuing their claim. However, in this claim it is evident that the claimant filed his claim in the Marshall County Magistrate Court only because an employee of the respondent informed him to file in "small claims court". The Court finds that it was reasonable for the claimant to understand this to mean that he had to file in magistrate court. The respondent's employee should have correctly informed the claimant that he should file his claim in the Court of Claims. Claimant reasonably relied upon the representation of respondent's employee, filed in magistrate court, and incurred an unnecessary expense.

Accordingly, the Court makes an award to claimant in the amount of $67.43.

Award of $67.43.

OPINION ISSUED DECEMBER 10, 2001

ANNA SPRINGER AS ADMINISTRATRIX
OF THE ESTATE OF JAMES B. SPRINGER
VS.

DIVISION OF HIGHWAYS
(CC-97-347)

James R. Fox and Jessica Baker, Attorneys at Law, for claimant.
Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

WEBB, JUDGE:

Claimant Anna Springer brought this action for the wrongful death of her husband, James B. Springer, after the vehicle he was driving slid off a bridge when he was traveling westbound on County Route 1/1, locally known as the Cleveland Wildcat Road in the Hacker Valley region of Webster County. County Route 1/1, at this location, is maintained by respondent in Webster County. This claim was bifurcated by Order and the initial hearing was limited to the issue of liability. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on January 13, 1997, at approximately 9:30 a.m. On the cold and snowy morning in question, the deceased, James B. Springer, and his brother Timothy Springer were traveling westbound on County Route 1/1 in a 1994 Ford F-150 XLT truck owned by the family business. On the morning in question, James B. Springer and Timothy Springer decided to go to a job site near Jumbo, Webster County. The James B. Springer residence is approximately one and three-quarter miles from the bridge in question. According to Timothy Springer, this was the shortest and safest route. Timothy Springer further testified that James B. Springer was an experienced driver; that he was very familiar with the road in question; that he was driving carefully at a speed of about five miles per hour down the snow covered hill; that while the road was snow covered, it was not icy; that as the truck approached the bridge, it suddenly began sliding; that the decedent and Timothy Springer both felt the movement of the truck as it began sliding; and that the decedent made a comment about the fact that they were sliding. The truck proceeded onto the bridge structure, turned sideways, hesitated at the edge of the bridge, and then rocked over the edge of the bridge. It fell approximately ten feet and landed in the creek known as the Williams Camp Run. The truck fell on its top when it landed in the upstream side of the creek. Timothy Springer testified that he believed that the truck got caught on a wheel curb that had been bent over the side of the bridge. Nearby individuals arrived at the scene to render assistance, including the Springers' other brother, David Springer. Timothy Springer escaped the truck with only minor injuries. Tragically, James B. Springer was trapped inside the vehicle. When James B. Springer was finally removed from the vehicle, attempts to revive him failed and he subsequently died.

Claimant's position in this claim is two-fold. Claimant alleges that respondent was negligent in its maintenance of the bridge and that it failed to provide guardrails on the bridge which would have prevented claimant's decedent from sliding in his truck off the side of the bridge. Secondly, claimant alleges that the design of the bridge was faulty in that it came at the bottom of a steep hill with an approach in a sharp curve on the easterly side and a fork with two sharp curves on the westerly side of the bridge.

Respondent contends that the driver error on the part of the decedent was the cause of the incident in which he died. Respondent also contends that this particular bridge is a typical bridge for a third priority road such as County Route 1/1 in Webster County and that it was maintained in the same manner as the other bridges twenty feet or less in length. Further, respondent raised the issue that the decedent and his brother chose to drive west rather than east on the Cleveland Wildcat Road and that the better

choice of route to exit this road was to go east from their homes rather than west toward the bridge over Williams Camp Run.[1] Respondent contends that the placement of guard rail on the bridges and highways throughout our State is discretionary with the Commissioner of the Division of Highways; therefore, a claim based upon the lack of guard rail is not a viable claim before this Court.

At this location, County Route 1/1 is a third priority dirt and gravel road with an average daily travel of approximately twenty vehicles per day. The road is narrow and basically is a one-lane road although there may be areas where two vehicles are able to pass. It has an average width of about twelve feet. As County Route 1/1 proceeds in a westerly direction toward a bridge referred to as the Williams Camp Run in the Boggs Mill area, the road has a steep slope approximately six-hundred-thirty-one feet in length. At the top of the slope, the slope is eight percent for one-hundred-thirty-five feet, which then increases to seventeen and one-half percent for approximately two hundred feet and finally decreases to thirteen percent for approximately one hundred feet, at the bottom of the slope. At the bottom of the slope to the southwest side of the road, there is a sharp right turn onto a one-lane wooden bridge over Williams Camp Run and sharp right or left turns (a fork area) after leaving the wooden bridge. Glen Edward Fisher, an Operator III for respondent, testified that because of the shade of the hill, the curve where the incident occurred tends to remain slicker than other parts of the road. David Springer, one of the decedent's brothers, also testified that this particular curve in the road is well shaded, and very seldom sees sunlight. Therefore, it was undisputed that this portion of the road tends to be slicker than other areas.

The bridge in question was built in 1963 across Williams Camp Run, a small stream. It is situated approximately ten feet above Williams Camp Run which normally has a depth of approximately three inches. The bridge was twenty feet seven inches in length consisting of two seventeen foot concrete abutments which were connected by five steel beams. The overlay of the bridge is wooden. The width of the bridge's deck was fifteen feet and the roadway width was fourteen feet. On each side of the bridge, two six inch by six inch wooden (oak) boards, which run the length of the bridge, were mounted to the steel beams underneath of the bridge by angle iron fasteners. Testimony established that these boards, commonly referred to by the witnesses as "wheel curbs," "rub rails," or "hub rails" functioned to warn a driver of a vehicle of the edge of the bridge. Hub rails on bridges are not intended to hold a vehicle on the bridge or to act as a guard rail. Marvin Murphy, a civil engineer and the District Administrator for respondent over Webster County at the time of this incident, explained that hub rails are designed to protect vehicles from going out on the edge of the bridge deck where it is weak. At one time, wooden hand rails were attached to the side of the bridge, but these

[1] The Court notes that respondent proposes this particular defense on occasion in claims. This Court is of the opinion that a traveler using the roads of this State may have many choices of routes and if respondent does not believe that a particular route is not the one that should be taken by travelers, then it has the responsibility to close the road or advise travelers to avoid the route with explicit, marked signage; otherwise, a traveler may choose his/her route with the knowledge that it is well maintained and usable. Claimant's decedent herein had a choice of which way to travel from his home and he chose the route which provided the most direct route to his destination which the Court has determined is what any driver could have done under the same circumstances.

had been knocked down many years prior to the incident herein. No guardrails had ever been present on the bridge. Respondent's District Seven Design Engineer, Thomas Freeman, testified that guardrails are not usually present on this type of road or bridge because of the low average daily travel. Furthermore, Mr. Freeman testified that this is a "third priority" route so designated for purposes of SRIC (snow removal and ice control), i.e., the routes designated as first priority are treated first, then the secondary roads, and the third priority roads are treated last. Third priority routes are those that are either stone based or dirt roads and in terms of treatment are generally cinder treated or plow only.

Respondent's Bridge Evaluation Reports adduced at the hearing established that the condition of the bridge deteriorated from a "good" to "fair" condition in March of 1987, and to a "poor" condition in June 1994. The 1994 report indicated that the deck had broken boards covered with runners, the steel was rusty, the curbs as well as scuppers were damaged and there were no diaphragms. After the 1994 report, no remedial measures were taken to repair the bridge. However, Glen E. Fisher, an Operator Three for respondent, testified that over time some repairs to the bridge had been made. He testified that part of his crew and a mechanic from the Webster Springs Cherry Fall Headquarters did work on and replaced the "hub rails"on this bridge. This repair work, according to Mr. Fisher, was done approximately one to one and one-half years prior to this incident. Mr. Fisher also testified that he had received only verbal complaints about the road and bridge at issue. These complaints were generally requests for cinder treatment during the wintertime for slick roads. Mr. Fisher also recalled that approximately twenty years prior to this incident that there were also complaints that the handrail along the sides of the bridge had been torn off by large gas trucks crossing the bridge. Jimmy Collins, Highway Administrator for respondent in Webster County, also testified that he had not received any written complaints regarding the bridge. Neither Mr. Fisher nor Jimmy Collins could testify whether or not the "hub rail"on the upstream side of the bridge where the Springer truck went off the bridge was bent in this incident or prior thereto. However, David Springer testified that the wheel curbs or hub rails on both sides of the bridge had been down for several years.

On the weekend before the incident, respondent's weather records for Webster Springs indicated that there was snow accumulation of 0.32 inches.[2] On the day of the incident, there was no precipitation recorded for the same area. However, Jimmy Collins testified that the measurements are taken farther south at Webster Springs and may not be representative as to the amount of snowfall as in the Hacker Valley area where the incident herein occurred. He also testified that although he did not recall any snowfall the night before, when he got to the scene there was quite a bit of snow. Webster County Deputy Sheriff David Lee Morris, the investigating officer who arrived at the scene about an hour after the incident, testified that there was up to fourteen inches of snow on the road surface. Officer Morris further testified that the road was slick and snow covered as he arrived at the scene. He maneuvered his four-wheel drive vehicle into fresh snow on the side of the road for better traction on the road. Officer Morris also testified as to the condition of the Springer truck. He stated that the driver's side portion of the cab was mashed in more than the passenger side and that the driver's side was also completely submerged.

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[2]The distance from Webster Springs to the area in question is about fifteen to twenty miles.

At the close of claimant's presentation of evidence at the hearing conducted on July 26 and 27, 2000, respondent made a Motion to Dismiss this claim contending that claimant failed to establish negligence on the part of the respondent as claimant based its claim upon the lack of guard rail on the bridge and the placement of guard rail is a discretionary act vested with the Commissioner. At this time the Court denies respondent's Motion to Dismiss as there were other issues addressed during claimant's presentation of evidence in its case in chief that the Court is required to consider after having heard the evidence put forth by respondent in its case in chief.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). As the *Adkins* Court stated:

> [w]e do not think the failure of the state road commissioner to provide guard rails . . . 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 . . . assumed to have occurred through such failure, and as the proximate cause thereof. The very nature of the obligation of the State, in respect to the construction and maintenance of its highways, precludes the idea that its failure to exercise discretion in favor of a particular location over another, on whether it should provide guard rails . . . at that point, is an act of negligence. Certainly, it must be known, as a matter of common information, that places of danger on our highways exist at innumerable points, particularly on our secondary roads. . . . In the very nature of things, the road commissioner must be permitted a discretion as to where the public money, entrusted to him for road purposes, should be expended, and at what points guard rails . . . should be provided, and the honest exercise of that discretion cannot be negligence. . . . Certainly, where the road commissioner is vested with discretion in matters of this character, it cannot be negligence that he selects for safety measures one point over another. . . . Id., 130 W.Va. at 660, 661; 46 S.E.2d at 88, 89.[3]

It is clear that *Adkins v. Sims* is controlling law in this case. There was no duty on the respondent's part to place guardrails on this bridge. Furthermore, testimony established that this type of bridge and roadway rarely have guardrails due to the fact that this is a third priority road and there is very low average daily traffic. Approximately twenty percent of bridges in District Seven are similar to the bridge in the instant claim and only a few of those have guardrails on them. There was undisputed testimony that this bridge had never had guardrails placed on it. It is the opinion of this Court that respondent was not under any legal duty to place guardrails

[3]The Division of Highways, formerly the office of State Road Commissioner, was transferred to, and administratively attached to, the Department of Transportation by the Executive Reorganization Act of 1989. See W.Va. Code §§ 17-2A-1 & 5F-2-1.

on this bridge.

The other basis for liability set forth by Ms. Springer in this claim is that the respondent was negligent in its maintenance of the road and bridge. Respondent may be held liable only for defective conditions on or near a highway caused by its negligence. *State ex rel. v. Gainer*, 151 W.Va. 1002; 158 S.E.2d 145 (1967). In order to hold respondent liable for defects of this type, claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). However, respondent is held liable only for those defective conditions that are the proximate cause of claimant's injuries or death. *Roush v. Johnson, 139 W.Va. 607; 80 S.E.2d 857 (1954)*. One requisite of proximate cause is the doing of an act or the failure to do an act that a person of ordinary prudence could foresee may naturally or probably produce injury to or the death of another. The second requisite of proximate causation is that such act or omission did in fact produce the injury or death. *Matthews v. Cumberland & Allegheny Gas Co. 138 W.Va. 639; 77 S.E.2d 180.*

In this claim, the claimant failed to establish that the respondent committed any act or omission in its maintenance of the road and bridge in question that was the proximate cause of Mr. Springer's tragic death. Respondent did not commit any act or omission which did in fact cause Mr. Springer's death. Although the evidence established that respondent had notice of the poor condition of the bridge on County Route 1/1 in Webster County, neither the condition of the road nor the bridge were the proximate cause of the Springer vehicle going over the side of the bridge. The testimony adduced at the hearing established that regardless of whether or not the hub rail or wheel curb was properly installed at the time of this accident, these structures are not designed or intended to prevent vehicles from going over the side of a bridge. These hub rails are not expected to support a vehicle or to keep one from going over the side of the bridge. The purpose of the hub rails is to provide a warning to a driver when he or she is too close to the edge of the bridge. Based upon the evidence with regard to the hub rail on the side of the bridge where claimant's decedent's truck went off the bridge, the Court is of the opinion that claimant has not established that the alleged bridge or road conditions were the proximate cause of the vehicle leaving the bridge. This particular bridge in this claim is typical of many bridges on third priority roads throughout Webster County and, in general, throughout West Virginia.

Although testimony was forthcoming at the hearing of this claim that this particular bridge was replaced by respondent some months after this tragic accident with a new structure that has guardrails and a redesigned approach and exit for the bridge, the Court recognizes that respondent has the discretionary duty to replace structures as it has the funds available. There are outside factors that may influence the replacement of structures in our State including public pressure and/ or political pressure. Evidence of subsequent remedial measures may be indicative of negligent maintenance in a small percent of the claims heard by this Court, but in this claim the Court has determined that negligent maintenance of the bridge was not the proximate cause of the accident which occurred herein resulting in the death of James B. Springer.

The Court is not unmindful of the tragedy that struck this family on the date of the incident herein. The Court is very sympathetic to the claimant and her daughter; however, the Court has no legal basis upon which to make an award in this claim.

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; therefore, a hearing on

the issue of damages will not be docketed.

Claim disallowed.

(The Honorable Judge Robert M. Steptoe took part in the hearing and the decision of this claim, but he did not take part in the approval of the written opinion. The Honorable Judge Franklin L. Gritt, having been appointed to the Court on July 1, 2001, did not take part in the decision of this claim.)

OPINION ISSUED DECEMBER 10, 2001

WILLIAM E. ULLUM AND LORETTA ULLUM
VS.
DIVISION OF HIGHWAYS
(CC-01-236)

Claimants appeared *pro se*.

Andrew Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimants and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. Claimants are the owners of real estate adjacent to WV Route 40 in Wheeling, Ohio County. Their residence sustained damage on February 14, 2001, when a retaining wall in front of the residence and abutting WV Route 40 fell onto claimants' property causing the alleged damages.

2. Respondent was responsible for the maintenance of WV Route 40 in Ohio County at the time of this incident.

3. Respondent failed to properly maintain WV Route 40 and the retaining wall abutting the highway such that it gave way and fell onto claimants' property.

4. As a result of this incident, claimants' property sustained damage to the front exterior of the house, a window, one of the front doors, and the interior of the house in the amount of $2,680.00, the amount of the low estimate submitted in evidence.

5. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of WV Route 40 and the retaining wall adjacent thereto on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' property; and that the amount of the damages submitted by claimants at the hearing is fair and reasonable. Thus, claimants may make a recovery for their sustained loss. In addition to these damages, the Court is of the opinion to award claimants $1,000.00 for the aggravation caused to them in the aftermath of this incident.

Accordingly, the Court is of the opinion to and does make an award to claimants in the amount of $3,680.00.

Award of $3,680.00.

OPINION ISSUED DECEMBER 10, 2001

UNIVERSITY HEALTH ASSOCIATES
VS.
DIVISION OF CORRECTIONS
(CC-01-222)

Claimant appeared pro se.
Daynus Jividen, Senior 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 payment in the amount of $160,703.50 for medical services rendered to inmates in the custody of respondent at St. Marys Correctional Center, Huttonsville Correctional Center, Mt. Olive Correctional Complex, and Pruntytown Correctional Center, facilities of the respondent. Respondent, in its Answer, admits the validity of the claim, but states that the correct amount owed to claimant is $64,677.34. Respondent further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim. Claimant, having reviewed the Answer of the respondent, agrees that the correct amount owed by respondent is $64,677.34.

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 DECEMBER 10, 2001

WELCH COMMUNITY HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-01-366)

Claimant appeared pro se.
Daynus Jividen, Senior 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 payment in the amount of $19,341.00 for medical services rendered to an inmate in the custody of respondent at Mt. Olive Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 DECEMBER 10, 2001

WV STATE COLLEGE/WV EDNET
VS.
DIVISION OF BANKING
(CC-01-374)

Claimant appeared *pro se*.
Joy M. Bolling, 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 $45.75 for providing teleconferencing services to respondent. In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $45.75.

Award of $45.75.

OPINION ISSUED DECEMBER 10, 2001

STEVEN G. WOODALL
VS.
DIVISION OF HIGHWAYS
(CC-00-231)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On May 22, 2000, claimant was traveling on his motorcycle on WV Route 10 in Cabell County when he came upon a curve in the highway where the pavement was covered in sand. At this location, respondent had placed sand in the road to absorb some substance that had spilled onto the roadway. The sand caused claimant

to lose control of his motorcycle and he slid some twenty-five to thirty feet on his side. Claimant suffered scrapes and bruising in the accident and his motorcycle sustained damage.

2. Respondent was responsible for the maintenance of WV Route 10 in Cabell County and respondent failed to maintain properly this road for the traveling public on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage and he suffered personal injuries alleged to be in the amount of $9,000.00.

4. Respondent agrees that the any damages suffered by the claimant is its responsibility, but respondent submitted the issue of damages to the Court for determination after a hearing on this issue.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of WV Route 10 on the date of this incident; that respondent exhibited reckless disregard for the safety of the travelers of WV Route 10 in failing to remove the excessive sand left on the roadway at this location; and that the negligence of respondent was the proximate cause of the personal injuries suffered by claimant and the damages to claimant's vehicle. Claimant asserts that he did not receive medical treatment for his injuries, but he has permanent scarring to his leg and his arm. Claimant established that his motorcycle sustained damages in the amount of $2,841.22, and he ruined his clothing for a loss of $210.00. Additionally, the Court has determined that claimant experienced pain and suffering as well as permanent scars to his leg and arm such that an award of $500.00 is fair and reasonable. Thus, claimant may make a total recovery for his sustained loss in the amount of $3,551.22.

Accordingly, the Court is of the opinion to and does make an award to claimant in the amount of $3,551.22.

Award of $3,551.22.

ORDER ISSUED DECEMBER 18, 2001

ETTA M. BRANHAM,
Claimant,

v. CLAIM NO. CC-99-380

WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION,
DIVISION OF HIGHWAYS,

Respondent.

STIPULATION

On this day came the claimant, Etta M. Branham, by counsel, Chad Berry, and respondent, West Virginia Department of Transportation, Division of Highways, by counsel, Andrew F. Tarr and Xueyan Zhang, and announced to the Clerk of the Court of Claims that the parties have agreed to stipulate to the above-referenced claim . Specifically, the parties stipulate to the following:

1. On October 28, 1998, Etta M. Branham was a pedestrian walking on Division Road in Huntington, West Virginia, who fell in an area of the road where a portion of the asphalt had been broken off .

2. As a result of her fall, Ms. Branham suffered injuries to her right ankle.

3. The Division of Highways is responsible for the maintenance of the portion of Division Road in Huntington, West Virginia, where Ms. Branham was injured.

4. Respondent concedes that it had at least constructive notice that the portion of Division Road where Ms. Branham was injured was in a somewhat deteriorated condition at the time of her injury.

5. Respondent acknowledges that there is a moral obligation on its part to provide some compensation to the claimant for her injuries.

6. Respondent agrees to settle this claim and reimburse Etta M. Branham in the total amount of $6,000.00 (Six Thousand Dollars) for her injuries.

7. The parties to this claim agree that the total sum of $6,000.00 paid by the respondent in Claim No. CC-99-380 acts as a full and complete settlement, compromise and resolution of all matters in controversy in said claim and as full and complete satisfaction of any and all past and future claims claimant may have against respondent arising from the matters described in this claim.

WHEREFORE, in accordance with the agreement contained in the stipulation, this Court makes an award of $6,000 (Six Thousand Dollars) to Etta M. Branham in Claim No. CC-99-380.

Entered this 18th day of December, 2001.

David M. Baker /s/
Presiding Judge

OPINION ISSUED DECEMBER 18, 2001

MARK DUNNETT
VS.
RACING COMMISSION
(CC-01-412)

Claimant appeared *pro se*.
Joy M. Bolling, 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 $2,125.00 for providing consultant services and expert testimony for respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

In view of the foregoing, the Court is of the opinion to and does make an

award to claimant in the amount of $2,125.00.

Award of $2,125.00.

OPINION ISSUED DECEMBER 18, 2001

JAMES R. PETERS AND JUDY PETERS
VS.
DIVISION OF HIGHWAYS
(CC-99-190)

Claimants appeared *pro se*.
Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

BAKER, JUDGE:

The claimants brought this action for water damage to their real estate and personal property which they allege was the result of respondent's inadequate drainage system and its negligent maintenance thereof. Claimants' residence is located in Belleville, Wood County, West Virginia. The Court is of the opinion to deny the claim for the reasons stated more fully below.

Claimants' Belleville home fronts on WV Route 68 which proceeds in a north-south direction. County Route 17, also referred to as Lee Creek Road, is to the south side of the claimants' property. It proceeds in an east-west direction with an incline above the Peters' property. There is an old railroad track just west of WV Route 68 which runs parallel with WV Route 68. The Ohio River is west of the railroad tracks. The incident giving rise to this claim occurred throughout two days on June 28, 1998, and June 29, 1998. An extremely heavy rainfall occurred on the evening of June 28, 1998, and lasted into the early morning of June 29, 1998. This heavy rainstorm resulted in the flooding of claimants' home and property which is the basis for a portion of the claim herein.

Claimants' also allege that water accumulates on WV Route 68 in front of their home due to a lack of drainage and this water backs up onto their property causing a loss of gravel and earth. They have placed mounds of earth in their front yard to prevent further damage from this accumulation of water which usually occurs during heavy rain storms.

On the specific dates mentioned herein above, water allegedly flowed from Lee Creek Road onto claimants' property damaging the landscape, washing out sand and mulch, and destroying their flower gardens. The water eventually rose so high that it came into their home through the back door and quickly flowed throughout the first floor. The water damaged the living room and dining room floors and walls. It also damaged the kitchen floor and cabinets, as well as all the first floor dry-wall and insulation. Much of the dining room and living room furniture, along with some antiques, were damaged. Mr. Peters testified that the flood water was approximately six to eight inches deep inside the house and that it left a water mark wherever it flowed. The claimants along with some neighbors and friends were able to force the water out of the home quickly so as to avoid more serious damage. Claimants allege damages to their real estate and personal property in excess of $65,000.00 which amount also includes the purchase of additional property above their property.

Claimants contend that the respondent failed to provide and maintain a

proper drainage system along County Route 17. They allege that the respondent created a surface drainage problem by negligently diverting surface water from County Route 17 to flow north onto claimants' property and flooding it. Allegedly, this has caused the water to overflow onto the claimants' property every time there is a heavy rain. Mr. Peters testified that this problem began in 1990 when the respondent blacktopped County Route 17 and replaced the old culverts underneath the road with new "diagonal culverts." The claimants also allege that respondent did not have adequate drains in front of their home and adjacent to WV Route 68, and that the drains were placed in the wrong location. Specifically, claimants allege that there are only two drains at this location and these drains are inadequate to capture all of the water flowing from the hillside above the road, thus resulting in excess water flowing onto their property from WV Route 68.

Mr. Peters made changes to drainage structures on claimants' property both prior to and after the June 28-29, 1998, flood. He testified that as far back as the summer of 1981 he was having flooding problems in his backyard. He made changes to the drainage system in his backyard. He graded it and filled it in with dirt between 1980 and the flood in 1998. In 1982, Mr. Peters also installed twenty-four inch culvert pipe from approximately ten feet from the southeast corner of his home to the edge of his original property line. Prior to the June 1998 flood, the water coming onto claimants' property from County Route 17 flowed through the continuous twenty-four inch culvert pipe onto claimants' property and then beneath the house through a twenty-four inch square concrete culvert which apparently was built beneath the foundation of the house during its original construction. Water also flows through a catch basin in the front northeastern corner of claimants' house and from there it flows westerly beneath WV Route 68 and the railroad tracks finally draining into the Ohio River. Mr. Peters testified that he purchased an additional piece of property in 1999 from a neighbor in an attempt to remedy what he believed to be one of the problems causing the flooding. This additional lot abuts claimants' property above and to the east. This property purchase it was intended as a buffer area to the lot on which their home is built. Mr. Peters constructed a diversion ditch across the lot to channel the water coming from the Lee Creek hollow away from his backyard. He has not had any severe water problems since he took this action to protect their property.

The respondent's position is that it did not cause the flooding of claimants home or property. It asserts that when it replaced two twenty-four inch culvert pipes underneath Route 17 in 1990 it did not contribute to the flooding. The respondent claims that it simply replaced the old pipes because they were rusting and damaged. Respondent asserts that Mr. Peters contributed to or caused his own flooding problem by making the changes to the drainage pipe and other structures and that these actions by claimants created or contributed to their own flooding problems due to changes made to the drainage system across their property. Respondent also asserts that the railroad company's culvert is clogged up with debris and improperly maintained, which contributes to and causes the flooding on its highway, WV Route 68 as well as the water in claimants' front yard. Furthermore, respondent asserts that the rainstorm on June 28 and 29, 1998, was an extremely heavy and unusual rainfall and that the claimants' home would have been flooded regardless of whatever drainage system was in place.

The evidence adduced at the hearing established that the respondent replaced two culverts underneath County Route 17 in 1990 with two new twenty-four inch culvert pipes. The replacement pipes are the same size and dimensions as the culvert pipes originally in place. The only difference is that the new pipes are in

much better condition than the pre-1990 pipes. Surface water from the Lee Creek Hollow flows downhill into a ditch-line on the south side of County Route 17. The water then travels through the two culverts beneath County Route 17 to the southeastern edge of claimants' new property line resulting from the purchase made in 1999. It is at this location that the twenty-four inch pipe which had once been an open channel connects to the eighteen inch pipe that Mr. Peters put in place after the June 1998 flood.

Dr. George A. Hall, respondent's Standards Manuals and Research Engineer, investigated the scene to make a professional determination of the cause for the flood. He viewed and photographed the drainage structures, interviewed witnesses, and measured the headwater depth on all pipes so he could make drainage calculations. Dr. Hall used a United States Geological Survey (USGS) topographic map of the area to enable him to create an outline of the drainage area to determine the rainfall runoff that would be expected from the drainage area to run through the drainage structure on claimants' property. Dr. Hall also contacted the Corps of Engineers at the Belleville dam located just a few miles from the claimants' home to obtain rainfall information for June 28 and 29, 1998. This information enabled Dr. Hall to reconstruct the water runoff that occurred on these two dates. Based upon this data, Dr. Hall concluded that the claimants' premise that the respondent had caused their flooding problem was false. Dr. Hall testified that respondent had no choice but to use the south side of County Route 17 to drain the water from Lee Creek Hollow. Dr. Hall stated that the south side of County Route 17 has a very steep bank cut out of rock and a very small channel for water flow. Furthermore, the pipe coming down the hill of Lee Creek Hollow is six feet in diameter and is more than adequate to handle the water draining down this hill. This pipe is thirty to forty feet from respondent's right of way and was actually installed by a local property owner. Dr. Hall spoke to the property owner and took photographs of this large pipe. The six foot pipe runs down the hill and connects into respondent's pipe which was installed underneath County Route 17 in 1990, during a re-paving job. After his review and analysis of the drainage areas to the east and the west of County Route 17, Dr. Hall concluded that the respondent did not create claimants' flooding problem by replacing the pipe underneath County Route 17. It is his opinion that within a reasonable degree of engineering certainty the flood damage to the claimants' home and property was caused by three contributing factors:

First, Mr. Peter's placed an eighteen inch pipe inside a 2 ft. x 2 ft. open culvert in his back yard and then covered it over. By doing so, he reduced the cross-section of the open drainage channel and reduced the amount of water which can flow through it. This water then flows from the channel to a culvert that runs underneath WV Route 68 and eventually empties into the Ohio River. Second, Mr. Peter's further reduced water flow through the concrete channel underneath his home by placing a pipe in it. In Dr. Hall's opinion, this contributed to the claimants' flooding. Dr. Hall also stated that the railroad company's culvert which is clogged up with debris and improperly maintained was also a contributing factor to the flooding on the claimants' property. Finally, Dr. Hall testified that the rainfall on June 28 and 29, 1998, was so heavy that no drainage system made could have handled all of the water at this location. According to records kept by the Corps of Engineers at the Belleville Dam, four inches of rain fell on and around the claimants' property between 4:00 p.m. and 6:30 p.m. on June 28, 1998. Then, five and one-half inches fell on June 29, 1998. This was a total of nine and one-half inches of rain in a twenty-four hour period. According to Dr. Hall, this is a storm which cannot be measured in a one-hundred

year interval, but in a one-thousand year interval. He stated that this is the type of storm for which dams are built to withstand.

Dr. Hall also explained that both the respondent and the claimants are having flood problems due to the failure of the railroad to maintain its drainage structure so water backs up from that system onto WV Route 68 and then onto claimants' property at the front of their residence. Photographs depict the clogged condition of the drainage structure on the property of the railroad.

To hold the respondent liable for flood damage to property, a claimant must establish by a preponderance of the evidence that respondent was negligent in protecting the property from foreseeable flood damage. *Haught v. Dept. of Highways*, 13 Ct. Cl. 237 (1980). Respondent must provide adequate drainage of surface water and culverts to carry away the drainage must be maintained in a reasonable state of repair. *Id.*

In determining whether this standard has been met, the Court has considered certain factors to determine whether the flood damage was foreseeable. These factors include: whether an unusually heavy rainfall occurred prior to the flood, *Hudson v. Dept. of Highways*, 15 Ct. Cl. 183 (1983); whether a water line break contributed to the flood, *Burger v. Dept. of Highways*, 16 Ct. Cl. 41 (1986), and whether the respondent was informed of the drainage problem prior to the flooding, and refused timely to correct the problem. *Johnson v. Dept. of Highways*, 13 Ct. Cl. 380 (1981).

After a careful review of the record in this claim, the Court concludes that the claimants did not establish by a preponderance of the evidence that the respondent was negligent in its maintenance of the drainage structures along County Route 17. The claimants did not establish by a preponderance of the evidence that the respondent had an inadequate drainage system that contributed in any way to the claimants' flood damage. The evidence does not substantiate claimants premise that the respondent had caused or contributed to their flooding by directing the flow of water down the hill along County Route 17. It is evident that the claimants had flooding and that some of the water may have come down the hill along County Route 17, but claimants did not present any evidence that the respondent failed to provide an adequate drainage system. Finally, both parties do agree that the storms on June 28, 1998 and June 29, 1998 were extremely heavy. The Army Corps of Engineers at the Belleville dam which is only a few miles from the claimants' home recorded a rainfall that can only be measured on the basis of a one-thousand year storm. No drainage system could handle this amount of rainfall in a twenty-four hour period. The rainstorm that resulted in the flooding of the claimants' property was not foreseeable.

After having reviewed all of the evidence in this claim, the Court has determined that there were many factors that brought about the flooding on their property in June 1998. The amount of the rainfall, the changes in the drainage structures on claimants' property, the fact the railroad does not maintain its drainage structure, and the natural lay of the land above claimants' property all combined to bring about the flood that occurred on June 28 and 29, 1998. The evidence established that the replacement of the two drainage structures on County Route 17 by respondent did not bring about the flood which occurred on June 28 and 29, 1998. Therefore, the Court of the is of the opinion that respondent is not liable for the flood damages to claimants' property.

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.

(The Honorable Judge Robert M. Steptoe participated in the hearing of this claim but not in the preparation of this opinion. The Honorable Judge B. Hays Webb, II, participated in the decision and the preparation of this opinion but he was not present at the hearing.)

OPINION ISSUED DECEMBER 18, 2001

VERIZON WEST VIRGINIA, INC.
VS.
DEPARTMENT OF ADMINISTRATION
(CC-01-399)

Joseph J. Starsick, Jr., Attorney at Law, for claimant.
John T. Poffenbarger, General Counsel, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Memorandum of Understanding entered into by claimant and respondent wherein the facts and circumstances of the claim were agreed to as follows:

1. Claimant provided telecommunications services to various State agencies during fiscal years 1998,1999, and 2000 for which claimant has not received reimbursement.

2. Respondent was responsible for the processing of the invoices submitted by claimant and the State agencies failed to reimburse claimant upon receipt of the invoices for telecommunication services.

3. As a result of the failure of respondent to pay for the services rendered to the various State agencies, claimant sustained a loss in the amount of $2,474,623.99.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent has a legal and moral obligation to compensate claimant in the amount of $2,474,623.99 for services rendered to the State of West Virginia; therefore, claimant may make a recovery in this claim.

Accordingly, the Court is of the opinion to and does make an award to claimant in the amount of $2,474,623.99. Further, the Court directs the Clerk of the Court to determine the individual agencies and the appropriate funding sources in the preparation of the 2002 Claims Bill.

Award of $2,474,623.99.

OPINION ISSUED JANUARY 8, 2002

ARAMAK CORRECTIONAL FOODSERVICE
VS.
DIVISION OF CORRECTIONS
(CC-01-385)

Claimant appears *pro se.*
Daynus Jividen, Senior 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 payment in the amount of $6,646.18 for food services rendered to Mt. Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JANUARY 8, 2002

BREWER & COMPANY OF WEST VIRGINIA, INC.
VS.
DIVISION OF JUVENILE SERVICES
(CC-01-457)

Claimant appeared *pro se*.
Shirley Skaggs, 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 $500.00 for providing sprinkler system inspections at the Industrial Home for Youth, a facility of respondent in Industrial. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoices could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 8, 2002

CARILION PATIENT TRANSPORTATION, LLC
VS.
DIVISION OF CORRECTIONS
(CC-01-447)

Claimant appears *pro se.*
Daynus Jividen, Senior 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 payment in the amount of $10,489.00 for medical transportation services provided for an inmate in the custody of respondent at Denmar Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JANUARY 8, 2002

CORRECTIONAL MEDICAL SERVICES, INC.
VS.
DIVISION OF CORRECTIONS
(CC-01-432)

Claimant appears *pro se.*
Daynus Jividen, Senior 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 payment in the amount of $67,872.01 for medical services rendered to inmates in the custody of respondent at Mt. Olive Correctional Complex, Huttonsville Correctional Center, Pruntytown Correctional Center, and Denmar Correctional Center, facilities of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JANUARY 8, 2002

MICHAEL THOMAS DARDEN AND LISA DARDEN

VS.
DIVISION OF HIGHWAYS
(CC-01-134)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to their 1995 Mercury Tracer which occurred when the vehicle struck a large hole on Route 19 in Bellevue, Marion County. This portion of Route 19 is maintained by the respondent in Marion County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on February 17, 2001 at approximately 3:00 p.m. The claimants were traveling on Route 19, also referred to as Pennsylvania Avenue, at approximately twenty-five miles per hour. As they approached an area that was under construction in Bellevue just outside of Fairmont, their vehicle struck a large hole in the travel portion of the road. Mr. Darden testified that he heard a loud bang and quickly realized that the front passenger side tire was flat. The impact also damaged the right front wheel, the right rear tire, and both struts. Claimants submitted a repair bill in the amount of $284.84. Claimants did not have insurance coverage to cover any portion of these damages.

Claimants assert that respondent failed properly to maintain this portion of Route 19 in Bellevue and that it failed to provide any warning to the traveling public that the road was under construction. Mr. Darden testified that the road appeared to have been under construction but no one was working on the road on the date of the incident due to the fact that it was a Saturday. He stated that there were no warning signs or devices before entering the area where the hole was located. He testified that the hole that the vehicle struck was approximately four to five inches deep. He also described his lane of travel as having a lot of gravel and blacktop pieces along with many holes. Claimants presented photographs depicting numerous holes in the area.

Respondent's position is that it did not fail properly to maintain this portion of road and that if there were any hazards at the location of this incident, it was the fault of the third party contractor. George Steorts, respondent's County Superintendent for Marion County, testified that he is responsible for the supervision of road maintenance in Marion County and this portion of Route 19 at issue falls within his responsibility. Mr. Steorts testified that the City of Fairmont had contracted with Green River Group, a private engineering firm and construction group for water line improvements, and that the portion of Route 7 at issue was under construction. Mr. Steorts testified that Route 19 had an open ditch cut which was overlaid partially with concrete and asphalt. He stated that the asphalt apparently was used because the contractor intended to open the ditch again at some point during the construction project. According to Mr. Sterots, the travel portion of the road was asphalt which was intended to be a temporary patch; that the holes in the road developed after the contractor had cut the road and dug the ditch; that these holes were not present prior to the contractor's work; and that respondent did not have any involvement with the contractor other than the issuance of a permit for the construction work. Respondent also introduced into evidence the bond that was put up by the contractor to the respondent in the amount of $75,000.00. However, Mr. Sterots testified that he was sure that respondent had an inspector overseeing the

contractor's job, but he was not sure who that individual was. Mr. Sterots testified that respondent normally oversees such projects as this one, but the incident herein took place on a Saturday, a day on which respondent probably did not have any employees present.

To hold respondent liable for damages caused by road defects of this type, the claimant must prove by a preponderance of the evidence that the respondent had actual or constructive notice of the defect. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Davis Auto Parts v. Department of Highways*, 12 Ct. Cl. 31(1977). Although the respondent was not directly involved with the actual construction project, it apparently had an inspector present. Given the severity of the holes, it is evident that these had been allowed to develop over a period of time. Respondent's inspector knew or should have known that these holes were present and that these holes presented a hazard to the traveling public. Respondent could have placed a warning device to warn drivers of the hazard or placed barrels over the holes. One of the purposes for the respondent's inspectors to be present at a construction site is to ensure the safety of the traveling public. Respondent's failure to do so in this claim was the proximate cause of the claimants' damages.

Accordingly, the Court is of the opinion to and does make an award in the amount of $284.84.

Award of $284.84.

OPINION ISSUED JANUARY 8, 2002

DAVIS MEMORIAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-01-413)

Claimant appears *pro se.*

Daynus Jividen, Senior 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 payment in the amount of $42,861.43 for medical services rendered to inmates in the custody of respondent at Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JANUARY 8, 2002

JESSE FREEMAN
VS.
DIVISION OF HIGHWAYS
(CC-01-076)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

The claimant brought this action for damage to his 1986 Ford F150 truck which occurred when one of respondent's fifty-five gallon barrels rolled off a hill and struck it. The barrel was owned by respondent and was located on respondent's property in Philippi, Barbour County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred during the night of February 9, 2001, on claimant's property located next to Route 119 South near Philippi, Barbour County. Mr. Freeman walked to his truck on the morning of February 10, 2001, and noticed that a large fifty-five gallon barrel was laying against the tailgate of his truck. It was an empty metal barrel and weighed approximately thirty-five to forty pounds. It apparently had rolled from respondents' property at the top of the hill above Mr. Freeman's parking lot. Respondent owns the property next to Mr. Freeman's property including the hill from which the barrel came. Mr. Freeman testified that the barrel rolled approximately one hundred to two hundred feet down the hill and struck his truck. He also testified that respondent had stacked barrels on their sides approximately three or four high in a pyramid type formation.

Claimant testified that he had purchased the 1986 Ford Truck in 1998. He stated that the barrel caused significant damage to the tailgate of his truck. He submitted a repair estimate which includes $246.25 for the tailgate, $46.47 for the chrome strip, $553.38 for the aluminum panel, and $250.00 for the paint and labor plus tax totaling $1,161.87 in damages. It is claimant's contention that respondent failed properly to secure the barrel which allowed it to roll down the hill and damage his truck.

Respondent's position is that the barrels were properly secured and that heavy winds blew the barrel over the hill which was an unforeseeable event. George Ervin, respondent's transportation crew supervisor for respondent in Barbour County, testified that respondent did have barrels stacked up on the hill above claimant's property for approximately two years prior to this incident. He testified that it was one of respondent's barrels that struck claimant's truck. He stated that there were ten barrels in total and that they were approximately one hundred and fifty feet from the edge of the hill adjacent to Mr. Freeman's property. This was the first time that any barrel had rolled down the hill. Mr. Ervin attributed this incident to a windstorm during the night of February 9, 2001. Respondent introduced photographs depicting the damage to the tailgate of claimant's truck. Mr. Ervin took these photographs just after the incident. He noted that the barrel had caused a dent in the bottom of the tailgate. He also noted that there was some fine rust on the surface of the tailgate and one rust hole through the tailgate.

This case is one of clear liability. It is undisputed that it was one of respondent's barrels that rolled down the hill and struck claimant's vehicle. It is also undisputed that the tailgate of claimant's vehicle was damaged as a result. Respondent should have anticipated the possibility that one of its barrels could come

lose and roll down the hill onto the claimant's property. It is foreseeable that such a large fifty-five gallon barrel would cause damage to property that is down hill from it. Respondent should have taken more precautions in securing the barrel. The fact that wind may have blown the barrel lose is a foreseeable event and should have been considered. Respondent's failure adequately to secure the barrel was the proximate cause of the damages to claimant's truck.

Accordingly, the Court makes an award to the claimant in the amount of $700.00 which has been calculated by the Court as a fair and reasonable award for the depreciated value of the tailgate.

Award of $700.00.

OPINION ISSUED JANUARY 8, 2002

ROBERT W. GOLDEN and LINDA L. GOLDEN
VS.
DIVISION OF HIGHWAYS
(CC-01-233)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

The claimants brought this action for damage to there 1996 Dodge Intrepid which occurred when claimant Linda Golden was driving the vehicle and it struck a large hole in the road on County Route 24 near Gypsy, Harrison County. This portion of County Route 24 is maintained by the respondent in Harrison County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on February 17, 2001, at approximately 4:45 p.m. Mrs. Golden was driving to her granddaughter's birthday party in Shinnston. The weather was nice and the road was dry. County Route 24 is a heavily traveled two lane road. It is divided by a yellow line and is marked by white lines on the sides. Mrs. Golden testified that she was not very familiar with this road. She was traveling under the speed limit. Suddenly, without warning her left front tire struck a large hole in the travel portion of the road. She described the impact as being hard and loud. She stated that the hole was approximately fourteen to fifteen inches long and significantly deep. The vehicle sustained damage to the left front tire, wheel, and tie rods. The rack and pinion steering was damaged and the vehicle had to be realigned. Mrs. Golden submitted an invoice in the amount of $1,716.16. However, claimants had insurance coverage in place with a deductible of $250.00, which limits their recovery on this particular invoice to that amount. Mrs. Golden testified that the vehicle began making noises and did not handle as well as it had before the incident. Therefore, approximately five months later she had to take the vehicle back for more repairs. Claimants had to have the remaining three tires replaced so that the vehicle would handle correctly and maintain proper balance. Claimants assert that the incident at issue was the proximate cause of this additional damage to the three tires They did not have insurance coverage for these expenses and submitted an invoice in the amount of $377.59. During the time the claimant's vehicle was being repaired,

they had to rent a vehicle for which they submitted an invoice in the amount of $144.00. There was insurance coverage available to pay for the rental expenses.

Respondent asserts that it did not have notice of this hole or a reasonable amount of time to make the necessary repairs. William H.Wyckoff testified that he has been employed by the respondent for ten years as the Assistant County Superintendent for Harrison County. His responsibilities include maintaining the roads, crew dispatch, and equipment dispatch. He is responsible for the maintenance of the section of County Route 24 where this incident occurred. Mr. Wyckoff testified that County Route 24 is a second priority road, but that it is heavily traveled. He stated that he and his crew were battling holes on County Route 24 during January and February 2001 due to the fact that a large number of coal trucks use this portion of County Route 24, as well as trucks going to and from a local land fill. Furthermore, there is heavy traffic going through this location to reach the Meadowbrook Mall and the FBI Center. Respondent introduced evidence that it had applied two tons of cold mix asphalt on County Route 24 on January 23, 2001, two tons of cold mix asphalt were applied to County Route 24 and County Route 26 on January 29,2001. Then, on January 31, 2001 another two tons were applied.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Simms*, 46 S.E.2d 811 (W.Va. 1947). For the respondent to be held liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to make adequate repairs. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). Testimony adduced in this claim established that the respondent had constructive if not actual notice of the hole which claimants' vehicle struck. Respondent knew that this was a heavily traveled road and that heavy coal and waste trucks travel the portion of County Route 24 at issue. Respondent was aware of a large number of holes on the road and had patched a large number of these holes just eighteen days prior to the claimants' incident. The size of the hole and the fact that respondent had just patched this portion of road leads the Court to conclude that either this hole was not repaired or that the repair work was inadequate under the circumstances. Thus, the Court finds negligence on the part of the respondent and that this negligence was the proximate cause of the damages to claimants' vehicle.

As to the damages incurred by the claimants, the Court has determined that the invoice for the immediate repair work constitutes the damages relative to the instant claim. Recovery for this invoice is limited to the amount of claimant's insurance deductible of $250.00. The invoice for three tires replaced some five months after the incident is not compensable due to the lapse of time from the incident. The claimant was unsure whether or not the invoice for the vehicle rental was paid by her insurance carrier or whether she incurred this expense; therefore, the Court will not make this invoice a part of the award.

Accordingly, the Court makes an award to the claimants in the amount of $250.00.

Award of $250.00.

OPINION ISSUED JANUARY 8, 2002

DRUSILLA MARIE LEMLEY

VS.
DIVISION OF HIGHWAYS
(CC-01-081)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to her 1994 Pontiac Grand AM GT. The incident occurred on State Route 7 near Blacksville , Monongalia County, when she maneuvered her vehicle to the berm of the road to avoid an oncoming truck. This portion of road is maintained by the respondent in Monongalia County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on December 4, 2000, at approximately 8:12 a.m. Claimant, Drusilla Lemley, was traveling from her home near Blacksville to her job in Sabraton. It was a cold and clear morning. Ms. Lemley was traveling eastbound on State Route 7. As she was entering the city limits of Blacksville, she rounded a sharp curve and was temporarily blinded by sunlight. At the same moment, an oncoming full-size Ford truck crossed the centerline forcing Ms. Lemley to maneuver her vehicle to the berm of the road to avoid a collision. She expected the berm to provide her room to safely pass when suddenly the passenger side tires dropped off the pavement. The impact caused significant damage to her vehicle including the front bumper, the front passenger side wheel and rim. The vehicle had to be realigned as well. Claimant submitted an estimate for the repairs in the amount of $1,254.09. She did not have insurance to cover any portion of these damages. She also claimed $48.00 for loss of work that day.

Claimant contends that the respondent failed to provide a safe and adequate berm at the location of this incident. Specifically, there was too steep of a drop off between the travel portion of the road and the berm. Claimant contends that this steep drop off presents a hazardous condition and that it was the proximate cause of the damage to her vehicle.

Respondent's position is that it did not have notice of any hazardous condition regarding the berm at this location and that it has provided an adequate berm to the best of its abilities. Kathy Westbrook, respondent's Highway Administrator in Monongalia County, supervises the maintenance of State roadways in Monongalia County which includes the portion of State Route 7 where this incident occurred. Mrs. Westbrook testified that State Route 7 is a blacktop, first priority road. It is a divided, two-lane road with white lines on both edges. Each lane is eleven feet in width. Testimony adduced at the hearing established that there were no other known incidents regarding the berm at this location. Mrs. Westbrook stated that there is not much of a berm or shoulder at this location and that what berm there is slopes down into a ditch. The deepest part of this ditch is approximately one foot to a foot and a half from the road. She added that it is difficult for respondent to maintain any type of shoulder or berm at this location.

The law is well settled that the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims,* 46 S.E.2d 811 (W.Va. 1947). However, the State has a duty to exercise reasonable care and diligence in maintaining roads. *Riggs v. Div. of Highways,* 22 Ct. Cl. 10 (1997). In order to establish negligence on behalf of the respondent, a claimant must prove by a

preponderance of the evidence that the respondent had either actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986). The Court has previously held that the berm or shoulder area must be maintained in a reasonably safe condition for use when the occasion requires, and liability may ensue when a motorist is forced to use the berm in an emergency such as avoiding oncoming traffic. *Sweda v. Dept. of Highways*, 13 Ct. Cl. 249 (1980); *Cecil v. Dept. of Highways*, 15 Ct. Cl. 73 (1984). Testimony established that the claimant was forced to the berm of the road to avoid an oncoming vehicle. The evidence established that the berm was not adequate and it had a drop off that was too steep. This condition was a hazard to the traveling public. Respondent should have made repairs to the berm area or at least placed a warning sign at this location to give notice to the traveling public. The failure to do so in this claim was the proximate cause of the claimant's damages.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $1,254.09.

Award of $1,254.09.

OPINION ISSUED JANUARY 8, 2002

OHIO VALLEY MEDICAL CENTER
VS.
DIVISION OF JUVENILE SERVICES
(CC-01-363)

Claimant appeared *pro se*.

Shirley Skaggs, 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 $165.07 for providing medical services to a juvenile at the Northern Regional Juvenile Detention Center, a facility of respondent in Ohio County. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $165.07.

Award of $165.07.

OPINION ISSUED JANUARY 8, 2002

PITNEY BOWES CREDIT CORPORATION
VS.
DIVISION OF JUVENILE SERVICES

(CC-01-459)

Claimant appeared *pro se*.
Shirley Skaggs, 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 $639.02 for providing mailing equipment to the Industrial Home for Youth, a facility of respondent in Industrial. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $639.02.

Award of $639.02.

OPINION ISSUED JANUARY 8, 2002

POCAHONTAS MEMORIAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-01-407)

Claimant appears *pro se.*
Daynus Jividen, Senior 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 payment in the amount of $10,922.13 for medical services rendered to inmates in the custody of respondent at Denmar Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JANUARY 8, 2002

SONYA SIMMS

VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-01-435)

Claimant appeared *pro se*.
Joy M. Bolling, 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, an inmate at the North Central Regional Jail in Doddridge County, seeks $23.90 for items of personal property that were entrusted to respondent. When claimant inspected her inventoried and stored personal property items, she discovered that her property was missing. Thus far, respondent's employees have been unable to produce claimant's personal property.

In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

This Court has taken the position in prior claims that if a bailment situation has been created, respondent is responsible for property of an inmate which is taken from that inmate, remains in its custody, and is not produced for return to the inmate.

Accordingly, the Court makes an award to the claimant herein in the amount of $23.90.

Award of $23.90.

OPINION ISSUED JANUARY 8, 2002

RALPH O. SMITH
VS.
DIVISION OF LABOR
(CC-01-379)

Claimant appeared *pro se*.
Joy M. Bolling, 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 $1,000.00 for providing classroom training to Brooke High School students seeking to obtain a contractor's license in West Virginia. The training was provided through an agreement with respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an

award to claimant in the amount of $1,000.00.

Award of $1,000.00.

OPINION ISSUED JANUARY 8, 2002

WEST GROUP, A THOMSON COMPANY
VS.
DIVISION OF CORRECTIONS
(CC-01-443)

Claimant appeared *pro se*.

Daynus Jividen, Senior 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 $161.00 for providing legal reference books to Pruntytown Correctional Center, a facility of respondent in Taylor County. The documentation for these books was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $161.00.

Award of $161.00.

OPINION ISSUED JANUARY 8, 2002

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.
VS.
DIVISION OF CORRECTIONS
(CC-01-433)

Claimant appears *pro se.*

Daynus Jividen, Senior 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 payment in the amount of $471,602.81 for medical services rendered to inmates in the custody of respondent at Huttonsville Correctional Center, Pruntytown Correctional Center, and Mt. Olive Correctional Complex, facilities of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JANUARY 8, 2002

WV REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
VS.
DIVISION OF CORRECTIONS
(CC-01-430)

Chad Cardinal, Assistant Attorney General, for claimant.
Daynus Jividen, Senior 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, Regional Jail and Correctional Facility Authority, provides and maintains the Eastern Regional Jail, the Central Regional Jail, the South Central Regional Jail, the Southern Regional Jail, the Southwestern Regional Jail, the Northern Regional Jail, and the Potomac Highlands Regional Jail as facilities for the incarceration of prisoners who have committed crimes in various counties. Some of the prisoners held in these regional jails have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action in the amount of $1,712,838.00, to recover the costs of housing and providing associated services to prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the claimant, these prisoners have had to remain in the regional jails for periods of time beyond the dates of the commitment orders.

Respondent filed an Answer admitting the validity of the claim and that the amount of the claim is fair and reasonable.

This Court has determined in prior claims by claimant for the cost of housing inmates that respondent is liable to claimant for these costs, and the Court has made the appropriate awards. This issue was considered by the Court previously in the claim of *County Comm'n. of Mineral County v. Div. of Corrections*, 18 Ct. Cl. 88 (1990), wherein the Court held that the respondent is liable for the cost of housing inmates.

In view of the foregoing, the Court makes an award to claimant in the amount of $1,712,838.00.

Award of $1,712,838.00.

OPINION ISSUED JANUARY 9, 2002

FLAT IRON DRUG STORE, INC.
VS.

DIVISION OF CORRECTIONS
(CC-01-351)

Claimant appeared *pro se*.
Daynus Jividen, Senior 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 $103.59 for providing pharmacy services for inmates at in the custody of respondent but being housed temporarily in the McDowell County Jail. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds that expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $103.59.

Award of $103.59.

OPINION ISSUED JANUARY 9, 2002

M. J. MCGINNIS, M.D.
VS.
DIVISION OF CORRECTIONS
(CC-02-008)

Claimant appears *pro se.*
Daynus Jividen, Senior 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 payment in the amount of $350.00 for medical services rendered to an inmate in the custody of respondent but being housed in the Mason County Jail. Respondent, in its Answer, admits the validity of the claim, and further 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 JANUARY 11, 2002

GRAFTON CITY HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-02-002)

Claimant appears *pro se.*
Daynus Jividen, Senior 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 payment in the amount of $31,006.11 for medical services rendered to inmates in the custody of respondent at Pruntytown Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JANUARY 17, 2002

MARION COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-01-126)

Claimant appeared *pro se*.
Jendonnae L. Houdyschell, 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, Marion County Commission, is responsible for the incarceration of prisoners who have committed crimes in Marion County, but have been sentenced to facilities owned and maintained by respondent, Division of Corrections. Claimant brought this action to recover $1,210.43 in costs for providing housing and/or medical care to 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 custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in *County Comm'n. of Mineral County vs. Div. of Corrections*, 18 Ct. Cl. 88 (1990), that respondent is liable to claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, respondent reviewed this claim

to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $1,089.92. Claimant agrees that this is the correct amount to which it is entitled.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $1,089.92.

Award of $1,089.92.

OPINION ISSUED JANUARY 17, 2002

AT&T CORPORATION
VS.
DEPARTMENT OF ADMINISTRATION
(CC-01-397)

Matthew S. Casto, Attorney at Law, for claimant.
John T. Poffenbarger, General Counsel, and Amy J. Haynie, Assistant General Counsel, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon the Petition, Answer, and Memorandum of Understanding filed by claimant and respondent wherein the facts and circumstances of the claim were agreed to as follows:

1. Claimant provided telecommunications services to various State agencies during fiscal years 1999 and 2000 for which claimant has not received reimbursement.

2. Respondent, at all times, was responsible for the processing of the invoices submitted by claimant and various State agencies failed to reimburse claimant upon receipt of the invoices for telecommunication services.

3. As a result of the failure of respondent to pay for the services rendered to the various State agencies, claimant sustained a loss in the amount of $627,977.83.

4. Respondent admits the validity of the claim and agrees that the amount of damages as put forth by the claimant is fair and reasonable compensation for the services rendered to the State agencies.

The Court has reviewed the facts of the claim and finds that respondent has a legal and moral obligation to compensate claimant in the amount of $627,977.83 for services rendered to the State of West Virginia; therefore, claimant may make a recovery in this claim.

Accordingly, the Court is of the opinion to and does make an award to claimant in the amount of $627,977.83. Further, the Court directs the Clerk of the Court to provide the appropriate funding sources for the payment of this claim in the preparation of the 2002 Claims Bill.

Award of $627,977.83.

OPINION ISSUED JANUARY 17, 2002

RANDOLPH COUNTY COMMISSION

VS.
DIVISION OF CORRECTIONS
(CC-02-014)

Claimant appears *pro se.*
Daynus Jividen, Senior 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, Randolph County Commission, is responsible for the incarceration of prisoners who have committed crimes in Randolph County, but have been sentenced to facilities owned and maintained by respondent, Division of Corrections. Claimant brought this action to recover $800.00 in costs for providing housing and/or medical care to 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 custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in *County Comm'n. of Mineral County vs. Div. of Corrections*, 18 Ct. Cl. 88 (1990), that respondent is liable to claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $800.00.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $800.00.

Award of $800.00.

OPINION ISSUED JANUARY 18, 2002

JAMES N. BARTRAM D/B/A B&M WRECKER SERVICE
VS.
DIVISION OF HIGHWAYS
(CC-01-070)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damages to his 1980 Chevrolet wrecker which occurred when he was traveling on County Route 37 near East Lynn in Wayne County. At that time, claimant's wrecker struck a ditch which extended across both lanes of the road. Respondent was at all times herein responsible for the maintenance of County Route 37 in Wayne County. The Court is of the opinion to make an award to claimant for the reasons set forth herein below.

On December 2, 2000, at approximately 11:30 a.m., claimant was towing a 1999 Hyundai automobile for a customer. He was driving his wrecker on County

Route 37 near East Lynn proceeding to Ft. Gay when he came upon a ditch described as being two feet wide, six inches deep, and extending across both lanes of travel. County Route 37 in this area is a two-lane, asphalt road with a sharp curve on both sides of the ditch that had been dug in the pavement. As claimant drove around a sharp curve, he saw the ditch across the road and he applied his brakes, but the wrecker went into the ditch. As the wrecker came out of the ditch, the automobile being towed shifted causing the right hook to come loose from the automobile and then the wrecker jack-knifed into the hillside. The front end of the wrecker sustained damage in the amount of $3,821.30 as a result of the accident. Claimant also incurred towing expense in the amount of $200.00 which represents a tow charge of $100.00 per vehicle towed and he incurred $10.00 for obtaining a copy of the accident report prepared by the Sheriff's office in Wayne County. Claimant's total loss is $4,031.30.

Claimant's position in this action is that respondent failed to maintain the ditch across County Route 37 in proper condition for the traveling public. There were no warning signs about the ditch which was across both lanes of travel.

Respondent's storekeeper in Wayne County, Geoffrey Adkins, testified that respondent's employees had dug a twenty-four inch trench across County Route 37 in order to place a pipe across the road to correct a drainage problem. According to respondent's work orders, this work was performed on November 28, 2000, and employees returned to the area on November 29 and 30, 2000, to place more material in the ditch as settlement occurred. However, respondent's employees did not return to check the area on December 2, 2000, the date of claimant's accident. Respondent did not place warning signs in the area of the ditch because it was not anticipated that further settlement in the ditch would occur. Mr. Adkins explained that County Route 37 is a route used by coal trucks which could have caused the settlement of the material in the ditch.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). In the claim herein, the Court has determined that respondent was negligent in its maintenance of County Route 37 on the date of claimant's accident. Respondent should have anticipated that settlement of the material in the ditch across County Route 37 would occur. Further, respondent should have placed warning signs as the ditch was between two sharp curves on County Route 37 such that travelers on the road would not have time to slow down or stop prior to driving across the ditch. The Court holds that the negligence of the respondent was the proximate cause of claimant's accident resulting in the damages to his wrecker. Therefore, claimant may make a recovery in this claim.

Accordingly, the Court is of the opinion to and does make an award to claimant in the amount of $4,031.30.

Award of $4,031.30.

OPINION ISSUED JANUARY 18, 2002

MELISSA D. CHRISTIAN
VS.

DIVISION OF HIGHWAYS
(CC-01-228)

Claimant appeared *pro se*.
Andrew F. Tarr & Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover for damages to her 1998 Pontiac Firebird which occurred when claimant was traveling on County Route 31 in Barboursville, Cabell County, and her vehicle struck a large hole in the road. Respondent maintains County Route 31 in Cabell County. The Court is of the opinion to make an award to claimant for the reasons set forth herein below.

On March 17, 2001, claimant was traveling on County Route 31 proceeding to the Huntington Mall when she came upon an unusually large hole in the pavement. Claimant did not see the hole as she was in a curve and, according to claimant, there were "shavings" of material in front of the hole which obscured it from her view and the hole was filled with water. Claimant's vehicle went into the hole causing damage thereto in the amount of $730.00. Claimant testified that she had not traveled this route for several weeks; that she was unaware of the hole on County Route 31; and that she did not observe any warning signs to alert her to the condition of the pavement on County Route 31.

Claimant's mother, Cheri Christian, testified that she went to the scene of claimant's accident two days later to measure the hole. She stated that the hole measured 110 inches long, 48 inches wide, and 10 inches deep. It was filled with water when she saw it. She immediately went to respondent's headquarters to report this condition on County Route 31.

Respondent did not offer any evidence to rebut claimant's allegations about the conditions existing on County Route 31.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). The Court is of the opinion that a hole of this size and in its location on County Route 31 could not have developed in a short period of time without respondent's knowledge. Therefore, the Court has determined that respondent had constructive notice of the hazardous condition on County Route 31 on the date of claimant's accident; that respondent was negligent in its maintenance of County Route 31 which negligence was the proximate cause of claimant's accident resulting in the damages to her vehicle; and that the claimant may make a recovery in this claim.

Accordingly, the Court is of the opinion to and does make an award to claimant in the amount of $730.00.

Award of $730.00.

OPINION ISSUED JANUARY 18, 2002

JON DAY, D.V.M.

VS.
WV RACING COMMISSION
(CC-01-476)

Claimant appeared *pro se*.
Joy M. Bolling, 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 $8,280.00 plus interest in the amount of $849.00 for providing services as a Lasix Veterinarian to respondent at the Mountaineer Racetrack. The documentation for the services provided by claimant during the period June 1, 1999, through March 31, 2001, was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount claimed including interest, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

The Court, having reviewed this claim, notes that the claim includes $849.00 in interest which is agreed to by the parties. However, WV Code §4-2-12 states, in part, as follows: "In determining the amount of a claim, interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest." Therefore, the Court is of the opinion that it has no legal basis for including interest in the award in this claim.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $8,280.00.

Award of $8,280.00.

OPINION ISSUED JANUARY 18, 2002

DEPARTMENT OF ADMINISTRATION
VS.
DIVISION OF JUVENILE SERVICES
(CC-02-028)

John T. Poffenbarger, General Counsel, for claimant.
Shirley Skaggs, 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 $7,649.73 for providing vehicular services for vehicles owned by respondent and used by it various employees. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of

$7,649.73.

Award of $7,649.73.

OPINION ISSUED JANUARY 18, 2002

DIVISION OF LIFELONG LEARNING - OHIO UNIVERSITY
VS.
DIVISION OF JUVENILE SERVICES
(CC-02-023)

Claimant appeared *pro se*.
Shirley Skaggs, 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 $3,700.00 which amount represents conference fees for two employees who attended a conference sponsored by claimant. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $3,700.00.

Award of $3,700.00.

OPINION ISSUED JANUARY 18, 2002

WESTLEY FRALEY
VS.
DIVISION OF HIGHWAYS
(CC-00-374)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 1988 Lincoln Town Car which occurred when his vehicle struck a portion of broken blacktop on the edge of the road and berm while he was traveling northbound on Route 10 near Pineville, Wyoming County. This portion of Route 10 is maintained by the respondent in Wyoming County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on September 23, 2000 at 11:00 p.m. It was a clear evening and the road was dry. There was very little traffic. Claimant was driving his 1988 Lincoln Town Car northbound on Route 10 in an area

referred to as Jesse Mountain. He had two other family members in the vehicle at the time of this incident. They were traveling from Pineville to their home in Oceana. Claimant was driving at approximately forty to forty-five miles per hour in a fifty-five mile per hour zone. He had just driven around a curve and he was approaching a straight stretch of highway approximately fifty to sixty yards long when his vehicle drifted slightly to the edge of the road near or onto the white line. His vehicle struck a large hole on the edge of the road. He lost control of the vehicle for a brief moment and it went off the road. He testified that he attempted to maneuver his vehicle back onto the road, but due to the depth of the drop-off between the road and the berm he was unable to do so. The jagged concrete cut and burst both passenger side tires and the exhaust system was knocked off the vehicle when the bottom of the vehicle struck the edge of the road. The vehicle was lodged between the berm and the edge of the road and had to be removed by a wrecker. Claimant testified that he travels this portion of highway almost daily and he was aware of the condition of the road. He testified that he had called the respondent approximately three or four months prior to this incident regarding the condition of the road. He stated that he spoke to personnel in the Princeton office and the Charleston office as well. Claimant's vehicle suffered damage to the two passenger side tires as well as to the exhaust system and the tail pipe for which he submitted repair bills in the amount of $285.11.

Claimant contends that respondent knew or should have known of the damaged berm on Route 10 and that it should have taken adequate measures to repair it in a more timely fashion. Claimant introduced photographs depicting the deteriorated edge of the road where this incident occurred. The photographs depict a large section of the edge of the road missing, which has created a significant variation between the height of the road surface and the side of the road. The photographs also depict that the deterioration from the berm has progressed into the white line on the edge of the road causing the road surface to be jagged. Claimant contends that the length and depth of the damaged berm is indicative of the fact that it has been present for a significant period of time; therefore, respondent should have made adequate repairs.

Respondent's position is that it was not aware of the poor condition of the berm at the location of this incident. Respondent also asserts that the claimant was not operating his vehicle with proper care when he drove it onto the berm of the road. James David Cox testified that he is currently the Assistant Crew Supervisor II for Wyoming County. He is responsible for the maintenance of Route 10 in Wyoming County and he is familiar with the location where this incident occurred. He stated that Route 10 is a two-lane, blacktopped, high priority road. It is divided by a double yellow line and has white lines on the edges. Each lane is twelve feet wide and the total width of the road is twenty-four feet. Mr. Cox admitted that there probably is a berm drop off problem in some areas, but he was not personally aware of the particular berm problem where this incident occurred. He testified that Route 10 is heavily traveled; that a lot of traffic uses the berm at the location of this incident; that there are a lot of heavy trucks that pull off the road at this location; and that this includes the respondent's gravel trucks which dump gravel off to the side of the road and then pull back out onto the highway. In his opinion, this vehicular activity could have caused the deterioration to the berm and the edge of Route 10.

The law is well established that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va. 1947). To hold respondent liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice

of the road defect at issue and a reasonable amount of time to make adequate repairs. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). This Court has held that the respondent has a duty to maintain the berm of a highway in a reasonably safe condition for use when the occasion requires. *Compton v. Division of Highways*, 21 Ct. Cl. 18 (1995). Liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway and it fails. *Sweda v. Dept. of Highways*, 13 Ct. Cl. 249 (1980). The berm plays an integral part of any highway. It allows a driver to drive a vehicle off the road when he or she needs to do so. The berm can also be of assistance to a driver who accidentally drifts to the edge of the road. The berm provides protection for the driver to keep the vehicle from going completely off the road and it also gives a driver more time to regain control of a vehicle in the event that an emergency arises.

In the present claim, the claimant established by a preponderance of the evidence that respondent had notice of the deteriorated berm and a reasonable amount of time to make adequate repairs. The size of the hole and the large amount of pavement that had deteriorated leads the Court to conclude that the berm had been in poor condition for a significant period of time. This berm presented a hazard to the traveling public and was the proximate cause of the damages to claimant's vehicle. The Court is of the opinion that the berm on a highway is for safety purposes and that the berm must be maintained in reasonably good condition for the travelers of its highways. To not hold the respondent liable for damages in claims such as the present, shifts the burden for inadequate maintenance of the State's highways to the taxpayers of West Virginia that have already paid for the cost of road maintenance by paying their taxes and road user fees levied by the State of West Virginia. It is bad public policy to shift the cost of repairing vehicles damaged by the poor maintenance of the State's highways to the very people whose vehicles are damaged due to a poorly maintained highway.

Accordingly, the Court makes an award to the claimant for the damages to his vehicle in the amount of $285.11.

Award of $285.11.

OPINION ISSUED JANUARY 18, 2002

SILAS THOMAS HALL
VS.
DIVISION OF HIGHWAYS
(CC-00-218)

Claimant appears *pro se.*
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant Silas Thomas Hall brought this action for damage to his 1990 BMW. His sister Margaret L. Hall was driving his vehicle when it struck a large hole on State Route 65 in Delbarton, Mingo County. This portion of State Route 65 is maintained by the respondent in Mingo County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on May 11, 2000, at

approximately 9:00 p.m. Ms. Hall was driving in a northeasterly direction. It was dark outside and she had the vehicle headlights on. The weather was clear and the road was dry. There was very little traffic on the road at this time. Ms. Hall was following a co-worker home after work. She was traveling at approximately forty five miles per hour which is the posted speed limit. As she drove around a sharp curve, an oncoming coal truck was on the center line forcing her to maneuver the vehicle to the right edge of the road. The vehicle struck a large hole immediately bursting the two passenger side tires. The force of the impact also damaged two rims and caused a hubcap to be lost. Ms. Hall submitted photographs which demonstrated that the hole extended approximately three or four inches into the travel portion of the road. The photographs also demonstrated that the hole completely covered the white edge line of the road and it was also at least five feet in length. Ms. Hall testified that she traveled this road often, but that it had probably been a month since she last traveled it prior to this incident. She had prior knowledge of this hole and stated that it had been there for a significant period of time. However, she testified that she could not avoid the hole due to the danger of the oncoming coal truck and the nature of the sharp curve. Claimant submitted a repair estimate for the two damaged rims and the hubcap plus tax in the amount of $803.71. Claimant also submitted a repair estimate for the replacement of the two damaged tires in the amount of $107.98. Claimant asserts that respondent knew or should have known of this hole and that it presented a hazard to the traveling public.

Respondent asserts that it did not have notice of this particular hole on State Route 65. Cecil Collins, a Transportation II employee for the respondent in Mingo County, testified that it is his general responsibility to oversee highway maintenance, including the section of State Route 65 at issue in this claim. He is familiar with the road and he stated that State Route 65 is a two-lane, blacktop highway with double yellow lines and white lines on the edges. It is a priority one highway. According to Mr. Collins, the width of the road varies depending on the exact location. The wider portions of State Route 65 are ten to eleven feet in each lane. However, he stated that at the location of this incident the width of each lane is probably only nine feet. He testified that he was not aware of this particular hole and he was not aware any employee in the maintenance department that had knowledge of this hole until after this incident. He also stated that there was a major repair job performed on State Route 65 within the last four years which included work on the berm, improvements to the drainage systems and re-pavement of the road. However, Mr. Collins admitted that he could not determine why a hole this size would be present. He stated that it appeared to be an old wooden culvert that had deteriorated over the years and rotted away causing a portion of the road to break away as well.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims,* 46 S.E.2d 811 (W.Va. 1947). To hold the respondent liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to make adequate repairs. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). In this claim, respondent did not have actual notice of the hole. However, the claimant established by a preponderance of the evidence that respondent had constructive notice of this hole. The size of this hole as well as its location leads the Court to conclude that the hole has been in existence for a period of time long enough for the respondent to have made adequate repairs. The size of the hole and its location created a hazardous condition for the traveling public. Thus, the Court finds that respondent was negligent and that this negligence was the proximate cause

of the damages to claimant's vehicle.

Accordingly, the Court makes an award to the claimant in the amount of $911.69.

Award of $911.69.

OPINION ISSUED JANUARY 18, 2002

INTEGRATED HEALTHCARE PROVIDERS
VS.
DIVISION OF CORRECTIONS
(CC-02-052)

Claimant appears *pro se.*
Daynus Jividen, Senior 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 payment in the amount of $50,520.01 for medical services rendered to inmates in the custody of respondent at Mt. Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, but further states that the amount owed to claimant is $35,290.71 and that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim. Claimant has reviewed the Answer of the respondent and agrees that the correct amount is $35,290.71.

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 JANUARY 18, 2002

ELEANOR JACOB
VS.
DIVISION OF HIGHWAYS
(CC-02–051)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. During the month of July, 2000, claimant's property sustained damage when a contractor for respondent, at the direction of respondent's employees, cut down two trees on claimant's property located adjacent to WV Route 27 near Wellsburg in Brooke County.

2. Respondent was responsible for the work being performed by its contractor and admits that the action taken was at the direction of its employees.

3. As a result of this incident, claimant's property sustained damage in the amount of $450.00.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its actions which resulted in the loss of two trees on claimant's property on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's property; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $450.00.

Award of $450.00.

OPINION ISSUED JANUARY 18, 2002

MARTHA LEATHERMAN
VS.
DIVISION OF HIGHWAYS
(CC-00-288)

Nicholas J. Monteleone, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On February 6, 1998, Tammy L. Hines (herein after referred to as decedent) was operating a motor vehicle southbound on Alternate Route 28 in or near Wiley Ford in Mineral County which area is adjacent to claimant's property. At that time and place, decedent lost control of her vehicle, crossed the center line, and collided with a northbound vehicle resulting in her death.

2. Respondent was at all times herein responsible for the maintenance of Alternate Route 28 in Mineral County.

3. As a result of this incident, decedent's estate brought an action in the Circuit Court of Mineral County against claimant, which case was settled for $25,000.00 and the case was dismissed from the circuit court by order made and entered on November 19, 2001. This action was predicated upon the fact that there was ice on the road caused by water runoff from claimant's property and/or respondent's drainage ditches adjacent to claimant's property. The theory was that the alleged water runoff from the claimant's property was the proximate cause of the

decedent's death. Claimant brought the claim herein against respondent for indemnification and/or contribution on the basis that respondent was the responsible party. Respondent was at all times immune from suit in the circuit court.

4. Respondent agrees to pay contribution toward this settlement in the amount of $2,000.00 which amount claimant and respondent consider to be full and complete satisfaction, settlement, compromise and resolution of all matters in controversy in the claim herein.

The Court has reviewed the facts of the claim and finds that respondent may settle and compromise this claim and, thus, claimant may make a recovery as agreed to by the parties.

Accordingly, the Court is of the opinion to and does make an award in the amount of $2,000.00.

Award of $2,000.00.

OPINION ISSUED JANUARY 18, 2002

GORDON W. LEWIS, JR., AND LILLY M. LEWIS
VS.
ALCOHOL BEVERAGE CONTROL ADMINISTRATION
(CC-01-017)

Carrie R. Marquis, Attorney at Law, for claimants.
Jeffrey G. Blaydes, Senior Assistant Attorney General, for respondent.

WEBB, JUDGE:

Claimants brought this action to recover $58,750.00 from the respondent which amount represents the bond paid to respondent for claimants to reserve a liquor license for a store in the City of Charleston. Claimants allege that they later were informed by respondent that the area where the store was to be opened was in fact in a different market zone. That being the case, claimants elected not to complete the purchase of the license, and the bond was forfeited to respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The facts in this claim reveal that claimant, Gordon W. Lewis, Jr.,[4] and his daughter, Lilly M. Lewis, made a decision to place a bid for a liquor store license from respondent in order to open a liquor store in Charleston with the intention to locate a store at Ashton Place or Southridge Center, both of which are shopping areas adjacent to Corridor G. Their first choice of location was Ashton Place, but they were denied a permit by the City of Charleston for that location. Their second choice for location of the store was Southridge Center. Claimants initially bid for a license in the Market Zone 36 based upon documents which they received from respondent in their bid package which described Market Zone 36 as "City of Charleston." A map

[4]Claimant Gordon W. Lewis, Jr., had been a successful bidder for a liquor store license in 1990, and he has operated a liquor store in Greenbrier so he had experience with the bidding process.

of the zones throughout West Virginia depicted various zones with numbers and there was a circle showing Market Zone 36 with the notation, City of Charleston, as the description of the zone boundaries. All of the discussions that claimant Mr. Lewis had with his daughter about the Market Zone 36 related to the City of Charleston. When the attempt to obtain a permit for a store a Ashton Place was denied, they turned their attention to a location at Southridge Center. It was at that time in the end of April 2000 that they learned that the portion of Southridge Center available for a liquor store was actually in Market Zone 38. Claimant Lilly M. Lewis attempted to search for another location in the City of Charleston defined as Market Zone 36, but her efforts proved to be fruitless.

Both claimants and Marie Lewis (wife of claimant Gordon W. Lewis, Jr.) testified that they believed that Southridge Center was within the city limits of Charleston and thus the Market Zone 36 included all of that area. However, respondent's definition of the City of Charleston did not include this area along Corridor G because the market zone boundaries were defined by respondent as being those boundaries in place for the bids for liquor store licenses in 1990. Claimants eventually gave up pursuit of finding a suitable location with the boundaries of Market Zone 36. Prior to the second round of bidding, claimants requested that respondent allow them to apply their bond to a bond for Market Zone 38, or, in the alternative, take inventory for the bond, but respondent refused consideration of these requests. Since they did not provide full payment for their license for a liquor store in Market Zone 36, respondent demanded and collected the amount of the bid bond from claimants in the amount of $58,750.00, which constitutes the amount of this claim.

Respondent relies upon the provisions in WV Code §60-3A-7(a)which states, in part, "The market zones established by the board for the retail sale of liquor within this state under the enactment of this section in one thousand nine hundred ninety may not be modified by the board unless authorized by the Legislature." This statutory provision is the basis for Rule 7.1 which states, "The market zones established by the Board for the retail sale of liquor within this State under the enactment of W. Va. Code §60-3A-7 in 1999 may not be modified by the Board unless authorized by the Legislature." Therefore, the retail liquor licensing board uses the boundaries for its market zones as set in 1990 and, at that time, the boundaries for the City of Charleston did not include the Southridge Center. Market Zone 36, although noted as being the City of Charleston, does not include all that property which is now within the city limits. Thus, the property including the Southridge Center annexed by the City of Charleston after 1990 was not a part of Market Zone 36 and the license bid upon by claimants did not permit a liquor store at that location. In accordance with the provisions of §60-3A-10(f) respondent forfeited claimants' bid bond. Respondent does not have a fiscal method to make a reimbursement of the amount collected on the bid bond even if it desired to do so.

In fact, the area of Southridge Center of interest to claimants is a part respondent's Market Zone 38, and claimants eventually were successful in the second round of bidding and they obtained a liquor store license for Market Zone 38 which included the portion of Southridge Center where claimants located their liquor store.

The Court heard testimony at the hearing of this claim and in the presentation of evidence concerning the assertion by claimants that they were misled by the bid documents and believed that they were placing a bid for all of the locations available within the city limits of the City of Charleston. They did not realize that there had been a boundary change between 1990 and 1999 when the City of Charleston annexed

property which included a portion of the Southridge Center. This boundary change could not be included by respondent in Market Zone 36 based upon the provisions in WV Code §60-3A-7 which limited the boundaries of the zones throughout West Virginia to the 1990 boundaries. However, there was nothing on the boundary descriptions to inform bidders of this unusual statutory quirk which affected the boundary limits for the City of Charleston. There was no language which indicated that the boundary was not the actual city limits. The Court believes that claimants were inadvertently misled by the bidding documents to their financial detriment, *i.e.*, that respondent retained claimants' bid bond in the amount of $58,750.00 and claimants received nothing in return. Claimants actually paid a second bid bond to obtain its license for Market Zone 38.

The respondent, on the other hand, was unjustly enriched under the facts in this particular scenario. The Court is of the opinion that the unjust enrichment which occurred herein constitutes an inequity that is unconscionable on the part of the State. Therefore, the Court has determined that the claimants are entitled to recover the bid bond money paid in good faith for a license in Market Zone 36. Equity and good conscience demand that moral obligations of the State be recognized by this Court which was created for the citizens of this State by the Legislature for this purpose.

In accordance with the findings of fact stated herein above, the Court makes an award to claimants in the amount of $58,750.00.

Award of $58,750.00.

OPINION ISSUED JANUARY 18, 2002

TONY McFARLIN
VS.
DIVISION OF CORRECTIONS
(CC-00-279)

Claimant appeared *pro se*.
Daynus Jividen, Senior Assistant Attorney General, for respondent.

PER CURIAM:

Claimant seeks payment for certain items of personal property which he had in his possession while an inmate at the Mt. Olive Correctional Complex, a facility of the respondent. When claimant was released from the arts and crafts program at Mt. Olive Correctional Complex, various leather hides and finished products that he had made were not returned to him. Claimant places a value on the leather hides at $112.10 and the finished products in the amount of $1,359.70. He seeks a total award of $1,471.80.

A hearing was conducted by the Court in this claim on October 25, 2001, at which time the claimant testified as to the facts and circumstances giving rise to this claim. Claimant was a member of the arts and crafts program at Mt. Olive Correctional Complex since the program began. He made and sold specialized leather products with imitation lizard, snake, and alligator print hides. The Mt. Olive arts and crafts program allowed some of the inmates to send their finished products to the Beckley Mall to sell to the general public. According to claimant, he sent approximately $650.00 to $700.00 dollars worth of finished leather products to the

Beckley Mall in hopes of having them sold. However, he stated that after three months, without any money being paid to him that he became concerned. He spoke to Henry Hudson who was the acting arts and crafts supervisor at the time of this incident regarding the status of the products at the Beckley Mall. Claimant testified that after approximately eight months he had yet to receive any money from the sale of his products from the Beckley Mall. He then filed grievances in an attempt to get his property back, which eventually was returned to him. It is his opinion that filing the grievances caused a dispute between himself and Mr. Hudson and that the incident giving rise to this claim arose from that dispute.

According to the claimant, a routine fire drill was conducted in either August or September of 1997 during his arts and crafts period. He stated that at the time he was at the cutting table working on leather. He testified that he stopped what he was doing and exited the building. An inventory was taken by the respondent following the fire drill and it was concluded that a utility knife was missing from his inventory. As a result, he lost his arts and crafts privileges. He claims that this was in retaliation for his filing grievances. He then was contacted by Keneth S. Watson, an assistant to Mr. Hudson in the arts and crafts program at the time of this incident. Mr. Watson allowed the claimant to observe his arts and crafts material that Mr. Watson was packing to send to storage. Claimant asserts that some of his leather hides were missing as well as all of his finished products. He claims that $1,359.70 worth of his finished leather products were missing from his inventory and three leather hides valued at $112.10. Claimant presented three sworn affidavits from other inmates who were in the arts and crafts program that claim to have seen Mr. Hudson load claimant's finished products and leather hides into a box and remove it for storage.

It is respondent's position that it was not responsible for the loss of the claimant's property and, even if it were, that the amount the claimant places on the value of the property is too high. Keneth S. Watson, an assistant in the arts and crafts program at the time of this incident, testified that he supervised the claimant in the program for approximately two years; that the claimant did use prints of imitation exotic leathers and sold them; and that he did not see the items that claimant asserts were stolen. He could not testify as to whether or not these items were returned to him or not. However, Mr. Watson testified that he is aware of the value of the items claimed to be removed and, in his opinion, the values placed on most items were inflated. He agreed with the value placed on the orange leather hide at $37.80 as well as the value of the deer skin hide at $19.30 and the black lizard hide at $55.00. However, he testified that the values placed on the finished leather items was inflated. In his opinion, the market value of the finished leather products totaled $881.00 not $1,359.70 as the claimant asserted.

This Court has held that a bailment exists when respondent records the personal property of an inmate, takes it for storage purposes, and fails to return it without a satisfactory explanation. *Heard v. Division of Corrections* 21 Ct. Cl. 151 (1997). In this claim, the claimant has established by a preponderance of the evidence that his arts and crafts property was at one time taken from his possession, was in the control of respondent, and was never returned to him. Respondent has failed to provide any explanation as to what happened to these items. Therefore, a bailment existed in this claim and respondent is responsible for the reasonable value of the claimant's property. The Court is of the opinion to make an award to the claimant for the value of the three leather hides in the amount of $112.10 and an award of $881.00 for the value of the finished leather products.

Accordingly, the Court is of the opinion to and does hereby make an award

to the claimant in the amount of $993.10.

Award of $993.10.

OPINION ISSUED JANUARY 18, 2002

KATY L. PRICHARD AND CHARLES E. PRICHARD
VS.
DIVISION OF HIGHWAYS
(CC-00-251)

Claimants appeared *pro se*.

Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to their real property allegedly caused by the negligent maintenance of a drainage ditch adjacent to County Route 13/9, locally known as Dalewood Drive, in Lavalette, Wayne County. This portion of County Route 13/9 is maintained by the respondent in Wayne County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

Claimants' residence is located adjacent to County Route 13/9 in Lavalette, Wayne County. They purchased the 1.69 acres of property approximately nine or ten years ago with the house already built on the property. At this location, County Route 13/9 is a paved secondary road that is not quite wide enough to be considered a two-lane road. In most locations, an oncoming vehicle must pull off the road and let the other vehicle pass. It is not marked with a traditional center line nor does it have white lines on the edges. County Route 13/9 is in front of claimants' house and there is a small creek behind the house. The ditch line at issue in this case is on the opposite side of County Route 13/9 adjacent to the road. There is a hillside above the ditch line and the ditch line is the drainage area for the water coming from the hillside as well as from the surface of the road. Claimants' home is located opposite the ditch line and below the grade of the road. The Lavalette Public Service District has a sewage collection line which runs along County Route 13/9 underneath the ditch line. Mr. Prichard testified that he believes the sewer line pipe is a plastic pipe which is one or two inches in diameter. This sewer line was put in approximately nine to ten years ago. In May 2001, the Lavalette Public Service District put in a new lift station on the opposite side of the road from claimants' home. A sewer line connection broke approximately three or four years ago which caused a portion of the road to slip and a small portion of the claimant's land as well. This slip occurred on the other end of the claimant's yard opposite the slip at issue in this claim. That slip problem was resolved and is not at issue in this claim. There is also a water line which runs adjacent to County Route 13/9 in front of the claimants' home. When the claimants first bought their home, they had a load of sand and a load of topsoil brought in and placed on the property and leveled out. The claimants also placed railroad cross ties in the backyard to level the property so that they could place a fence between their home and the creek. Claimants did not make any other alterations to their property. However, Mr. Prichard put in a drainage system to drain the water coming off the roof of their house. The water comes down the gutter, through a pipe that is connected to

an elbow and this elbow connects to another pipe which runs down hill and into the creek. Mr. Prichard testified that their pipe was not leaking, and, in his opinion, this water line was not causing the slip due to both its location and the fact that once the slip occurred, it exposed the pipe which showed that there was no leak.

Claimants started having problems with their property slipping in late May or early June of 2000. Mrs. Prichard testified that the ditch line across the road from her home began to hold water in late April or early May of 2000. According to the claimants, there were several heavy rains from approximately April or May of 2000 through the end of June 2000. There was a very large hump with a large rock underneath it that was blocking the ditch and preventing the water from running through the ditch line. After the heavy rains from April through June of 2000, the water was trapped so that it became a small pool. This resulted in an extraordinary amount of water being trapped in the ditch line for an extended period of time. Mrs. Prichard called the respondent to come out to the location where the water was trapped sometime in late June 2000. She testified that no one responded until after she had made numerous telephone calls. Then respondent attempted to clean out the ditch line. According to Mrs. Prichard, the respondent used a machine with a large rubber wheel which it ran up and down the ditch line to lower the surface of the ditch. Respondent's actions did not remove the large rock which was the problem causing the water to be trapped. Mrs. Prichard testified that the water would get as deep as eighteen inches at times. The water would be backed up as far as fifty to seventy-five feet from the large rock at times. In addition to the water collecting in the ditch line, silt and mud would also collect. According to the claimants, when the water would dry up from the spring and summer heat, the next rain would simply start the problem over again. The longer the water was trapped in the ditch, the more the slip progressed. The slip started getting close to the claimants' home and extended further down their yard. Mrs. Prichard called the respondent one more time to have the ditch cleaned out. However, respondent only cleaned out some mud and silt which was very little help because it did not remove the large rock which was blocking the water from flowing through the ditch line. By late July 2000, claimants' property was seriously damaged by the slip. The slip extended from the front of their yard next to the road to the edge of their back yard near the creek. Finally, Mr. Prichard and Mrs. Prichard's cousin used shovels and a mattock to remove the large rock and remove the dirt which was causing the water to pool. Once this was done, the water then flowed through the ditch line and claimants have not had any trouble with water backing up in the ditch line. Furthermore, the slip did not progress any further and no more water was seeping from the slip in their yard. However, there was extensive damage done to their property before they cleared the ditch line. The claimants submitted a repair estimate in the amount of $6,000.00 from Robert Smith Excavating representing the cost to repair the slip. Mrs. Prichard testified that Mr. Smith would have to use heavy equipment to remove a great deal of the dirt and dig down to the base of the slip to put in tiles and slag to provide support. Mr. Smith would then need to haul the dirt back to the property and smooth it out again to return it to its original condition.

It is the claimants contention that the respondent was negligent in failing to timely and adequately clean the ditch line and to remove the large rock blocking the ditch line. Its failure to do so caused the water to back up and form a pool. This caused the water to seep under ground and flow beneath County Route 13/9 through claimants' property to the back yard and cause the property to start slipping toward the creek.

Respondent asserts that the water pooling in the ditch line on County Route 13/9 was not the cause of the slip on claimants' property. Respondent maintained the ditch line just as it maintains other ditch lines in the area. A back hoe was used to clean the ditch line as part of the routine maintenance. A copy of a DOH-12 dated July 19, 2000, was submitted in evidence of the work done.

Dr. George A. Hall, the Research and Manuals Engineer for respondent, testified as a geotechnical engineer. He explained that he made a site visit to observe the road, ditch line, and claimants' property. He also took a soil sample from the ditch line while at the site. He described the slide on claimants' property as having two toes at the bottom of the slope meaning that the slide developed in multiple sections. The material located in the slide is a shaley clay material. There was evidence presented that the slide had been present for a long time since trees in the area were leaning and bent, and in his opinion, this substantiates his position that there has been some hillside creep for several years. Although there was a saturation of the soil in the slide, it is his opinion that the pooling of the water in the ditch line of County Route 13/9 did not cause the slip on claimants' property because it would have taken a matter of years for the pressure of pooling water in the ditch line to push water in the saturated soil to the point of causing a slide on claimants' property. He explained that there will be natural ground water seepage in the whole area of the slide because it is a natural hillside drain and it would be expected to experience landslide activity. He also opined that the history of sewer leaks in the area possibly could be a contributing factor because the leaking water would be under additional pressure. It was his understanding that the sewer line had been in place for ten years, but he did not know what kind of pressure was on the line. Therefore, he concluded that the respondent's action in allowing the water to pool in the ditch line on County Route 13/9 was not the cause of the slide which occurred on claimants' property.

The Court has held in many previous claims that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. See *Haught v. Dept. of Highways*, 13 Ct.Cl. 237 (1980). In claims of this nature, the Court will examine whether respondent negligently failed to protect a claimant's property from foreseeable damage. See *Rogers v. Div. of Highways*, 21 Ct.Cl. 97 (1996). The Court also has held that where respondent sets in motion a slip by digging a ditch and allowing water to pool in the ditch which then causes a slip on a claimant's property, the respondent is negligent in its actions and will be liable for the damages to the property owner. See *Mount v. Div. Highways*, Unpublished Opinion No. CC-96-578 (1999).

In the instant claim, the Court has reviewed the testimony and exhibits and the Court has difficulty with the conclusions put forth by respondent. In fact, there are times that the Court views a claim based upon common sense rather than scientific and technical theories. In this particular claim, the slip on claimants' property became visibly worse as the pooling in the ditch line continued to occur. There is no dispute, even by respondent's expert, that the water from the ditch line on County Route 13/9 seeps through the ground beneath the road toward the creek with claimants' property between those two points. Therefore, it seems to the Court that the heavy rains created a saturated soil condition for all of the property in the area but especially for claimants' hillside property which was already subject to slipping toward the creek. When respondent failed to respond to claimants' complaints about the standing water in the ditch line, a condition developed which gives support to the claimants' position that this water impacted the saturated water in the soil to increase the slide activity on claimants' property. The Court is of the opinion that there was a saturation of the soil

and the pooling of the water in the ditch line did, in fact, contribute to the slide that occurred. It was the failure of respondent to maintain the ditch line on County Route 13/9 that brought about the pressure on the water in the soil in the area beneath the road and continuing throughout the soil on claimants' property. Claimants took control of the situation effecting a remedy by removing the blockage in the ditch line. The Court can only conclude that the water in the ditch line brought about the slide on claimants' property. Therefore, the Court finds that the negligence of the respondent in failing to respondent to claimants' complaints brought about the damages on claimants' property for which the respondent is liable.

In accordance with the finding of facts and conclusions of law the Court as stated herein above, the Court is of the opinion to and does make an award to claimants in the amount of $6,000.00.

Award of $6,000.00.

OPINION ISSUED JANUARY 18, 2002

JAMES TIMOTHY SAMPLES
VS.
DIVISION OF CORRECTIONS
(CC-00-460)

Claimant appeared *pro se*.
Daynus Jividen, Senior Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover the value of certain personal property items that he alleges were lost by the respondent while he was an inmate at Mt. Olive Correctional Center. He was serving a term of confinement in lock-up for five months. When he was released from lock-up to the mainline population, several items of his personal property were missing. Claimant placed a value of $383.44 upon the lost items.

A hearing was conducted by the Court in this claim on October 25, 2001, at which time the claimant testified as to the facts and circumstances giving rise to this claim. Mr. Samples was in a single cell until December 13, 1999, at which time he was moved into a double cell with another inmate. Mr. Samples packed his personal property into boxes and stored it in the double cell. He did not remove the items from the boxes due to the fact that he knew that on December 14, 1999, he was going to magistrate court where he knew that he was going to be found guilty and sent to lock-up as a result. He had placed his property including a 14kt gold chain and cross in a box underneath his bed. Mr. Samples testified that his property was removed by the unit team and taken to the state shop while he was in lock-up. There was a brief period of time that Mr. Samples' property was left in the double cell alone with another inmate. Mr. Samples was in lock-up from December 14, 1999, until February 7, 2000. When he returned to his cell from lock-up, he discovered that some of his property was missing, including arts and crafts items, two pair of sweat pants, two sweat shirts, and 14kt gold chain and cross. Mr. Samples testified that although the "Resident's Personal Property Form" which inventoried some of his property was filled out on February 7, 2000, he did not see it until May 4, 2000. He stated that this

inventory did not list all of his property, but that what was listed he did receive. The list did not include the property items which he claims are missing.

Claimant asserts that respondent was responsible for his property once he was removed from the double cell and sent to lock-up and that a bailment relationship existed at that point in time when he no longer had control or possession of his property.

Respondent contends that it was not responsible for claimant's property and that it followed proper procedures in removing his property from the cell to the state shop and that if the property is missing, it must have been stolen by another inmate.

Laura Crouse Adams, a Correctional Counselor at Mt. Olive Correctional Complex at the time of this incident, testified that the normal procedure for securing an inmate's property when he is removed from his cell for lock-up includes contacting the state shop and having someone from that department come to the cell to pick up the inmate's property and secure it. However, in this case since the claimant already had already boxed his property, the state shop personnel went to the double cell and removed it. She stated that claimant's property was left in the double cell alone with another inmate for "some period of time". Mrs. Adams also testified that she did search the claimant's property items at the request of the claimant while the items were stored in the state shop, but she could not find the gold chain and cross. She also recalls that the other inmate who was in the same cell with Mr. Samples had his property searched but the gold chain and cross were not found.

Timothy Ray Moses, supervisor at the Mt. Olive state shop at the time of this incident, stated that he recalls the claimant having in his possession a gold chain and cross. He also testified that he searched for the arts and crafts items for the claimant upon his request to do so, but he was unable to find these items for Mr. Samples.

Patrick Whittington was a storekeeper at the state shop at the time of this incident. He testified that he had a conversation with the claimant regarding the fact that certain property items were not listed on the "Resident's Personal Property Form" that inventoried claimant's property. Mr. Whittington recalls that the claimant specifically mentioned the gold chain and cross as missing.

This Court has held that a bailment exists when respondent records the personal property of an inmate and takes it for storage purposes, and then has no satisfactory explanation for not returning it. *Heard v. Division of Corrections* 21 Ct. Cl. 151 (1997). In this claim, the evidence adduced at the hearing established that the claimant had a 14kt gold chain and cross in his possession while an inmate at Mt. Olive. The evidence also established that prior to his being sent to lock-up, the claimant also had two pair of sweat pants and two sweat shirts in his possession as well as various materials for arts and crafts. However, upon being released from lock-up to his cell, none of these items were found and returned to the claimant. The property was in the control and possession of the respondent during the time the claimant was in lock-up. The respondent has no plausible explanation for what happened to these items other than to imply that another inmate may have taken them while alone with the property in the double cell. However, there was no evidence set forth to support this theory. Regardless, respondent was responsible for the claimant's property when he was taken from his cell to Magistrate Court. The claimant did not have any means to guard or watch over his property during this time period. The respondent was in the position to safeguard the claimant's property once he was removed from his cell. Respondent should have secured the property immediately after the claimant was removed from the double cell. The Court has determined that

respondent was responsible for securing the claimant's property and failed to take the appropriate action to protect the property; therefore, the Court is of the opinion that an award of $383.44 represents a fair and reasonable reimbursement to claimant for the lost property.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $383.44.

Award of $383.44.

OPINION ISSUED JANUARY 18, 2002

THOMAS MEMORIAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-02-038)

Claimant appears *pro se.*
Daynus Jividen, Senior 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 payment in the amount of $35,206.13 for medical services rendered to inmates in the custody of respondent at Mt. Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JANUARY 18, 2002

GERALD J. WARNER
VS.
DIVISION OF HIGHWAYS
(CC-01-473)

Claimant appeared *pro se.*
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim

were agreed to as follows:

1. On October 13, 2001, claimant was traveling eastbound on I-70 in Wheeling, Ohio County, when he drove through the Wheeling Tunnel. As he was traveling through the tunnel, a portion of the ceiling tiles broke loose and fell onto and in front of his vehicle, a 1994 Chevrolet Sportvan. This incident caused damages to claimant's vehicle for which he filed this claim.

2. Respondent was responsible for the maintenance of the Wheeling Tunnel as it is a part of I-70 in Ohio County.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $733.97; however, claimant is limited to a recovery of $250.00, the amount of his insurance deductible.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of the ceiling tiles in the Wheeling Tunnel on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $250.00.

Award of $250.00.

OPINION ISSUED JANUARY 18, 2002

HENRY S. WILLIAMS
VS.
DIVISION OF HIGHWAYS
(CC-01-061)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 1995 Chevy S-10 truck. The incident occurred when he was traveling on State Route 16 near War in McDowell County, and his vehicle slid on excess gravel on the road. This caused him to lose control of the vehicle which then struck the hillside. This portion of road is maintained by the respondent in McDowell County. The Court is of the opinion to make an award for the reasons stated more fully below.

The incident giving rise to this claim occurred on January 28, 2001, between 1:30 and 2:00 p.m. The claimant was returning from Charleston to his home in War. He was traveling southbound on Route 16 in his Chevrolet S-10 pickup truck. The weather was clear and the road was dry. However, there had been a heavy snow a few days prior to this incident which had covered the road. There were no vehicles near the claimant in either lane of traffic. He was traveling down a curvy hill at approximately twenty miles per hour. As he approached a sharp s-turn in the road, he slowed his vehicle to fifteen miles per hour. Claimant testified that he felt his truck

slide on the large amount of gravel on the road. He tapped the brakes, but he could not maintain control of the truck, which then slid into the side of the hill. The force of the impact damaged the truck's right side of the front bumper and the right side front fender. Claimant submitted a repair estimate in the amount of $297.86. He testified that he was familiar with Route 16 and traveled it approximately two to three times a week. He stated that he had just traveled the same portion of road the day prior to this incident and there was still snow on the road. Claimant is employed by the respondent in McDowell County and he stated that he had assisted the maintenance crew in salting the section of Route 16 where this incident occurred on the night of January 26, 2001. He stated that he remembered that they had salted the road quite heavily due to the snow. He described the gravel used in the salting of the road as fine in texture and approximately a quarter inch round.

Claimant asserts that the respondent left too much gravel on the road and that it should have been removed from the travel portion of the road once the snow had melted. He asserts that the large amount of gravel left after the snow melted created a hazardous condition and that respondent should have been aware of this condition and taken adequate remedial measures to correct it.

Respondent's position is that it was not aware that the gravel created a hazard to the traveling public and that the claimant knew that there was gravel on the road at this location and yet he failed to operate his vehicle with due care under the circumstances then and there existing. Gose Richard Yates, the transportation crew leader for the respondent in McDowell County, testified that his crew had salted the road during the night of January 26, 2001 due to a significant snowfall. According to Mr. Yates, they used a mixture of salt and fine gravel. The gravel is approximately a quarter inch or smaller. He stated that in situations when the snow melts, the gravel left over from the salting is kicked out to the sides of the road by traffic. However, in this particular situation, Mr. Yates stated that there was a large amount of gravel remaining on the travel portion of the road at the location of this incident. He personally went to the location after Mr. Williams reported the incident to him and swept the gravel out of the travel portion of the road. Mr. Yates admitted that the curve where this incident occurred is a dangerous one and that the gravel possibly could have contributed to the wreck.

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). However, the State does owe a duty of reasonable care and diligence in the maintenance of a highway. *Parsons v. State Road Comm'n.*, 8 Ct. Cl. 35 (1969). For the respondent to be held liable in this claim, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect in question. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). In the present claim, the evidence established that there was a large amount of gravel used in salting the road and that there was a large amount of excess gravel left on the road after the snow melted. The large amount of the fine gravel remaining in a sharp, blind curve of the road created a hazardous condition which the respondent should have been aware of and corrected once the snow had melted. However, the Court is also of the opinion that the claimant was at fault in failing to exercise due care. Claimant had helped place the salt and gravel mix on the road. He was aware or should have been aware that some excess gravel would be left on the road especially since the incident occurred on a weekend. Therefore, the Court is of the opinion that claimant is at fault to the extent of thirty percent for the accident which caused the damages to his vehicle.

Accordingly, the Court makes an award to the claimant in the amount of $208.50.

Award of $208.50.

OPINION ISSUED JANUARY 18, 2002

WOOD COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-02-041)

Claimant appears *pro se.*

Daynus Jividen, Senior 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, Wood County Commission, is responsible for the incarceration of prisoners who have committed crimes in Wood County, but have been sentenced to facilities owned and maintained by respondent, Division of Corrections. Claimant brought this action to recover $43,015.51 in costs for providing housing and/or medical care to 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 custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in *County Comm'n. of Mineral County vs. Div. of Corrections*, 18 Ct. Cl. 88 (1990), that respondent is liable to claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $43,015.51.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $43,015.51.

Award of $43,015.51.

OPINION ISSUED MARCH 20, 2002

DREAMA E. ARANGO
VS.
DIVISION OF HIGHWAYS
(CC-01-073)

Claimant appeared *pro se*.

Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to her vehicle which occurred when she was operating her vehicle on WV Route 2 in Weirton, Hancock County, and her vehicle struck a piece of cement in her lane of travel. WV Route 2 is a highway maintained by respondent. The Court is of the opinion to deny this claim for the reasons set forth below.

Claimant was driving to work on May 23, 2000, on WV Route 2 when she observed a "huge" piece of cement approximately "a car length" in front of her on the roadway. WV Route 2 is a four-lane highway and claimant was proceeding southbound in the right lane. It was raining and there was heavy traffic as it was about 8:00 a.m. or the time at which many people are on their way to work. There was a bus in the left lane next to claimant and traffic behind her. She was unable to avoid driving over the piece of concrete. As soon as she had driven over the concrete, she was aware that her tire blew out so she drove into the mill gate and called the city police. Claimant described the piece of concrete as being twelve inches long and four to five inches wide. Claimant's husband came to the scene and took a photograph of the curb adjacent to WV Route 2. The concrete piece had come out of the curb and gotten into the roadway. Claimant's vehicle sustained damages in the amount of $231.89.

Respondent's Hancock County Supervisor, Samuel DeCapio, testified that he received notice of the concrete in the road from his clerk so he sent a crew to place a barrel at the edge of the curb as a warning. He explained to the Court that the respondent has an agreement with the City of Weirton that limits respondent's maintenance responsibility to the highway "curb to curb" and the city is responsible for maintenance of the curb and sidewalk. Therefore, respondent had no duty to maintain this curb from which the concrete piece evidently had broken away and somehow moved into claimant's lane of travel. The Court requested that respondent send to the Court a copy of a Memorandum issued on December 21, 1982, that set forth respondent's policy for maintenance in municipal areas. That document was filed post trial and the document states, in part, "DUTIES AND RESPONSIBILITIES OF THE MUNICIPALITIES ARE: 7. Maintenance of curbs and sidewalks."

The Court, having reviewed the record in this claim, is of the opinion that the respondent established that it is not responsible for the maintenance of the curb adjacent to WV Route 2 in the City of Weirton, and, further, that it had no notice of the piece of concrete in the road at the time of claimant's accident. Therefore, the claimant may not make a recovery in this claim.

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

Claim disallowed.

OPINION ISSUED MARCH 20, 2002

JAMES BLAKE
VS.
DIVISION OF HIGHWAYS
(CC-01-246)

Claimant appeared *pro se*.

Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damages to his vehicle which occurred on June 2, 2001, when he was operating his vehicle on County Route 60, locally known as Glen Easton Road, in Marshall County. Claimant came upon a tree limb hanging over the road which he was unable to avoid thus his vehicle struck the limb causing damage to the windshield and driver side mirror. Respondent was responsible at all times herein for the maintenance of County Route 60. The Court is of the opinion to deny this claim for the reasons set forth below.

Claimant testified that he was driving his 1986 Chevrolet pick up truck on June 2, 2001, at approximately 10:00 p.m. It was dark, foggy, and raining slightly so the road was wet in places. As he drove downhill at about twenty miles per hour, he came around a curve and saw a tree limb hanging out over the road. He swerved to miss the limb, but it struck the windshield and side mirror on the driver's side of his vehicle causing damages in the amount of $130.11. Photographs submitted in evidence depict the area as a narrow road with many trees hanging over the roadway. Claimant determined that this particular limb had broken from one of the trees and was hanging over and into the road. Claimant did not have any insurance available to cover the damages to his vehicle.

Respondent's County Administrator for Marshall County, Ronald Faulk, testified that respondent received notice from the Wheeling Tunnel personnel of the hazardous limb on County Route 60 at 6:30 a.m. on June 3, 2001, at which time employees were sent to the area to remove the limb. Mr. Faulk described County Route 60 as a low priority road that is paved, but it is a narrow feeder road.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable defective conditions of this type, a claimant must prove that respondent had actual or constructive notice of the situation and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986).

The Court, having reviewed the record in this claim, has determined that respondent was not negligent in its maintenance of County Route 60 on the date of claimant's accident. Respondent did not have adequate notice of the fact that a limb was hanging from a tree into the roadway of County Route 60 creating a hazardous situation for drivers using the road; therefore, the Court cannot find liability on the part of the respondent in this claim.

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

Claim disallowed.

OPINION ISSUED MARCH 20, 2002

CHARLESTON RADIATION THERAPY
VS.
DIVISION OF CORRECTIONS
(CC-02-087)

Claimant appears *pro se.*
Leslie K. Tyree, General Counsel, 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 in the amount of $8,339.00 for medical services rendered to an inmate in the custody of respondent at Mt. Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 20, 2002

EDWARD COLLINS
VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-01-465)

Claimant appeared *pro se*.
Joy M. Bolling, 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, an inmate at the Southern Regional Jail in Raleigh County, seeks $1,070.00 for items of personal property that were entrusted to respondent. When claimant inspected his inventoried and stored personal property items, he discovered that his property was missing. Thus far, respondent’s employees have been unable to produce claimant’s personal property.

In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

This Court has taken the position in prior claims that if a bailment situation has been created, respondent is responsible for property of an inmate which is taken from that inmate, remains in its custody, and is not produced for return to the inmate.

Accordingly, the Court makes an award to the claimant herein in the amount of $1,070.00.

Award of $1,070.00.

OPINION ISSUED MARCH 20, 2002

ANDREA D. DUFFICY
VS.
DIVISION OF HIGHWAYS
(CC-01-267)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damages to her vehicle, a 1996 Pontiac Firebird, which occurred on July 10, 2001, when she was driving north on I-79 between Bridgeport Hill and the Meadowbrook Exit and her vehicle was struck by chunks of asphalt. Respondent maintains this section of I-79 in Harrison County. The Court is of the opinion to deny this claim for the reasons set forth herein below.

Claimant testified that she was traveling in the left lane on I-79 northbound to the Meadowbrook Exit in the afternoon on July 10, 2001, when she saw a van in front of her drive over a "humongous" object in the highway. There was traffic all around her so she was unable to change lanes. It appeared to the claimant that the object was a large asphalt patch that had come out of a hole in the highway. The object broke into two chunks when the van went over it and the chunks went under claimant's vehicle. Claimant estimated the size of the area repaired on I-79 as being two feet in width and covering the whole travel lane from side to side. I-79 in this area is a four-lane, paved interstate. Claimant drove immediately to her home. She notified respondent's Bridgeport office the following day about her accident on I-79. The chunks of asphalt caused damages to the frame, brake system, an engine mount, the windshield wiper fluid container, and to the side of her vehicle. The cost of the completed repairs was in the amount of $1,333.44 and certain other repairs have not yet been completed. Claimant has liability insurance only.

Robert Gary Suan, a crew leader/foreman for respondent in Harrison County at the Lost Creek office, testified that he reviewed the maintenance records for July 10, 2001, and several days thereafter for patching work on I-79 at and near the place of claimant's accident and he could find no work orders for work performed by respondent's employees. Mr. Suan also reviewed the radio logs for July 10, 2001, for notice to respondent of claimant's accident and there was no notice to respondent that anything had occurred on I-79 relative to the asphalt patch.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). In the instant claim, there has been nothing established to prove that respondent knew or should have known that a patch from a hole on I-79 was going to break loose from the surface of the highway on the date of claimant's accident; therefore, the Court finds that there was no negligence established on the part of the respondent. Thus, the Court must deny any recovery in this claim.

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

Claim disallowed.

OPINION ISSUED MARCH 20, 2002

MARK J. FOUSE
VS.
DIVISION OF HIGHWAYS
(CC-01-274)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damages to his vehicle which occurred on January 3, 2001, when he was proceeding west on I-70 through the Wheeling Tunnel and his vehicle struck a large piece of asphalt on the highway. Respondent is responsible for the maintenance of I-70 in Ohio County where the claimant's accident took place. The Court is of the opinion to deny this claim for the reasons set forth below.

Claimant described his accident as happening as he was driving with one of his field agents as a passenger and they were proceeding to the North Wheeling Fire Department. They were traveling west on I-70 which is a four-lane interstate. Claimant was driving in the right lane and he was driving at about 45 miles per hour through the Wheeling Tunnel when he saw an object in the road in front of his vehicle, a 1998 Ford Taurus. He was unable to swerve or stop due to traffic beside him and behind him. There was a pickup truck in front of him which swerved and then drove over the object. When claimant's vehicle went over the object, his vehicle immediately quit running. Claimant was able to drift his vehicle to the end of the tunnel and park at the side of the highway. This incident took place at approximately 3:00 p.m. Claimant believed that his vehicle struck a piece of concrete or asphalt. There was only debris left in the tunnel after the accident. As a result of this incident, claimant's vehicle sustained damage to the transmission, the oil pan, and the gas tank. Claimant had insurance which covered the damages except for his deductible in the amount of $500.00 so claimant is limited to that amount if there is any recovery.

Terry Kuntz, respondent's Supervisor for I-70 in this area, testified that he received notice that there was debris in the Wheeling Tunnel at approximately 3:40 p.m. on the date of claimant's accident so he sent a crew to clean up the area. The crew found pieces of asphalt which he opined had come from a hole in I-70 just east of the westbound Wheeling Tunnel entrance. Apparently, a truck had hit the patch which came up out of the hole and then dragged the chunk of asphalt into the tunnel where claimant had his collision with it. Mr. Kuntz explained to the Court that there are video cameras in the tunnel, but there are blind spots for these cameras. The cameras assist respondent's employees in viewing traffic in the tunnel for any problems and no tapes are available from the cameras. Mr. Kuntz also testified that it is common during wintertime for patching in holes to come out of a hole because of the freezing and thawing of the surface of the road.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims,* 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road

defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). In the instant claim, the Court has determined that respondent did not have notice of the large piece of asphalt dragged into the Wheeling Tunnel by traffic; therefore, respondent was not negligent in its maintenance of I-70 on the date of claimant's accident. Since there was no negligence established on the part of the respondent in this claim, the claimant may not make a recovery.

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 MARCH 20, 2002

RONALD FULLER
VS.
DIVISION OF HIGHWAYS
(CC-99-003)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage he alleges occurred on property he owns on the back channel of the Ohio River on Wheeling Island in Ohio County. Respondent had contracted with the C. J. Mahan Construction Company to construct a new bridge known as the Back Channel Bridge on Wheeling Island and the alleged damages occurred during the construction of the bridge. The Court heard this claim after having taken a view of the bridge and claimant's property. The Court is of the opinion to deny this claim for the reasons stated herein below.

Claimant purchased several tracts of property on the Ohio side and the West Virginia side of the Ohio River on or about November 6, 1997, as indicated on the deed. The deed was recorded in Belmont County, Ohio, on June 15, 1998, as evidenced by a stamp on the deed. Claimant contends that respondent allowed its contractor to dig a ditch on his property and to burn debris and other materials on his property during construction of the bridge on Wheeling Island. His property line is parallel to the bridge on one side, along the right of way for the railroad tracks, and then abutting the waters of a back channel of the Ohio River. The property is tree and brush covered. There is no access to the property from the land above the property. Claimant testified that he was at the site during the construction of the Back Channel Bridge when he observed employees for the contractor burn a pile of "wood and junk" on his property and then take soil from his tract of land to cover up the area after the burning took place. Claimant alleges damages in the amount of $10,000.00 to his property as the result of the trespass by respondent's contractor during construction of the Back Channel Bridge.

Respondent asserts that any damage to claimant's property occurred in February 1997 prior to the time that claimant made his purchase of the property; therefore, the claimant has not sustained any damages.

Robert Langen, the Area Engineer for respondent and the Project Engineer for the construction of the Back Channel Bridge on Wheeling Island, testified that C.J. Mahan Construction Company was the contractor for the construction of this particular bridge. He testified that during the piling operation for the abutment of the bridge closest to the railroad tracks and claimant's property, a foreman for the contractor dug a hole or trench to Wheeling Creek to drain the construction area for a piling operation necessary to construct one of the bridge abutments. Respondent did not have an inspector at the site and the action was taken without respondent's permission. The parties were aware that the trench dug was not on the State's right of way. That was the only trespass that he knew occurred on claimant's property.

The issue in this claim is one of trespass. Respondent's contractor encroached upon the claimant's property without permission or any form of right-of-way agreement between claimant and respondent. The parties herein agree that a trespass occurred, but respondent wishes the Court to believe that the trespass occurred prior to ownership of the property by claimant. However, claimant testified that he observed one act of trespass after he purchased the property, but prior to the actual recording of the deed. Respondent admits that if it had been present and observed the contractor's actions, it would have prohibited any trespass on property outside the State's right of way for the construction project, *i.e.*, the construction of the Back Channel Bridge. The Court is of the opinion that respondent is liable for the acts of its contractor as it failed in its duty to inspect and oversee its contractor on the occasion(s) when a trespass occurred.

The next issue for the Court to address is that of determining the damages suffered by claimant as a result of any trespass on this particular tract of property. Claimant could not provide the Court with any estimate or actual statement as to the damages to his property. Therefore, he has failed in his burden of proof to establish any viable damages to his property. This particular tract has no reasonable access other than crawling down a brush and tree covered bank. Thus, the Court has determined that any award calculated as fair and reasonable to both parties herein would require the Court to resort to pure speculation which this Court declines to do. Thus, claimant is not entitled to any recovery in the claim.

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

Claim disallowed.

OPINION ISSUED MARCH 20, 2002

FRANK HYATT
VS.
DIVISION OF HIGHWAYS
(CC-01-269)

Earvin John Hyatt, claimant's son, appeared on behalf of the claimant.

Andrew F. Tarr and Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 1992 GEO Tracker which occurred when his son, Earvin John Hyatt, was driving the vehicle on WV Route 52 through Wilmore in McDowell County. Mr. Hyatt came upon a tree or tree limb

hanging into the roadway and the vehicle struck the limb causing damage to the vehicle. Respondent is responsible for the maintenance of WV Route 52 in McDowell County. The Court is of the opinion to deny this claim for the reasons set forth below.

On June 26, 2001, at about 9:00 p.m., claimant's son, Earvin John Hyatt, was operating claimant's vehicle and he had two passengers in the vehicle with him. It was dark and it had rained two hours earlier so the road was wet. As Mr. Hyatt proceeded on WV Route 52, he was driving at 50 miles per hour when he suddenly came upon what appeared to him to be a limb hanging from a tree over the road. He swerved to miss the limb, but it struck the right front headlight area of claimant's vehicle. Mr. Hyatt testified that he had driven this same highway at about 3:00 p.m. and there was nothing unusual at this spot on WV Route 52. He was not sure if the vehicle struck a tree or a limb hanging from a tree. There was damage to the headlight, the hood, and the grill area of claimant's vehicle and these damages are not covered by insurance as claimant has liability insurance only. The estimate for repair of the damages is in the amount of $1,300.37.

Kenneth Bowles, a Crew Leader for respondent in McDowell County, testified that he was notified by emergency personnel to move a tree limb from WV Route 52 on the date of Mr. Hyatt's accident. It was dark at the time he went to the scene where he found a small tree that had broken from the hillside and was leaning over the highway. He described the terrain in this area as a hillside covered with many trees and the road is curvy. He was able to move the tree by himself to get it out of the highway. He was not sure if the tree was on the State's right of way.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). The Court must find that respondent was not negligent in this claim as it had no notice of the fallen tree on WV Route 52 and it responded as soon as one of its employees received notice of the hazard. The Court is sympathetic with the position of claimant's son who came upon an emergency situation, tried to avoid a collision with the tree, but he was unable to avoid the tree which struck the vehicle. Since the Court finds no negligence on the part of the respondent for this tree being in the road, there may be no recovery by the claimant.

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

Claim disallowed.

OPINION ISSUED MARCH 20, 2002

DARA M. KRACK AND REED KRACK
VS.
DIVISION OF HIGHWAYS
(CC-01-024)

Claimants appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to their vehicle which occurred when claimant Dara Krack was operating their vehicle on County Route 11 in Calhoun County, and the vehicle slid on a patch of ice causing it to make contact with an oncoming vehicle. Respondent was responsible at all times herein for the maintenance of County Route 11. The Court is of the opinion to deny this claim for the reasons set forth below.

The incident giving rise to this claim occurred on January 4, 2001, at approximately 5:30 p.m. Mrs. Krack testified that she was driving a 1985 Mercury Colony Park station-wagon. She was traveling west on County Route 11 returning from her place of employment in Charleston to her home in Calhoun County. The weather was cold and there was some light snow falling. She stated that it was turning dark outside and that she had the headlights on. It had snowed the day prior to this incident as well. Mrs. Krack stated that most of the road surface was dry on her drive home from Charleston. However, once she approached the Calhoun County line on County Route 11, also referred to as Nicut Road, the road surface was snow covered and icy. County Route 11 at this location is curvy with some small hills. It is a one-lane, third priority road. Mrs. Krack testified that she was traveling at approximately 15 miles per hour when suddenly she approached another vehicle that had just crested a small hill ahead of her. The road at this location is narrow and there is only space enough for one vehicle to pass at a time. Mrs. Krack testified that she had a short distance to maneuver her vehicle to avoid the oncoming car. She tried to stop but she was unable to do so. She then attempted to maneuver the vehicle to the right side of the road but due to the ice on the road the vehicle would not respond and collided with the oncoming vehicle. Mrs. Krack was forced to crawl out of the passenger side. Fortunately, she was not injured but the vehicle was damaged. Claimants seek $6,000.00 in damages which represents the total value of their vehicle.

The accident was investigated by West Virginia State Trooper Douglas P. Starcher and he completed the accident report. He noted that the road surface was slippery. However, he also noted in his report that Mrs. Krack was exceeding a safe speed and failed to maintain control of her vehicle.

It is claimants' position that the respondent failed to clear the road of ice and snow adequately and in a timely fashion and that its failure to do so created a hazardous condition that was the proximate cause of this incident. Mr. Krack took photographs of the road near the location of this incident on the following day. The photographs indicate that the road was snow covered and that the collision occurred on the crest of a small hill. Mrs. Krack testified that the road was slick to walk on and that the individual in the other vehicle slipped and fell on the ice when he exited his vehicle. Denver Cottrell, whose home is located adjacent to County Route11, testified that this incident occurred near his mailbox. He stated that the road surface was "solid ice" on the date of this incident and that it had not been treated by respondent.

It is respondent's position that it did not have notice of the icy condition of the road at this location. Respondent also asserts that it was on "SRIC" or snow removal and ice control on the date of this incident. Its available crews were working on the first priority roads and they had not been able to reach the second and third priority roads such as County Route 11.

Glenn Hanlin, County Supervisor for the respondent in Calhoun County at the time of this incident, testified that he is responsible for the maintenance of approximately 500 miles of roads and highways in Calhoun County and that there are 19 crew members available to respond to snow and ice removal. The portion of

County Route 11 at issue is a tar and chip surface road and is designated a third priority road. According to Mr. Hanlin, the priority one roads are treated first which has always been the policy of the respondent. The priority one routes are treated first with salt and abrasive mixtures because these roads are the most heavily traveled and there is a higher risk for accidents. The tar and chip roads such as the portion of County Route 11 at issue have to be treated with sand, cinders, and sawdust. There is not enough salt available to treat all the priority one routes as well as the second and third priority routes. Mr. Hanlin also stated that tar and chip roads are not durable enough to withstand salt treatment as such treatment would destroy the road surface. Mr. Hanlin testified that he did not receive any complaints regarding snow and ice on County Route 11 prior to this incident. He stated that he requires his clerk diligently to maintain a phone log and to convey any messages or complaints regarding the roads to him. He stated that even if a complaint had been made regarding snow and ice on County Route 11 and he was not made personally aware of it at that time, it would still be recorded in the phone log. Mr. Hanlin was adamant that no such complaint was recorded in the phone log prior to this incident.

Joseph Webb, Assistant Supervisor in Calhoun County, testified that on the date of this incident, January 4, 2001, he and the available maintenance crews were treating the primary routes in Calhoun County which include Route 16, Route 5, and Route 33. He stated that respondent was under snow removal and ice control operations.

Bruce Leedy, the Regional Maintenance Engineer for respondent in the Parkersburg District which includes Calhoun County, testified that, generally speaking, surface treated roads such as tar and chip should be treated with something other than salt because salt tends to destroy tar and chip roads. He also stated that in general it is better to treat roads with rock and chips or sand rather than to not treat at all. However, Mr. Leedy testified that he had absolutely no complaints regarding County Route 11 prior to this incident. The first complaint he received regarding County Route 11 was from Mr. Krack after this incident.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold the respondent liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). The respondent cannot be expected or required to keep its highways absolutely free of ice and snow at all times, and the presence of an isolated patch on a highway during winter months is normally insufficient to charge the respondent with negligence. *McDonald v. Dept. of Highways*, 13 Ct. Cl. (1979). However, the respondent does owe a duty to travelers to exercise reasonable care and diligence in the maintenance of highways. *Lewis v. Dept. of Highways*, Ct. Cl. 136 (1986).

In this claim, the evidence established that this portion of County Route 11 is a third priority tar and chip road in terms of maintenance priority. The evidence also established that it is the respondent's normal practice to treat primary roads first, before treating the lower priority roads. The respondent was treating the primary routes in Calhoun County on the date of this incident, but it had not been able to reach the second and third priority routes prior to the incident. The Court is of the opinion that the respondent was acting diligently in treating the snow and ice hazards on the date of this incident and there is insufficient evidence of negligence on which to

justify an award.

Therefore, in view of the foregoing, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED MARCH 20, 2002

STEVE MERKLE, JR., AND STEPHANIE L. MERKLE
VS.
DIVISION OF HIGHWAYS
(CC-01-123)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damages to their 1991 Chevrolet Cavalier which occurred when claimant Stephanie Merkle was driving the vehicle owned by her father. She was proceeding north on WV Route 52 and a rock fell from the mountain side adjacent to the road onto the vehicle she was driving causing damage to the hood. Respondent maintains WV Route 52 in Mercer County where this incident occurred. The Court is of the opinion to deny this claim for the reasons set forth below.

Claimant Stephanie Merkle described the rock fall incident which occurred on March 8, 2001, as she was driving from Bramwell and proceeding north on WV Route 52. It was sunny and clear. She was in a line of traffic driving at approximately 45 miles per hour when she suddenly was aware that a rock was falling from the side of the mountain adjacent to the road and the rock landed on top of the hood of the vehicle and then bounced across the road. WV Route 52 is a two-lane, paved highway with double yellow center lines and white edge lines. Claimant was startled by the incident so she drove onto the berm and saw a hole in the hood of the vehicle. She then proceeded to her home. Claimant is familiar with WV Route 52 since she drives back and forth from her home in Northfork, McDowell County, to Bluefield State College in Mercer County on a daily basis to attend classes at the College. Claimant and her father took the vehicle to be repaired at a cost $903.22.

Melvin Blankenship, a Crew Leader Supervisor for respondent in Mercer County, testified that he is familiar with WV Route 52 where claimant Stephanie Merkle's accident occurred. He explained that rocks fall occasionally in that area; however, respondent has falling rock signs in place at regular intervals on WV Route 52 to warn the traveling public.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). Respondent in the instant claim had no notice that the particular rock that fell on claimants' vehicle was going to fall from the

mountainside at that moment. This is the kind of hazard to which travelers of mountainous areas are subjected. Respondent's only course of action is to place the proper warning signs in these areas which is of no consolation to the claimants herein. However, the Court is left with no option other than to deny a claim wherein a rock suddenly falls from the mountain adjacent to the road and lands atop a vehicle. To do otherwise would place an untenable burden upon the respondent in its maintenance of the roads and highways throughout this State. Thus, the Court finds that respondent was not negligent in its maintenance of WV Route 52 on the date of claimant Stephanie Merkle's accident.

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

Claim disallowed.

OPINION ISSUED MARCH 20, 2002

JOHN G. RYAN, JR.
VS.
DIVISION OF HIGHWAYS
(CC-00-175)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for the value of his 1992 Ford Ranger pick up truck which was rendered a total loss in an accident that claimant had on County Route 7 (locally referred to as the Irontown Road) in Taylor County. Respondent is responsible for the maintenance of this road. The Court is of the opinion to deny this claim for the reasons set forth herein below.

Claimant was returning from his workplace, the Pruntytown Correctional Center, on February 14, 2000, at approximately 7:30 a.m. on his way to his home in Kingwood, Preston County. The weather was overcast and sprinkling rain. He had the vehicle headlights on as it was dark. He was traveling north on County Route 7 in Taylor County when he came upon water running across the roadway. He saw the water at a distance of some twenty-five to thirty yards so he took his foot off of the accelerator. He estimates his speed at 35 to 40 miles per hour. His truck went into the water, hydroplaned, flipped over end for end, then rolled over twice landing on the passenger side door on the right side of the road. County Route 7 is a two-lane, paved road. In the area of claimant's accident there is a dip in the road just after a slight curve to the south of the dip and then the road becomes level before going uphill to the north of the dip. There was a culvert under the road in the area of the standing water which had become clogged causing water to overflow onto the roadway. Claimant described the water as running across the road, five to six feet in width, and six to seven inches deep at the deepest point. Claimant testified that there had been heavy rain in the area during the night. While he was still at the accident scene, he observed some men use a tree to unclog the culvert under the road. He did not receive any serious injuries other than some scrapes and bruises. He took a week of sick leave from his employment after the accident. He alleges damages in the amount of $3,800.00 to $3,900.00 for his pickup truck for which he received $1,500.00 in

salvage value and $1,200.00 to $1,100.00 for stress caused by the accident and for being without transportation for two months.

Respondent's position in this claim is that it did not have notice of the pooling of water on County Route 7 at the time of claimant's accident. Respondent sent a crew to the scene shortly after the accident. There were water problems on many of the road and highways in Taylor County being treated by respondent throughout the night of February 14, 2000, due to heavy rain in the area.

This accident was investigated by Sergeant Paul S. Ferguson of the WV State Police. His West Virginia Uniform Traffic Crash Report was made an exhibit in this claim. The report notes "slippery pavement" and "failure to maintain control" as contributing circumstances. The driver description of the accident was as testified to by the claimant.

Larry Weaver, a Transportation Crew Supervisor for Taylor County, testified that the accident scene herein is located on the portion of County Route 7 in Taylor County for which he is responsible. This is a secondary route which is a non divided highway or a road without a center line. Mr. Weaver received notification of claimant's accident when he reported to work at 7:30 a.m. or thereabouts and dispatched a crew to the scene. He stated that about one and a quarter inches of rain had fallen during the night. He described the area of County Route 7 as having culverts under the road at intervals where there are low spots. The culverts have the inlet end on east side of the north-south road and the outlet end is on the west side. The claimant was traveling in a northerly direction. He measured the sight distance as a little over 400 feet for the driver traveling north. This particular road is about 16 feet in width and it has a posted speed limit of 35 miles per hour. He explained that the culverts were fairly new as these were replaced when the road was paved some three years prior to the accident herein.

James M. Lucas, an Equipment Operator III in Taylor County, testified that he was sent to County Route 7 on the morning of claimant's accident where he and another employee took a small tree to unplug the clogged, fifteen-inch culvert. It was clogged by a plastic bag containing a plastic pop bottle and another bottle. They were able to push the items out of the culvert thus allowing the water to flow through the culvert and off of the roadway. This alleviated the water problem.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). It is apparent in the instant claim that there was a heavy rain which caused problems for respondent throughout Taylor County on the night of claimant's accident. Respondent addressed the problem with the clogged culvert on County Route 7 as soon as it received notice of the problem. The Court does not place a burden upon respondent of anticipating all problems with its roadways. If respondent receives notice of a serious problem on a road and alleviates that problem with proper notice and in an adequate frame of time, then it has met its responsibility to the traveling public. Therefore, the Court has determined that respondent was not negligent in its maintenance of County Route 7 at the time of claimant's accident and it is not liable for this unfortunate accident.

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

Claim disallowed.

OPINION ISSUED MARCH 20, 2002

NELSON L. SUDER AND RHONDA SUDER
VS.
DIVISION OF HIGHWAYS
(CC-01-131)

Claimants appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damages to their 1996 Ford Taurus GL which occurred when their daughter was driving the vehicle and it went over a piece of concrete on County Route 9 in Upshur County. Respondent was at all times herein responsible for the maintenance of this roadway. The Court is of the opinion to deny this claim for the reasons set forth below.

Claimants' daughter, Hope Jean Suder, was operating their vehicle on March 2, 2001, in the vicinity of the Tennerton Bridge in Tennerton, Upshur County, while traveling east on County Route 9 (locally referred to as the Tallmansville Road). She had two passengers in the vehicle one of whom was an infant and one was a friend she was taking to a store to meet his family. She was not familiar with the road. The incident occurred between 9:00 p.m. and 10:00 p.m. so it was dark. The weather was clear and the road was dry. As Ms. Suder approached the Tennerton Bridge, she observed something in the roadway. There was on-coming traffic at the time so she was unable to swerve into the other lane and she could not drive to the right since the bridge rail was at the end of the bridge. Since there was traffic behind her, she drove the vehicle over the object in the middle of her travel lane. She realized that the vehicle's undercarriage had struck the object so she drove into a lighted area off the road in order to look at the vehicle where she and her friend discovered that the gas tank was leaking as a result of the collision with the object in the roadway. Ms. Suder and her friend looked for the object, but they only found a small piece of what appeared to be concrete. She then drove to a store about a mile from the accident location where both the claimants came to look at the vehicle. The vehicle then was driven back to their home. It was later determined that the damages to the vehicle were in excess of claimants' insurance deductible of $250.00 which amount is the limit of any recovery.

When claimant Rhonda Suder returned to the Tennerton Bridge the next morning with her daughter, they observed several pieces of concrete with black markings and they brought the largest chunk home. She noticed that there was concrete on the sides of the road and it was her opinion that the concrete pieces were broken off from a barrier on the road.

County Route 9 in this area is a two-lane, paved road with a yellow centerline and white edge lines. Photographs were submitted into evidence depicting the area. There were railroad tracks across the roadway as well as the Tennerton Bridge just after the tracks. Ms. Suder drove across the tracks at a speed of approximately twenty-five miles per hour and the object was in the road just before the bridge deck. She thought she had driven over a rock in the road until she found the debris consisting of little chunks with black marks. She and her mother opined

that the vehicle had struck the larger piece of concrete that they found the next day.

The Court, having reviewed the testimony and evidence in this claim, has determined that the Court would have to resort to speculation to find negligence upon the respondent for this incident. Whether the piece of concrete found by claimant Rhonda Suder is the actual object is not the issue as much as where the concrete originated, how it got into the roadway, was respondent responsible for its being in the road, was respondent aware of the object in the road, and was respondent negligent in its maintenance of County Route 9 at the time of the accident. Claimants have the legal obligation to establish all of these issues. Based upon the evidence put forth at the hearing of this claim, the Court must find that respondent has not been shown to be negligent in its maintenance of County Route 9.

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

Claim disallowed.

OPINION ISSUED MARCH 20, 2002

WEST VIRGINIA UNIFORMS
VS.
DIVISION OF CORRECTIONS
(CC-02-083)

Claimant appeared *pro se*.
Leslie K. Tyree, General Counsel, 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 $934.80 for providing trousers to Mt. Olive Correctional Complex, a facility of the respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $934.80.

Award of $934.80.

OPINION ISSUED MARCH 20, 2002

WEST VIRGINIA NETWORK FOR EDUCATIONAL TELECOMMUTING
VS.
DIVISION OF CORRECTIONS
(CC-02-068)

Claimant appeared *pro se*.
Leslie K Tyree, General Counsel, 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 $20.00 for providing educational telecommuting services to Mt. Olive Correctional Complex, a facility of the respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $20.00.

Award of $20.00.

OPINION ISSUED MARCH 20, 2002

MICHAEL A. WILLIAMS
VS.
DIVISION OF CORRECTIONS
(CC-00-330)

Claimant appeared *pro se*.

Daynus Jividen, Senior Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover the value of various items of personal property that he alleges were not returned to him or mailed to a relative at his request by employees of the respondent when he was transferred from a work release center to Huttonsville Correctional Center. A hearing was conducted in this claim from the Mt. Olive Correctional Complex by telephone with the claimant who was present at the Huttonsville Correctional Center. The Court is of the opinion to deny this claim for the reasons set forth herein below.

Claimant was assigned to the Huntington Work Release Center when he was subject to a disciplinary hearing. As a result of the hearing, he was transferred to the Cabell County Jail from which he was transported to the Huttonsville Correctional Center. He had certain items of personal property which he claims should have been transferred with him or mailed to his sister in Bluefield, West Virginia. He explained to the Court that when he was taken to Huttonsville Correctional Center, he was present during a telephone conversation with a guard and personnel at the Huntington Work Release Center regarding his personal property which was still at the Center. He told the guard to have the items mailed to his sister, but he was required to provide $17.00 for the postage. He did not have the money in his account at that time so the personal property was disposed of by the Huntington Work Release Center.

Respondent’s position in this matter is that it provided claimant the opportunity to ship his personal property to an address of his choosing and that he did not take advantage of that opportunity so respondent had no obligation to maintain his property. It bases this position upon the case of *State ex rel. Anstey v. Davis*, 203 W.Va. 538, 509 S.E. 2d 579 (1998) which sets forth the rights of inmates as to their personal property. That case does not place a burden upon respondent to maintain

property for an inmate as long as the inmate is provided the opportunity to ship the property to an address of his/her own choosing. In the instant claim, the claimant was provided the opportunity to mail his property and he did not take advantage of that opportunity. Therefore, respondent is not liable to claimant for the value of his personal property.

The Court, having reviewed the evidence in this claim, has determined that respondent met its responsibility to claimant for his personal property. Claimant admits that he did not have sufficient funds in his account to pay for the mailing of his property to his sister; therefore, respondent is not liable to claimant for the value of this property.

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

Claim disallowed.

OPINION ISSUED APRIL 2, 2002

KAY MEDLEY
VS.
DIVISION OF HIGHWAYS
(CC-00-127)

Claimant appeared *pro se*.
Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

PER CURIAM:

Claimant seeks an award for personal injuries and damage to her vehicle which occurred when she was traveling westbound on U. S. Route 60 near Smithers in Kanawha County, and her vehicle struck some rocks in the road. Respondent was responsible at all times herein for the maintenance of U. S. Route 60. The Court is of the opinion to deny this claim for the reasons set forth below.

The incident giving rise to this claim occurred on July 21, 1999, at approximately 10:00 p.m. Mrs. Medley was driving a 1992 Subaru Legacy Outback. She was on her way home from church with her daughter as her passenger. She testified that it was raining lightly that evening and there had been a heavier rain the day before. U. S. Route 60 at this location near the underpass at the Montgomery Bridge has two lanes of travel for westbound traffic and one lane for the eastbound traffic. The two lanes of travel extend for approximately one mile. Mrs. Medley testified that she was traveling at approximately forty miles per hour in a fifty mile per hour zone. As she was proceeding westbound on U. S. Route 60, her vehicle suddenly struck a rock in the right lane. She maneuvered her vehicle to the left passing lane to avoid striking additional rocks. However, there were rocks in the left lane as well which her vehicle went over causing both right side tires to burst She then drove to the right side of the road to wait for assistance. Her vehicle was towed thereafter to one location and later to a Ford dealer for repairs. Mrs. Medley suffered injuries to her shoulder and significant damage to her vehicle. The vehicle repairs cost $1,466.72. However, she had a $100.00 deductible feature as part of her automobile insurance coverage; therefore, any potential recovery for the vehicle damage is limited to the deductible feature of $100.00. In addition, she incurred an out of pocket towing bill in the amount of $50.00 for which she seeks recovery. As

a result of the shoulder injuries, Mrs. Medley missed seven weeks of work. She incurred physical therapy bills in the amount of $2,400.25 which were paid in full by her insurance. She also incurred $400.00 in medical expenses with her physician which were not covered by insurance. Mrs. Medley is seeking a recovery for the unpaid medical expenses in the amount of $400.00 and $2,184.00 in lost wages.

It is claimant's contention that respondent knew or should have known about the rock fall hazard at this location and that it should have taken adequate measures to insure that the rocks would not fall onto the road. Mrs. Medley testified that she travels this portion of U. S. Route 60 approximately twice a week. She also testified that she has seen rock falls at this location and that she has complained about the rock falls prior to this incident.

It is the respondent's position that it did not have notice of this particular rock fall until after the claimant's accident and that it has had "falling rock" warning signs in place at this location for a significant period of time.

Grant F. McGuire, a foreman for the respondent, testified that his responsibilities include overseeing the removal of debris from the roads and highways at the location of this incident. Mr. McGuire testified that there are two sets of "Falling Rock" warning signs posted near the location of claimant's accident. He stated that there is one set of signs located near the Montgomery bridge for the westbound traffic which claimant would have driven past on the night of this incident. According to Mr. McGuire, this area is a known rock fall area. However, he stated that there have only been a few rock slides and none of them were significant. On the night of this incident, Mr. McGuire was the foreman on duty and he received the call regarding this rock fall at 10:00 p.m. He stated that he and his crew cleared the rocks that were on the road at the location of this incident and then notified the district headquarters that the road was cleared. Respondent submitted into evidence a DOT-12 daily work report indicating that respondent's employees did respond to this rock fall incident and they spent a total of two hours at the scene from 10:00 p.m. to 12:00 p.m.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold the respondent liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). With regard to falling rocks, the Court has held that the unexplained falling of a rock onto a road, without a positive showing of negligence on the part of the respondent, is insufficient to justify an award. *Coburn v. Dept. of Highways*, 16 Ct. Cl. 68 (1986).

In the present claim, the Court is of the opinion that there is no evidence of negligence upon which to justify an award. The evidence established that respondent has had signs in place warning the traveling public of the potential for falling rocks at this location. Respondent did not have prior notice of this particular rock fall, and there was no pattern of multiple repeated rock falls at this location prior to the incident herein. The evidence established that the respondent did respond to this incident in a timely fashion. Thus, respondent was not shown to have been negligent in its maintenance of U.S. Route 60 on the date of claimant's accident.

While the Court is sympathetic to the claimant and the damages she suffered, the Court is of the opinion that the respondent took reasonable steps to advise motorists of potential rock falls in this area. In view of the foregoing, the Court

hereby denies this claim.

Claim disallowed.

OPINION ISSUED APRIL 2, 2002

MONONGALIA HOME CORPORATION dba
SUNDALE NURSING HOME,
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-00-459)

Stephen F. Gandee and Charles M. Johnson, Attorneys at law, for claimant.
Joy M. Bolling, Assistant Attorney General, for respondent.

BAKER, JUDGE:

This claim came before the Court on January 18, 2002, upon respondent's motion to dismiss for lack of subject matter jurisdiction under W.Va. Code §14-2-14. The Court is of the opinion to grant respondent's motion to dismiss for the reasons set forth below.

This claim arises out of a contract dispute between the parties. Claimant is a not-for-profit business which provides nursing home related services. Prior to December 31, 1995, claimant provided services to Medicare Part B recipients and received payment from Medicare Part B for such services. Subsequent to December 31, 1995, claimant claimed bad debt write-offs for unreimbursed co-insurance and deductibles that related to those Medicare Part B recipients. In 1996, claimant continued the same procedure that it had in the past, but was advised by Medicare on or about August 25, 1997, that the liability for the co-insurance and deductibles should be paid by respondent's Medicaid Program instead of Medicare. In response to the change in the federal law, respondent created a system for providers such as claimant to obtain reimbursement. Respondent selected September 1996 and all subsequent service dates as the cut off date for payment of coinsurance and deductibles that were no longer being paid by Medicare Part B. Claimant submitted into evidence a memorandum from respondent that instructs providers that claims for services after September 1996 will be considered. Claimant asserts that it relied upon this memorandum to its detriment and did not file for unreimbursed services for the period beginning in January 1995 through September 1996. Thus, claimant's bad debt write-offs were disallowed by Medicare for the year 1996. Claimant also had to pay back the 1995 bad debt write-offs to Medicare as a result.

It is claimant's position that respondent acted in an arbitrary and capricious manner in selecting the September 1996 date as the cut off period for the payment of the coinsurance and deductibles not paid by Medicare Part B, and, in so doing, precluded claimant from filing its claims. Claimant asserts that as a result of the respondent's actions it was unable to receive reimbursement or otherwise write off incurred expenses as bad debt. As a result, claimant incurred expenses in the amount of $121,038.72 in Medicare Part B coinsurance and deductibles for the period of January 1995 through September 1996. It is claimant's position that the respondent's actions effectively prevented it from access to an administrative review process, and, without an administrative review record, claimant will not be heard in the regular

courts of this State. Claimant argues that the claims were not filed in a timely matter through no fault of its own. As a result, claimant argues that it is now time barred from the administrative process and judicial review to which it is entitled in the regular courts of the State. Therefore, its only recourse for a remedy is in this Court. Finally, claimant argues that even if its claim were not time barred and could be heard in the regular courts of the State, it would not be granted a monetary award due to the respondent's immunity under the 11th Amendment of the U.S. Constitution[5]. For these reasons, claimant argues that this Court is the proper forum to hear its claim.

It is respondent's position that this Court does not have jurisdiction over the instant claim based upon the provisions in W.Va. Code §14-2-14. Specifically, respondent asserts that this claim may be heard in the regular courts of the State; therefore, this Court does not have jurisdiction to hear the claim. Respondent further asserts that claimant has access to an administrative appeal under the *Department of Health and Human Resources Medicaid Regulations, Chapter 700, Section 751,* and it may pursue further recourse through judicial review in the regular courts of the State. According to respondent, claimant never availed itself of these remedies. Claimant has yet to file a claim or attempt to be heard by the administrative body and the respondent has not prevented claimant from doing so.

The issue in this claim is whether or not this Court has subject matter jurisdiction over the instant claim. W. Va. Code §14-2-14(5) states that the jurisdiction of this Court shall not extend to any claim: "5. With respect to which a proceeding may be maintained against the state, by or on behalf of claimant in the courts of the state." In this claim, claimant has or had access to an administrative appeal under the *Department of Health and Human Resources' Medicaid Regulations Chapter 700, §751* review process and respondent cannot deny claimant entry into this process. Claimant has or had access to relief under the Administrative Procedure Act provided for in W Va. Code §29A-5-4. Once claimant has exhausted all potential remedies under the Administrative Procedure Act, then it has access to the regular courts of this State where its claim may be decided on the merits. *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 183 S.E.2d 692 (1971). If at any time claimant has or had access to the regular courts of the State, this Court is without jurisdiction. As a statutorily created Court, the Court may not broaden its jurisdiction in order to decide the merits of a particular claim as to do so would be a violation of its statutory authority.

For the reasons mandated by W. Va. Code § 14-2-14(5), the Court lacks jurisdiction over the subject matter of this claim. Accordingly, the Court grants respondent's motion to dismiss this claim.

Claim dismissed.

OPINION ISSUED APRIL 2, 2002

LEE B. SIPPLE AND BRENDA G. SIPPLE
VS.

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[5]This Court sees no applicability of the 11th Amendment of the US Constitution to the facts in this claim.

DIVISION OF HIGHWAYS
(CC-00-160)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for personal injuries and damage to claimant Lee B. Sipple's vehicle which occurred when claimant Brenda G. Sipple was operating her husband's vehicle on County Route 8 in Mingo County, and Mrs. Sipple was forced to drive onto the berm of the road to avoid an oncoming coal truck. When she attempted to re-enter the roadway from the berm, she lost control of the vehicle which then crossed both lanes of travel, went over an embankment, and collided with some trees. Respondent was responsible at all times for the maintenance of County Route 8. The Court is of the opinion to make an award in this claim for the reasons set forth below.

The incident giving rise to this claim occurred on March 20, 2000, between 10:00 a.m. and 11:00 a.m. Claimant Brenda G. Sipple was driving her husband's 1988 Mercury Cougar and her husband was with her in the front passenger seat. They were traveling south on County Route 8 on their way to Wal-Mart to do some shopping. The weather was cool and damp. It had rained earlier in the morning but it had stopped by the time the claimants were traveling. The road surface was damp but not saturated. County Route 8 at this location is a narrow, two-lane road with double yellow lines. There are no white lines on the edges of the road. The paved portion of the road is approximately 17 feet wide. From the center line to the edge of the pavement on the lane in which claimants were traveling is approximately eight (8) feet in width. Mrs. Sipple stated that she was traveling at approximately thirty to thirty-five miles per hour through a gentle left curve and she was approaching a more severe left curve, when suddenly she was faced with an oncoming coal truck. The coal truck was across the center line and well into her lane of travel. She had to maneuver the vehicle onto the berm of the road to avoid a head-on collision. Both right side wheels were on the berm. Once the coal truck passed, she slowed the vehicle down and attempted to maneuver it back onto the road. However, both claimants testified that the right rear wheel would not pull up onto the pavement and when she attempted to maneuver the vehicle onto the road it suddenly shot left across the road and went over the embankment. The vehicle struck a tree and stopped. It then began smoking. Fortunately, both claimants were able to get out of the vehicle safely. Claimants went to Williamson Memorial Hospital where they were treated and released. Mr. Sipple had a large cut on his forehead which required seven stitches. Mrs. Sipple also suffered significant bruising to her leg and stomach as well as a lacerated lip. Mrs. Sipple has had some back pain as a result of this incident and has been treated by a chiropractor. The 1988 Mercury Cougar which was titled in Mr. Sipple's name only was totaled as a result of this incident. The claimants submitted into evidence the NADA value of the vehicle which had an average retail value of $2,300.00.

It is the claimants' contention that the respondent was negligent in its maintenance of the road at the location of this incident and that this negligence created a hazardous condition that was the proximate cause of the claimants' damages.

It is respondent's position that it did not have notice of the condition at issue nor did it have an adequate amount of time and resources to make the needed repairs.

Respondent also asserts that Mrs. Sipple was negligent in the operation of her vehicle which was the proximate cause of the accident.

Mrs. Sipple testified that the edge of the road was not only jagged but very deep compared to the berm and that when she attempted to maneuver the vehicle back onto the road the back right wheel was off the ground. She stated that she believes that this is what caused the vehicle to shoot across the road and over the embankment. Photographs submitted into evidence by the claimants demonstrate that County Route 8 at this location is narrow. The photographs also indicate that the right edge of the road is in very poor condition. The evidence demonstrates that the pavement is eroded along the right edge of the road where Mrs. Sipple was forced to maneuver her vehicle due to the coal truck.

Mr. Sipple testified that he and Mr. Ernest Lockhart photographed and measured the depth of the edge of the pavement where the vehicle was forced to the berm. The depth between the top portion of the pavement and the berm at this location is approximately twelve inches. Mr. Sipple also testified that he believed the right rear tire was in the air due to the jagged and deep drop off and that once Mrs. Sipple maneuvered the vehicle back onto the pavement the back right tire caught something and caused her to lose control. He also testified that Mrs. Sipple slowed down adequately, but she was not close to being completely stopped when she attempted to maneuver the vehicle back onto the highway.

Earnest R. Lockhart, testified that he arrived at the scene of this incident shortly after it had occurred. He lives in the vicinity of the incident and is familiar with County Route 8. He stated that he personally spoke to someone with the respondent regarding the condition of County Route 8 prior to the incident at issue. He testified that he spoke to Norman D. Stepp who was employed by the respondent on numerous occasions regarding the condition of County Route 8 in general. He stated that they spoke about the poor condition of County Route 8 and the problems that the coal trucks were causing. However, the conversations were regarding a large section of County Route 8, not just the location of this incident.

Norman D. Stepp, a crew leader for the maintenance division for the respondent at the Gilbert substation in Mingo County, testified that he had received complaints from numerous individuals regarding the portion of County route 8 where this incident occurred. He stated that the road has been damaged, especially the shoulders, by the large volume of heavy coal trucks that use it. According to Mr. Stepp, the road was built in approximately 1930 and it was not designed for heavy coal trucks. He explained that coal trucks have been using the road heavily for approximately six years. He testified that the coal trucks are doing significant damage especially on the shoulders of the road where they "rut" the shoulders out and cause large drop-offs between the pavement and the berm. Mr. Stepp also testified that respondent is responsible for maintaining the berm of the highways including those on County Route 8. He added that the berm of a highway is to be used by the public. In his opinion, the berm provides a safety net in the event that a driver has to use it in an emergency and to avoid oncoming traffic.

Cecil W. Collins, a Maintenance Supervisor-Transportation Worker II for the respondent in Mingo County, testified that the coal trucks have made County Route 8 a dangerous road at times. He stated that there are many locations along County Route 8 that vehicles are forced to yield to the coal trucks and use the berm in order to avoid a collision. He also stated that County Route 8 is a small secondary road that was designed for regular vehicular traffic and that it is adequate for that purpose, but it is too narrow in places to accommodate coal trucks. According to Mr. Collins, what

has in essence happened is that the burden of avoiding coal truck collisions on County Route 8 has shifted to the individual driver for whom the road was intended. Mr. Collins testified that the road is not adequate to handle coal truck traffic as well as regular vehicles and he agrees with the claimants that the road can use some improvements. However, he testified that given the confines of maintaining the primary routes including U.S. Route 52, as well as other roads in the area, with a limited number of crew, he believes that the respondent has done an adequate job in maintaining County Route 8. Mr. Collins admitted that the depth of the berm away from the road surface at the location of this incident is a safety factor. According to Mr. Collins, this berm is not in the condition that it should be. However, Mr. Collins pointed out in his testimony that there are many competing interests at a given time for the respondent to contend with especially during the winter months when the crews are under snow removal and ice control. These competing interests based on the time of year as well as weather factors must be taken into consideration by the respondent. Therefore, according to Mr. Collins the respondent did the best job it could under these circumstances.

Earl D. Bevins, the Assistant District Engineer in District Two located in Huntington which includes Mingo County, testified that he believes that the respondent is doing a credible job given the circumstances which it confronts in Mingo County. There are numerous factors that have to be taken into consideration in determining what maintenance work must or can be done. These factors include the road priority, the weather, available personnel and financial issues. Given these considerations, Mr. Bevins testified that the respondent did the best it could under these circumstances.

It is a well established principle of law that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold the respondent liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). The State owes a duty of reasonable care and diligence in the maintenance of a highway. *Parsons v. State Road Comm'n.*, 8 Ct. Cl. 35 (1969). The respondent also has a duty to maintain the berm of a highway in a reasonably safe condition for use when the occasion requires. *Compton v. Div. of Highways* 21 Ct. Cl. 18 (1995). Liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway and it fails. *Sweda v. Dept. of Highways*, 13 Ct. Cl. 249 (1980).

In this claim, the evidence established that County Route 8 at the location of this incident presented a hazardous condition to the traveling public. The evidence also established that the respondent had actual notice of this condition and a reasonable amount of time to take corrective action. Testimony also established that the berm at the location of this incident has to be used often by the traveling public to avoid colliding with oncoming coal trucks and that this berm is in a very poor condition. The Court is aware of the fact that the respondent is faced with competing interests, especially during the winter months to maintain the State's roads and highways and that County Route 8 was not built for heavy coal trucks. However, the Court is of the opinion that the respondent failed adequately to maintain the road and the berm at this location and that this failure was the proximate cause the accident herein. However, the Court is also of the opinion that Mrs. Sipple failed to maintain control of the vehicle and that her negligence is equal to or greater than the

respondent's. Therefore, based upon the rule of comparative negligence no award is granted to Mrs. Sipple in this claim. However, the Court is of the opinion that claimant Lee B. Sipple may recover for the loss of his vehicle in the amount of $2,300.00, the injuries to his head, and for his pain and suffering in the amount of $700.00 for a total award of $3,000.00.

In accordance with the finding of facts and conclusions of law as stated herein above, the Court is the opinion to and does make an award to claimant Lee B. Sipple of $3,000.00.

Award of $3,000.00 to Lee B. Sipple.

OPINION ISSUED APRIL 9, 2002

JARED B. CASDORPH AND BERNARD G. CASDORPH
VS.
DIVISION OF MOTOR VEHICLES
(CC-02-057)

Claimant appeared *pro se*.
Joy M. Bolling, 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 Jared B. Casdorph seeks $70.00 for paying a fine when he was stopped by the WV State Police on January 21, 2002, and his driver's license check with respondent indicated that his license was suspended. He received the fine based upon the check on his driver's license. Respondent had failed to remove the suspension from claimant's records when his driver's license had been reinstated on August 2, 2001. Claimant was required to pay the fine due to the inaccurate records inadvertently maintained by respondent.

In its Answer, respondent admits the validity of the claim as well as the amount, but the Court is aware that it does not have a fiscal method to pay the claim.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $70.00.

Award of $70.00.

OPINION ISSUED APRIL 9, 2002

MARCIA E. LUCAS
VS.
DIVISION OF HIGHWAYS
(CC-99-422)

Herbert H. Henderson, Attorney at Law, for claimant.
Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

GRITT, JUDGE:

Claimant brought this action for personal injuries to herself and for damage to her vehicle which occurred when she was operating her vehicle on Roach Truss Bridge in Cabell County, and the vehicle struck both sides of the bridge. Respondent was responsible at all times herein for the maintenance of the Roach Truss Bridge. The Court is of the opinion to deny this claim for the reasons set forth below.

The incident giving rise to this claim occurred on November 8, 1998, at approximately 6:30 p.m. Claimant Marcia Lucas and two of her children, Tinia Stratton and Jonathan Lucas, were traveling in her 1997 Ford Explorer. Claimant was driving her vehicle with her daughter in the front seat and her son seated in the middle of the back seat. All three occupants were wearing their seatbelts at the time of the incident. They had been shopping at the Huntington Mall and were returning to their home in Ferrellsburg, Lincoln County. It was a dark, cloudy evening. It had rained earlier in the day, but it was only sprinkling while the Lucas family was traveling home. Claimant testified that the road surface was not slippery or wet prior to reaching the Roach Truss Bridge. Tinia Stratton recalled that the roads prior to the bridge were wet but neither slippery nor in poor condition. Claimant was traveling Cyrus Creek Road which she was familiar with and often used to get home. However, claimant decided to also use Roach Road which a friend recommended to her as a short cut. According to claimant, she was traveling southwest on Cyrus Creek Road when she approached a stop sign where she turned right onto Roach Road. Claimant had never traveled Roach Road before. She estimated the distance from the stop sign where she turned off Cyrus Creek Road onto Roach Road to the Roach Truss Bridge to be approximately 70 to 100 yards. Upon reaching the one lane bridge, she stopped her vehicle to make sure there was no oncoming traffic approaching from the other side of the bridge. Claimant testified that she cautiously drove onto the bridge traveling approximately 15 to 20 miles per hour. She was approximately one third of the way across the bridge when suddenly something under the vehicle raised it up which caused her to lose control of the vehicle. The claimant's car started spinning around and did so approximately two or three times. According to claimant, the vehicle made two three hundred sixty degree turns and after the second spin it slammed into the left side of the bridge where the sidewalk is located. The force of the impact caused the vehicle to slide across the bridge and strike the right side of the bridge. After striking the right side of the bridge, the vehicle slid back to the left side of the bridge where claimant believes it came to rest upon a large board which was two inches thick and six inches wide. The force of the initial impact caused both front seat air-bags to deploy. Tinia Stratton was injured slightly by the air bag. Jonathan Lucas was slightly injured when he was tossed around in the back seat. Claimant's chin and mouth were bleeding as a result of the impact. Once the vehicle stopped, all three occupants got out of the vehicle. Jonathan Lucas testified that as soon as he stepped onto the surface of the bridge, he noticed that there were numerous boards missing around him. He testified that there was one hole large enough for two men to fall through to the river below. He also stated that the guardrail on one side of the bridge was missing and that the surface of the bridge was very slick. All three occupants testified that the bridge was so slick that they had a difficult time walking on it. Claimant also stated that there was a large hole in the bridge where she exited the vehicle and that had she not been warned of it by her son she would have fallen through it. The claimant and her children walked away from the gap in the bridge to the other side where it was relatively safer. They waited on the next passing vehicle for help. Larry Pinkerman, at that time a sergeant with the Cabell County Sheriff's

Department (now a Lieutenant), arrived at the scene, as well as an ambulance which took all three individuals to Cabell Huntington Hospital where they were treated and released.

Although claimant's children did not suffer severe injuries in this incident, claimant herself
suffers with pain and limitations in her activities as the result of back injuries which she alleges were caused by this accident.

It is claimant's position that the respondent negligently failed to maintain and repair the Roach Truss Bridge. Claimant also asserts that respondent failed to place any warning signs indicating that the bridge was slippery when wet. According to the claimant, these acts and omissions created a hazardous condition which was the proximate cause of the claimant's damages. Claimant testified that many of the boards on the bridge were rotten, loose and protruding. All three occupants of the vehicle testified that the vehicle was lifted up by protruding boards. Claimant submitted into evidence numerous photographs taken approximately one week after the incident which indicate that there were a number of boards in the traveling portion of the bridge protruding upwards. One photograph submitted into evidence showed that a few of the boards protruded as high as six to eight inches. The claimant testified that it was one of these loose and protruding boards that lifted her vehicle up and caused her to lose control and wreck. Claimant also submitted into evidence a bridge inspection report created by respondent on June 8, 1998, which states that the bridge's sidewalk was in poor condition and that several boards around the sidewalk are also "severely loose." The report also stated that both ends of the bridge had uneven transitions and both asphaltic approach roadways were in poor condition.

Respondent admits that this bridge was not in good condition, but it asserts that the condition of the bridge was not the proximate cause of the claimant's accident. Respondent asserts that the claimant failed adequately to maintain control of her vehicle and that such failure to maintain control of the vehicle was the proximate cause of this incident.

Lieutenant Larry Pinkerman of the Cabell County Sheriff's Office was the investigating officer at the scene of this incident. He testified that he was notified of the accident at 6:36 p.m. at which time he proceeded to the scene. He recalled that the bridge was wet and slippery when he arrived at the scene. He stated that the bridge was old and in a state of disrepair. However, he did not recall having any difficulties crossing the bridge when he arrived at the scene. He completed the West Virginia Uniform Traffic Accident Report in which he indicated that the surface of the bridge was wet. He also indicated in this report that the claimant's failure to maintain control was a contributing circumstance, but he testified that he does not know what caused her initially to lose control of the vehicle. He testified that he believed that the claimant was traveling eastbound when this incident occurred, whereas the claimant testified that she was traveling westbound. Lieutenant Pinkerman stated that he believed the claimant was traveling eastbound due to the fact that this was the direction in which her vehicle was facing when he arrived on the scene. Furthermore, he believed that this bridge was not wide enough for a Ford Explorer to do a three hundred sixty degree turn and stop facing the opposite direction.

Gregory Lee Surber, a bridge repair design engineer for the respondent in Cabell County, testified that the Roach Truss Bridge was built in 1926. It has since been replaced by a new bridge. However, at the time of this incident it was Mr. Surber's responsibility to design any repairs for the bridge. Mr. Surber described the

bridge as a five-span truss type bridge which was approximately 425 feet in length. The width between the trusses on each side of the bridge was 18 feet, not including the sidewalk. Mr. Surber testified that the deck or the surface of the bridge was made of laminated two by six boards. He testified that his office was responsible for making repairs to this bridge but unless there was a "design repair" to be made he would not be involved personally. He stated that maintenance type repairs are not his responsibilities. He also stated that he was not aware of any calls or reports from the general public regarding the condition of the Roach Truss Bridge prior to this incident. He did not know of this incident until just a few days prior to the hearing of this matter. Mr. Surber recalls making repairs to the Roach Truss Bridge, but he is not sure how long ago this was. He explained that respondent did not have any plans to make repairs to the bridge although he was aware that the boards on the bridge surface were old and worn and that the bridge was in poor condition.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). However, the State owes a duty of reasonable care and diligence in maintaining its roads under all circumstances. *Parsons v. State Road Comm'n*, 8 CT. Cl. 35 (1969). To hold respondent liable for road defects or hazards, claimant must prove by a preponderance of the evidence that respondent had actual or constructive notice of the defect or hazard and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); Pritt v. Dept. of Highways, 16 Ct. Cl. 8 (1985). Respondent is only held liable for those defective conditions that are the proximate cause of claimant's damages. *Roush v. Johnson*, 139 W. Va. 607; 80 S.E.2d 857 (1954). One requisite of proximate causation is the doing of an act or the failure to do an act that a person of ordinary prudence could foresee may naturally or probably produce injury to or the death of another. The second requisite of proximate causation is that such act or omission did in fact produce the injury or death of another. *Matthews v. Cumberland & Allegheny Gas Co.* 138 W.Va. 639; 77 S.E.2d 180. This Court has consistently held that an award cannot be based upon mere speculation as to the proximate cause of a claimant's damages. *Mooney v. Dept. of Highways*, 16 Ct. Cl. 84 (1986); *Phares v. Div. of Highways*, 21 Ct. Cl. 92 (1996).

In this claim, claimant has failed to establish by a preponderance of the evidence that the respondent's failure to maintain the Roach Truss Bridge was the proximate cause of her accident and the resulting damages. The evidence establishes that this bridge was in poor condition and respondent's own bridge report dated June 8, 1998, demonstrates this fact; however, the problems identified in this report relate more to the sidewalk area, the paint and the approaches to the bridge. The fact that the bridge was in poor condition does not, in and of itself, establish liability. The claimant was unable to identify where on this bridge there was a specific defect that caused her to lose control of her vehicle. Claimant and her two children testified that something hit underneath the vehicle causing it to raise up and subsequently spin out of control, and it was their collective opinion that it was probably a protruding board that caused the vehicle to "raise up" and then spin out of control. However, neither the claimant nor her two children were able to identify which boards, if any, caused the vehicle to "raise up." The testimony adduced at the hearing from the investigating officer established that the bridge surface was slippery, but he had no trouble crossing the Roach Truss Bridge when he arrived on the scene. Based upon the evidence submitted in this claim, the Court is of the opinion that although this bridge was in poor condition, claimant has not established that the condition of the bridge at that

time was the proximate cause of her failure to maintain control of her vehicle as she drove across the bridge. The slippery condition of the bridge deck did not appear to be either a cause of or a contributing factor to the accident. It would be mere speculation on the part of the Court to conclude exactly what caused the claimant to lose control of her vehicle at the time of her accident. This Court has consistently declined to make a finding for claimants in claims where it would have to resort to speculation in order to make awards.

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 APRIL 9, 2002

THE WATER SHOP
VS.
WEST VIRGINIA GRIEVANCE BOARD
(CC-02-100)

Claimant appeared *pro se*.
Amy J. Haynie, Assistant General Counsel, 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 $410.00 for providing bottled water to a facility of respondent in Monongalia County. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $410.00.

Award of $410.00.

OPINION ISSUED MAY 2, 2002

PHILIP ADAMS
VS.
DIVISION OF HIGHWAYS
(CC-01-113)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 1999 Suzuki Grand Vitara,

which occurred when his wife Mitzi Adams was operating his vehicle on Route 9/18 near Cass in Pocahontas County, and the vehicle slid on a patch of ice causing Mrs. Adams to lose control whereupon the vehicle slid off the roadway and over the side of a hill. Respondent was responsible at all times herein for the maintenance of Route 9/18 in Pocahontas County. The Court is of the opinion to deny this claim for the reasons set forth below.

The incident giving rise to this claim occurred on February 4, 2001, some time between 1:00 p.m. and 3:00 p.m. Mitzi Adams was driving her husband's vehicle from her mother's home to the store. She had her daughter in the car with her. Mrs. Adams described Route 9/18 as a one-lane, dirt and gravel road. She stated that if two vehicles approach each other head on then one of the vehicles must pull to the side of the road or back up and let the other vehicle pass. Mrs. Adams had traveled this road the night before this incident and she described it as being snow covered and icy. There is no guard rail at this location. On the right side of the road there is a steep drop-off and a river at the bottom. As Mrs. Adams was traveling to the store on the morning of this incident, she noticed that the ice and snow were starting to melt on the road due to the rising temperature. She was proceeding to the store when suddenly the vehicle went over a large sheet of ice approximately six or eight inches deep and twelve feet long. Mrs. Adams testified that once her vehicle was on the ice, she lost control of it and it slid over the hill. She stated that the only thing that kept her from going all the way down the hill approximately another sixty feet and into the river was a large tree and rock which caught her vehicle.

Claimant submitted an invoice for the repair costs to his vehicle which was approximately $1,005.94. However, he had full coverage on the vehicle and any recovery is limited to $300.00 which is the amount of the insurance deductible feature. It is the claimant's position that respondent knew or should have known of this ice and that it created a hazardous condition for the traveling public.

It is respondent's position that it did not have notice of the icy condition of the road and that it had not yet reached this route for snow and ice removal, since it is a third priority dirt and gravel road.

Ronald Cole, respondent's maintenance crew at the Greenbank substation in Pocahontas County, testified that he is responsible for maintaining and treating roads in the Greenbank area including Route 9/18. He is familiar with Route 9/18 which is an orphan road that was taken over by the respondent within the last few years. He described the road as a very narrow, one-lane road consisting of dirt and gravel. Route 9/18 is a third priority road and respondent maintains approximately one mile of the road. Mr. Cole testified that since it is a third priority road it is not treated until all first priority roads such as Route 252 are treated. According to Mr. Cole, unless the respondent receives a call regarding a problem with it, the road is not checked. On the date of this incident there were no calls or complaints regarding Route 9/18 and there were no reported incidents or activities recorded. On February 5, 2001, his substation received a call regarding Route 9/18 and a crew was sent over to cinder the road.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In this claim, the evidence established that no calls or reports were made to respondent regarding any icy road conditions on Route 9/18 prior to this incident. Route 9/18 is a third priority, dirt and gravel road. It is the respondent's normal practice to treat primary roads first, before treating the lower priority roads, such as Route 9/18. Respondent does not and cannot treat the lower priority roads due to the fact that the major routes, such as Route 250, have to be maintained on a priority basis. Respondent only treats the third priority roads when it is given notice that a problem exists. There was no such notice in this claim.

The Court is of the opinion that claimant failed to establish by a preponderance of the evidence that respondent had notice of the icy condition of Route 9/18 on the date of Mrs. Adams' accident. Since there was no negligence established on the part of the respondent, the Court will not make a recovery to claimant.

Therefore, in view of the foregoing, the Court is of the Opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED MAY 2, 2002

ANNA P. HADDAL, M.D.
VS.
DIVISION OF HIGHWAYS
(CC-00-518)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On November 10, 2000, claimant was driving on Route 60 in the Spring Hill area of South Charleston, Kanawha County, when her vehicle, a 1993 Mitsubishi Eclipse, struck a depressed area in the roadway where a storm drain was sunk below the road surface. When her vehicle went into the sunken area, it damaged a tire and a wheel, both of which had to be replaced.

2. Respondent is responsible for the maintenance of Route 60 in Kanawha County and respondent failed to maintain properly this area of the highway on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $200.00.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 60 in Kanawha County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $200.00.

Award of $200.00.

OPINION ISSUED MAY 31, 2002

JAMES PIERCE and LORA PIERCE
VS.
DIVISION OF HIGHWAYS
(CC-01-282)

Claimant appeared *pro se*.

Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to their 1993 Eagle Talon which occurred when their daughter was operating the vehicle on Route 214 in Kanawha County and the vehicle struck a large hole in the road. Respondent was responsible at all times herein for the maintenance of Route 214. The Court is of the opinion to make an award in this claim for the reasons set forth more fully below.

The incident giving rise to this claim occurred on March 1, 2001, on Route 214 in Alum Creek near the Kanawha and Lincoln County border. The claimants' daughter Miranda Pierce was driving the vehicle at the time of the incident. She was on her way to a friend's house in South Charleston. Ms. Pierce testified that the incident occurred sometime in the evening, but she could not recall if it was daylight or dark. The weather was unremarkable except for a light rain that had just begun. Route 214 at this location is a paved two-lane road. Ms. Pierce testified that it is curvy in many areas. As she drove from Lincoln County into Kanawha County, she was preparing to drive around a curve when suddenly the vehicle struck a large hole in the road. The impact caused the front passenger side tire to burst. Fortunately, she was able to maintain control of the vehicle so she drove a short distance to a gas station for help. Claimant Lora Pierce submitted repair bills in the amount of $494.14 and $37.05 which represent her out-of-pocket loss. Claimants seek a total of $531.19 in damages. Claimants contend that respondent knew or should have known of this hole; that respondent should have made adequate repairs; and that its failure to do so created a hazardous condition that was the proximate cause of their damages.

Miranda Pierce testified that, although she did not see the hole on the evening of this incident, she knew it was there. She testified that she had known that the hole was at this location for approximately two or three years. She stated that she had traveled past the hole while driving Route 214 earlier on the day of this incident. She also stated that she traveled the road regularly on the way to and from her home. She described the hole as approximately two feet wide and approximately one foot long and significantly deep. Ms. Pierce went on to describe the location of the hole as extending from the middle of the white line to outside the white line. The claimant Lora Pierce testified that she viewed the scene after the incident and based upon her recollection, the hole extended even further beyond the white line than Miranda Pierce described.

It is a well established principle that the State is neither an insurer nor a

guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E. 2d 811 (W. Va. 1947). In order to hold the respondent liable for defects of this type, the claimant must prove that the respondent had actual or constructive notice of the road defect. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Hamon v. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The Court is of the opinion that a hole this size would have developed over a significant period of time and that the respondent had at least constructive notice of this defect. However, a driver also has a duty to use reasonable care and diligence in the exercise of her driving privileges. *Copley v. Division of Highways* 22 Ct. Cl. 144 (1998).

In this claim, the driver of the vehicle Miranda Pierce was aware that the hole existed. The evidence adduced at the hearing demonstrated that she had known of the hole for a substantial period of time prior to the incident. Considering her knowledge of the defect on Route 214, the Court might have applied the principle of comparative negligence; however, the Court is aware that the law in this State is that the negligence of the driver may not be imputed to the owner of the vehicle. See *Bartz v. Wheat*, 285 S.E. 2d 894, 169 W.Va. 86 (1982). Thus, the Court finds that the respondent's negligence in the maintenance of Route 214 constitutes the basis for an award to claimants for the damage to their vehicle.

In view of the foregoing, the Court grants an award to claimants in the amount of $531.19.

Award of $531.19.

OPINION ISSUED MAY 31, 2002

DAVID A. VELEGOL and CAROLYN J. VELEGOL
VS.
DIVISION OF HIGHWAYS
(CC-99-244)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to their well which they allege was caused by respondent's negligent drilling of core borings during a construction project on Route 2 near Colliers in Brooke County. The Court is of the opinion to deny this claim for the reasons set forth more fully below.

The incident giving rise to this claim allegedly occurred sometime in mid-January 1999. A core boring project being performed by HDR, an engineering firm with which respondent had a contract, began in late December or early January of 1998. The core borings were necessary for respondent to design a "cut slope" along Route 2 in Brooke County as part of a road widening project to widen Route 2 from a two-lane highway to a four-lane highway. Claimants' home is located on a hillside above the Ohio River in Brooke County on a 250 acre farm. Claimants have a 3,000 foot property line that is adjacent to the east boundary of State Route 2. Claimant David A. Velegol had the well at issue drilled in 1971 at about the same time he had the house built in which claimants currently reside. The well had a sixteen gallon per minute one and one-half horsepower pump installed at the time it was drilled and it

was the same pump still in use until the incident at issue. The well was 177 feet deep. At the bottom of the well, there was a storage capacity of twenty feet. The pump was located approximately six feet off the bottom of the well so it could avoid any sediment that may fall there. An aunt and uncle live within one hundred feet of claimants' home and they are also provided water by this well. According to Mr. Velegol's testimony, the quantity of the well water prior to this incident was very stable. However, on January 23, 1999, claimants first noticed that they had lost their water. Mr. Velegol testified that he turned on the spigot and had absolutely no running water. He had not noticed any problems with the water flow prior to January 23, 1999. According to Mr. Velegol, the water flow on January 22, 1999 , was perfect. He stated that he went through a routine series of diagnostic tests to determine the problem. He ruled out a blown fuse, pump failure, electrical relay problems, or a break in the lines. He had just put in new heavy duty plastic pipe and he was certain that it was not a break in the line.

Thereafter, claimants attempted to reestablish water from the existing well by extending it deeper. Claimants hired an individual to drill to a deeper level in an attempt to establish water. However, claimants were unable to reestablish water and after one week of drilling they decided it was impractical to continue this effort and chose a different location to drill a new well. Claimants had a new well drilled in late February or early March 1999. During the time that claimants did not have the use of their well, they purchased a 1800-gallon water tank to transfer the water into their system for use by themselves and their aunt and uncle until water from the new well was available.

It is claimants' contention that respondent negligently conducted the drilling of core borings during its widening project of Route 2 near their home. Claimants contend that the core boring project was the proximate cause of the loss of the water flow from their well. As a result of respondent's alleged negligence, claimants seek an award in the amount of $11,030.01, plus interest, which represents the cost of providing water while the new well was being dug, the cost of the new well, the cost of attempting to rehabilitate the old well, and landscaping for their yard .

Claimant David Velegol testified that he is a licensed professional engineer and that he has worked in the field of engineering for 38 years. Mr. Velegol has a masters degree in mechanical engineering and has specialized in the area of "fluid flow and heat transfer". Mr. Velegol's theory as to the cause of the loss of his well water is that during the drilling of the core borings, the drilling ruptured a major underground artery in the aquifer that was supplying water to his home.

Respondent's position is that the project for drilling core borings did not cause or contribute to the damage to the claimants' well in any manner.

Robert L. Dodson, III, was employed by HDR Engineering as the project geotechnical engineer for respondent's core boring project which is at issue in this claim. Mr. Dodson testified that there were a total of twenty three core drillings performed. Borings one through twelve were performed on the south side of the valley. Borings thirteen through twenty-one were performed north of the valley. There were two supplemental holes drilled on each side of the valley in the same vicinity as the others. The closest core boring hole to claimants' property was hole number sixteen which was 640 feet away from claimants' well. Core boring hole number fifteen was 710 feet away from the well. The equipment used in drilling the borings consisted of "track and rubber tire mounted drill rigs" that were described as looking similar to all-terrain vehicles and approximately the size of a pick-up truck. Mr. Dodson testified that the drilling machine that punched holes into rock surface

was approximately three inches in diameter. The drilling machine used to punch holes into the soil was approximately six to eight inches in diameter.

According to Mr. Dodson, the core borings showed the makeup of the strata below the surface of the ground. The strata near the location of the claimants' well consisted of approximately ten to twenty feet of soil, minor layers of bedded shale and sandstone, then a major unit of sandstone 90 to 110 feet thick. Finally, there is a sequence of shales and claystone. The major unit of sandstone which is 90 to 100 feet thick is referred to as the Morgantown Grafton sandstone. Mr. Dodson stated that sandstone is considered to be a good water-bearing formation, and it is from this unit that most of the wells in the area including the claimants get their water. Mr. Dodson also testified that the Morgantown Grafton sandstone is the aquifer for the entire area.

In response to the claimants' initial complaint of the loss of water flow from the well, the respondent sent Mr. Dodson to investigate the claimants' well and determine if the core borings were the proximate cause of the loss of water flow from claimants' well. As a result of this investigation, the respondent reached a conclusion by approximately January 28, 1999 that "while possible, it's not probable that any of the core borings affected the water level or quality in the Velegol well." Mr. Dodson testified that since then he has obtained more information and it is now his professional opinion that it is "highly unlikely" that any of the core borings affected the water level or quality of the Velegol well. Mr. Dodson also testified that during his investigation he discovered that there are two homes with wells that are just a few hundred feet from the core borings and that none of the residents had any trouble with their wells.

Mr. Dodson conducted investigations in the late summer of 1999 and in November of 1999 regarding the causation of the loss of the claimants' well water. This "well study" report was prepared by Mr. Dodson for the respondent in May of 2000. It compared and contrasted the water production of claimants' "old" well that was allegedly damaged and the new well that they were forced to drill. The "old" well had a yield of 7.73 gallons of water per minute with a five gallon per minute pump while the yield from the new well was 11.5 gallons of water per minute The water quality test showed that the "old" well had 5x the level of iron in it as did claimants' second well. Mr. Dodson stated that he attributed this to the rust on the casing of the old well, whereas the new well did not have the same problem. However, according to this test, the hardness of the water from the new well was much worse than the old well. The old well had 218 milligrams per liter of hardness while the new well had 429 milligrams per liter of hardness. Mr. Dodson concluded from this study that the old well had fully regenerated itself by November of 1999.

As the parties in this claim are aware, the Court referred this claim to a consultant, Dr. Mark A. Widdowson, Ph.D., P.E. Dr. Widdowson is an Associate Professor of Civil Engineering at Virginia Polytechnic Institute and State University. He specializes in the area of hydrology and he was the Program Coordinator for the Hydrosystems Graduate Program from 1999-2001. Dr. Widdowson was asked to render his expert opinion in the field of hydrology regarding the facts of this claim. After reviewing the pleadings, the exhibits, and the transcript in this claim, Dr. Widdowson rendered his expert opinion to the Court by teleconference and by a short written summary.

It is his opinion that neither party established a compelling technical explanation for the temporary failure of claimants' well. He reviewed the rainfall records for the entire year of 1999 and determined that January1999 was one of the

wettest years on record. There were drought conditions during the summer of 1999. However, the rainfall for November of 1999 was near or above average. Therefore, he concluded that it is highly unlikely that the drought contributed to the problem. Dr. Widdowson also stated that given the specifications and condition of the claimants' well as determined by the respondent's investigation conducted in November 1999, it is not probable that the respondent's core borings caused the rate of water production from the well to substantially decline on and around January 23, 1999. Dr. Widdowson indicates that due to the respondent's inadequate hydrogeologic investigation, the effect of the core borings on the flow of water from claimants' well is uncertain, and the possibility of a negative effect should not be ruled out.

However, Dr. Widdowson also concludes that due to the lack of information about the condition of the water table on and around January 23, 1999, the date that claimants' well stopped producing water, there is no way to determine the specific cause of the failure of claimants' well.

In all claims it is the burden of the claimant to establish by a preponderance of the evidence that the respondent acted negligently and that the alleged negligence was the cause of the damage to property of the claimant. In the instant claim, the claimants bear the burden of proving that respondent was negligent in drilling the core borings, and, further, that such negligence was the proximate cause of the temporary loss of water flow from their well. Absent specific evidence that the proximate cause of the damage to claimants' well was the core boring project, the Court is constrained to deny the claim. *Stephenson v. Division of Highways* 22 Ct. Cl. 98 (1998). If the claimant does not establish the proximate cause of the damages then the Court is left to speculate as to the cause. This Court has consistently held that an award cannot be based on speculation. *Mooney v. Department of Highways* 16 Ct. Cl. 84 (1986); *Phares v. Division of Highways* 21 Ct. Cl. 92 (1996).

After a thorough review of the evidence and the expert evidence in this claim, the Court is of the opinion that the claimants have not established that the temporary loss of water from their well was the result of any negligence on the part of the respondent. Although the timing of the loss of the water flow from the well is suspicious, the claimants did not establish by a preponderance of the evidence that any specific actions of the respondent caused this particular loss of water from their well. The evidence produced did not establish what caused the temporary loss of the water flow from the well.

Therefore, 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 31, 2002

FIRST VIRGINIA BANK-BLUE RIDGE
VS.
DIVISION OF MOTOR VEHICLES
(CC-00-087)

Gregory S. Matney, Attorney at Law, for claimant.
Joy M. Bolling, Attorney at Law, for respondent.

PER CURIAM:

Claimant First Virginia Bank-Blue Ridge brought this action to recover the value of a lien that it asserts that respondent failed to record on a title processed by respondent for a vehicle licensed in West Virginia. Claimant alleges that there was sufficient notice to respondent that claimant had a valid lien on the vehicle at issue in this claim and that the respondent's negligent failure to list claimant's lien on the title of said vehicle caused the claimant damages in the amount of $25,000.00. The Court is of the opinion to deny this claim for the reasons set forth below.

1. On August 15, 1997, Dick Myers Chevrolet-Geo, Inc. purchased a 1996 Chevrolet S-10 which is the vehicle later licensed in West Virginia and the subject matter of this claim.

2. On August 28, 1997, Dick Meyers Chevrolet-Geo, Inc. sold the same 1996 Chevrolet S-10 truck to Daniel L. Mathias for $21,354.64.

3. On August 28, 1997, Dick Meyers Chevrolet-Geo, Inc. also prepared a re-assignment of title to Daniel L. Mathias, listing as lien holder the claimant on a Commonwealth of Virginia re-assignment of title form. There is nothing in the record to demonstrate that a copy of the re-assignment of title was ever received by respondent.

4. On December 8, 1997, Daniel L. Mathias applied to respondent for a Certificate of Title to the same 1996 Chevrolet S-10 truck, listing South Branch Valley National Bank as the lienholder. Mr. Mathias did not list the claimant First Virginia Bank-Blue Ridge on this application for title. Respondent then issued a title to Mr. Mathias.

5. The claimant and respondent both show South Branch Valley National Bank as the titled lienholder which is correct based upon the evidence presented to the Court.

6. Nothing presented to the Court demonstrates that the respondent had notice of claimant's lien when it issued the title at issue in this claim.

The Court, having reviewed the chronology of the documents filed in this claim, finds that the claimant has not met its burden of proof in demonstrating that respondent had sufficient documentation to be on notice that claimant had an existing lien on the vehicle at issue in this claim prior to its issuance of the Certificate of Title. Thus, claimant may not make a recovery in this claim.

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

Claim disallowed.

OPINION ISSUED MAY 31, 2002

HEALTHNET AEROMEDICAL SERVICES
VS.
DIVISION OF CORRECTIONS
(CC-02-195)

Claimant appears *pro se.*

Leslie K. Tyree, General Counsel, 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 in the amount of $8,530.99 for medical transportation services provided for an inmate in the custody of respondent at Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 MAY 31, 2002

DAVIS MEMORIAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-02-188)

Claimant appears *pro se.*

Leslie K. Tyree, General Counsel, 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 in the amount of $498.00 for medical services rendered to an inmate in the custody of respondent at Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 MAY 31, 2002

JOSEPH NORONHA, M.D. P.C., INC.
VS.
DIVISION OF CORRECTIONS
(CC-02-192)

Claimant appears *pro se.*
Leslie K. Tyree, General Counsel, 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 in the amount of $286.00 for medical services rendered to an inmate in the custody of respondent at Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 MAY 31, 2002

POCAHONTAS MEMORIAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-02-206)

Claimant appears *pro se.*
Leslie K. Tyree, General Counsel, 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 in the amount of $3,629.12 for medical services rendered to inmates in the custody of respondent at Denmar Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 MAY 31, 2002

COTTRILL'S CARS, INC.
VS.
DIVISION OF CORRECTIONS

(CC-02-168)

Claimant appears *pro se.*
Leslie K. Tyree, General Counsel, 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 in the amount of $522.65 for expenses incurred when an inmate in the custody of respondent at St. Marys Correctional Center, a facility of the respondent, escaped and stole a 1995 GEO Tracker. Respondent, in its Answer, admits the validity of the claim, and further 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 MAY 31, 2002

WHEELING HOSPITAL

VS.
DIVISION OF CORRECTIONS
(CC-02-201)

Claimant appears *pro se.*
Leslie K. Tyree, General Counsel, 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 in the amount of $13,302.75 for medical services rendered to an inmate in the custody of respondent at Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 MAY 31, 2002

CARL S. HIGH, M.D.
VS.
DIVISION OF CORRECTIONS
(CC-02-178)

Claimant appears *pro se.*
Leslie K. Tyree, General Counsel, 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 in the amount of $408.00 for medical services rendered to inmates in the custody of respondent at Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 MAY 31, 2002

DENZIL GRANT
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-02-145)

Claimant appeared *pro se*.
Joy M. Bolling, 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 $192.00 for items of personal property that were entrusted to respondent’s employees when he was taken to Central Regional Jail, a facility of the respondent. At the time of claimant’s trial, he discovered clothing was missing from his storage unit. Thus far, respondent’s employees have been unable to produce claimant’s personal property.

In its Answer, respondent admits the validity of the claim, but states that the amount of $92.00, rather than the amount claimed of $192.00, is fair and reasonable. Claimant is in agreement with the amount of $92.00. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

The Court has taken the position in prior claims that a bailment situation has been created if property of an inmate which is taken from that inmate, remains in the

custody of respondent, and is not produced for return to the inmate at a later date.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $92.00.

Award of $92.00.

OPINION ISSUED MAY 31, 2002

MATTHEW JAY NEWMAN, SR.
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-02-140)

Claimant appeared *pro se*.
Joy M. Bolling, 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 $175.00 for an item of personal property that was entrusted to respondent's employees when he was taken to Southwestern Regional Jail, a facility of the respondent. At the time of claimant's trial, he discovered a ring was missing. Thus far, respondent's employees have been unable to produce claimant's personal property.

In its Answer, respondent admits the validity of the claim, but states that the amount of $75.00, rather than the amount claimed of $175.00, is fair and reasonable. Claimant is in agreement with the amount of $75.00. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

The Court has taken the position in prior claims that a bailment situation has been created, if property of an inmate which is taken from that inmate, remains in the custody of respondent, and is not produced for return to the inmate at a later date.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $75.00.

Award of $75.00.

OPINION ISSUED JUNE 19, 2002

ANTHONY CREEK RESCUE SQUAD
VS.
DIVISION OF JUVENILE SERVICES
(CC-02-217)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $481.50 for providing medical transportation services for an inmate at Anthony Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JUNE 19, 2002

RANDALL KEVIN SARRETT
VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-02-211)

Claimant appeared *pro se*.
Joy M. Bolling, 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, an inmate at the Southern Regional Jail, in Raleigh County, seeks $85.00 for an item of personal property that was entrusted to respondent when he was taken into the facility. At the time of claimant’s release, he discovered his shoes were missing. Thus far, respondent’s employees have been unable to produce claimant’s personal property.

In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

The Court has taken the position in prior claims that a bailment situation has been created if property of an inmate which is taken from that inmate, remains in the custody of respondent, and is not produced for return to the inmate at a later date.

Accordingly, the Court makes an award to the claimant herein in the amount of $85.00.

Award of $85.00.

OPINION ISSUED JUNE 19, 2002

XEROX CORPORATION
VS.
ALCOHOL BEVERAGE CNTROL ADMINISTRATION
(CC-02-142)

Claimant appeared *pro se*.
Joy M. Bolling, 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 $1,408.72 for monthly maintenance charges for a copier used by the respondent. In its Answer, respondent admits the validity of the claim, but states that the correct amount owed to claimant is $1,408.68. The respondent further states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid. The claimant has reviewed the claim and agrees that the amount of $1,408.68 is the correct amount owed.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $1,408.68.

Award of $1,408.68.

OPINION ISSUED JUNE 19, 2002

RIDGE RUNNER INDUSTRIES
VS.
STATE FIRE MARSHALL
(CC-02-182)

Claimant appeared *pro se*.
Joy M. Bolling, 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 $2,136.00 for three fiberglass camper tops purchased by the respondent State agency. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $2,136.00.

Award of $2,136.00.

OPINION ISSUED JUNE 19, 2002

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.
VS.
DIVISION OF CORRECTIONS
(CC-02-212)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $612.50 for medical services rendered to inmates in the custody of respondent at Pruntytown Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JUNE 19, 2002

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.
VS.
DIVISION OF CORRECTIONS
(CC-02-157)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $2,867.09 for medical services rendered to an inmate in the custody of respondent at Pruntytown Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JUNE 19, 2002

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.
VS.
DIVISION OF CORRECTIONS
(CC-02-156)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $2,062.44 for medical services rendered to an inmate in the custody of respondent at Pruntytown Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JUNE 19, 2002

WHEELING HOSPITAL, INC.
VS.
DIVISION OF CORRECTIONS
(CC-02-209)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $2,565.56 for medical services rendered to an inmate in the custody of respondent at Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity

of the claim, and further 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 JUNE 19, 2002

WHEELING HOSPITAL, INC.
VS.
DIVISION OF CORRECTIONS
(CC-02-208)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $242.54 for medical services rendered to an inmate in the custody of respondent at Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JUNE 19, 2002

VISION HEALTH CARE, INC.
VS.
DIVISION OF CORRECTIONS
(CC-02-207)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $19.00 for medical services rendered to an inmate in the custody of respondent at Pruntytown Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 AUGUST 15, 2002

RICKY E. BOWMAN AND DINNA M. BOWMAN SMITH
VS.
DIVISION O HIGHWAYS
(CC-98-225)

G. Patrick Jacobs, Attorney at Law, for claimant.
Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

WEBB, JUDGE:

Claimant Ricky E. Bowman originally brought this action for damage to his vehicle and for personal injuries to his minor daughter Dianna Bowman; however, Dianna Bowman is now of majority so she is a proper party claimant. The incident which brought about this claim occurred when claimant Dianna Bowman was traveling north on Route 214 in Yawkey, Lincoln County, lost control of the vehicle she was driving which was owned by her father, and had an accident on property belonging to respondent. This portion of Route 214 and the adjacent property is maintained by respondent in Lincoln County. The Court is of the opinion to deny this claim for the reasons stated more fully below.

Claimants contend that respondent was negligent in its maintenance of the berm of Route 214 at the location of this incident in that the culvert hole was located too close to the road and it was camouflaged by high grass and weeds creating a hazardous condition to drivers. Claimants also contend that respondent could have placed a grate over the large culvert hole to prevent vehicles that are forced to use the berm from driving into such a deep hole. In the alternative, claimants contend that respondent could have at least put up warning signs to alert drivers of the hazardous condition ahead. Claimant Ricky Bowman seeks an award in the amount of $10,575.00 for damage to his vehicle. His vehicle was appraised by Ricky Woodrum who testified that he is certified in estimating vehicle damage. Mr. Woodrum testified that the damage to the vehicle exceeded its value. The results of the appraisal were based on top N.A.D.A. book value. Ms. Bowman suffered personal injuries as a result of this incident, but all of her medical expenses were paid for by insurance.

Respondent asserts that driver error on the part of claimant Dianna Bowman was the cause of this accident because Ms. Bowman negligently lost control of her vehicle as she was proceeding around the curve prior to the Yawkey substation.

Respondent also asserts that Ms. Bowman should have been able to regain control of her vehicle on the gravel lot prior to reaching the culvert hole, because the distance from where the vehicle entered the lot to the culvert hole is approximately two hundred feet. Further, respondent states that the culvert was six feet off the roadway which it considers to be a safe distance from the road, and, thus, does not present a hazard to the traveling public.

Claimant Dianna Bowman[6] was sixteen years of age at the time of the incident which is the subject matter of this claim. Ms. Bowman was a student at Duval High School when this incident occurred. On May 28, 1998, she received a phone call while at school from a friend's mother who asked if she and her friend, Tracy Miller, would come to the hospital to be with her daughter whose grandfather had just died. Dianna Bowman, Tracy Miller, and a male friend named "Gary" got permission to leave Duval High school early. Dianna Bowman drove her father's 1997 Chevrolet Cavalier with Ms. Miller and Gary as passengers. They left school between 11:30 a.m. and noon to drive to Charleston Area Medical Center in Charleston. Claimant Dianna Bowman dropped off her friend Gary at his home just a few miles from the school. Tracy Miller remained in the vehicle with Ms. Bowman as a front seat passenger. They proceeded driving on Route 3 until reaching the intersection of Route 3 and Route 214. At the intersection, claimant Dianna Bowman had a yield sign at which she brought the vehicle to a complete stop. She then turned onto Route 214 and proceeded northbound for a short distance before reaching a curve. She estimated that she was traveling between thirty-five and forty miles per hour in a fifty-five mile per hour zone. She rounded the curve safely, but just as she was coming out of the curve, a white truck allegedly crossed the center line and forced Ms. Bowman's vehicle partially off the road where she proceeded onto a gravel parking lot owned and maintained by the respondent. Claimant Dianna Bowman's passenger also testified that she observed the white truck cross the center line and come about one foot into Ms. Bowman's lane of travel. Ms. Bowman stated that it was approximately a foot to a foot and a half into her lane. She testified that she had very little room to maneuver and that when she did go off the road just slightly, her tires hit the gravel. She attempted to maneuver the vehicle back onto the road, but the vehicle kept sliding out of control and "fish-tailing" in the gravel. The vehicle then slid sideways over a large culvert hole on the gravel lot and flipped over on its top. Apparently, one of the tires caught the hole causing the vehicle to flip over on its top and slide a significant distance from the hole where it came to rest. Both claimant Dianna Bowman and Ms. Miller were temporarily trapped in the vehicle. Ms. Bowman was eventually able to climb out of the vehicle on her own. She immediately went and helped Ms. Miller out of the vehicle. Fortunately, Ms. Miller was not injured. However, Ms. Bowman had a serious cut on the side of her head which was bleeding significantly. She also had a less serious cut to her left middle finger which was also bleeding.

Ms. Bowman further testified that she had driven this section of road many times and was very familiar with it. She stated that she had to drive over this section

[6]At the time of this accident, Ms. Bowman was not married; since that time she has married and now uses her married name, Dianna Michelle Smith. Although Mrs. Smith's friend referred to her as "Shelly," the Court will refer to her as Dianna Bowman for the purposes of this opinion.

of road to get to most places due to the location of her home.

Claimant Ricky Bowman testified that he closely examined the culvert hole at issue and estimated it to be approximately six feet deep and approximately eight to ten feet in diameter. He described the hole as being only four feet from the edge of the road. In addition, he introduced photographs into evidence that depicted thick, high grass, weeds, and shrubbery that had grown around the culvert hole. The photos also demonstrated that this hole was not visible to the traveling public due to the high weeds, grass, and shrubbery. Mr. Bowman opined that it was feasible to place a metal grate of some kind over this hole, or, in the alternative, that it was feasible and safer for the respondent to continue running the culvert pipe underground in which case there would be no hole at all.

West Virginia Senior State Trooper David Michael Lee was the investigating police officer at this incident. He was first notified of the incident at 1:00 p.m. and arrived on the scene at 1:15 p.m. He indicated that the time of the accident was at approximately 12:20 p.m. Trooper Lee took measurements, photographs, and statements from all individuals involved including the two eye witnesses, and then put his findings in the West Virginia Uniform Traffic Accident Report. According to the accident report, the weather at the time of the incident was cloudy, but there was no rain and the road condition was dry. Trooper Lee did not testify to or indicate in his accident report, what caused this incident. He did list as a "contributing circumstance" the driver's failure to maintain control of the vehicle. However, he testified that the reason he put this down was the mere fact that she lost control of the vehicle and left the roadway. Trooper Lee did not know at what speed Ms. Bowman was traveling. He testified that her vehicle stopped sliding between 75-90 feet from the culvert hole. He based this testimony from his drawing in the accident report, which while not to scale was still adequately drawn by using relevant and helpful reference points. Trooper Lee was unable to substantiate Ms. Bowman's claim that another vehicle forced her off the road either by eye-witness testimony or other evidence obtained from the scene. Finally, Trooper Lee also stated that the culvert had "some weeds and shrubbery around it."

Darrell Quintrell, an employee of the respondent at the Yawkey substation, testified that he was operating the end-loader when he heard a large amount of gravel hitting the back of the machine very hard. That caused him to turn around to see claimant's vehicle lying on its top. He was the first to arrive on the scene and he helped the girls walk across the road to the substation office to help stop Ms. Bowman's bleeding and to try to calm them until the ambulance arrived. Jeff Hughes, also an employee at the Yawkey substation, witnessed the incident and had already called 911. Mr. Quintrell testified that he encouraged Ms. Bowman to call her father which she reluctantly did. According to Mr. Quintrell, she was afraid to call him because she had damaged his car. Ms. Bowman and Ms. Miller were transported by ambulance to Charleston Area Medical Center General Division where they were treated and released.

At the location of this incident, State Route 214 is a two-lane road with a yellow center line and white lines on each edge. It is a first priority, blacktopped highway with a width of approximately eighteen feet six inches. According to Larry Pauley, the Lincoln County Supervisor for respondent, the hole where the culvert is located is on respondent's property. The Yawkey substation is adjacent to State Route 214. Directly across Route 214, respondent owns a lot for the storage of gravel and salt that is adjacent to the road and this lot is also part of the substation. There is a culvert pipe with its inlet end on respondent's headquarters lot which passes beneath

the highway and then through the gravel/salt storage lot to the creek. The culvert pipe itself is an 18 inch or 24 inch diameter pipe and it may be thirty to forty feet in length. The culvert hole is located on the gravel/salt storage lot. He described the culvert hole as being some six feet from the edge of the pavement of Route 214. He explained that this is actually a "clean-out" or a drop inlet to provide an opening where employees have access to the culvert pipe for cleaning it out. The culvert pipe is cleaned out from that hole on an as needed basis by respondent's employees. There is no grate over the culvert hole. It is his opinion that a grate is not needed over the culvert hole as the six foot area between the hole and the Route 214 is sufficient for travelers on the highway to make a recovery.

Jeffrey L. Hughes, an equipment operator for respondent in Lincoln County, testified that he was driving a dump truck from respondent's gravel storage lot at the time of this incident. His truck had just been loaded with gravel by Mr. Quintrell who was operating the end-loader. Mr. Hughes testified that after being loaded with gravel he started driving south on Route 214. He testified that he drove into the curve at issue in this claim and all the sudden he heard "a commotion." This caused him to look in his rear view mirror where he saw a car fishtail on the gravel parking lot, hit the culvert, and then turn over. Mr. Hughes did not notice what type of vehicle it was that had just passed him. He stated "it was just any other vehicle as far as when I passed the vehicle." He does not recall seeing any other vehicles on the road other than his and the one that went off the road. He testified that his vehicle was not across the yellow line into the other lane. Furthermore, he stated that his truck was loaded, he had just started driving from respondent's lot, and he had not gained much speed when he observed claimant's accident occurring.

In the instant claim, the Court is of the opinion that the respondent may have been negligent in regard to the location and maintenance of the hole on its property adjacent to Route 214; however, this was not a proximate cause of the accident. To be actionable, respondent's negligence must be a proximate cause of the claimant's injuries. *Tracy v. Cottrell*, 206 W.Va. 363; 524 S.E.2d 879 (1999); *Louk v. Isuzu Motors, Inc.*, 198 W.Va. 250; 479 S.E.2d 911 (1996); *Roush v. Johnson*, 139 W.Va. 607, 80 S.E.2d 857 (1954). Drivers also have a duty of reasonable care in operating their vehicles while driving on West Virginia's highways. The evidence established that claimant Dianna Bowman did not properly maintain control of her vehicle under the circumstances. The evidence as to whether or not some other vehicle did, in fact, cross the center line and force the claimant off the road is contradictory in the record. However, regardless of the answer to this issue, the facts are such that claimant Dianna Bowman had sufficient time and space while on the gravel lot to bring the vehicle under control. A reasonably prudent driver would have been able to maintain control of the vehicle. The Court concludes that claimant Dianna Bowman was negligent in her failure to maintain proper control of the vehicle she was operating on Route 214 and that such negligence was the sole proximate cause of the accident. Therefore, claimants Ricky E. Bowman and Dianna Bowman may not make a recovery in this claim.

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

Claim disallowed.

OPINION ISSUED AUGUST 15, 2002

TIMOTHY W. HAZELTON
VS.
DIVISION OF HIGHWAYS
(CC-99-112)

Shawn R. Romano, Attorney at Law, for claimant.
Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

BAKER, JUDGE:

Claimant brought this action for personal injuries which he received in a single-vehicle accident that occurred on March 7, 1997. Claimant was operating his vehicle and proceeding south on W.Va. Route 10 in Wyoming County which route is maintained by the respondent. Claimant came upon a patch of ice on Route 10 which he alleges caused his single-vehicle accident resulting in severe injuries. This claim was bifurcated for the purpose of the hearing; therefore, the claim was submitted to the Court upon the issue of liability only. The Court is of the opinion to deny liability on the part of respondent in this claim for the reasons set forth herein below.

FACTS OF THE CLAIM

On March 7, 1997, claimant, having ended his shift as a backhoe operator at Voyager Mining in Wyoming County at approximately 5:30 a.m., was driving south on Route 10 through Wyoming County to his home in Pineville. His normal routine was to stop at a Hardee's Restaurant to take his breakfast home with him and he, in fact, did this on this occasion. Approximately twelve miles from the Hardee's restaurant, claimant approached an area on Route 10 where there was a patch of ice on the surface of the road resulting from water running across the roadway surface. At this point, claimant's Toyota Truck apparently slid on the ice and the truck overturned, whereupon claimant was ejected from his vehicle. Claimant suffered severe injuries in this accident, and, as a result of the injuries, he has no recollection of the events which took place immediately prior to the accident after he stopped to buy his breakfast at Hardees.

Officer S.E. Cook, a Deputy Sheriff in Wyoming County, was the investigating officer who reported to the accident scene on the morning of March 7, 1997. Officer Cook's investigation report notes that he received notice of the accident at approximately 6:01 a.m.; that he arrived at the scene at 6:13 a.m.; that it was a cold morning; that there were some icy spots on the road; that claimant was already being loaded into the ambulance at the time of his arrival; and that it was hectic at the scene. He could not remember water being on the road, so he relied upon the notations in his report. He did note slippery pavement in his report as the result of an icy patch and he determined that claimant's vehicle slid on a patch of ice causing claimant to lose control of his truck which struck an embankment and overturned. He depicted the claimant lying in the center of the road on his diagram which fact he determined from information from ambulance personnel and from evidence on the road surface. He could not state whether or not claimant was wearing his seat belt at the time of the accident or how claimant was ejected from his vehicle.

Claimant alleges that respondent had the duty to maintain the rights of way, ditches, and culverts on Route 10 at the accident site and that its failure to maintain

the ditches allowing water to flow onto the surface of the road was the proximate cause of his accident and resulting injuries.

Respondent asserts that although it may have had actual notice of the condition of the ice forming at this particular spot on Route 10, such notice was only immediately prior to claimant's accident. An employee of the respondent, Theodore Hawkins, who took note of the icy area while he was on his way to work that morning, was at respondent's headquarters near to the scene of the accident where he was in the act of preparing to take deicing material to the scene. When he arrived at the area where he intended to treat the road surface with the deicing material, claimant's accident had occurred and emergency personnel were attending to the claimant. Therefore, it is respondent's position that it acted reasonably and responsibly as soon as it had notice of the ice forming on Route 10 and its employees responded as quickly as possible.

James Oliver Stewart, the County Maintenance Supervisor for respondent in Wyoming County, is responsible for overseeing the maintenance of all the roads, including the maintenance of the ditches and culverts adjacent to the roadways, in Wyoming County. It was the responsibility of the respondent to ensure that the ditches and culverts running parallel to the roads performed adequately and that water was not permitted to flow across the roadway surfaces. He testified that the occasions when water flowed across the road at the site of claimant's accident were infrequent and occurred maybe twice a year. Route 10 is a primary route in Wyoming County based upon its traffic count. For the purpose of snow removal and ice control, the primary routes are treated as the number one priority. He first noticed claimant's accident from respondent's headquarters where he was already at work on the morning of March 7, 1997, when he observed flashing lights in the area of the accident site. The accident scene is approximately 500 to 600 yards from respondent's headquarters in Wyoming County. Mr. Stewart had driven through that section of Route 10 on his way to work but he had observed only water on the road. He estimated the time that he arrived at work to be around 6:00 a.m. He testified that he had noticed water on the road in this particular area of claimant's accident "very infrequently," or probably only two times a year. He explained that the ditches along the roadways fill up from sediment, *i.e.*, trash, leaves, so maintenance activities include maintaining all the ditches along the roadways to prevent water from building up in the ditches and flowing across the roadways. Employees use a grader, a backhoe, or an end loader to remove obstacles in the ditch line so water stays in the ditch line. This is done on Route 10 at least once a year and sometimes twice. In the area at the accident scene, there are two driveways that abut the roadway on opposite sides of the road. Since one of the driveways is elevated above the road and the driveway opposite it on the other side of Route 10 proceeds down to a lower level, water may flow from the one driveway, across the road surface, and then go down the driveway on the other side of Route 10.

Theodore Hawkins, a Transportation Crew Chief in Wyoming County for respondent, testified that he drove through the area of the accident scene prior to the accident in order to drive to respondent's headquarters. At that time he noticed that water was running across the road and that it was starting to freeze so he proceeded to load calcium, the substance used by respondent as deicing material, into his truck. He was of the opinion that this took him about eight or nine minutes from the time he first observed the water and ice on the road to the time that he started back down the road to treat the condition he observed on Route 10 with the calcium. It was during that eight to nine minute interval that claimant's accident occurred. Mr. Hawkins

could only recall one other time when he had observed water flowing across the road at the location of claimant's accident and that occasion was several years before the accident.

Claimant's expert witness, Robert Wolfe, a registered structural engineer, provided expert opinions as to the drainage in the area of the accident site on Route 10. He visited the scene and he reviewed photographs of the area provided to him by claimant's counsel. The terrain in this particular area of Route 10 had not changed from the time of the accident in 1997 to the time Mr. Wolfe visited the scene in October 2001. He concluded from his review of the area and examination of the photographs that the ditches had not been maintained properly allowing the water to run onto and across the roadway. There are two driveways on either side of Route 10 at the area where the water was flowing across the road and there was no sign, according to Mr. Wolfe, of respondent having provided a ditch for the water coming from the driveway on the west side of Route 10. This driveway is about 40 feet wide where it abuts Route 10 and it is elevated above the road whereas the driveway on the east side proceeds downhill. Water flows from the driveway on the west across Route 10 onto the driveway on the east side of Route 10. The ditch abutting the westerly driveway to the south appeared to Mr. Wolfe to be filled with stone, and, therefore, it was his opinion that respondent had not maintained the ditches for which it is responsible in a proper manner. In his written report, he attributes claimant's accident to inadequate maintenance of the drainage ditches, the surface of the highway and the driveway on the west side of Route 10, the absence of proper drainage across the westerly driveway, and the silt in the ditch south of that driveway which allows water to overflow from the ditch onto the road surface and across the road to the easterly driveway. He based his theory, in part, on the fact that there was evidence of substantial erosion on both the east and west driveways.

CONCLUSIONS OF LAW

At the close of the hearing of this claim, the Court requested that the parties submit memoranda of law on two issues. The first issue is whether there is presumption of lawful operation that arises when one is operating an automobile. The second issue regards whether the fact that the claimant may not have been wearing his seatbelt at the time of his accident may be considered by this Court in its decision.

The West Virginia Supreme Court has set forth a general standard to be followed regarding the presumption of the exercise of due care when no evidence has been received to the contrary. "In the absence of evidence to the contrary, there is a general presumption that one will exercise due care for the safety of himself and other persons." *Lambert v. Great Atlantic and Pacific Tea Company, Inc.* , 155 W. Va. 397, 407 , 184 S.E.2d 118(1971) citing *Atlantic Coast Line Railroad Company v. Brown*, 82 Ga. App. 889, 892, 62 S.E.2d 736, 739; *Yeary v. Hollbrook*, 171 Va. 266, 284, 198 S.E.2d 441,449; *Armstrong v. Rose* 170 Va. 190, 203, 196 S.E. 613, 618; 29 Am. Jur.2d, Evidence, §168, p. 208. The law set forth by the West Virginia Supreme Court of Appeals is clear, and applying the law to the facts in this claim, claimant is entitled to the presumption of due care in the operation of his motor vehicle prior to the accident. Thus, the burden shifts to respondent to introduce evidence of claimant's failure to exercise due care in the operation of his motor vehicle prior to the accident. Respondent did not produce any evidence which indicated that claimant's accident was caused by circumstances other than the icy patch which existed on Route 10. Therefore, the presumption is that the claimant was operating his vehicle with due care at the time of the accident.

Evidence that claimant was or was not wearing a seatbelt at the time of the accident may not be used as evidence of negligence, contributory negligence, or comparative negligence in an action. West Virginia Code § 17C-15-49(d) states as follows:

A violation of this section is not admissible as evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages, and shall not be admissible in mitigation of damages: Provided, That the court may, upon motion of the defendant, conduct an in camera hearing to determine whether an injured party's failure to wear a safety belt was a proximate cause of the injuries complained of. Upon such a finding by the court, the court may then, in a jury trial, by special interrogatory to the jury, determine (1) that the injured party failed to wear a safety belt and (2) that the failure to wear the safety belt constituted a failure to mitigate damages. The trier of fact may reduce the injured party's recovery for medical damages by an amount not to exceed five percent thereof. In the event the plaintiff stipulates to the reduction of five percent of medical damages, the court shall make the calculations and the issue of mitigation of damages for failure to wear a safety belt shall not be presented to the jury. In all cases, the actual computation of the dollar amount reduction shall be determined by the court.

Although the evidence in this claim does not establish whether the claimant was or was not wearing his safety belt at the time of the accident, the law provides that this evidence may not be used as evidence of negligence or contributory evidence or comparative negligence on the part of the claimant.

However, W.Va. Code §17C-15-49(d) apparently permits the issue of the use of a seat belt to be raised for the consideration of damages in a case when the defendant makes a motion to the Court for an in camera hearing to determine whether an injured party's failure to wear a safety belt was a proximate cause of his or her injuries. Thus, this issue affects only the issue of damages.

The general rule of law in West Virginia is that the State is not an insurer of the safety of the traveler on its highways. See *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). This Court has previously held that respondent cannot be expected or required to keep its highways absolutely free of ice and snow at all times, and the presence of an isolated patch of ice on a highway during winter months is normally insufficient to charge the respondent with negligence. *McDonald v. Dept. of Highways*, 13 Ct. Cl. 13 (1979). However, the Court has found that respondent does owe a duty to travelers to exercise reasonable care and diligence in the maintenance of highways. *Lewis v. Dept. of Highways*, 16 Ct. Cl. 136 (1986). In order to establish liability on behalf of the respondent for road defects of this type, the Court has held that a claimant must prove that the respondent had actual or constructive notice of the condition and a reasonable amount of time to take corrective action. *Bartram v. Dept. of Highways*, 15 Ct. Cl. 23 (1983).

In the present claim, the patch of ice claimant encountered on the morning of March 7, 1997, was an isolated patch. Respondent was not in a snow removal and ice control situation during the evening of March 6, 1997, through the early morning hours of March 7, 1997. Respondent had knowledge that water flowing across Route 10 at the location of claimant's accident occurred on an infrequent basis and respondent addressed it whenever it did occur. Even the claimant, who drove to and from work along Route 10, did not recall having any problems with ice at the location of his accident on any prior occasion.

While both Mr. Stewart and Mr. Hawkins observed water flowing across the road on their way to work, the claimant's accident occurred before Mr. Hawkins, who noticed that the water was turning to ice, could act to remedy the situation. Mr. Stewart testified that the accident occurred only minutes after he got to his office. Although claimant established that respondent had notice of the water flowing across the road on the morning of the claimant's accident, respondent did not have a reasonable amount of time to take corrective action before claimant's accident occurred.

The Court, having considered all of the evidence in this claim, has determined that the facts of the claim do not establish that respondent was negligent in its maintenance of Route 10 in Wyoming County on the date of claimant's accident. The Court is not unmindful of the severe injuries that the claimant received in this accident, but the Court is constrained by the applicable principles of law to find for the respondent in this claim.

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.

The Honorable B. Hays Webb, II, did not participate in the hearing of this claim, but he did participate in the decision of the claim.

OPINION ISSUED AUGUST 15, 2002

STACIE D. MILLER and DANIEL J. MILLER
VS.
DIVISION OF HIGHWAYS
(CC-02-084)

Claimants appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimants and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On January 31, 2002, claimant, Stacie D. Miller, was traveling on Eighth Street Road in Cabell County when her vehicle struck a large crack in the road damaging a tire and a rim.

2. Respondent was responsible for the maintenance of Eighth Street Road at this location in Cabell County and respondent failed to maintain properly Eighth Street Road on the date of this incident.

3. As a result of this incident, claimants' vehicle sustained damage in the amount of $258.63. However, claimants are limited to the amount of their insurance deductible feature which is $250.00.

4. Respondent agrees that the amount of $250.00 for the damages put forth by the claimants is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Eighth Street Road in Cabell County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' vehicle; and that the amount of the damages agreed

to by the parties is fair and reasonable. Thus, claimants may make a recovery for their loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $250.00.

Award of $250.00.

OPINION ISSUED AUGUST 15, 2002

INA F. ELKINS
VS.
DIVISION OF HIGHWAYS
(CC-01-262)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On June 19, 2001, claimant was traveling on Route 19 in Beckley, when her vehicle struck a large hole in the road damaging a tire.

2. Respondent was responsible for the maintenance of Route 19 at this location in Beckley and respondent failed to maintain properly Route 19 on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $78.00.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 19 in Beckley on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $78.00.

Award of $78.00.

OPINION ISSUED AUGUST 15, 2002

EMILY JO GHIZ
VS.
DIVISION OF HIGHWAYS
(CC-01-172)

Claimant appeared *pro se*.
Andrew Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On February 16, 2001, claimant was traveling east on Route 60, between 20th and 21st Streets in Cabell County, when her vehicle struck a large hole in the road damaging a tire.

2. Respondent was responsible for the maintenance of Route 60 in Cabell County on the date of this incident, and, further, respondent admits that it failed to maintain Route 60 in proper condition on this date.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $135.33.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 60 in Cabell County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $135.33.

Award of $135.33.

OPINION ISSUED AUGUST 15, 2002

NANCY A. STOUT
VS.
DIVISION OF HIGHWAYS
(CC-01-138)

William C. Garrett, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant Nancy A. Stout brought this action for personal injuries and property damage to her 1992 Chevrolet truck which occurred when her vehicle slid on ice and struck a hillside. Claimant was traveling north on Route 20 in Webster County when the incident occurred. This portion of road is maintained by respondent in Webster County. The Court is of the opinion to deny this claim for the reasons set forth below.

The incident giving rise to this claim occurred on December 15, 2000, at approximately 8:30 a.m. Claimant was driving home from her place of employment. She works the night shift from 12:00 midnight until 8:00 a.m. She lives in Diana which is north of Webster Springs, and on the date of this incident, she was working in Bolair which is south of Webster Springs. Route 20 proceeds through Bolair, Webster Springs, and Diana. Claimant described the road conditions that morning as otherwise good and the weather was clear. The temperature was approximately 32 degrees. She was traveling down a portion of Route 20 known as McGuire Mountain

and was approaching a right-hand curve near an overlook. As she drove into the curve, she testified that her vehicle slid on a patch of "black ice" and then slammed into the mountainside. Ms. Stout testified that all she recalls is losing control of the vehicle and seeing the hillside coming at her. The next thing she knew was that someone was pulling her truck door open to help her. She was taken by ambulance to Webster Springs Memorial Hospital where she was treated and released. She suffered a large cut to her head, an injury to her leg causing heavy swelling, and serious bruising under her right arm and her neck.

Claimant alleges that respondent failed to maintain properly a ditch or culvert that had stopped up causing water to overflow onto the road and freeze creating a hazardous condition known as "black ice" which it knew or should have known existed. The total damage to the vehicle was $3,849.00. However, claimant is limited to the amount of her insurance deductible of $500.00. Claimant also incurred medical expenses in the amount of $1,519.34, all of which were covered by her insurance except for $40.00 she paid out-of-pocket.

Respondent asserts that it did not have notice of ice or water on the road at the location of this incident, and that as soon as it was made aware of the condition, the proper treatment was provided.

Claimant testified that she drove this section of Route 20 five days a week for the past three or four years and that she was very familiar with it. Although she did not see water or ice on the road at the time of this incident, she has seen water running across the road at this location before. She testified that water runs down the steep hillside and often times does not go into the ditch, but instead runs out onto the road.

Testimony at the hearing established that this ditch has to be "pulled" occasionally, but respondent could not state the last time this had been done. Claimant also established that there are a few culverts along the road near the location of this incident, which also require periodic maintenance. Respondent was not able to provide information as to the last time this was done either. Jimmy Collins, County Maintenance Supervisor for respondent in Webster County at the time of this incident, is responsible for the maintenance of roads and highways in Webster County. This includes the portion of Route 20 at issue in this claim. Mr. Collins testified that Route 20 is a priority one road and that he is very familiar with it including the portion at issue in this claim. He described Route 20 as a two-lane, blacktopped highway with double yellow lines and white lines on both edges. The speed limit on Route 20 is 55 miles per hour, but there is a 45 mile per hour advisory speed sign for the curve where this incident occurred. Mr. Collins travels this portion of Route 20 on McGuire Mountain everyday on his way to and from work. He testified that he drove past the exact location of claimant's incident earlier that same morning at approximately 7:05 a.m. and he did not notice anything out of the ordinary. He did not see any water or ice on the roadway. He stated that he arrived at work between 7:00 a.m and 7:15 a.m., as he routinely does. It is approximately ten minutes from the site of this incident to Mr. Collins' office. According to Mr. Collins, it was raining lightly that morning, and it had rained lightly the night before. He testified that the temperature was warming up that morning to approximately 32 degrees and that there was a little fog. Mr. Collins was not aware of claimant's accident until between 7:30 a.m. and 8:15 a.m., when the 911 Center called his office. After receiving this telephone call, Mr. Collins sent a truck to the area with a mixture of salt and cinders to spread onto the road as a precautionary measure. Respondent submitted into evidence a Snow Removal and Ice Control (SRIC) log for December 15, 2000, which showed that it

sent a truck to the location of this incident with three tons of salt and cinder mixture at 9:00 a.m. The log also showed the same truck returning to its duty station at 10:00 a.m.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va 1947). To hold respondent liable, the claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). Respondent cannot be expected or required to keep its highways absolutely free of ice and snow at all times, and the presence of an isolated patch on a highway during a winter month is normally insufficient to charge the respondent with negligence. *McDonald v. Dept. of Highways*, 13 Ct. Cl. (1979). However, respondent at all times does owe a duty to travelers to exercise reasonable care and diligence in the maintenance of highways. *Lewis v. Dept. of Highways*, Ct. Cl. 136 (1986).

In the instant claim, claimant has been unable to establish evidence of any negligence on the part of the respondent. Respondent did not have prior notice that a hazardous condition existed on Route 20 at the location of claimant's accident. Respondent's employee had just passed the exact location of this incident shortly before it occurred and he did not observe any water or ice on the road. Further, as soon as respondent became aware of a problem, it sent a crew and truck out to treat the road and remedy the situation. After reviewing all of the evidence in this claim, the Court is of the opinion and concludes that any ice that may have formed on the road at the location of this incident did so shortly before the incident, and further, that respondent did not have notice of the formation of ice on the road surface or a reasonable amount of time to make adequate repairs.

Therefore, in view of the foregoing, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED AUGUST 15, 2002

MARGARET S. POLK
VS.
DIVISION OF HIGHWAYS
(CC-01-285)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On May 10, 2002, claimant was traveling west on Route 47 when her vehicle struck a piece of metal in the road damaging the gas tank.

2. Respondent was responsible for the maintenance of this portion of Route 47 and respondent failed to maintain properly Route 47 on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $250.00.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 47 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $250.00.

Award of $250.00.

OPINION ISSUED AUGUST 15, 2002

CHRISTI CHAPMAN and LARRY CHAPMAN
VS.
DIVISION OF HIGHWAYS
(CC-01-336)

Claimants appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimants and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On July 29, 2001, claimant, Christi Chapman, was traveling west on I-64 near the Teays Valley exit, Putnam County, when her vehicle struck a hole causing damage.

2. Respondent was responsible for the maintenance of I-64 in Putnam County and respondent failed to maintain properly this area of I-64 on the date of this incident.

3. As a result of this incident, claimants' vehicle sustained damage in the amount of $444.00.

4. Respondent agrees that the amount of damages as put forth by the claimants is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of I-64 in Putnam County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $444.00.

Award of $444.00.

OPINION ISSUED AUGUST 15, 2002

BEULAH REED
VS.
DIVISION OF HIGHWAYS
(CC-01-165)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On March 30, 2001, claimant was traveling on Route 65, Mingo County, when her vehicle struck a large hole in the road damaging a rim and a tire.

2. Respondent was responsible for the maintenance of Route 65 at this location in Mingo County and respondent failed to maintain properly Route 65 on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $500.00.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 65 in Mingo County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $500.00.

Award of $500.00.

OPINION ISSUED AUGUST 15, 2002

REBECCA MOORE and KENNY MOORE
VS.
DIVISION OF HIGHWAYS
(CC-01-260)

Claimant appeared *pro se*.
Andrew Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimants and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On May 26, 2001, claimant, Rebecca Moore, was traveling on Route 14 in Williamstown, Wood County, when her vehicle struck a hole in the road damaging a wheel and tire.

2. Respondent was responsible for the maintenance of Route 14 in Wood County, and respondent failed to maintain properly Route 14 on the date of this incident.

3. As a result of this incident, claimants' vehicle sustained damage in the amount of $594.00.

However, claimants are limited to the amount of their insurance deductible feature which is $500.00.

4. Respondent agrees that the amount of $500.00 for the damages put forth by the claimants is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 14 in Wood County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $500.00.

Award of $500.00.

OPINION ISSUED AUGUST 15, 2002

WALTER H. WARREN, JR. and LOLA B. WARREN
VS.
DIVISION OF HIGHWAYS
(CC-01-271)

Claimant appeared *pro se*.
Andrew Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimants and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On May 23, 2001, claimant, Lola B. Warren, was traveling on Route 60 in Hurricane, Putnam County when her vehicle struck a large hole in the road damaging a tire and a rim.

2. Respondent was responsible for the maintenance of Route 60 in Putnam County and respondent failed to maintain properly Route 60 on the date of this incident.

3. As a result of this incident, claimants' vehicle sustained damage in the amount of $572.87. However, claimants are limited to the amount of their insurance deductible feature which is $250.00.

4. Respondent agrees that the amount of $250.00 for the damages as put forth by the claimants is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 60 in Putnam County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $250.00.

Award of $250.00.

OPINION ISSUED AUGUST 15, 2002

DAWN L. URCHASKO
VS.
DIVISION OF HIGHWAYS
(CC-01-230)

Claimant appeared *pro se*.

Andrew Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On May 25, 2001, claimant was traveling from Highland Avenue onto Route 14 in Williamstown, Wood County, when her vehicle struck two large holes in the road causing damage to her vehicle.

2. Respondent was responsible for the maintenance of this portion of road in Wood County and respondent failed to maintain properly Route 14 on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $107.68.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 14 in Wood County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $107.68.

Award of $107.68.

OPINION ISSUED AUGUST 15, 2002

WEST VIRGINIA UNIVESITY HOSPITALS, INC.
VS.
DIVISION OF CORRECTIONS
(CC-02-220)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $28,084.66 for medical services rendered to inmates in the custody of respondent at Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 AUGUST 15, 2002

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.
VS.
DIVISION OF CORRECTIONS
(CC-02-155)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $19,918.15 for medical services rendered to inmates in the custody of respondent at Pruntytown Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 AUGUST 15, 2002
R. NILIMA BHIRUD
VS.
DIVISION OF CORRECTIONS
(CC-02-215)

Claimant appeared pro se.
Heather A. Connolly, 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 payment in the amount of $4,400.36 for medical services rendered to inmates in the custody of respondent at Mount Olive Correctional Complex. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim, but states that the correct amount owed to claimant is $4,015.36. Respondent further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim. The claimant has reviewed the claim and agrees that the amount of $4,015.36 is the correct amount owed.

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 AUGUST 15, 2002

TELEPAGE COMMUNICATION SYSTEMS
VS.
DIVISION OF JUVENILE SERVICES
(CC-02-269)

Claimant appeared *pro se*.
Barbara F. Elkins, 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 $105.30 for providing paging services to the respondent State agency. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $105.30.

Award of $105.30.

OPINION ISSUED AUGUST 15, 2002

TASHA NICOLE ROSS
VS.
DIVISION OF MOTOR VEHICLES
(CC-02-291)

Claimant appeared *pro se*.
Joy M. Bolling, 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.

On January 30, 2002, claimant paid a traffic ticket in Dunbar, Kanawha County. On June 2, 2002, claimant was pulled over by police and informed that her license was suspended and she was placed under arrest. Claimant was forced to pay $150.00 as a percentage of her bail in order to be released from jail. Apparently, respondent had failed to note that claimant had received a ticket which she paid prior to the deadline of February 16, 2002. Claimant seeks reimbursement of $150.00 for the percentage of bail she was required to pay as a result of respondent's error.

In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method to reimburse claimant for a loss such as that experienced by claimant; therefore, the claim has been submitted to this Court for determination.

The Court, having reviewed the facts and circumstances in this claim, has determined that claimant is entitled to a recovery for his sustained loss.

Accordingly, the Court makes an award to claimant in the amount of $150.00.

Award of $150.00.

OPINION ISSUED AUGUST 15, 2002

XEROX CAPITAL SERVICES, LLC
VS.
DEPARTMENT OF TAX AND REVENUE
(CC-02-263)

Claimant appeared *pro se*.
Joy M. Bolling, 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 payment in the amount of $818.00 for monthly equipment services and supplies for copying equipment at a facility of respondent in Kanawha

County. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $818.00.

Award of $818.00.

OPINION ISSUED OCTOBER 10, 2002

DAVIS MEMORIAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-02-300)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $20,000.65 for medical services rendered to inmates in the custody of respondent at Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

MEDICAL PARK ANESTHESIOLOGISTS
VS.
DIVISION OF CORRECTIONS
(CC-02-320)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $715.00 for medical services rendered to an inmate in the custody of respondent at Northern Regional Jail, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

A. FREDERICK GALL, JR., M.D.
VS.
DIVISION OF CORRECTIONS
(CC-02-332)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $1,310.00 for medical services rendered to an inmate in the custody of respondent at Mount Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

HEALTHNET AEROMEDICAL SERVICES
VS.
DIVISION OF CORRECTIONS
(CC-02-328)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $5,064.15 for transportation services rendered to an inmate in the custody of respondent at Pruntytown Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

DR. G. Y. DAGHER
VS.
DIVISION OF CORRECTIONS
(CC-02-338)

Claimant appears *pro se.*

Heather A. Connolly, 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 payment in the amount of $1,275.00 for medical services rendered to an inmate in the custody of respondent at Mount Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

A. K. KATRIB, M.D.

VS.
DIVISION OF CORRECTIONS
(CC-02-318)

Claimant appears *pro se.*

Heather A. Connolly, 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 payment in the amount of $74.68 for medical services rendered to an inmate in the custody of respondent at Mount Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

A. K. KATRIB, M.D.
VS.
DIVISION OF CORRECTIONS
(CC-02-317)

Claimant appears *pro se.*

Heather A. Connolly, 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 payment in the amount of $84.23 for medical services rendered to an inmate in the custody of respondent at Mount Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

DR. A. K. KATRIB
VS.
DIVISION OF CORRECTIONS
(CC-02-339)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $84.23 for medical services rendered to an inmate in the custody of respondent at Mount Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

DR. A. K. KATRIB
VS.
DIVISION OF CORRECTIONS

(CC-02-336)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $26.91 for medical services rendered to an inmate in the custody of respondent at Mount Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

GENERAL AMBULANCE, INC.
VS.

DIVISION OF CORRECTIONS
(CC-02-341)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $1,067.50 for medical services rendered to an inmate in the custody of respondent at Mount Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

CHARLESTON PSYCHIATRIC GROUP, INC.
VS.
DIVISION OF CORRECTIONS
(CC-02-321)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $1,766.78 for medical services rendered to inmates in the custody of respondent at Northern Correctional Facility, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

MONTGOMERY RADIOLOGISTS, INC.

VS.
DIVISION OF CORRECTIONS
(CC-02-225)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $150.00 for medical services rendered to an inmate in the custody of respondent at Mount Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

MCDOWELL COUNTY AMBULANCE SERVICE AUTHORITY, INC.
VS.
DIVISION OF CORRECTIONS
(CC-02-040)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $2,042.50 for transportation services rendered to inmates in the custody of respondent but being held in the McDowell County Jail. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

HEALTHNET AEROMEDICAL SERVICES

VS.
DIVISION OF CORRECTIONS
(CC-02-223)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $4,070.96 for providing medical transportation services for an inmate in the custody of respondent at Pruntytown Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

ASSOCIATED RADIOLOGISTS, INC.
VS.
DIVISION OF CORRECTIONS
(CC-02-285)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $127.00 for medical services rendered to an inmate in the custody of respondent at Mount Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

DR. JOSEPH NORONHA

VS.
DIVISION OF CORRECTIONS
(CC-02-289)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $1,181.74 for medical services rendered to an inmate in the custody of respondent at Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

JOHN P. HENDERSON, M.D.
VS.
DIVISION OF CORRECTIONS
(CC-02-190)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $559.00 for medical services rendered to inmates in the custody of respondent at Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 OCTOBER 10, 2002

MARY J. HUTCHISON

VS.
DIVISION OF HIGHWAYS
(CC-01-200)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to her trailer which occurred when her son was towing it with his van while traveling on Fifth Avenue, U.S. Route 60 in Huntington, Cabell County, and the trailer struck a large hole in the road. This portion of U.S. Route 60 is maintained by the respondent in Cabell County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on April 17, 2001, at approximately 3:00 p.m. Claimant's son, Bill Hutchison, was driving his GMC Van and towing claimant's trailer eastbound on U.S. Route 60 also known as Fifth Avenue. The trailer is as an eight foot wide Haulmark dual axle trailer. Mr. Hutchison was in the extreme left lane of a five-lane highway. He was traveling at approximately twenty-five miles per hour, which is the posted speed limit, through a straight stretch when suddenly the trailer's left front tire struck a large hole in the travel portion of the his lane. The impact was serious enough to cut a large hole in the side of the tire causing it to immediately burst. The hole was approximately one and one-half feet in diameter and was approximately six to eight inches deep. Mr. Hutchison stated that he travels this portion of U.S. Route 60 a few times each week, but he has not used the left lane in a long time. He was not aware that the hole existed prior to this event. Further, he did not see the hole until a second or two before the trailer struck it. The weather on the date at issue was clear and the road surface was dry. The hole did not have any water in it at the time of this incident. Mr. Hutchison submitted a repair estimate in the amount of $195.00. The damage to the tire and rim was $145.00 plus a $50.00 shipping cost.

Claimant asserts that respondent was negligent in its maintenance of U.S. Route 60 at the location of this incident and that its negligence created a hazardous condition for the traveling public.

Respondent contends that it did not have notice of the hazard at issue and that it had adequately maintained U.S. Route 60 at the location of this incident.

Ernest E. Setliff, employed by respondent in Cabell County as a Crew leader, testified that his responsibilities consist of checking and maintaining the roads under his responsibility. The portion of U.S. Route 60 at issue is under his responsibility. He described U.S. Route 60 as a high priority road and one that is heavily traveled. Mr. Setliff was aware of this particular hole as it had been patched on at least two prior occasions. He described the hole as being six to eight inches deep. He also stated that this area is a problem area for holes because water comes from the sidewalk onto the road. The water gets under the road surface causing it to break and causing more holes. In his opinion, the roadway is built too close to the sidewalk at this location which causes the water to flow onto the road. However, prior to April 17, 2001, Mr. Setliff could not recall the last time the hole was patched without checking his "time sheet". Respondent introduced a DOT-12 into evidence, which is also known as a "time sheet". It was dated April 5, 2001, and was prepared by Mr. Setliff. It states that respondent used a tenth of a ton of cold mix to patch holes on

U.S. Route 60. Mr. Setliff testified that he recalls patching the area on Route 60 between 20th and 22nd Streets which he believes covers the area at issue in this claim. However, there is no mention on the DOT-12 that this portion of Route 60 was, in fact, repaired.

It is a well established principle of law in this State that respondent is neither an insurer nor a guarantor of the safety of motorists on its roads or highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va. 1947). For the respondent to be held liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to make adequate repairs. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). Mr. Hutchison testified that he stopped his vehicle to observe the hole just after the incident and observed that it was within his lane of travel. He also submitted into evidence photographs of the location taken one or two days after the incident. However, by the time he got back to the location to take the photographs respondent had already patched the hole. The photographs depict extra concrete and debris around the area indicating that patching had been performed very recently. Based upon these photographs, it is evident that the hole or holes patched were within the travel portion of Mr. Hutchinson's lane of travel. In this claim, the evidence established that this portion of U.S. Route 60 presented a hazard to the traveling public. The size of the hole, its location in the travel portion of the highway, and the fact that respondent knew that it existed leads the Court to conclude that respondent had notice of this hazardous condition and had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimant may make a recovery for the damages to her trailer.

Accordingly, the Court makes an award to claimant in the amount of $195.00.

Award of $195.00.

OPINION ISSUED OCTOBER 10, 2002

CAROLYN ROSE SMITH
VS.
DIVISION OF HIGHWAYS
(CC-01-290)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to her 1998 Dodge Avenger ES which occurred when she was operating her vehicle on an access road to U.S. Route19 in Daniels, Raleigh County, and her vehicle struck a large hole in the access road. Respondent was responsible at all times herein for the maintenance of this access road. The Court is of the opinion to make an award in this claim for the reasons set forth below.

The incident giving rise to this claim occurred on the evening of July 8, 2001, after dark. Claimant was driving out of the parking lot of a Rite Aid drug store when her vehicle went into a large hole which extended from the exit area of the

parking lot into the access road to U.S. Route19. Both the claimant and her passenger, Tabbatha Perdue, described the hole as being filled with water at the time of this incident. Claimant had entered the shopping area from an entrance area some distance from where she exited the parking lot. The access road to U.S. Route 19 is a narrow one-lane road with white lines on both edges. After this incident, claimant drove her vehicle home. The next morning she noticed that there was damage to the left front and rear wheels whereupon she returned to the scene of her accident to view the hole. She described the hole as being two feet and a half feet wide, four feet long, and approximately ten inches deep. As a result of this incident, claimant obtained an estimate for the damages to her vehicle in the amount of $809.79. Claimant did not have insurance to cover her loss.

Claimant contends that respondent negligently failed to maintain the access road to U.S. Route19 at the location of this incident and that it knew or should have known of this hole and made adequate repairs.

Respondent did not present any evidence or witnesses in the defense of this claim.

Given the size of the hole in the access road to U.S. Route 19, and the fact that it extended well into the travel portion of the road, it is evident that it had been present for a significant period of time. The Court has determined that the respondent had at least constructive, if not actual, notice of this defect. Also, respondent had a reasonable amount of time to make adequate repairs and failed to do so. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). The Court is of the opinion that respondent was negligent in its maintenance of the access road to U.S. Route 19 on the date of claimant's accident, and, therefore, claimant may make a recovery for the damages to her vehicle.

. Accordingly, the Court makes an award to the claimant in the amount of $809.79.

Award of $809.79.

OPINION ISSUED OCTOBER 10, 2002

CALLA SMITH AND HUBERT SMITH
VS.
DIVISION OF HIGHWAYS
(CC-00-369)

Claimants appeared *pro se*.
Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to their property which occurred when a large tree fell from respondent's right of way onto claimant's building along County Route 1/11 in Wayne County. The right of way at issue is owned and maintained by respondent in Wayne County. The Court is of the opinion to deny this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred in the early morning hours of September 6, 2000. Claimant Calla Smith resides on the property where this incident occurred. She was asleep in her bed when she heard a lot of loud noise coming from outside her home. The property is located next to County Route 11/1, also known as

Bowman Hill Road, in Wayne County. Within a few moments, a neighbor came to her door and told her that a large tree had fallen on her building. The building served as both a barn and a garage. One half of the building was two stories high and was used as a barn and storage area for tools and other items while the other half was used as a garage where Ms. Smith parked her pick-up truck. The building was already built on the parcel of property when Ms. Smith purchased it with the residence in 1968. However, both Calla Smith and her brother Hubert Smith own the building. Claimants are not sure how long this particular building has been on the property, but photos of the building taken in 1971depict a structure that at the time appeared to be in sound condition. Testimony adduced at the hearing also established that the building was still in at least good condition just prior to this incident and that it still had a solid foundation. The tree that fell on the building was located on the respondent's right of way a few feet from County Route 11/1, almost directly across the road from claimants' building. The trunk of the tree was located approximately 13.2 feet from the center line of the road and it was growing from a small bank above a ditch line along the road. The tree was a large White Oak with green leaves and many wide, long branches. It was approximately thirty-eight inches in diameter. Prior to this incident, the branches of the tree extended across the road and hung almost completely over top of the claimants' building which had been its condition for several years.

Ms. Smith testified that the tree crushed the left half of the building that served as a barn. It destroyed the structure along with most of the items stored in it, including small hand tools, plows, wood, and extra tin. Fortunately, the tree did not land directly on the garage section of the building, where Ms. Smith parked her 1992 Ford truck. There was only a small scratch on the truck from the fallen tree. Respondent was called to the scene to remove the tree which was totally blocking the road and was lying on top of what was remaining of the left side of the building. Respondent's crew successfully removed the limbs off of the building so as to not cause damage to the garage portion of the building where Ms. Smith's truck was parked. Respondent hauled off the debris and gave Ms. Smith the remaining quality wood to use as firewood. The claimants left the garage portion of the building standing throughout the remainder of the fall of 2000 and the winter of 2001 so that Ms. Smith could park her truck in the garage during this period. Claimants seek $27,000.00 in damages which was the estimate provided to them by a contractor for the reconstruction of a building comparable to the one destroyed by the tree.

Claimants contend that respondent knew or should have known that this tree posed a hazard for falling and that it should have remedied this hazard prior to this incident by either cutting the tree down or removing some of the larger limbs.

Respondent asserts that it did not have notice that this tree posed a hazard and that it acted diligently in responding to this incident.

Randolph Smith, Transportation Crew Chief for the respondent in Wayne County at the time of this incident, testified that he is responsible for responding to complaints regarding road conditions or hazards. Mr. Smith is responsible for dispatching crews and the proper material to the appropriate sites. He is familiar with County Route 11/1 including the location where this incident occurred. He testified that County Route 11/1 is a two-lane, blacktopped, secondary road. It is approximately twelve feet wide in most places. Mr. Smith testified that the Right of Way Division of respondent informed him that its right of way on County Route 11/1 is thirty feet. Mr. Smith was first notified of the incident just prior to 7:00 a.m., when he received a telephone call. He immediately dispatched a crew to the scene. Upon

arrival, the crew recognized that the situation was unique and problematic. Therefore, they called Mr. Smith to the scene for his advice and supervision. Mr. Smith testified that the tree was a large White Oak and had fallen completely across the road and one half of claimants' building. Mr. Smith and his crew determined that they would remove the tree one limb at a time, instead of many at once, so as to salvage the garage portion of the building. Respondent was successful in doing so. According to Mr. Smith, the tree was alive and had no signs of dead or decaying branches. All the branches were strong and healthy with green leaves. In concluding what caused this tree to fall, it was Mr. Smith's opinion that it simply "uprooted." He stated that "the whole root bottom upturned". However, Mr. Smith could not state what caused the tree to do this. He testified that it was windy earlier that morning when he came to work. There had not been any severe rain storms in recent days and the area around the base and roots of the tree was dry. According to Mr. Smith, there were no apparent reasons for this tree to fall on that particular day.

The Court has held that respondent may be responsible for dangerous trees or tree limbs on its property or rights of way. The general rule adopted by the Court is that if a tree is dead and poses an apparent risk, then respondent may be held liable. *Wiles v. Div. of Highways*, 22 Ct. Cl. 170 (1999). However, when a healthy tree falls and causes property damage as a result of a storm, the Court has held that there is insufficient evidence of negligence upon which to justify an award. *Gerritsen v. Dept. of Highways*, 16 Ct. Cl. 85 (1986). Further, to hold respondent liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl.8 (1985).

In the present claim, the Court is of the opinion that claimant did not establish by a preponderance of the evidence that respondent had notice that the tree at issue was at risk of falling. Respondent had received no complaints about the tree. The numerous photographs admitted into evidence establishes that the tree was green and alive. Thus, respondent did not have actual notice that the tree posed a risk of falling. The claimants could not state with any degree of certainty what caused the tree to fall, but only that the bottom foot or two of a small back portion of the tree looked dead. One of claimants' witnesses was of the opinion that the tree was rotted on its back side, but this side of the tree was not visible from the road. The witness had no idea why the tree may have been partially rotted. No other logical explanation for the tree to suddenly fall was provided by either of the parties to this claim. This Court has consistently held that an award cannot be based on mere speculation. *Mooney v. Dept. of Highways*, 16 Ct. Cl. 84 (1986); *Phares v. Div. of Highways*, 21 Ct. Cl. 92 (1996). For this Court to make a determination as to the reason why the tree fell on the date of the incident herein would require the Court to resort to speculation which it will not do. Thus, the Court finds that respondent was not negligent in its maintenance of County Route 11/1 or its right of way on the date that the tree fell onto claimants' property.

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

Claim disallowed.

The Honorable Benjamin H. Webb, II, Judge, was not present at the hearing of this claim, but he did take part in the decision made by the Court and in the written opinion.

OPINION ISSUED OCTOBER 10, 2002

JOHN MYERS
VS.
DIVISION OF HIGHWAYS
(CC-01-106)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 1993 Mitsubishi G.T. which occurred when he was operating his vehicle on the Interstate 77 northbound ramp, Exit 119, near Goldtown, Jackson County, and the vehicle struck a metal plate in the road. Respondent was responsible at all times herein for the maintenance of Exit 119. The Court is of the opinion to deny this claim for the reasons set forth below.

The incident giving rise to this claim occurred on December 29, 2000, at approximately 7:00 p.m. Claimant John Myers was driving his vehicle down the ramp at Exit 119 off of I-77 at Goldtown. The weather was clear and cold. The road surface was in good condition. Mr. Myers was traveling between forty to fifty miles per hour on the ramp, which he testified to as a long exit ramp. Mr. Myers lives just a little over a mile from the Goldtown Exit and he was on his way home. As his vehicle reached near the half way point on the exit ramp, he felt a hard bump and heard a loud noise as he drove over a patched area in the road surface. He drove another fifty yards and turned left onto Route 21 when he realized he had a flat tire. Mr. Myers took a flashlight and examined the patched area to see what his vehicle had just struck. He testified that he observed a metal plate that had sunk down approximately two to three inches below the road surface. He stated that when he stepped on this metal plate it would give a little bit and he characterized it as spongy in nature. Mr. Myers testified that he had driven this exit ramp for at least seven years and had passed over this patched area hundreds of times safely. He described the area at issue as a patched almost perfect square like area. He also stated that it is adjacent to the white edge line, but totally within the lane of travel. As a result of this incident, claimant had to replace one wheel and tire and his vehicle had to be aligned. Mr. Myers seeks an award of $591.43. He did not have any insurance in force at the time of this incident to cover these damages.

Claimant contends that respondent knew or should have known that this metal plate and the manner in which it was covered presented a potentially hazardous condition to the traveling public.

Respondent asserts that it did not have notice of any hazard at the location at issue until after this incident. Therefore, respondent asserts it did not have a reasonable amount of time to take corrective action.

Claimant explained that it was his belief that the last time the exit ramp had been paved was in 1998 and that the contractor who did so paved around the metal plate and left it exposed. He stated that he assumed that respondent then came in and smoothed out the area. Mr. Myers testified that the location at issue has remained the same since approximately 1998 until the night at issue when the metal plate apparently sunk down a few inches from the pavement creating a large hole with a portion of protruding metal.

Bruce Leedy, the Regional Engineer for respondent, is responsible for the area at issue. He testified that he was contacted by the claimant after this incident occurred. Mr. Leedy went to the scene in March 2001 to determine what the problem may have been. He stated that it was obvious to him that a hole of some sort had been patched recently and that this was probably the second or third time that it had been patched. Mr. Leedy testified that there had been some sort of patch there for at least two years. However, Mr. Leedy could not testify as to the condition of this location prior to March 2001.

Stanley W. King, supervisor for respondent at the Allen's Fork Garage in Jackson County, oversees the maintenance of thirty-two miles of Interstate 77 including the area at issue with which he is familiar. Mr. King testified that an old drain had been covered with a metal plate and patched with blacktop at the location where claimant's incident occurred and it had been in that condition for at least six years. He stated that when the old drain had stopped working, respondent had covered it with the metal plate and then blacktopped over the entire area. He was certain that there was not any metal left exposed at all. Mr. King also stated that he had not received any complaints regarding this location prior to this incident. Further, he testified that on December 29, 2001, respondent was on snow removal and ice control duty or "SRIC". Respondent introduced into evidence a DOH-12 demonstrating that the work crew was "cold patching" holes on I-77 and on Route 21. Mr. King stated that respondent does not record the exact location of every hole it patches during "SRIC", but he stated that if the maintenance crew saw a metal plate exposed it would have repaired it. He also stated that normal working hours for respondent at the Allen's Fork Garage is from 7:30 a.m. to 4:00 p.m.

It is a well established principle of law that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Simms*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, the claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). However, respondent owes a duty to the traveling public to exercise reasonable care and diligence in the maintenance of the highways of this State. *Lewis v. Dept. of Highways*, Ct. Cl. 136 (1986).

In the present claim, the Court has determined that claimant failed to produce sufficient evidence to establish that respondent had prior notice that there was a hole or protruding metal at the location of this incident. Although it is undisputed that respondent was aware that there was a drain and metal plate covered over by blacktop, respondent was not aware of any hazardous condition at this location. The evidence established that respondent was not informed of the problem until after the claimant's incident. The Court is of the opinion that respondent was not negligent in its maintenance of the I-77 Exit Ramp 119 at the time of claimant's incident.

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

Claim disallowed.

OPINION ISSUED OCTOBER 10, 2002

CRAIG W. EVANS
VS.
DIVISION OF HIGHWAYS

(CC-01-120)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his1994 Ford Escort which occurred when he was traveling across a bridge on Parsons Branch Road in Wayne County and the vehicle struck a large drop off on the bridge. Respondent was responsible at all times herein for the maintenance of Parsons Branch Road. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on December 7, 2000, at 1:30 a.m., when claimant Craig Evans was on his way home from work in Fort Gay. The weather and road conditions were unremarkable and there was very little traffic at that time of night. Mr. Evans described Parsons Branch Road as a narrow, single-lane blacktop road. He normally does not take this route home so he had not driven this road during the previous few weeks. However, this route is a little shorter and that was the reason he decided to use it on this occasion. Mr. Evans stated that he was traveling thirty-five miles-per-hour. As he approached the small bridge at issue, he saw no warning signs and he proceeded across the bridge as he normally would. Suddenly, as he neared the end of the bridge, he felt a bump and heard a strange noise. He kept driving until he reached the top of a hill where the vehicle stalled out. This was approximately two-tenths of a mile from where the incident occurred. Fortunately, Mr. Evans was close to his home and he was able to walk there safely. The next morning he noticed that his vehicle's oil pan was busted and that the engine was destroyed. Further, the front fender was bent and the front bumper was cracked. Claimant's vehicle also sustained damage to a headlight assembly and a park lamp. Claimant submitted an estimate in the amount of $1,632.44 which represented the cost to have all damages repaired except for the engine. He testified that he had a new engine put in at a cost of $750.00. According to Mr. Evans, he had purchased the vehicle six months prior to this incident for $900.00. Claimant went back to the scene of the incident where he observed oil strung out on the road beginning at the drop-off and going up the road approximately fifty yards. He is certain that this was oil from his vehicle. Mr. Evans estimated the drop-off at the edge of the bridge to be approximately six inches. He also noted that respondent had been working on the bridge recently. He called respondent to report the incident and the condition of the bridge.

Claimant contends that respondent was negligent in its maintenance of the bridge and for failing to warn the traveling public of a hazardous condition.

Geoffrey Adkins, respondent's storekeeper in Wayne County, testified that he is familiar with the portion of road at issue. He testified that he was not aware of any hazards on the Parsons Branch bridge prior to this incident. He found out about the claimant's incident later in the day of December 7, 2000. He went to the scene and determined that repairs needed to be made immediately. He submitted into evidence a DOT-12 which indicates that a problem was found on the bridge. It also indicates the inventory and manpower used to make the repairs, which involved using a large dump truck to fill the drop-off with cold-mix for a safer transition. Mr. Adkins testified that another crew had been working on the bridge six or seven days prior to this incident. They had left the portion of the bridge where the surface of the bridge

starts to meet the road at least six inches too low. There should have been a smooth transition from the bridge back onto the road. However, respondent's employees had failed to fill in the wooden surface of the bridge with blacktop to make it level with the road. Finally, Mr. Adkins also stated that there were no warning signs, barrels, or cones in place to give oncoming traffic notice of the hazard.

The Court is of the opinion that respondent had notice of the drop-off between the bridge surface and the road. Claimant's photographs admitted into the evidence for this claim clearly demonstrate the severity of this drop-off. Respondent had just made repairs to the bridge less than a week prior to this incident and yet this drop-off continued to be there. The Court has determined that respondent had a reasonable amount of time to take corrective actions, but failed to do so. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). Respondent knew or should have known that the condition of this bridge presented a very serious hazard to the traveling public. Thus, claimant may make a recovery for the damages to his vehicle.

The Court has reviewed the documents and claimant's testimony regarding the damages to his vehicle. The damages exceed the value of the vehicle in this claim; therefore, the Court considers the value based upon the purchase price of the vehicle. In this instance, any recovery will be limited to the amount paid by claimant for the vehicle.

Accordingly, the Court makes an award in this claim in the amount of $900.00 which the Court has determined to be the fair and reasonable value of the vehicle at the time of the incident.

Award of $900.00.

OPINION ISSUED OCTOBER 10, 2002

JOYCE LITTON
VS.
DIVISION OF HIGHWAYS
(CC-01-315)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to her 2000 Chevrolet Monte Carlo which occurred when she was driving on U.S. Route 52 in Mingo County and her vehicle struck a hole in the edge of the pavement. Respondent is responsible for the maintenance of U.S. Route 52 in Mingo County. The Court is of the opinion to make an award to the claimant based upon the reasons set forth herein below.

On August 5, 2001, claimant Joyce Litton, a resident of Wayne County, was driving on U.S. Route 52 from her home on her way to meet a family member in Mingo County. Her daughter-in-law, Barbara Litton, was a passenger in her vehicle. As claimant was proceeding in a straight stretch into a curve, a coal truck approaching in the opposite lane crossed the center line causing claimant to veer to the edge of the pavement. At that point her vehicle went into a hole that extended from the area of the white edge line into the berm. Claimant lost control of her vehicle, veered into the opposite lane, and then she managed to gain control of her vehicle to bring it to a stop.

Some neighbors in the area assisted her as both of the tires on the left side of the vehicle were destroyed as well as both rims being damaged. Her husband came to her assistance also. The damages to her vehicle are in the amount of $1,547.47, but claimant is limited to a recovery of $1,000.00 which represents the deductible feature of her insurance policy.

Claimant's position is that respondent was negligent in its maintenance of U.S. Route 52. Photographs admitted into evidence depict a fairly large hole with a jagged edge which extends from the white line into the berm. These photographs were used to substantiate her position.

Respondent contends that it did not have notice of this particular hole on U.S. Route 52 and it was not negligent.

Cecil Collins, a Transportation Worker Two for respondent in Mingo County, testified that the responsibility for maintaining this portion of U.S. Route 52 is within his office. He described U.S. Route 52 as being a two-lane highway which is a priority one route. It is approximately twenty to twenty-two feet wide with white edge lines. There is guardrail on the side of the highway where claimant went into the hole. He explained that gravel or mill run is "applied to the berm to try to make it proportion to the highway" so there would not be a major drop off. He had checked his office records and noted that there had been no complaints about this area of U.S. Route 52 until after claimant's accident described herein.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986).

The Court is aware that a reasonable prudent driver will yield to an oncoming coal truck intruding in her lane. Claimant herein submitted photographs which depict a large, jagged hole in the edge of the pavement on U.S. Route 52. The Court is of the opinion that this hole created a hazard to the traveling public and that respondent had constructive, if not actual, notice of this hazard. Therefore, claimant may make a recovery for the damages to her vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to claimant in the amount of $1,000.00.

Award of $1,000.00.

OPINION ISSUED OCTOBER 10, 2002

RONNIE MARKEL, PAMELA MARKEL,
and TARA MARKEL
VS.
DIVISION OF HIGHWAYS
(CC-99-341)

Claimants appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants Ronnie Markel and Pamela Markel originally brought this action for damage to their vehicle and for personal injuries to their minor daughter Tara Markel; however, Tara Markel is now of majority so she is a proper party claimant. The incident giving rise to this claim occurred when claimant Tara Markel was traveling north on County Route 38 in Berkeley County, lost control of her vehicle in a curve, and the vehicle then struck a tree on the side of the road. This portion of County Route 38 is maintained by respondent in Berkeley County. The Court is of the opinion to deny this claim for the reasons set forth more fully below.

On June 12, 1999, at approximately 10:00 p.m., Tara Markel and two other passengers were traveling north on County Route 38 also referred to as Blairton Road. Ms. Markel was driving her parents' 1987 Honda Accord four door LX. She and her passengers had visited a friend and they were on their way home. It had been raining earlier that evening, but the rain had stopped by the time the claimant was driving home. She stated that the roads were wet and that it was foggy. The fog was thick enough to allow Ms. Markel to see several feet ahead of her. She stated that she was traveling with her low beam lights on. Ms. Markel testified that she was traveling approximately thirty-five miles per hour or less, but probably below thirty-five miles per hour in a straight stretch. As she approached the top of a hill, she thought that the road was continuing straight, when suddenly she realized that she was approaching a significant curve. She stated that she did not realize how bad the curve was until she was up on it. She applied the brakes but could not maintain control of the vehicle, which skidded off the road and crashed head-on into a tree. Tara Markel suffered neck and back strain as a result of the impact and the vehicle was totaled. The curve where this incident occurred is not posted with any speed limit signs or any warning signage. There are posted speed limit signs of thirty miles per hour in place prior to reaching this curve. Ms. Markel testified that she knew the speed limit on this portion of Route 38 was thirty miles per hour.

The claimants contention is that there should have been a sign posted near this curve warning the traveling public of its potential danger. The claimants contend if there had been such a warning sign present that Tara Markel would have slowed the vehicle down and proceeded with more caution and that she would not have lost control of the vehicle. Ronnie Markel and Pamela Markel are seeking an award of $3,425.00, which they claim is the value of their vehicle. Tara Markel suffered personal injuries for which she incurred medical expenses in the amount of $1,315.27. However, all of this was covered by her parents' automobile insurance and, therefore, she seeks no award for this amount. Tara Markel also incurred lost wages of which amount eighty-five percent was covered by her parents' insurance carrier. Therefore, Ms. Markel seeks recovery for the remaining fifteen percent of her lost wages. She also seeks an award for future medical care for the injuries she sustained in this incident.

Respondent asserts that it had no notice that the curve where this incident occurred presented a hazard to the traveling public until after this incident on June 12, 1999. Respondent also asserts that the maximum speed limit on this road is thirty miles per hour and that no vehicle should be traveling above thirty miles per hour under any circumstances.

Claimant Ronnie Markel testified that in his opinion respondent should have had a warning sign in place to give the the traveling public notice to reduce their speed due to an approaching sharp curve. He testified that there is such a warning sign prior to reaching the next curve in the road on Route 38. He maintains that since

respondent had placed a warning sign at the next curve on Route 38, then it could have and should have placed one at the location of this incident. Mr. Markel introduced photographs to demonstrate that there is enough space in a straight stretch prior to the curve at issue to place a warning sign. He also presented photographs to demonstrate that the curve at issue was a significantly sharp curve which was unmarked by any warning signs.

Tara Markel testified that it is her opinion a driver cannot make the turn safely while traveling thirty-miles per hour, which she knew to be the speed limit on that road. Ms. Markel testified that she had traveled this road as a passenger prior to this incident approximately twice, but she had never driven it herself. At the time of this incident, Ms. Markel was sixteen years of age and had been driving approximately one year. She completed a "special driver education" class prior to driving on her own and prior to this incident. She testified that she was driving carefully on the night of this incident and acted as any prudent driver would under the circumstances. According to Ms. Markel, she did not realize that the straight stretch of the highway was changing into a curve. At the last second, she realized it was a sharp curve. Then, she attempted to slow down, but still lost control of the vehicle. She stated that there was a great deal of vegetation including trees on the opposite side of the road where the curve was and this heavy vegetation made it even more difficult for her to recognize that she was approaching a sharp curve.

Mark Baker, the assistant supervisor of maintenance operations in Berkeley County, testified that he is in charge of the daily field operations for maintenance in Berkeley County. He is familiar with County Route 38 and the location of the incident at issue. County Route 38 is a two lane, secondary, blacktop road. It has a double yellow center line and white lines on the edges. The approximate width is twenty-two feet. Mr. Baker testified that to the best of his knowledge his office had not received any complaints regarding the curve at issue prior to the claimant's incident on June 12, 1999. To the best of his knowledge, Mr. Baker recalls the speed limit at the time of this incident to have been thirty miles per hour at the location of this incident. He does not recall ever being called out to a wreck at or near this location during the nine years he has been employed in this position.

Larry Deitz, the District Traffic Engineer for respondent in District 5 which includes Berkeley County, testified that one of his responsibilities is signage and requests regarding signage issues. Mr. Deitz is familiar with County Route 38 and the location of this incident. He testified that the Traffic Engineering Department keeps a file on each county road within District 5. In each file, is a complaint form which is kept in the event that any complaints or requests arise from the public. According to Mr. Deitz, there are no complaints or requests regarding the curve at issue. He went on to testify that there are a large number of curvy roads in this State and that a lot of these roads have come into being over a long period of time. He stated that factors such as increases in traffic, and speed limits, as well as changes in pavement, can in some cases cause a curve to become a problem. Individual curves also may be provided signs according to complaints that come to the respondent from citizens.

The well established law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). To hold respondent liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *see also Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986). Finally, to be actionable, the

respondent's negligence must be the proximate cause of the claimant's injuries. Louk v. Isuzu Motors, Inc. 198 W.Va. 250; 479 S.E.2d 911 (1996); *see also Roush v. Johnson*, 139 W.Va. 607, 80 S.E.2d 857 (1954).

In the present claim, the Court is of the opinion that the claimant failed to establish by a preponderance of the evidence that respondent had prior notice that the curve at issue presented a hazard to the traveling public. The evidence established that respondent did not have any prior complaints regarding this curve, nor had there been any accidents there until the accident which is the subject matter of the instant claim. Given the nature of West Virginia's curvy roads, including the one at issue, respondent cannot be expected to foresee every curve that could potentially present a danger to the traveling public. While sympathetic to the claimants, the Court is constrained by the evidence to deny the claim.

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

Claim disallowed.

OPINION ISSUED OCTOBER 10, 2002

MARY ALICE HAMBY
VS.
DIVISION OF HIGHWAYS
(CC-01-192)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to her 1989 Chevrolet S-10 pick-up ruck which occurred when she was operating her vehicle on Route 49 near Merrimac, Mingo County, and a tree fell and struck her vehicle. Respondent was responsible at all times for the maintenance of this portion of Route 49 in Mingo County. The Court is f the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on April 26, 2001, at proximately 8:50 a.m. The weather was clear and the road surface was dry and in good condition. Claimant Mary Hamby was on her way to school at Southern West Virginia Community College. Ms. Hamby was traveling northbound on Route 49 and was approximately three hundred feet from her home when suddenly and without warning a tree fell from the hillside to her right and struck her vehicle. She heard something hit the top of her truck. She accelerated in an attempt to avoid it, but the tree still struck the hood and cracked the windshield. Route 49 is a two-lane, blacktop highway with a center line and two white edge lines. It is considered a priority one route. However, Ms. Hamby described the highway at this particular location as "falling in". She testified that the southbound lane had been falling in for a significant period of time. Respondent had placed some beams or piling to stabilize the road approximately one year prior to this incident. When respondent placed the beams and piling, it had to close the southbound lane. To allow the continual flow of traffic, respondent had made a cut into the hillside on the northbound side of the road

to extend that lane. Ms. Hamby testified that after the lane widening construction, the tree which struck her vehicle was growing only two or three feet from the road. Ms. Hamby also stated that the tree was rotten because it broke into many little pieces after striking the truck. Her vehicle sustained damages as a result of this incident.

Claimant described the damages that the tree did to her vehicle including damage to the hood which she replaced. The front and back fenders also were replaced. In addition, the windshield was damaged and needs to be replaced, as does the passenger side mirror and the sun visor. Claimant submitted three different invoices from various body shops for the costs to repair her vehicle. The estimates were in the amounts as follows: $1,594.76, $1,881.89, and $1,472.75. Claimant did not have comprehensive insurance coverage to cover any of her losses. Therefore, she made the repairs necessary to receive an inspection sticker so as to be able to drive the vehicle again. Replacing the hood and two fenders cost $500.00. However, she still needs to replace the windshield and the mirror which will cost approximately $350.00. The vehicle was a gift to Ms. Hamby. At the time of this incident, she had owned the truck for three years. She believes the person who purchased it for her paid approximately $2,000.00 for the truck.

Claimant asserts that respondent was negligent in its maintenance of Route 49 at the location of this incident and that this negligence created a hazardous condition for the traveling public.

To substantiate her position, claimant introduced numerous photographs of parts of the tree which struck her vehicle. One photograph depicted a fairly large part of a dead tree lying on the side of the road. Another photograph depicted a smaller piece of wood which appeared to have broken off of the main tree. The photographs support claimant's testimony that the tree was dead when it struck her vehicle. It appears that the tree had been dead for a significant period of time. In addition, claimant also introduced into evidence photographs showing that the hillside on the side of the road from where the tree fell was slipping in and that the root system of the trees was being disturbed. This evidence also supports claimant's testimony that someone had cut into the hillside.

It is respondent's position that it did not have notice of any tree hazards or potential tree hazards at the location of this incident and that it adequately maintained Route 49 at the location at issue.

Bill Parsley, an equipment two operator for the respondent in Mingo County, testified that he is responsible for operating large trucks, various heavy equipment, and for cutting brush along the highways including Route 49 at the location at issue. He is also familiar with the facts of this incident. He agrees with the claimant that there is a bad place in the road where the tree fell. He stated that personnel from one of the other departments had placed some "piling" which caused some problems with the road at that location. On the date of this incident, Mr. Parsley and his crew were cutting weeds and brush along Route 49. However, they did not cut any brush or otherwise work at the location where this incident occurred, but Mr. Parsley did drive by the location between 10:00 and 10:30 a.m. on the date of the incident. He testified that he did not see any trees at the location of the incident that were near the road that concerned him. In addition, he testified that neither he nor his crew noticed any trees that presented a potential risk of falling onto the highway on the date of the incident. Furthermore, he had traveled this portion of Route 49 prior to this incident and he had worked on it as well and he did not notice any potential risks regarding tree falls. Finally, he stated that he had not received any complaints regarding tree falls or potential tree falls at this location prior to this incident.

It is a well established principle of law that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). In cases involving falling trees or tree limbs, the Court has held that respondent is liable for dangerous trees or tree limbs on its property or right-of-ways. The general rule this Court has adopted is that if a tree is dead and poses an apparent risk, then respondent may be held liable. *Wiles v. Div. of Highways*, 22 Ct. Cl. 170 (1999).

In the present claim, the Court is of the opinion that respondent had notice of the hazard presented by the tree in question and had a reasonable amount of time to take corrective action. The evidence adduced at the hearing established that the tree was dead and that it was located well within the respondent's right-of-way. Further, the evidence also established that respondent had done some construction work on the road and in doing so made a cut into the hillside and weakened the soil and root system of this tree. This activity created a hazard to the traveling public for potential tree falls.

Thus, the Court finds that respondent was negligent in this claim and that this negligence was the proximate cause of claimant's damages. Given the fact that the estimates submitted to the Court are higher than the value of the vehicle at the time of this incident, the Court will grant an award based upon the difference between the market value of the truck before the incident and the value of the truck after the incident which the Court has determined as being $250.00. Claimant also may recover the $500.00 she spent on existing repairs plus an additional $350.00 to replace the windshield and the mirror.

Accordingly, the Court makes an award to claimant in the amount of $1,100.00.

Award of $1,100.00.

OPINION ISSUED OCTOBER 10, 2002

FLORETTA TAYLOR
VS.
DIVISION OF HIGHWAYS
(CC-01-319)

Claimant appeared by and through her son, Thurmon S. Taylor.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover costs associated with water damage to her real estate which she alleges is due to negligent maintenance of the drainage system for U.S. Route 52 in McDowell County. At the hearing of this claim, the Court amended the style of the claim to reflect the owner of the real estate as the only party in interest. The Court permitted claimant's son, Thurman S. Taylor, to present her claim as the claimant is physically unable to do so. Claimant's son is familiar with the circumstances of the claim and the Court determined that he has

sufficient knowledge of the facts in the claim to testify and present the evidence on behalf of the claimant. Respondent is at all times herein responsible for the maintenance of U.S. Route 52 in McDowell County. The Court is of the opinion that respondent is liable in this claim for the reasons stated more fully below, and, further, the Court considers the claim to have been heard on the issue of liability only.

Claimant's son, Thurman S. Taylor, testified in this claim to set forth the facts in the claim as follows. Claimant's property and home are situate on Kyle Bottom Road in Kyle, McDowell County. U.S. Route 52 is a main road located on a hillside above claimant's property. The drainage system for U.S. Route 52 provides for a culvert beneath the highway which has its outlet end on a hillside some distance from claimant's property, but the water from the culvert empties such that the water flows to the drainage system for Kyle Bottom Road. Once the water flows to Kyle Bottom Road, there is a ditch line which carries the water in a downhill direction to claimant's property, and more specifically, to the edge of her driveway. At this point, claimant alleges that the water from the ditch line has no place to flow so it flows onto her driveway causing a muddy, impassable area for her on the driveway and in her yard. She attempted to remedy the situation by having 180 feet of six-inch pipe placed beneath her driveway and alongside the driveway to divert the water flowing directly onto her property towards the creek where it ultimately flows. Claimant also had gravel placed in her driveway to alleviate the muddy conditions. It is alleged that water has continuously flowed onto her property for the past twenty years. At one time, she paid an individual for work on her driveway but this did not alleviate the water problem. Claimant has suffered with the water problems for some twenty years. She has spent money for an attempted remedy, but to no avail. In 2001 she had her son (the witness at the hearing) install six-inch pipe under and along side of her driveway but the pipe is not of an adequate size to prevent excessive water from flowing onto the driveway and causing damage thereto. She also had gravel placed in the driveway and railroad ties put in to support the gravel. She expended $309.76 for the pipe and a grate. Claimant did not provide the Court with an estimate of the cost for remedying her water problems by installing fifteen-inch pipe in place of the six-inch pipe or replacing the gravel in the driveway.

Claimant asserts that the crux of her problem is the failure of respondent to provide for proper drainage on Kyle Bottom Road for the water flowing from U.S. Route 52. Therefore, respondent is negligent in its maintenance of its drainage system causing damage to her property.

Respondent contends that it has done all it can with its drainage system and that it is the responsibility of the claimant to provide a proper drainage system beneath her driveway to alleviate the water problems which she has on her property.

A crew leader employed by respondent at the Havaco substation in McDowell County, Paul Linzy Gullett, testified that he is familiar with claimant's property on Kyle Bottom Road. Although he is not personally aware that any complaints have been received by respondent about water problems on Kyle Bottom Road, he was part of the crew that installed the drainage structure placed by respondent at the location of claimant's driveway. Respondent installed a fifteen-inch pipe beneath the roadway some feet before claimant's six-inch pipe. The purpose of the new pipe is to divert the water flowing toward claimant's driveway to flow into the pipe which goes beneath the road and then into a drainage ditch on the opposite side of the road where the water eventually flows to a creek. It was Mr. Gullett's opinion that claimant is responsible for any excess water that flows onto her driveway and property even though it flows from respondent's drainage structures.

For the respondent to be held liable for damages caused by inadequate drainage, claimant must prove that respondent had actual or constructive notice of the existence of the inadequate drainage system and a reasonable amount of time to correct it. *Orsburn v. Div. of Highways,* 18 Ct. Cl. 125 (1991); *Ashworth v. Div. of Highways* 19 Ct. Cl. 189 (1993).

After a careful review of the evidence in this claim, as well as the photographs submitted by in this claim, the Court is of the opinion that the proximate cause of the damage to claimant's property is respondent's failure to maintain an adequate drainage system for the water flowing from U.S. Route 52. Respondent knew of the drainage problems at this location for a significant period of time and that the claimant was experiencing an excessive amount of water flowing onto her property. However, respondent failed to provide for an adequate drainage system for the water flowing on Kyle Bottom Road from U.S. Route 52 to prevent excessive water from flowing onto claimant's property. Thus, the Court has determined that claimant herein may make a recovery for the damages to her property.

In accordance with the findings as stated herein above, the Court directs the Clerk of the Court to set this claim for hearing on the issue of damages as soon as may be practicable.

OPINION ISSUED OCTOBER 10, 2002

TIMOTHY WAYNE HART AND VIOLET HART
VS.
DIVISION OF HIGHWAYS
(CC-01-115)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to their 1994 Dodge Caravan which occurred when claimant Violet Hart was operating her vehicle on State Route 2 in Huntington, Cabell County, and the vehicle struck a large hole in the road. Respondent was responsible at all times herein for the maintenance of State Route 2. The Court is of the opinion to make an award in this claim for the reasons set forth below.

The incident giving rise to this claim occurred on February 17, 2001, between 7:30 p.m. and 8:00 p.m. Mrs. Hart was traveling State Route 2 in Huntington. She was going to visit her mother-in-law. Mrs. Hart had traveled State Route 2 on prior occasions, but she had not driven it in a while. She decided to use it on the evening at issue because she thought it may be quicker. The weather was clear and very cold. The road was dry and in otherwise good condition. State Route 2 at the location of this incident is a two-lane road with yellow center lines and white lines on both edges. Mrs. Hart was traveling thirty-five miles per hour which is the posted speed limit. As she proceeded through a straight stretch, she suddenly hit something in the road which made a loud noise. Then, the front end of the van started shaking. She stopped the vehicle and noticed that she had a flat tire. She also took a flashlight

and walked back to see what the vehicle had struck and observed a large hole in the road. The hole was located within the travel portion of the road and extended toward the white edge line. According to Mrs. Hart, both passenger side tires and wheels were damaged by the impact. As a result of this incident, claimants had to replace one wheel and two tires. They also had to have the front end realigned. Claimants submitted into evidence an estimate of $537.95 for these damages. However, claimants did not have these repairs done. Mr. Hart testified that he purchased four tires and wheels for the van prior to this incident and kept the original factory tires and wheels. After the incident, he replaced all four tires and replaced them with the original factory tires and wheels. Claimants did not have insurance coverage to cover their loss.

Claimants contend that respondent negligently failed to maintain State Route 2 at the location of this incident and that it knew or should have known of this hole and made adequate repairs.

Respondent did not present any evidence or witnesses in the defense of this claim.

Claimants introduced into evidence a video tape demonstrating the hole at issue and the surrounding area. Claimant Timothy Hart took the video tape the morning after the incident and he also observed the hole at issue. The evidence showed that this hole was inside the white line and clearly within the travel portion of the road. Mr. Hart testified that the hole was six to seven inches deep and approximately five to six inches wide. It was also evident from the video tape that the hole was substantially large in size. Mr. Hart also testified that in order to avoid striking the hole an approaching vehicle would have to maneuver across the center line.

Given the size of the hole, and the fact that it extended well into the travel portion of State Route 2, it is evident that it has been present for a significant period of time. Therefore, the Court is of the opinion that the respondent had at least constructive, if not actual, notice of this hole. Respondent had a reasonable amount of time to make adequate repairs and failed to do so. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). The Court may only make an award to claimants for their actual out-of-pocket loss. The Court will not make an award based on the estimate submitted by the claimants in this claim. Mr. Hart testified that he had purchased four new wheels for the van at a cost of $450.00 which includes the tires as well. He had replaced the four original factory tires and wheels with these new ones just prior to this incident. Mrs. Hart testified that the two passenger side tires and wheels were damaged in this incident. Therefore, the claimants' out-of-pocket expense for the two tires and wheels was $225.00 and they incurred $24.00 for the alignment for a total loss of $249.00

. Accordingly, the Court makes an award to the claimants in the amount of $249.00.

Award of $249.00.

OPINION ISSUED OCTOBER 10, 2002

AMANDA BRADFORD andRODNEY TWYMAN
VS.
DIVISION OF HIGHWAYS
(CC-01-214)

Claimant appeared *pro se*.
Andrew F. Tarr , Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to claimant Amanda Bradford's 2000 Ford Ranger which occurred when claimant Rodney Twyman was operating the vehicle on State Route 46 in Mineral County near Piedmont, and the vehicle struck several large rocks lying in the road causing damage to the vehicle. Respondent was responsible at all times herein for the maintenance of State Route 46. The Court is of the opinion to deny this claim for the reasons set forth below.

The incident giving rise to this claim occurred between 6:00 to 6:30 p.m. on February 20, 2001. Rodney Twyman had just dropped Amanda Bradford off at her place of employment in Keyser. Afterwards, he drove west on State Route 46 and stopped for a short period of time at his brother's home. He then proceeded to his home in Piedmont still traveling west on State Route 46. It was just getting dark outside and Mr. Twyman had the vehicle headlights on. Mr. Twyman testified that he had just reached the crest of a small hill on the road and was coming down the other side of the hill when suddenly he saw numerous rocks in his lane of travel. He stated that he swerved over into the left lane to avoid the larger rocks, but saw an oncoming vehicle and was forced back into his lane where his vehicle struck several large rocks. He testified that he could not maneuver to the left because of a steep hill and there was oncoming traffic in the other lane of travel. He described the rocks in the other lane as small, while the rocks in his west bound lane were much larger. He described some as being larger than basketballs. The vehicle struck a few of these rocks causing significant damage including a burst tire, a bent rim, and a bent frame. Claimants also had to have a new torsion bar and the vehicle realigned.

The vehicle was leased by Ms. Bradford through Ford Credit beginning in June of 2000. She is the sole lessee. However, both Ms. Bradford's and Mr. Twyman's names are on the insurance policy and both parties have paid out-of-pocket expenses for the damage caused to the vehicle. The claimants had full coverage on the vehicle with a $500.00 deductible, but they chose not to submit this claim to their insurer. Claimants did submit three paid invoices into evidence which totaled $650.21. However, claimants are limited to their insurance deductible in the amount of $500.00 in the event that any award were to be granted.

Claimants contend that respondent knew or should have known that there was a potential hazardous condition for rock falls at the location of this incident and that it failed to warn the traveling public of this hazard and failed to remedy it. According to the claimants, the respondent's negligence was the proximate cause of the damages to the vehicle.

Respondent asserts that it did not have notice that the location of this incident presented a rock fall hazard to the traveling public and that it is not responsible for the damage caused to the claimant's vehicle.

Mr. Twyman testified that State Route 46, also referred to at this location as Piedmont Road, is a two lane blacktopped road with double yellow center lines and white lines on the edges. At the location of this incident, Mr. Twyman described the road as somewhat zig-zagging. He stated that he had never seen rock falls along this portion of road. He travels this road often including on his way to and from work. Mr. Twyman testified that there is no guardrail at this location and that the rocks must have rolled off of the steep hill on the opposite side of the road. According to Mr. Twyman, most of the large rocks landed in his lane which is the west bound lane of

travel. He testified that he had no choice but to strike the rocks in the road given the oncoming vehicles and the steep drop-off on the left side of the road. Although he was able to apply the brakes quickly, the vehicle was almost on top of the rocks before he first saw them. Mr. Twyman stated that there are rock fall warning signs located approximately two miles away from the location of this incident near Keyser.

John B. Lusk, respondent's County Maintenance Supervisor in Mineral County, is responsible for the maintenance of State Route 46 and for responding to any complaints from the public regarding roadway hazards. He is familiar with State Route 46 including the location of this incident. He testified that he was unaware of any rock falls at this location prior to the incident at issue. He did not receive any notice until the following morning regarding this rock fall. He was notified that there were rocks along the edge of the road. He dispatched an employee with a snow plow to plow the rock out of the way and had the remainder removed. Mr. Lusk stated that there are rocks frequently found on State Route 46. There are falling rock warning signs located near Keyser to warn travelers of rock fall hazards at that particular location which is a known rock fall location. One rock fall warning sign is approximately 1/10 of a mile west of Keyser and the second rock fall warning sign is located approximately one mile west of Keyser. One sign is for east bound traffic while the other is for west bound traffic. However, Mr. Lusk stated that these signs are approximately one and one-half miles to two miles from the location of this incident. They are not intended to cover the location of this incident, nor the entire five mile length of road between Keyser and Piedmont. Mr. Lusk testified that other than the posted area near Keyser there are not regular rock slides along this portion of road. He stated that there may be an occasional rock on the road due to the mountainous terrain that is straight up and down and adjacent to the road, but that the location of this incident is not known as having a history of prior rock falls.

The well established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va 645; 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). This Court has held that the unexplained presence of rocks or debris on the road without a showing that respondent had notice of a dangerous condition posing a risk to the traveling public is insufficient evidence to justify an award. *Hammond v. Dept. of Highways*, 11 Ct. Cl. 234 (1977); *Coburn v. Dept. of Highways* 16 Ct. Cl. 68 (1977).

In the present claim, claimants failed to establish that respondent had prior notice of a rock fall at this location or that this location presented a hazardous condition for rock falls to the traveling public. The Court is not unsympathetic to the claimants' position; however, in view of the foregoing, the Court is constrained by the evidence to and does deny this claim.

Claim disallowed.

OPINION ISSUED OCTOBER 10, 2002

ROY L. HOLSTEIN and SHEILA HOLSTEIN
VS.
DIVISION OF HIGHWAYS

(CC-01-160)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to their 1993 Volvo Station-Wagon which occurred when claimant Sheila Holstein was operating their vehicle on Route 114 in Pinch, Kanawha County, and the vehicle struck a large hole in the road. This portion of Route 114 is maintained at all times herein by respondent in Kanawha County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on April 4, 2001, at approximately 4:45 p.m. The claimant Sheila Holstein was driving a 1993 Volvo Station-Wagon northbound on Route 114, also called Indian Creek Road. She was on her way home with approximately 350 pounds of groceries in the car that she had just purchased for the local food pantry that several churches in the area support. The weather was cold and cloudy with a few snow flurries, however the road surface was not slick. Mrs. Holstein described the traffic as very heavy that day in both directions. She was traveling through a straight stretch near Seneca Hills Subdivision in Pinch, with another vehicle directly in front of her. Due to the vehicle being in front of her, she was unable to see the large hole in front of her in time enough to avoid striking it with her vehicle. Mrs. Holstein estimates that she was approximately fifteen feet from the hole before she saw it. Given such a short time to react, and the lack of an adequate berm to maneuver onto, she had no alternative but to drive into the hole. The impact was hard, but initially the claimants did not know the significance of the damage. Approximately four days later, Mrs. Holstein was driving the same vehicle when she was alerted by another motorist that she had a flat tire. Claimants went to have this tire replaced and at this time the mechanics discovered that there was additional damage. One tire was destroyed, the right front wheel was cracked and bent, and the right rear wheel was bent. The total cost of the replacements and repairs for this damage was $965.17. However, claimants had comprehensive insurance coverage that covered this loss with a deductible of $250.00. Therefore, claimants are limited to a recovery in the amount of their deductible.

Claimants contend that respondent knew or should have known of such a large hole in the road on Route 114 and that it should have taken adequate measures to repair this hole.

Mrs. Holstein testified that Route 114 at this location is a two-lane, blacktop road with double yellow lines and white lines on the edges. She also testified that she was traveling the speed limit of forty miles-per-hour. According to Mrs. Holstein, there are numerous holes in the road along this portion of Route 114. She described this hole as being between one and a half to two feet from the white edge line within the lane of travel. Although she could not state how deep it was, she did state that it was at least one foot wide. Mrs. Holstein also stated that at this location there is a ditch and a rock cliff on the right side of the road and on the left side there is a steep drop off over a hill.

The law is well established in this State that the respondent is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va. 1947). To hold respondent liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or

constructive notice of the road defect at issue and a reasonable amount of time to make adequate repairs. *Pritt v. Dept. of Highways*, 16 Ct.Cl. (1985).

In the present claim, claimants established by a preponderance of the evidence that the respondent had at least constructive, if not actual, notice of this hole. The size of this hole, its location into the travel portion of the road, and the fact that this incident occurred in April leads the Court to conclude that the hole had been in existence for a long enough period of time that adequate repairs should have been made. Thus, the Court finds that respondent was negligent in this claim.

Accordingly, the Court makes an award to claimants in the amount of $250.00

Award of $250.00.

OPINION ISSUED OCTOBER 10, 2002

ROBERT W. COLEMAN
VS.
DIVISION OF HIGHWAYS
(CC-01-163)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 1999 Ford Taurus which occurred when he was operating his vehicle on County Route 20 in Kanawha County and his vehicle struck a large hole in the road. Respondent was responsible at all times for the maintenance of County Route 20. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on April 15, 2001, at 10:00 a.m. Claimant Robert Coleman was traveling eastbound on County Route 20, also known as Kanawha Forest Road. The weather was clear and the road surface was in good condition. Mr. Coleman was one and four tenths of a mile east of Connell Road proceeding to Kanawha Forest. He had just driven out of a curve when, suddenly and without warning, his vehicle struck a large hole on the right side of his lane. It was a hard impact which jolted the claimant and immediately burst his front passenger side tire. Mr. Coleman testified that the hole was five feet long, three feet wide, and approximately eight inches deep. It was located within the travel portion of the road and extended to the very edge of the road. He also testified that County Route 20 at this location is a narrow, two-lane road. Although the traffic was very light at this time, he did approach an oncoming vehicle near the location of this incident. He stated that he travels this road once or twice a year, but that he had not done so in the past year prior to this incident. He also stated that he did not see the hole prior to the impact and that it was full of water which made it more difficult for him to notice. As a result of this incident, claimant had to purchase two new passenger side tires and rims. The vehicle also had to have a four wheel alignment. The total cost of these repairs was $857.70. However, claimant had comprehensive insurance coverage that covered these expenses so he may only recover $200.00 which is the deductible amount of his insurance policy.

Claimant contends that respondent knew or should have known of such a large hole in the road and that it should have taken adequate measures to correct it. Its failure to do so was the proximate cause of claimant's damages. Claimant introduced photographs at the hearing of this matter demonstrating that this hole was large in length and width, and it was significantly deep. Some of the photographs depicted the hole extending well into the travel portion of the road. Furthermore, the photographs, as well as Mr. Coleman's testimony, indicate that this hole was nearly full of water, which could make it difficult for drivers of vehicles to observe the size and significance of this hole until right upon it.

It is respondent's position that it was not aware of the hole until after this incident and that it was not negligent in its maintenance of County Route 20.

Chet Burgess testified on behalf of respondent. Mr. Burgess testified that he is the maintenance supervisor for respondent at the St. Albans Headquarters, in Kanawha County. He is responsible for the maintenance of County Route 20 including the location of this incident. He stated that he is familiar with the portion of road at issue. Mr. Burgess described County Route 20 as a secondary, two-lane, blacktop highway with a center line but no edge lines. The road is eighteen feet wide with each lane being approximately nine feet wide. Mr. Burgess testified that he did not have prior knowledge of this hole. He also stated that his office receives and records public complaints regarding County Route 20. He searched the records and found no complaints regarding a hole at or near the location of this incident. In addition to responding to public complaints, he stated that normal routine maintenance for County Route 20 consists of one inspection every month or two. Finally, Mr. Burgess testified that this hole appeared to be a fairly recent hole that probably developed during the winter months prior to this incident.

The law is well established in this State that respondent is neither an insurer nor a guarantor of the safety of motorists on its roads. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va. 1947). To hold respondent liable, claimant must prove by a preponderance of the evidence that the respondent had actual or constructive notice of the defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the present claim, the size of the hole and the fact that it extended well into the travel portion of the road leads the Court to conclude that it had been in existence for a long enough period of time for respondent to have been aware of its existence and to have made adequate repairs. Furthermore, this incident occurred in the middle of April. Even if the hole developed during the winter, respondent had adequate time to notice it and make the necessary repairs. Thus, the Court finds that respondent was negligent in the maintenance of County Route 20 at this location and that this negligence was the proximate cause of the claimant's damages.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $200.00.

Award of $200.00.

OPINION ISSUED OCTOBER 10, 2002

TRANSAM TRUCKING, INC.
VS.
DIVISION OF HIGHWAYS

(CC-01-140)

Claimant corporation made no appearance.
Andrew F. Tarr and Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover for damages to one of its vehicles when it was being driven on I-64 through the City of Charleston and a light fell onto the windshield of the vehicle causing damage thereto. Claimant is an out-of-state corporation and it chose not to appear at the hearing of this claim after having received due notice. Due to the unusual facts and circumstances in this claim which would generally be the subject of a stipulated claim by respondent, the Court agreed to hear testimony from respondent to understand better what had happened during the incident.

Respondent's witness in this claim was Stephen W. Knight, the expressway maintenance supervisor for I-64 in the Charleston area. He explained to the Court that on the date of the damages to claimant's vehicle, November 14, 2001, there was damage to an overhead light which was part of an interstate sign. Apparently, some vehicle other than claimant's vehicle had clipped the arm of one of the lights beneath the sign and broke it off resulting in the precarious situation of one light dangling in the air by its wire. It was this light that fell onto claimant's vehicle causing damage to the windshield and the cab. Respondent received notice of the condition of the light when the Charleston Police Department advised Metro which in turn contacted respondent's headquarters. Mr. Knight and another employee responded to the scene as soon as respondent received notice of a problem. Mr. Knight is of the opinion that an oversized vehicle had struck the arm on the light causing the damage to it. He also stated that he was at the scene when claimant's vehicle was hit by the light that fell from the interstate sign; that he observed the damage to claimant's vehicle; and that he and his employee picked up the light that had fallen.

The Court has determined that the testimony from Mr. Knight establishes that respondent was not negligent on the date of the incident herein. Indeed, respondent's employees responded in a timely manner, but they were unable to prevent the circumstances which caused the damages to claimant's vehicle. This was an unusual situation for which respondent is not responsible.

In accordance with the finding of facts as stated herein above, the Court must deny this claim.

Claim disallowed.

OPINION ISSUED OCTOBER 10, 2002

BRENDA K. MITCHELL
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-02-298)

William E. Kiger, Attorney at Law, for claimant.
Joy Bolling, 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 $3,000.00 for an item of personal property that was entrusted to respondent's employees when she was taken to the North Central Regional Jail, in Doddridge County, a facility of the respondent. At the time of claimant's release, she discovered her diamond ring was missing. Thus far, respondent's employees have been unable to produce claimant's personal property.

In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

The Court has taken the position in prior claims that a bailment situation has been created if property of an inmate which is taken from that inmate, remains in the custody of respondent, and is not produced for return to the inmate at a later date.

Accordingly, the Court makes an award to the claimant herein in the amount of $3,000.00.

Award of $3,000.00.

OPINION ISSUED OCTOBER 10, 2002

THOMAS . WYATT
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY

(CC-02-309)

Claimant appeared *pro se*.
Joy M. Bolling, 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 $475.00 for items of personal property that were entrusted to respondent's employees when he was taken to Southern Regional Jail, a facility of the respondent. At the time of claimant's release, he discovered various personal items were missing. Thus far, respondent's employees have been unable to produce claimant's personal property.

In its Answer, respondent admits the validity of the claim, but states that the amount of $450.00, rather than the amount claimed of $475.00, is fair and reasonable. Claimant is in agreement with the amount of $450.00. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

The Court has taken the position in prior claims that a bailment situation has been created if property of an inmate which is taken from that inmate, remains in the custody of respondent, and is not produced for return to the inmate at a later date.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $450.00.

Award of $450.00.

OPINION ISSUED OCTOBER 10, 2002

HOURLY COMPUTER SERVICES
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-00-191)

Larry G. Kopelman, Attorney at Law, for claimant.
Joy M. Bolling, Assistant Attorney General, for respondent.

GRITT, JUDGE:

Claimant, a computer vendor, brought this action to recover finance charges which it incurred during the completion of a contract entered into with respondent for computers, software, and installation of the computers. The finance charges, referred to as interest by claimant, are in the amount of $13,476.67, which represents the amount of this claim. The Court is of the opinion to deny this claim for the reasons set forth herein below. Further, respondent's motion to amend the style of the pleadings to substitute the State Auditor in the place of the named respondent is denied for the reason stated herein below.

On October 14, 1999, claimant and respondent entered into a contract for the purchase of 600 computers, including software and installation of the computers, for a purchase price of $739,750.00. The contract (designated as Purchase Order DHS 31227) provided for the completion of the contract within sixty (60) days with a completion date of December 15, 1999. The first set of 200 computers was delivered and installed in November 1999[1] with the second set of 200 computers being delivered in early December 1999 and the last set of 200 computers being delivered in late December 1999 or early January 2000. An invoice in the original amount of $739,750.00 that serves as the basis for claimant's claim herein was dated December 31, 1999, received by respondent on January 4, 2000, signed by respondent's representative as certification of the merchandise having been received on January 16, 2000, and paid by respondent on or about March 10, 2000, in the final agreed upon amount of $697,150.00. The amounts of $24,600.00 and $18,000.00 were deleted from the total of the original invoice for the reasons discussed below. During this time frame, a dispute arose between the parties as to the software required under the contract and the delivery schedule for the computers. The parties ultimately agreed to extend the installation of the software beyond the sixty (60) days provided for in the contract. The Court has not been provided the date the extension was granted. The parties also disagreed concerning the license for the software. Claimant originally began providing a software license with each computer, but respondent's representative requested one license for all the computers purchased by respondent. The respondent's insistence on one license for all the software to be installed pursuant

[1]After the hearing of this claim, claimant provided copies of Service Orders and an invoice dated November 29, 1999, in the amount of $244,200.00 to support testimony that the respondent had received an invoice for the first 200 computers, software, and installation. This invoice was not paid by respondent.

to the contract occurred after the delivery of first 400 of the computers, but claimant later agreed to provide the one license to end this dispute. The final area of dispute was over the price of the installation of the computers. Claimant delivered the last 200 computers, but many of these units were set up and installed by respondent's personnel. A reduction of $5,000.00 in the charge for the installation of the last installment of 200 computers was eventually agreed to by claimant due to the reduced number of units actually installed by claimant's personnel. However, a formal vendor's complaint was filed with the Department of Administration's Purchasing Division by respondent involving all of the issues mentioned above which was resolved by the parties through mediation.[2] The respondent's vendor's complaint was resolved with the respondent agreeing to pay to the claimant the sum of $697,150.00.[3] The claimant apparently purchased the computers and software sold to the respondent by using an existing line of credit previously obtained by the claimant from a lender of its choice. Claimant alleges that it was not paid for the computers in a timely manner by respondent resulting in unnecessary finance charges to it, and that it is entitled to reimbursement of the finance charges.

The parties have raised issues regarding (1) the payment of interest based on the provisions of a contract that is before the Court for interpretation, (2) the payment of pre-award and post-award interest on awards made by the Court, (3) the inclusion of finance charges incurred by a vendor as an element of its overhead expense as an element of damages to be considered by the Court in making an award, and (4) the applicability of WV Code §5A-3-54, generally referred to as the "Prompt Pay Act of 1990" to certain claims that may be brought before the Court. The Court will address each of the issues presented separately.

Contract Interest

WV Code §14-2-12, which sets forth the general powers of the Court of Claims, states specifically that ". . .in determining the amount of a claim, interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest." The Court notes that there was no provision in the contract between the parties herein that interest be paid to claimant and therefore the claimant cannot recover any interest as a part of its claim that is traditionally described as "contract interest." The specific statutory disallowance of traditional contract interest contained in WV Code §14-2-12 differs from the general rule in West Virginia found in WV Code §56-6-27 that states that "the jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and in all cases they shall find the aggregate of principal and interest due at the time of the trial" and that "judgment shall be entered for such aggregate with interest from the

[2]The documentation for the formal vendor's complaint was provided to the Court after the hearing by counsel for the respondent. This information was reviewed by the Court. The first date which indicates a dispute between claimant and respondent is that on an electronic message dated January 13, 2000. A meeting was held on February 8, 2000, to discuss several issues. While a formal vendor's complaint was made by the respondent, the only date evident regarding the filing of the complaint is March 7, 2000.

[3]The parties did not provide the Court with the date their dispute was mediated and resolved.

date of the verdict." See, *The First National Bank of Bluefield v. Clark, 191 W.Va. 623, 447 S.E.2d 558 (1994); Erikson Construction Co. v. Morey, 923 F.Supp.878 (1996);* and *Board of Education of McDowell County v. Zando, Martin & Milstead, 182 W.VA. 597, 390 S.E.2d 796 (1990).*

Pre-award and Post-award Interest

The disallowance of all interest but for the payment of interest specifically required by contract by the provisions of WV Code §14-2-12 is, in essence, a bar to the recovery of pre-award and post-award interest. The prohibition against paying pre-award and post-award interest on awards made by the Court contained in WV Code §14-2-12 also differs from the statutory requirements of WV Code §56-5-31 which mandates that "damages shall bear interest from the date of the right to bring the same shall have accrued, as determined by the court"and "that every judgment or decree for the payment of money entered by any court of this State shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not" at a rate of "ten dollars upon one hundred dollars per annum." See, *The First National Bank of Bluefield, supra; Erikson Construction Co., supra; and Board of Education of McDowell County, supra.;* and *Adams v. Nissan Motor Corp. in U.S.A., 182 W.Va. 234, 387 S.E.2d 288 (1989).* Traditionally, the denial of both pre-judgment and post-judgment interest violates the requirements of WV Code §56-6-31. *Rakes v. Ferguson, 147 W.Va.660, 130 S.E.2d 102 (1963).*

Interest as an Element of Overhead Expense

In its claim, the claimant is attempting to equate the finance charges that it incurred which are an element of its overheard expense, to the interest that may be paid to a vendor pursuant to the provisions of the "Prompt Pay Act of 1990." The "Prompt Pay Act" requires that for purchases of services or commodities the State Auditor shall issue a State check "in payment thereof within sixty days after a legitimate uncontested invoice is received by any of such agencies receiving the services or commodities. Any state check issued after sixty days shall include interest at the current rate ...." Claimant alleges that this provision of the "Prompt Pay Act" allows it to make a claim for interest in the amount of $13,476.67, which said amount is actually the amount of the finance charges incurred by the claimant in the satisfaction of its contract with the respondent and not the amount of interest as contemplated by the Act or calculated according to the provisions of the Act.

It is a mistake in fact and law to equate the payment of finance charges incurred by a vendor as an element of its overhead expense while engaged in the general pursuit of a business enterprise and the statutory interest that is required by the provisions of the "Prompt Pay Act." The Court can find no statutory authority or case law to support the claimant's contention that it is entitled to recover the finance charges that it incurred while doing business with the respondent. Without statutory or case law authority to include finance charges incurred as an element of overhead expense by a vendor doing business with a State agency in a claim against the agency for breach of contract as an element of the vendor's damages, the Court declines to chart new territory in that regard.

Prompt Pay Act of 1990

The respondent contends that the "Prompt Pay Act " does not apply to this claim for the reasons that no "legitimate uncontested invoice" had been received by the respondent for payment and, therefore, there is no basis for the allegation that the invoice was not timely paid. The respondent also asserts the position that this Court lacks subject matter jurisdiction in this claim on the basis that claimant has a remedy in the regular courts of this State if it is proceeding under the "Prompt Pay Act." The

respondent contends that an action such as mandamus may be brought in the courts of the State against the respondent concerning the interest that may be due the claimant pursuant to the "Prompt Pay Act."

The issue of jurisdiction of a court with respect to any action before it may be raised at any time during the proceedings, even by the court itself. This Court is a court of limited jurisdiction with only the subject matter jurisdiction being specifically granted it by the Legislature in the creation of the Court of Claims. WV Code §14-2-14(5) establishes this Court's limited jurisdiction and provides that the jurisdiction of the Court shall not extend to any claim ". . .with respect to which a proceeding may be maintained against the state, by or on behalf of the claimant in the courts of the state."

In reviewing the language of the "Prompt Pay Act" the Court notes certain deficiencies in the Act including, but not limited to, the fact that there is (1) no mention in the statute for a remedy if a vendor disagrees with the State Auditor in its application of the interest provisions of the Act, (2) no time frame or a method for resolving a disputed invoice, and (3) no time limitation for making a claim for interest claimed to be due on the part of a vendor.[4] Because this Court is a court of limited jurisdiction and even though the "Prompt Pay Act" as currently presented may be deficient in many respects, the Court cannot conclude that it is without subject matter jurisdiction to make an award of interest that may be otherwise due a vendor pursuant to the Act.[5] To the extent that this Court impliedly assumed jurisdiction to hear claims for interest due a vendor pursuant to the provisions of the immediate predecessor to the current "Prompt Pay Act" in *R. L. Banks & Associates, Inc. vs. Public Service Commission, 17 Ct.Cl. 159 (1988),* said implication is hereby expressly denied.

The respondent also asserts that the claimant failed to pursue its administrative remedy in its claim for interest under the "Prompt Pay Act." The Court cannot consider the respondent's argument inasmuch as the provisions of WV Code §5A-3-54 do not contain an administrative process for reviewing a claim for interest by a vendor and because no such procedural rules have been promulgated by the State

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[4]The provisions of WV Code§5A-3-54(d) states that. . . the state agency initially receiving a legitimate uncontested invoice shall process such invoice for payment within ten days from its receipt: Provided, That in the case of the department of health and human resources, the division of highways and the public employees insurance agency, such invoices shall be processed within fifteen days of their receipt. In spite of this requirement, the respondent has not provided the Court with the precise date the claimant's invoice was received and submitted for payment.

[5]The State Auditor is encouraged by the Court to develop, implement and distribute to all State agencies and properly registered and qualified vendors a uniform written policy regarding the resolution of contested invoices submitted by vendors and when interest may be due a vendor pursuant to the Act. The "policy" supplied to the Court as Attachment B to the respondent's Supplement to Previously Filed Motion To Dismiss is inadequate to accomplish the purpose of the Act. The failure to develop and implement such a policy frustrates the very purpose for which the Act was adopted, that is, to encourage small West Virginia business owners to do business with State agencies.

Auditor pursuant to the provisions of WV Code §29A-1-1, *et.seq.*, the State Administrative Procedures Act.

The Court is of the opinion to and does hereby deny the respondent's motion to amend the style of the pleadings to substitute the State Auditor in the place of the named respondent inasmuch as the claim presented by the claimant is a claim for interest as an element of its overhead expense growing out of the contract dispute with the respondent.

Therefore, for all of the reasons stated above, the Court is of the opinion to and does hereby decline to recommend the payment of this claim.

Claim disallowed.

OPINION ISSUED NOVEMBER 1, 2002

MARGARET LOUISE WALSH-ELLISON
VS.
DIVISION OF HIGHWAYS
(CC-02-062)

Claimant appeared *pro se.*
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to her Ford Contour which occurred when she was traveling on Route 19/21 in Raleigh County and her vehicle struck a large hole on the edge of the road. This portion of Route 19/21 is maintained by the respondent in Raleigh County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on November 17, 2001, at approximately 8:00 a.m. The weather was clear and the road surface was dry. Ms. Ellison was traveling Route 19/21 on her way to see her mother in Oak Hill. At this location, Route 19/21 is a two-lane road with a double yellow line and white lines on the edges. Claimant was traveling approximately thirty to thirty-five miles per hour as she was approaching a red light. At the location of this incident, there is a left turning lane for traffic to turn onto South Fayette Street. Prior to the designated location for the left turn, there is a restricted lane of travel with yellow lines. The claimant testified that there was a truck that drove into the turning lane too soon and was within the restricted lane. The truck was very close to claimant's vehicle. In order to avoid contact, claimant drove her vehicle slightly to the left where it struck a large hole on the edge of the road. The impact destroyed the two passenger side tires and wheels. The hole was approximately eight and a quarter inches deep and extended from the edge of the road and covered a small portion of the white edge line. Claimant described the hole as very jagged and sharp around the edges. She testified that she knew the hole was present and that it had been there since June or July of 2001. Further, she had called respondent's office to report this hole as well as other problems along the same stretch of road in approximately June of 2001 prior to the incident. Ms. Ellison submitted a repair estimate for the two wheels in the amount of $132.64. and a repair estimate in the amount of $105.89 for the two tires.

Claimant asserts that respondent was negligent in its maintenance of Route 19/21 at this location and that its negligence created a hazardous condition for the traveling public.

Respondent contends that it did not have a reasonable amount of time to repair this location following the heavy rain damage to the highways in Raleigh County and that under the circumstances it adequately maintained route 19/21.

Michael B. Allen, employed by respondent in Raleigh County as a foreman, testified that his responsibilities include maintaining and monitoring the roads under his responsibility. This portion of Route 19/21 is within his responsibility and he is familiar with the location of this incident. He stated that Route 19/21 is a high priority road and is heavily traveled. Mr. Allen was aware that the shoulder of the road was in poor condition at this location due to the heavy rains that occurred during the prior summer months. He testified that there were higher priority routes and locations to repair before reaching this particular hole on the edge of the road.

It is a well established principle of law in this State that respondent is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va. 1947). For the respondent to be held liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to make adequate repairs. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16Ct. Cl. 8 (1985).

In this claim, the evidence established that this portion of Route 19/ 21 presented a hazard to the traveling public. The size of this hole, its location in the road, and the fact that respondent knew that it existed leads the Court to conclude that respondent had notice of this hazardous condition and an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent in this claim and claimant may make a recovery for her damages.

Accordingly, the Court makes an award to claimant in the amount of $238.53. Award of $238.53.

OPINION ISSUED NOVEMBER 15, 2002

LARRY D. WHITEHAIR, SHARON WHITEHAIR,
DALE WHITEHAIR, and AMY WHITEHAIR
VS.
DIVISION OF HIGHWAYS
(CC-89-433)

Mark R. Staun and Douglas B. Hunt, Attorneys at Law, for claimants.
Andrew F. Tarr, Attorney at Law, for respondent.

GRITT, JUDGE:

Claimants, Larry D. Whitehair, Sharon Whitehair, Dale Whitehair, and Amy Whitehair, brought this action for One Million Dollars against the respondent for personal injuries sustained as a result of an automobile accident that occurred on

November 10, 1987, on the northbound Little Sandy Bridge while they were traveling north on I-79 in Kanawha County. The hearing of this matter was held September 19 through 21, 2001, and April 2 and 3, 2002. Prior to the beginning of the hearing of the claim, the Court visited the scene of the incident. The Court is of the opinion to deny this claim for the reasons set forth more fully below.

The incident at issue in this claim occurred on the northbound Little Sandy Bridge, which bridge is located on I-79 near Elkview approximately ten miles north of Charleston in Kanawha County. The Little Sandy Bridge consists of two bridges that cross over Little Sandy Road and Creek. One bridge carries northbound traffic on I-79, while the other bridge carries southbound traffic. A gap of several feet divides the bridges from one another. Each bridge has a concrete deck and is over one thousand feet long. Each bridge has two traffic lanes and the bridges are supported by pillars. Both bridges contain 32-inch high concrete barriers or parapet walls that run along the sides of each bridge. The bridges are curved, with the traffic facing a curve to the left on the northbound bridge. There is a steadily increasing height between the bridges and the ground below the bridges from both ends of each bridge to the center. Guardrail is located at both the northern and southern ends of each bridge. There were striped object markers in place at each end of each bridge.[1] These markers had been placed at these locations to warn the traveling public that they were entering a bridge. It is not certain whether or not that there was a "Bridge Freezes Before Roadway" sign in place for northbound traffic to observe at the time of this incident. There are grassy median strips that extend both north and south from both ends of the Little Sandy Bridges. The southern grassy median strip extends for 2.4 miles south of the bridges where it ends at a concrete median strip.

The incident giving rise to this claim occurred on November 10, 1987. The Whitehair family went to the Charleston Town Center Mall to do some early Christmas shopping and to have dinner. They left the mall at closing time which was approximately 9:00 p.m. Larry Whitehair, husband of Sharon Whitehair and father of claimants Amy and Dale Whitehair, was driving his1985 Buick LeSabre. Claimant Sharon Whitehair was in the front passenger seat while Dale Whitehair was in the back seat behind his father and Amy Whitehair was in the back seat behind her mother. When the claimants left Charleston Town Center Mall, there was some form of precipitation falling. The testimony regarding exactly what form of precipitation was actually falling is not entirely clear, but the majority of witnesses testified that it was raining lightly. Each of the claimants testified that Larry Whitehair did not have any trouble operating his vehicle between Charleston and the Little Sandy Bridges. There is nothing in the record that I-79 presented a hazard to the claimants until they reached the northbound Little Sandy Bridge. However, the closer the claimants got to their home in Elkview, the more the weather deteriorated. Sharon Whitehair testified that their vehicle was either on or very near the entrance to the northbound Little Sandy Bridge when she noticed that there were vehicles ahead of their vehicle on the bridge which appeared to be sliding. The claimants testified that there were

[1]Charles Raymond Lewis, II, the Planning and Research Engineer with respondent's Traffic Engineering Division, testified there were striped object markers in place at each end of each bridge since 1985.

two or three vehicles spinning out of control on the bridge ahead of their vehicle. All of the vehicles spinning out of control were in the right lane. Larry Whitehair was able to maneuver his vehicle around the first one or two vehicles. However, either the second or third vehicle slid or otherwise drifted from the right lane into the left lane directly into the path of the claimants' vehicle, and according to the testimony of claimant Larry Whitehair, that vehicle "clipped" claimants' vehicle. The claimants' vehicle continued to slide and came to rest at an angle against the concrete parapet wall on the left side of the northbound passing lane of the bridge. The rear of their vehicle was protruding into the passing lane. The resting-place of the claimants' vehicle was close to the northern end of the bridge. The Whitehair family suffered injuries as a result of the impact with the parapet wall. Larry Whitehair stated that he struck the steering wheel with sufficient force to break it. Sharon Whitehair testified that she struck the dashboard injuring her head, shoulder, and biting into her tongue. Dale Whitehair testified that he hit the back of the front seat hard enough to break it. Amy Whitehair also struck the back of the front seat causing her to have a bloody nose.

After coming to a complete stop, Dale Whitehair testified that he recalls his parents asking if everyone was all right. Larry Whitehair tried to restart his vehicle a few times but it was too badly damaged to start. The testimony is unclear as to which parent made the statement, but one of them stated that they could not stay in the car. Regardless, the entire family immediately exited the vehicle. Amy Whitehair exited the vehicle through the right rear door. At approximately the same time, Sharon Whitehair was exiting the vehicle through the right front door. Larry Whitehair could not exit through the driver side door because it was jammed against the parapet wall. Therefore, he had to crawl over to the right front door to exit the vehicle. Dale Whitehair was the last person to exit the vehicle because his feet got tangled up with Amy Whitehair's purse straps when he was tossed around in the back seat during the accident. Once he got his feet free from the purse straps, he was able to exit the vehicle through the left rear door. Each claimant testified that he or she left the vehicle out of fear that another car was going to slam into their vehicle on the icy bridge. They all stated that their intentions as a group were to reach an area of safety. The claimants, except for Amy Whitehair, testified that the bridge surface was very slick and that they had a difficult time standing up without holding on to something. According to the claimants, almost as soon as they exited the vehicle they observed another vehicle coming directly towards them. They testified that they were trying to climb over the parapet wall into the what they believed to be the southbound lanes of I-79 to place the wall between themselves and other northbound vehicles. Each claimant testified that he or she believed that each was simply stepping into the southbound lane.[2] Tragically, this was not another lane but the bridge parapet wall

[2]Although the statements herein reflect the testimony from each of the claimants at the hearing of this claim, the Court notes that interrogatories sworn to by claimants Sharon Whitehair, Dale Whitehair, and Amy Whitehair filed in an action then pending in the Kanawha County Circuit Court against Larry Whitehair stated as follows: "...the Defendant [Larry Whitehair] negligently advised and encouraged the Plaintiffs to jump over the bridge to avoid oncoming traffic."

on the other side of which was a sheer drop to the ground below. Three of the four claimants testified that they believed they were not on a bridge at the time of the accident. Each of the claimants fell approximately 80 feet to the ground. Miraculously, they all survived this treacherous fall, but each family member suffered serious injuries.

Claimants contend respondent knew or should have known that the northbound Little Sandy Bridge presented an icy, hazardous condition to the traveling public; that respondent had a number of pre-treatment options which could have prevented or alleviated such icing conditions on the bridge, but failed to utilize any of these options; and that respondent failed to provide proper warning to the traveling public of a known hazardous condition. It is claimants' contention that respondent's failure to respond properly to this hazard constituted negligence and that this negligence was the proximate cause of the claimants' injuries sustained in their fall from the bridge.

Respondent asserts that it did not have adequate notice that there was ice forming on the northbound Little Sandy Bridge nor did it have a reasonable amount of time to apply remedial materials. Respondent also asserts that pretreatment options were not the proper standard to apply under these circumstances and pretreatment options would have been ineffective to prevent icing on the northbound Little Sandy Bridge. Further, respondent asserts that flashing warning signs and /or ice sensor devices would not have been helpful in this claim.

Patrick Rodgers, the operator of a 1985 Subaru hatchback, arrived on the scene after the claimants' vehicle came to rest. He stated that he had driven over the Little Sandy Bridges a few times prior to this incident. Mr. Rodgers had three passengers in his vehicle. Jeffrey M. Miller was the front seat passenger while Kristina D. Cyrus and Sally A. Jenkins were seated in the rear. Kristina Cyrus has since married and now uses her married name, Kristina Skross, by which she will be identified throughout this opinion. Mr. Rodgers and his passengers were students at West Virginia Wesleyan College and on the date of this incident they had also been shopping at the Charleston Town Center Mall. They were on their way back to Buckhannon when this incident occurred. Mr. Rodgers stated that it was only misting rain when they left the mall, but the further north he drove the heavier the rain became. He stated that it was approximately a little less than ten miles prior to the bridge when the precipitation changed from rain to a mixture of rain and snow.

Mr. Rodgers testified that he did not have any problems operating his vehicle between Charleston and the northbound Little Sandy Bridge. This was corroborated by Kristina Skross who also stated that Mr. Rodgers had no trouble operating the vehicle until he arrived at the bridge. She further testified that in her opinion he was driving safely under the circumstances then and there existing. Mrs. Skross stated that she knew that they were on a bridge when this incident occurred. Both Mr. Rodgers and Mrs. Skross indicated that it was not until he was very close to the bridge that he started slowing down due to poor road conditions. At this point, he stated that it was very dark outside and visibility was poor. His vehicle was in the passing lane as he drove onto the northbound Little Sandy Bridge. As soon as he drove onto the bridge he immediately knew that it was covered with ice. The only vehicle that he observed on the bridge at that moment was the claimants' vehicle which was resting against the left side of the bridge at the point on the bridge where the northbound lanes turn to the left. Claimants' vehicle was resting against the wall near the north end of the bridge.

Upon observing the claimants' vehicle, Patrick Rodgers proceeded to try to drive into the right lane when his vehicle spun around on the ice and did at least one 360-degree turn. Mr. Rodgers initially brought his vehicle to rest with the rear of his vehicle facing the right side of the claimants' vehicle. He testified that his vehicle initially stopped approximately one or two feet away from the claimants' vehicle. According to Mr. Rodgers and Mrs. Skross, there was no collision between the Rodgers' vehicle and the claimants' vehicle. As soon as he brought his vehicle to a stop, he looked back and saw a Buick traveling directly towards his vehicle. The Buick, driven by Ramona Gunnoe, slammed into the right front of Mr. Rodgers' vehicle. The impact of this collision spun his vehicle around such that the left front portion of his car came to rest against the right front fender of the Whitehair vehicle. Ms. Gunnoe's vehicle came to rest in the grassy median approximately thirty-five yards north of the location of the initial impact. Mr. Rodgers' stated that all of the damage to his Subaru was caused by Ms. Gunnoe's vehicle. After the impact from Ms. Gunnoe's vehicle, the three passengers in Mr. Rodgers' vehicle got out of the vehicle and stepped onto the bridge while Mr. Rodgers stayed in the vehicle to try to contact the State police. Mr. Rodgers saw the first police car arrive on the scene. The police officer was traveling northbound on I-79, and when he reached the bridge, his vehicle slid out of control and almost struck the Rodgers' vehicle. Once Mr. Rodgers was finally able to get out of his vehicle, he noticed that the bridge was a "solid sheet of ice." He described it as being half an inch thick. Patrick Rodgers remembers looking up and seeing his passengers walk north along the concrete wall to the grassy median area off the bridge on the left side of I-79. According to Mr. Rodgers, the distance from the accident scene to the end of the bridge appeared to be around 35 to 50 yards. Mr. Rodgers testified that he did not see the claimants during this entire sequence of events, including up to and after his vehicle was struck by the Gunnoe vehicle.

Mrs. Skross testified that she and Sally Jenkins exited Patrick Rodgers' vehicle approximately one or two minutes after the collision. Once out of the vehicle, she and Sally Jenkins began walking towards the end of the bridge along the left side of the bridge next to the parapet wall when she saw three people sitting on the wall. She stated that one person appeared to be standing right behind them. According to her observations, it appeared that there were two children and their mother sitting on the wall and the father was standing behind them. Suddenly, she observed the four people jump off the bridge. The three people sitting on the wall jumped first. The woman was the last one sitting on the wall to jump followed by the father, who was the last one to jump. Mrs. Skross testified that she does not believe that anyone else saw them jump. She recalls looking over the side of the bridge where they had jumped to determine whether or not she should jump. However, Ms. Jenkins warned her that she could not see the ground or what was below and that she should not jump. Mrs. Skross also stated that she could see across to the southbound bridge as well as observing steam rising up from underneath the southbound bridge. Once she decided not to jump, Mrs. Skross and Ms. Jenkins ran to the end of the northbound bridge and stopped on the left side of the interstate in the grassy median. Mrs. Skross estimated that it took a matter of seconds to reach the end of the bridge from the location where she saw the claimants jump. She also added that it was not slippery at the location on the bridge where they ran off of it. Mrs. Skross made a sworn statement to the investigating officer, State Trooper K.T. Quinlan, on the night of this incident, which statement was corroborated by her testimony regarding her

observations of the claimants jumping off the northbound Little Sandy Bridge. Also in this statement, she identified the wrecked vehicle as a white Buick and stated that she saw people getting out of the Buick while the vehicle she was in was still spinning.

The first police officers arrived at the scene of the accident at approximately 9:36 p.m. Deputy Jesse Johnson of the Kanawha County Sheriff's Office participated in the investigation of the accident. Approximately fifteen to twenty minutes prior to the accident, Deputy Johnson had driven across the southbound Little Sandy Bridge. He was traveling from the Elkview detachment to Charleston. He testified that the roadway had been damp all evening, but he stated that there had not been any ice on the roads. He also testified that when he drove over the southbound Little Sandy Bridge prior to the accident, the conditions on the bridge were cool and damp and he had no problem traveling across the bridge at that time. Deputy Johnson got to the scene of the accident at the same time as Officer K. T. Quinlan of the West Virginia State Police. By the time Deputy Johnson and Officer Quinlan arrived at the scene of the incident at approximately 9:36 p.m., the conditions on the northbound Little Sandy Bridge had seriously deteriorated. Both officers stated that there was black ice on the bridge.

Lewis Adkins, a former employee with respondent, was a truck driver for respondent at the time of this incident. He has since retired. One of Mr. Adkins' responsibilities while employed with the respondent was to drive a salt truck to treat roads during the winter when needed. During the winter of 1987 and 1988, Mr. Adkins was responsible for treating I-79 from the Westmoreland Exit in Charleston to the Elkview Exit in Elkview. This area includes the Little Sandy Bridges. He had been responsible for treating this portion of highway for six or seven years prior to this incident. He was familiar with the Little Sandy Bridges. Although Mr. Adkins was somewhat confused about the hours that he worked that evening, first explaining that he was on the midnight shift after the claimants' accident, the work logs from respondent established that he actually was working the evening shift, and thus his testimony was relevant for the time period in question herein. He testified that during his first trip across the northbound Little Sandy Bridge that night he noticed that the front tires on his truck slid a little on the bridge when he was applying salt to it. According to Mr. Adkins, he did not apply very much salt on the bridge on his first trip across it. Mr. Adkins testified that he informed his supervisor that it was not enough salt and that he needed to put more down based upon how slick this bridge was. Mr. Adkins testified that he was told not to place a heavy layer of salt on the bridge by his supervisor. Mr. Adkins' supervisor is deceased and was not available to testify. After leaving the bridge, Mr. Adkins traveled north to finish treating I-79 up to the Elkview exit. It was approximately twenty or thirty minutes after he left the northbound Little Sandy Bridge that he heard about the incident herein. Mr. Adkins then proceeded southbound to the Little Sandy Bridges where he observed the emergency vehicles and personnel on both of the I-79 bridges. Once he observed the accidents that had occurred, Mr. Adkins went back to the respondent's garage where he got a larger load of salt. He drove back to the northbound Little Sandy Bridge and placed a thicker layer of salt on this bridge as well as the other bridges on his route.

Hugh McLean, a highway engineer currently employed with a private engineering firm, testified as claimant's expert witness. Mr. McLean visited the Little Sandy Bridges, took measurements, reviewed several depositions in this claim, and

reviewed construction drawings and records of the Little Sandy Bridges in forming his expert opinions. It is based upon this information and his knowledge in the field of highway engineering that he is of the opinion that the icy conditions on the northbound Little Sandy Bridge were the cause of the automobile accidents which occurred. Further, these icy conditions could have been prevented by the respondent and the failure to do so constitutes negligence on respondent's part. Mr. McLean testified as to how icy conditions lead to the lack of a friction coefficient which can cause accidents. A friction coefficient is the friction that develops between two surfaces. In this particular claim, it is the friction between vehicular tires and the bridge deck. The friction coefficient allows the car to move, steer, and turn. If there is not an adequate friction coefficient, then the tires are not going to maintain their grip on the road and the vehicle will not respond as the driver directs. Therefore, ice can severely degradate the friction coefficient. He concluded that based upon numerous eye-witnesses testimony, including Officer Quinlan and Deputy Johnson, the northbound Little Sandy Bridge did have ice on it the night of this incident.

Mr. McLean is of the professional opinion that a system of flashing lights would have been helpful, especially to augment static warning signs which drivers tend to ignore after a period of time. Mr. McLean stated that the flashing lights would increase the drivers' attention to the fact that there was a hazard ahead. The second warning device that he asserts could have been used is a detection device attached to the bridge or installed in it that warns the respondent that conditions are conducive for icing to develop. Furthermore, Mr. McLean indicated that these various warning systems have been available as far back as the early 1960's and that they have been reasonably reliable. Mr. McLean is also of the opinion that the northbound Little Sandy Bridge should have been pre-treated to provide more protection for the traveling public. He described pre-treating as applying a de-icing solution or agent on the bridge surface in advance of a storm or in anticipation of an icing event. According to Mr. McLean, the de-icing treatment will remain effective, depending upon the amount of traffic and the solution used, from a few days up to two weeks. Mr. McLean testified that this de-icing treatment has been available and used successfully since the early 1970's. It is his expert opinion these measures, if taken on the northbound Little Sandy Bridge, may have prevented the claimants' accident.

Charles Raymond Lewis, II, Planning and Research Engineer of the Traffic Engineering Division for respondent testified as an expert witness on behalf of respondent. His general responsibilities with respondent include processing accident studies and traffic safety studies. He serves in the highway safety improvement program and also works in training. He testified that the Division of Traffic Engineering works in five areas including planning, design, construction, maintenance, and operation of the highways. Mr. Lewis is familiar with the Little Sandy Bridges. He has driven over them and stopped to look at the bridges in his job capacity a total of at least a dozen times. In conducting his investigation for this claim, he visited the site three times, reviewed records, interpreted plans, and compiled information regarding the bridges. In preparation for testifying, he also reviewed the report of the claimants' expert witness, as well as the depositions and prior testimony. After reviewing all of this information, Mr. Lewis concluded that respondent had not failed adequately to maintain the northbound Little Sandy Bridge and was not negligent in this claim for the following reasons. Mr. Lewis testified that the standard procedures for icy bridge conditions such as this are for respondent to

patrol the bridge periodically when it appears necessary, to have a salt truck on standby so as to spot treat, and to rely on law-enforcement to report any deteriorating conditions. The salt trucks are equipped with spreader boxes as well as salt and abrasives to spot treat the needed areas. Mr. Lewis testified that regardless of whether or not there was a "Bridge Freezes Before Roadway Sign" present at the time of the claimants' incident, it would probably not have made any difference in the outcome. Such a static warning sign is effective for non-local drivers who would tend to pay more attention to the sign due to a lack of familiarity with the highway. However, local drivers who drive the same section of road will already be aware of the condition and will tend not to rely upon signage for the highway. The local driver may not even notice the existence of the signs after passing the signs so often. Given the fact that both Larry and Sharon Whitehair had driven across the Little Sandy Bridges on a daily basis for several years, Mr. Lewis concluded that if there had been a sign present it would not have made a difference.

Mr. Lewis also addressed the issue of pre-treatment, which he described as anticipating a storm and then treating the road surface ahead of the storm usually with either sodium chloride or calcium chloride. It is his opinion that pre-treatment is not a viable option especially on an interstate where there is a heavier volume of traffic that would remove the substance. Furthermore, these pre-treatment substances are water soluble and even a moderate amount of rain would have washed the materials off the road surface quickly. Mr. Lewis testified that given the rain immediately prior to the accident, pre-treating the northbound Little Sandy Bridge would not have been helpful.

The next issue Mr. Lewis addressed was whether or not an ice detection or sensor device would have been helpful in preventing this incident. According to Mr. Lewis, ice detectors or sensors were available in 1987 and there were two such devices installed by respondent prior to 1987. There was one such device at the St. Albans/Nitro Bridge on I-64 and one on the Fort Hill Bridge. He testified that neither one of these devices was reliable. The sensors would either not detect the icy conditions and expose drivers to a high risk in that the driver would rely on the sensors to their own detriment or the sensors would give a false alarm and detect icy conditions when such a condition did not exist. Finally, Mr. Lewis also disagreed with the claimants' expert that respondent should have had in place a sensor device in conjunction with flashing warning lights. Again, he testified that such a device was unreliable based upon the same opinion given above, and since the sensors were unreliable, these devices should not have been used. Mr. Lewis concluded that in his opinion respondent took all maintenance precautions that it could possibly do on the night of this incident which was to rely on law enforcement and to spot treat the northbound Little Sandy Bridge.

It is a well established principle of law that the State of West Virginia is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, the claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl.8 (1985). Respondent cannot be expected or required to keep its highways absolutely free of ice and snow at all times, and the presence of an isolated patch on a highway during winter months is normally insufficient to

charge respondent with negligence. *McDonald v. Dept. of Highways*, 13 Ct. Cl. (1979). However, the respondent does owe a duty to travelers to exercise reasonable care and diligence in the maintenance of highways. *Lewis v. Dept. of Highways*, Ct. Cl. 136 (1986).

In the instant claim, the Court is of the opinion that respondent acted reasonably under the circumstances then and there existing. Respondent did not have adequate notice of the icy conditions on the northbound Little Sandy Bridge, and it did not have a reasonable amount of time to take corrective actions. Flashing warning signs would not have been effective in this claim such that the placement of such signs in all probability would not have prevented the accidents which occurred on the northbound Little Sandy Bridge that night. The sensor and detection type devices available to respondent at that time were not proven to be reliable. In addition, the pre-treatment options recommended by claimants' expert would not have been helpful in this claim because the traffic and rain would have removed it before such substances would have been effective. According to respondent's expert, respondent met the appropriate standard of care which was to spot treat icy areas on the roads and bridges. Mr. Adkins testified that he had just salted the northbound Little Sandy Bridge approximately fifteen minutes prior to this incident. Although Mr. Adkins may have wanted to apply more salt at the time, there was no evidence presented that the application of more salt would have or could have prevented this incident particularly in light the testimony of Mr. Lewis, respondent's expert witness. While the Court is sympathetic to what happened to the Whitehair family and what each of them has been through since this accident, the Court is of the opinion that the respondent acted diligently in its maintenance of the northbound Little Sandy Bridge on the date of this incident and was not negligent. Inasmuch as the Court finds no negligence on the part of the respondent, it is not necessary to consider the claimants' negligence that contributed to their injuries. However, the testimony of the claimants that they did not know they were on a bridge, especially in light of the claimants' familiarity with the bridge and the testimony of the other witnesses, lead to the conclusion that the claimants knew or should have known they were on a bridge at the time they decided to cross the parapet wall on the northbound Little Sandy Bridge. Further, since the Court has determined that the respondent was not negligent in the maintenance of the bridge, it is not necessary to consider the claimants' argument with regard to the doctrine of sudden emergency.

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 DECEMBER 12, 2002

GINO CRITILLI
VS.
DIVISION OF HIGHWAYS
(CC-01-335)

Paul C. Camilletti, Attorney at La, for claimant.

Andrew F. Tarr, Attorney at Lafor respondent.

PER CURIAM:

Claimant brought this action for damage to his 1981 Cadillac which occurred when he was traveling on County Route 86/7 in Marshall County and his vehicle struck a large broken sign post. Respondent was responsible at all times herein for the maintenance of County Route 86/7 in Marshall County. The Court is of the opinion to make an award in this claim for the reasons set forth herein below.

The incident giving rise to this claim occurred on June 10, 2001, between 4:00 p.m. and 5:00 p.m. Claimant and his girlfriend were traveling to a friend's graduation party. It was a clear, warm, sunny day. The road surface was dry and in good shape. Claimant was driving on County Route 86 at approximately fifty to fifty-five miles per hour. He slowed the vehicle to approximately fifteen to twenty miles per hour as he made a right turn onto County Route 86/7 also referred to as Marshall Drive. Once he made the turn onto County Route 86/7, he was forced to maneuver his vehicle onto the berm of the road in order to allow an oncoming vehicle to safely pass. As he maneuvered his vehicle to the right, he heard a loud explosion type noise and a metallic object dragging underneath his car. This was followed by a second similar explosion type noise. He got out of his vehicle to find that it was impaled on a broken sign post sticking up from the ground on the berm of the road. Both passenger side tires had burst and it took two tow trucks to maneuver the vehicle off of the sign post. The impact destroyed two tires, damaged the muffler, exhaust pipe, carburetor and the fuel tank. Claimant testified that he did not see the sign post before striking it with his vehicle because he was watching for traffic as he made the right turn. He was also watching for the oncoming vehicle which he let pass, and his view of the sign post was obscured by the lay of the land at this location. County Route 86/7 is designated as a two-lane road. However, according to the claimant it is narrow and difficult for two vehicles to pass without one driver having to maneuver onto the berm, especially in this incident involving two large vehicles. Claimant submitted repair bills in the amount of $819.39 for the damage to his vehicle.

Claimant asserts that respondent knew or should have known of the broken sign post and failed to remove it in a timely fashion. Its failure to do so created a hazardous condition to the traveling public.

Respondent contends that it did not have notice of the broken sign post prior to this incident.

James R. Wurtzbacher, the Traffic Services Supervisor for respondent in District Six which includes the area at issue in Marshall County, is responsible for supervising the maintenance of signs in Marshall County. According to Mr. Wurtzbacher, County Route 86/7 is seventeen feet wide and that the location where this incident occurred was on the respondent's right-of-way. He testified that he did not have any prior notice that there was a broken sign post at the location at issue. He did not become aware of this broken sign post until after this incident. Mr. Wurtzbacher testified that on June 13, 2001, a new speed limit sign was put in place at or near the location of this incident. He also testified that this sign was put up by respondent because the previous sign was missing. However, he could not state why it was missing or when it disappeared.

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). To

hold respondent liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). Respondent has a duty to maintain the berm of a highway in a reasonably safe condition for use when the occasion requires. *Compton v. Division of Highways*, 21 Ct. Cl. 18 (1995).

In the present claim, the Court is of the opinion that the respondent had constructive, if not actual, notice of the broken sign post. The evidence establishes that the broken sign post was on respondent's right of way. Given the damage caused to claimant's vehicle, it is obvious that the sign post was high enough and that it should have been noticed by the respondent's employees during routine maintenance. Further, the fact that this is a narrow road, it is foreseeable that a driver would need to use the berm at this location to allow oncoming traffic to pass safely. The evidence also establishes that the claimant was allowing another vehicle to pass and he acted reasonably in using this berm. Therefore, the Court is of the opinion that the respondent failed to adequately maintain the berm at this location and that this failure was the proximate cause of the damages to claimant's vehicle.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $819.39.

Award of $819.39.

OPINION ISSUED DECEMBER 12, 2002

ALLEN HALL
VS.
DIVISION OF HIGHWAYS
(CC-02-092)

Claimant appeared *pro se.*
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 1993 Chrysler Concorde which occurred when he was traveling on Route 2 south of Moundsville in Marshall County and his vehicle struck a large rock in the road. Respondent was responsible at all times herein for the maintenance of Route 2. The Court is of the opinion to make an award in this claim for the reasons set forth below.

The incident giving rise to this claim occurred on February 10, 2002, between 4:30 p.m. and 5:00 p.m. Claimant, his wife, son, and father-in-law were on their way back from New Martinsville. He was driving northbound on Route 2 towards their home in Moundsville in Marshall County. It was raining and the road surface was wet. When he was just south of Moundsville traveling at approximately fifty-five miles per hour and proceeding around a curve, his vehicle suddenly struck a large rock in the road. The impact was strong enough to lift the front of the vehicle up and slam it back down. Claimant maneuvered the vehicle off the road to see if any

of his passengers was injured. Fortunately, no one was injured, but the vehicle was seriously damaged and had to be towed from the scene. Claimant submitted a repair bill into evidence in the amount of $402.81 and a tow bill in the amount of $30.00. He testified that he was aware that this area was a rock fall area and he was traveling in the left lane because he was concerned about rocks falling from the hillside on the right side of the road. He travels this portion of the road approximately three to four times per month and he has seen many rock falls. He stated that he did not see this rock until after his vehicle struck it. He is not sure if it was already sitting there or if it had just rolled off the hillside. He is certain that it was in the far left lane which means it rolled across two lanes of traffic before coming to rest. Claimant also testified that this area is referred to as the "narrows" and is known for rock falls especially during the winter months. He stated that he had comprehensive insurance coverage that would cover these damages, but the deductible feature was $500.00. Claimant seeks $432.81 in damages.

Claimant asserts that respondent knew or should have known that this was a high risk area for rock falls and yet failed to take timely and adequate measures to remedy this hazardous condition.

It is respondent's position that it acted diligently in this claim in that it had warning signs in place and a procedure implemented to detect and remove fallen rocks.

Christopher Minor was the Assistant County Supervisor for respondent in Marshall County at the time this incident occurred. His responsibilities included daily supervision of work crews and overall maintenance of the highways. Mr. Minor was responsible for the maintenance of Route 2 at the location of this incident and is familiar with the road at this location. He testified that this portion of Route 2 is a four-lane, divided highway with white edge lines, a center line, and guardrail. Mr. Minor testified that he believes that there is a rock fall warning sign for southbound traffic and one for northbound traffic. There was a falling rock warning sign approximately one mile from this location. Mr. Minor testified that this location is a known rock fall area. He stated that it is referred to as the "lower narrows". Mr. Minor testified that respondent had a system in place on the night in question whereby the respondent has patrolmen working eight hour shifts that cover a twenty-four hour period due to the freeze/thaw cycle. The patrolmen drive primarily within the Glendale area known as the "upper narrows" and make three or four trips back and forth looking for rocks. The patrolmen drive south below Moundsville, where this incident occurred, a little less often because that area is known to have fewer rock falls. According to Mr. Minor's log book, on the date in question, respondent had patrolmen in the area between 4:15 p.m. and 5:20 p.m. However, there was no report of any rock falls.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the present claim, the Court is of the opinion that respondent had constructive notice of rock fall hazards in the area at issue. The area on Route 2

commonly referred to as "the narrows" is a section of highway known for dangerous rock falls which are a hazard to the traveling public. Although respondent had patrolmen on duty watching for rock falls on the date of this incident, this action has not proven to be an adequate remedy to protect the traveling public from the rocks which frequently fall onto the highway. Thus, the Court is of the opinion that respondent is liable for the damages which flow from its inadequate protection of the traveling public in this specific location of Route 2, and further, that respondent is liable for the damages to claimant's vehicle in this claim.

In accordance with the findings of fact and conclusions of law as stated herein above, the Court is of the opinion to and does make an award to the claimant in this claim in the amount of $432.81.

Award of $432.81.

OPINION ISSUED DECEMBER 12, 2002

DANIEL HENSLEY
VS.
DIVISION OF HIGHWAYS
(CC-02-077)

Claimant appeared *pro se.*
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant brought this action for damage to his 1985 Maserati Bi-Turbo which occurred when a large tree located on respondent's right of way fell onto his vehicle when it was parked in the driveway of his residence at 476 Russell Road, Saint Albans, Kanawha County. Respondent was responsible at all times herein for the maintenance of Russell Road. The Court is of the opinion to deny this claim for the reasons set forth more fully below.

The incident giving rise to this claim occurred on December 14, 2001, at approximately noon. The weather was mild, clear, and a little breezy. Claimant's wife and his daughter, Michelle Roberts, had just returned from the store and they were carrying groceries to the house. Claimant had also just returned home and he was behind his wife and daughter when he heard a loud cracking sound. Suddenly, a large tree fell toward the claimant nearly striking him. The tree landed on top of Michelle Robert's new Ford Mustang GT totally destroying it. Tree limbs also landed on claimant's Maserati which was parked a little farther away from the tree. Claimant did not have insurance coverage on the Maserati because he did not drive it during the winter months. He stated that he treated the vehicle basically as a show car. He testified that he had owned the Maserati for approximately two or three years. Claimant submitted into evidence a repair estimate in the amount of $5,159.44 for the damage to the Maserati. However, claimant has made many of the repairs listed in the estimate himself and he purchased some used parts to do so.

Claimant contends that respondent knew or should have known that the tree which fell onto his vehicle posed an apparent risk of falling and presented a hazardous condition to the claimant and the traveling public in general.

Respondent did not present any witnesses in this claim.

Claimant testified that the tree was located across the road from his driveway and very close to Russell Road. He also testified that it was clearly located on the respondent's right of way. He described the tree prior to this incident as having "two parts". He stated that one limb listed greatly towards his neighbor's property, while the second limb was basically straight up in the air. He also testified that the tree had been struck by lightning sometime prior to this incident and that part of the top of the tree was blown out. Respondent had previously removed the portion that was destroyed, but did nothing to the remaining tree. According to claimant, certain portions of the tree were rotten. Further, he stated that the tree did not have a good support system to hold it up. Claimant also testified that he had spoken to respondent about the tree at issue a couple of times prior to this incident. He stated that he had informed a few of respondent's employees, who were working at or near the location of this incident, that the tree made it hard to get out of his driveway. He informed them that a few visitors at his residence had actually backed into the tree while backing out of his driveway. However, Mr. Hensley did not mention to the respondent that he had concerns about the tree falling. He only spoke to the respondent in regards to having it moved or relocated for his convenience.

To hold respondent liable, claimant must prove by a preponderance of the evidence that the respondent had actual or constructive notice of the defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). The general rule of this Court with regard to tree fall claims is that if a tree is dead and poses an apparent risk, then the respondent may be held liable. However, when a healthy tree falls and causes property damage as a result of a storm, the Court has held that there is insufficient evidence of negligence upon which to justify an award. *Wiles v. Division of* Highways, 22 Ct. Cl.170 (1998); *Gerritsen v. Dept. of Highways*, 16 Ct. Cl. 85 (1986).

In the instant claim, the Court is of the opinion that respondent had no notice that the tree at issue posed an apparent risk to the public. The evidence adduced at the hearing established that the tree had been struck by lightning. There is undisputed evidence that respondent's employees observed the tree while working at or near the location of this incident after it had been struck by lightning. Claimant only complained to respondent's employees that the tree was a nuisance for drivers maneuvering their vehicles out of his driveway. Neither claimant nor respondent had reason to believe that the tree was in danger of falling.

Accordingly, claimant having failed to establish that respondent had actual or constructive notice of the defect in the tree which caused it to fall on claimant's Maserati, the claim must be denied.

Claim disallowed.

OPINION ISSUED DECEMBER 12, 2002

JAMES F. CUSICK
VS.
DIVISION OF HIGHWAYS
(CC-02-172)

Claimant appeared pro se.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 1989 Chevrolet Celebrity which occurred when his wife, Denise Cusick, was operating his vehicle on State Route 2 in Marshall County and the vehicle was struck by a large rock. Respondent was responsible at all times herein for the maintenance of State Route 2. The Court is of the opinion to make an award in this claim for the reasons set forth below.

The incident giving rise to this claim occurred on March 22, 2002, at approximately 2:00 p.m. Denise Cusick was traveling northbound on State Route 2 in Marshall County. She had taken her grandson to his home and was on her way home to Benwood. It was a cloudy and dry day. The road surface was in good condition. Mrs. Cusick stated that she was traveling at approximately thirty miles per hour in a fifty mile per hour zone. At this location, State Route 2 is a four-lane highway. Mrs. Cusick decided to travel in the left lane, because she had seen rocks fall onto the right lane on prior occasions and felt safer in the left lane. She was traveling in a curve in the road when she suddenly saw a large rock bounce onto the pavement and then bounce again directly onto the hood of her vehicle. She testified that she could not maneuver into the southbound lane because there was an oncoming vehicle and that she could not maneuver the vehicle to the right lane because there was another vehicle beside her. According to Mrs. Cusick, the impact was severe. She maneuvered the vehicle to the side of the road to look at the damage. Claimant submitted a repair estimate in the amount of $1,360.09. Claimant testified that the rock smashed a hole in the hood of the vehicle, destroyed the headlight, and damaged the header panel. Claimant does not have comprehensive insurance coverage to cover these damages.

Claimant asserts that respondent knew or should have known that this was a high risk area for rock falls and yet failed to take timely and adequate measures to remedy this hazardous condition.

It is respondent's position that it acted diligently and took reasonable measures to warn and protect the traveling public from the hazards of rock falls.

Christopher Minor, the Assistant County Supervisor for respondent in Marshall County at the time of this incident, testified that his responsibilities include daily supervision of work crews and overall maintenance of highways. Mr. Minor was responsible for the maintenance of Route 2 at the location of this incident. He is familiar with State Route 2 between Glendale and McMechen, commonly referred to as "the narrows." He stated that this area is a known rock fall area and it has been considered as such since the road was built in 1941. In an attempt to protect the traveling public, he testified that respondent has placed warning signs on both ends of State Route 2 in Glendale which is referred to as "the upper narrows". There are flashing warning lights on top of these signs. Further, Mr. Minor testified that the "whole length of the Narrows has been poled and lit with high intensity lights." He

also stated that respondent maintains patrols for the "rock freeze/thaw cycle" during winter months. However, there were no patrols beyond the normal shift at the time of this incident since it was in late March. Finally, Mr. Minor testified that he had no notice or reports of any rock falls at or near the location of this incident.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). In order to hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the present claim, the Court is of the opinion that respondent had constructive notice of rock fall hazards in the area at issue. This area on State Route 2 referred to as "the narrows" is a section of highway known for dangerous rock falls which are clearly a hazard to the traveling public.

Even though respondent has flashing warning signs in place and numerous lights to assist drivers in seeing rock falls, these actions have not proven to be an adequate remedy to protect the traveling public from the rocks which frequently fall onto the highway. Thus, the Court is of the opinion that respondent is liable for the damages which proximately flow from its inadequate protection of the traveling public in this specific location of State Route 2 in Marshall County, and further, that respondent is liable for the damages to claimant's vehicle in this claim.

In accordance with the findings of fact and conclusions of law as stated herein above, the Court is of the opinion to and does make an award to the claimant in this claim in the amount of $1,360.09.

Award of $1,360.09.

OPINION ISSUED DECEMBER 12, 2002

MACEL E. RHODES, INDIVIDUALLY,
AND AS NEXT FRIEND OF
ROMAN ALEXANDER TARANTINI, AN INFANT
VS.
DIVISION OF HIGHWAYS
(CC-97-431)

Shari L. Collias, Attorney at Law, for claimants.
Andrew Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On November 25, 1995, claimant and her son, Roman Alexander Tarantini, were passengers in a vehicle being driven by Michael Tarantini. They were traveling southbound on I-79 near the town of Amma in Roane County when the

vehicle struck a boulder that had fallen from the adjacent hillside and landed in the southbound lane of the interstate.

2. Respondent was responsible for the maintenance of I-79 in Roane County at all times herein. Respondent did not have notice of the boulder that had fallen onto the interstate at the time of claimants' accident; however, respondent did have notice that rock falls had occurred at milepost 22 of I-79 with increasing frequency in the previous couple of years prior to the date of this incident herein. Even though respondent had knowledge of previous rock falls, respondent had failed to place warning signs at the location of claimants' accident to advise the traveling public that the area was a rock fall area. Respondent had not taken any corrective measures to address the falling rock problem.

3. As a result of this incident, claimant suffered severe personal injuries and claimant's son suffered minor physical injuries.

4. Respondent and claimants have agreed to settle and compromise this claim for $110,000.00 to be paid as follows: the claimant Macel E. Rhodes is to receive the total sum of $105,000.00 for her past and future pain and suffering, estimated out-of-pocket past and future medical expenses and estimated lost wages. The claimant Macel E. Rhodes as the legal guardian of Roman Alexander Tarantini, an infant, is to receive the total sum of $5,000.00 for medical expenses and for the loss of consortium, love, affection, services, society and companionship of and from his mother, Macel E. Rhodes, during the period of her treatment and recovery from the injuries she received as a result of the accident.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of I-79 in Roane County on the date of this incident; that the negligence of respondent was the proximate cause of the injuries suffered by claimant Macel E. Rhodes and her son, Roman Alexander Tarantini, an infant; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery in this claim.

Accordingly, the Court is of the opinion to and does make an award in the amount of $110,000.00 as set out herein below.

Award of $105,000.00 to Macel E. Rhodes.

Award of $5,000.00 to Macel E. Rhodes as the legal guardian of Roman Alexander Tarantini, an infant.

OPINION ISSUED DECEMBER 12, 2002

ROBERT W. GALLENTINE
VS.
DIVISION OF HIGHWAYS
(CC-01-345)

Claimant appeared pro se.

Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his horse trailer which occurred when he was pulling it with his 1995 Ford F-250 truck on County Route 38 in

Marshall County, and the horse trailer struck a large tree stump at the edge of the road. Respondent was responsible at all times herein for the maintenance of County Route 38. The Court is of the opinion to make an award in this claim for the reasons set forth below.

The incident giving rise to this claim occurred on August 18, 2001, between 10:30 a.m. and 11:00 a.m. Robert Gallentine was driving his 1995 Ford F-250 truck on County Route 38 also known as Wayman's Ridge Road and his truck was pulling his two-horse "goose neck" trailer. He did not have horses in it at that time since he was on his way to pick a pony up for his grandson. Mr. Gallentine had purchased this trailer new approximately one year prior to this incident. The weather was clear and the road surface was dry. As the claimant was approaching a left curve, he slowed the vehicle to approximately ten or fifteen miles per hour and maneuvered it to the edge of the road, so as to avoid colliding with any oncoming vehicles. When he did so, the right side of the trailer hit a large tree stump concealed in the weeds on the berm of the road. The impact destroyed one right side tire and wheel. It also seriously damaged the running board, trim, axle, and fender of the trailer. Claimant had comprehensive insurance coverage that covered these damages with a deductible of $500.00. He submitted a repair bill in the amount of $1,926.59 for the damages sustained. However, claimant is limited to a recovery of the amount of his insurance deductible.

It is claimant's contention that respondent knew or should have known of this tree stump and negligently failed to remove it in a timely fashion and this negligence created a hazardous condition that was the proximate cause of the claimant's damages.

It is respondent's position that it did not have notice of the condition at issue nor a reasonable amount of time to take corrective action.

Mr. Gallentine testified that he has traveled this road at least fifteen times prior to this incident but has never done so with a horse trailer. Claimant also testified that he did not see the stump on any prior occasions. He stated that he did not see the stump until after the trailer hit it, because it was concealed by high weeds. He also stated that County Route 38 is fairly narrow which he corroborated with photographs that depict County Route 38 at this location. Additional photographs depict the tree stump at issue which was not visible to traffic traveling in the same direction as the claimant due to the growth of weeds. These same photographs demonstrate that the tree stump at issue was large and was located only inches from the blacktop portion of the road.

Michael T. Davis testified on the claimant's behalf. Mr. Davis has lived on the property adjoining County Route 38 at the location of this incident since 1987. He testified that the tree stump at issue has been present for many years. He stated that it was a locust tree that a prior property owner cut down. Mr. Davis stated that he believed the road to be approximately sixteen to eighteen feet wide at this location. He also testified that the stump was on respondent's right-of-way. Mr. Davis also testified that he reported the tree stump to respondent "a few years ago" because he felt that it could cause a serious accident. However, he had not reported it again until after the incident at issue.

Christopher Minor, the assistant county supervisor for respondent in Marshall County, testified that he is responsible for overseeing the maintenance of County Route 38 at this location. He is familiar with the location at issue and

described County Route 38 as a state and local service route. He described it as a blacktopped, two-lane road that varies in width from eighteen to twenty feet wide. However, he stated that at the location of this incident the road is only sixteen to eighteen feet wide. Mr. Minor testified that neither he nor his office had any record or notice about the stump at issue. He did not learn about the stump until after the incident. Mr. Minor testified that this stump was on respondent's right-of-way. He stated that the stump was located on the "sodded shoulder" that respondent maintains. This maintenance includes mowing the berm or shoulder areas in the spring and summer and snow removal during the winter. Mr. Minor testified that his crew tries to mow the berms of this type of road at least twice a year, but is not always able to do so. He also stated that it was a possibility that his crew could have mowed around the stump and not seen it.

It is a well established principle of law that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). However, the State owes a duty of reasonable care and diligence in the maintenance of a highway. *Parsons v. State Road Comm'n*., 8 Ct.. Cl. 35 (1969). Respondent also has a duty to maintain the berm of a highway in a reasonably safe condition for use when the occasion requires. *Compton v. Div. of Highways* 21 Ct. Cl. 18 (1995).

In the present claim, the evidence establishes that County Route 38 at the location of this incident presented a hazardous condition to the traveling public. Respondent had at least constructive notice, if not actual notice, of the tree stump at issue and a reasonable amount of time to take corrective action. The tree stump struck by claimant's horse trailer was on respondent's right of way and only inches from the road. It was also concealed by weeds preventing drivers from seeing it which created a trap for the traveling public. The evidence also established that claimant needed to use the portion of the berm at issue due to the approaching curve and that his use of the berm was reasonable. The Court is of the opinion that respondent should have removed the tree stump or at least placed a hazard paddle at this location prior to this incident; that respondent was negligent in its maintenance of the berm on County Route 38; and further, that this negligence was the proximate cause of the damages to claimant's trailer.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $500.00.

Award of $500.00.

OPINION ISSUED DECEMBER 12, 2002

JACKIE JEWELL
VS.
DIVISION OF HIGHWAYS
(CC-02-135)

Claimant appeared pro se.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to her 2001 Pontiac Grand Am which occurred when she was traveling on Chattaroy Hollow Road in Mingo County and her vehicle struck one or two large holes in the road. Respondent was responsible at all times herein for the maintenance of Chattaroy Hollow Road. The Court is of the opinion to make an award in this claim for the reasons set forth below.

According to the claimant, the incident giving rise to this claim occurred sometime in mid-January 2002 in the early evening hours. She could not state with certainty what the date or time of the incident was. Mrs. Jewell had driven to the Mingo County Public Service District to bring her husband home from work. She and her husband, who was the front seat passenger, were traveling to their home in Williamson, Mingo County, on Chattaroy Hollow Road. The weather was clear and the road surface was dry. As she was traveling around a curve at approximately thirty to thirty-five miles per hour, an oncoming vehicle forced her to maneuver her vehicle to the right side of her lane to avoid a collision. Suddenly, she felt a bump and heard a loud noise when her passenger side tires struck one or two large holes in the travel portion of the road. Mrs. Jewell testified that she had no choice but to maneuver the vehicle over the holes due to the oncoming vehicle. She admitted that she knew the holes were present and that these holes had probably been there for a few months prior to this incident. Claimant described the holes as being significantly deep. However, she was unable to measure the holes. The impact damaged both passenger side wheels and rims. Claimant has full coverage on this vehicle with a $500.00 deductible, which would have covered this damage. However, she testified that she did not make a claim against her insurance company because one of its agents informed her that she should pursue a claim against the respondent first. She submitted a repair estimate in the amount of $326.40. which represents the damage to the front wheel and rim. Claimant also seeks $326.40 for damage to her rear wheel and rim. Thus, she seeks a total award of $652.80 in damages. However, the most claimant may recover in this Court is the amount of her insurance deductible feature which is $500.00.

It is claimant's position that respondent failed properly to maintain the road in a timely fashion and this failure was the proximate cause of her damages.

Respondent did not offer any witnesses or evidence in the trial of this matter.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Simms*, 46 S.E2d 811 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the present claim, the Court is of the opinion that respondent had at least constructive notice of the holes at issue in Chattaroy Hollow Road and that the holes presented a hazard to the traveling public. The testimony at the hearing of this matter establishes that the holes had been present for a significant period of time. Further,

the holes were large and within the travel portion of the road. Thus, the Court finds respondent negligent and claimant may make a recovery for the amount of her insurance deductible of $500.00.

Accordingly, the Court makes an award to the claimant in the amount of $500.00.

Award of $500.00.

OPINION ISSUED DECEMBER 12, 2002

EARL E. BLAIR
VS.
DIVISION OF HIGHWAYS
(CC-02-070)

Claimant appeared *pro se.*
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 1990 Chevrolet Van which occurred when he was traveling on U.S. Route 119 South in Upper Shephard's Town, Mingo County, and his vehicle struck a large piece of metal protruding onto the roadway. Respondent was responsible at all times herein for the maintenance of U.S. Route 119 in Mingo County. This claim was consolidated for hearing by the Court with claim CC-02–122, both claims having arisen out of the same or similar set of facts and circumstances. The Court is of the opinion to deny this claim for the reasons set forth more fully below.

The incident giving rise to this claim occurred on January 26, 2002, between approximately 12:30 and12:45 p.m., on U.S. Route 119 in Upper Shephard's Town. Earl E. Blair had been shopping and he was returning to his home in Thacker approximately thirty-five miles from the location of this incident. Mr. Blair was traveling south on U.S. Route 119 at approximately sixty-five miles per hour which is the designated speed limit. As he drove his vehicle around a curve, he observed a courtesy patrol vehicle parked on the side of the road just a short distance ahead of him with two other vehicles. As Mr. Blair approached the vehicles, he decided to maneuver his van over into the far left lane to provide a safe distance between his vehicle and the vehicles on the side of the road. However, once he got into that lane he noticed a large piece of metal sticking up in the road. Mr. Blair testified that he did not see it until his vehicle was right up on it, because it had been rolled over by the other vehicles and it was difficult to see. Claimant's vehicle struck the metal causing the front bumper to bend, the front end was knocked out of alignment, the lower control arm was bent and the gas tank as well as the catalytic converter were destroyed. Claimant submitted a repair estimate in the amount of $1,674.42. He does not have comprehensive coverage on this vehicle to cover any of the losses. Claimant still owns the van, but the repairs have not been made and thus it cannot be driven on the road.

Claimant alleges that respondent knew or should have known of this hazardous condition and that respondent failed to take timely and adequate measures to remedy the hazard.

Respondent contends that it did not have notice of this hazard and that it acted reasonably and diligently as soon as it discovered the hazard.

Cecil W. Collins, a transportation Worker II for respondent in Mingo County, is responsible for highway maintenance and responding to highway emergencies. He is familiar with the portion of U.S. Route 119 at issue. At this location, U.S. Route 119 is a four-lane highway approximately twenty-two feet wide with a six to eight foot berm. Mr. Collins was notified of the incident at approximately 2:00 p.m. the same day. However, Lisa Ellis, a Courtesy Patrol Driver, was the first State agent on the scene. Mr. Collins testified that Ms. Ellis contacted Berry Mullins and Terry Ooten who are assistant supervisors for respondent. According to Mr. Collins, Mr. Ooten went to the scene and determined what tools and equipment were needed to remove the metal. Mr. Collins and Mr. Ooten met at respondent's headquarters to obtain the tools and equipment and proceeded to the scene where they removed the piece of metal from the road. Mr. Collins testified that while at the scene he observed the courtesy patrol truck parked on the side of the road back beyond where the piece of metal was located. Mr. Collins also testified that this was the first time such an incident had occurred and that he had no idea how or why this occurred.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the present claim, the Court is of the opinion that claimant failed to establish by a preponderance of the evidence that respondent had notice of this road defect. This was the first such incident at or near this location. Further, claimant failed to establish by a preponderance of the evidence that respondent had any reason to believe that this piece of metal presented a risk of breaking loose. While the Court is sympathetic to the claimant, there is insufficient evidence of negligence on which to justify an award.

Therefore, in view of the foregoing, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 12, 2002

BOBBY JOE MESSER
VS.
DIVISION OF HIGHWAYS
(CC-02-122)

Claimant appeared *pro se.*
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his vehicle which occurred when he was traveling on U.S. Route 119 South in Upper Shephard's Town, Mingo County and his vehicle struck a large piece of metal projecting onto the roadway. Respondent was responsible at all times herein for the maintenance of U.S. Route 119 in Mingo County. This claim was consolidated for hearing by the Court with claim CC-02-070 both claims having arisen out of the same or similar set of facts and circumstances. The Court is of the opinion to deny this claim for the reasons set forth more fully below.

The incident giving rise to this claim occurred on January 26, 2002 at approximately 12:00 p.m. on U.S. Route 119 in Upper Shephard's Town. Claimant had just picked up his tax check and he was traveling back to his home in Dingess. He was operating his1999 Dodge Dakota at a speed of approximately sixty to sixty-five miles per hour. He and his girlfriend had driven on U.S. Route 119 north approximately thirty to forty minutes prior to this incident. They had passed by the exact location where the incident occurred, but claimant had not observed any piece of metal protruding into the roadway at that time. Claimant was talking to his girlfriend who was a front seat passenger. As he approached the curve, he suddenly saw a piece of metal protruding onto the highway. He applied the brakes and maneuvered the vehicle to the left lane in an attempt to avoid the object. However, the right rear tire struck the piece of metal destroying it, as well as the wheel and rim. It also damaged the rear fender. Claimant maneuvered his vehicle onto the berm to observe the damage, when a second vehicle also struck the metal object head-on. Claimant was helping the driver of the second vehicle change his tire when Earl E. Blair, the claimant in Claim No. CC-02-070, drove through the same location in his van and struck the same piece of metal. Claimant herein described the piece of metal as looking similar to a piece of railroad metal possibly like an I-beam or H-beam. He also stated that the piece of metal was approximately three feet high at its highest point and that it extended across the four lane road into the far left lane. Claimant submitted a repair estimate in the amount of $770.97. He had comprehensive insurance coverage at the time, but the deductible feature on his policy was $1,000.00 which exceeded his damages.

Claimant asserts that respondent knew or should have known of this hazard and failed to take timely remedial action to eliminate it.

Respondent contends that it did not have timely notice of the metal protruding onto the road nor did it have reason to know that a potential hazard existed in regards to this piece of metal.

Cecil W. Collins, Transportation Worker II for respondent in Mingo County, is responsible for highway maintenance and responding to highway emergencies. He is familiar with the portion of U.S. Route 119 at issue and is responsible for its maintenance. Mr. Collins stated that U.S. Route 119 is a four-lane highway, approximately twenty-two feet wide with a six to eight foot berm. Mr. Collins first became aware of the incident at approximately 2:00 p.m. the same day. However, Lisa Ellis, a Courtesy Patrol Driver, was the first State agent on the scene. Mr. Collins testified that Ms. Ellis contacted Berry Mullens and Terry Ooten who are

assistant supervisors for respondent. According to Mr. Collins, Mr. Ooten went to the scene and determined what tools and equipment were needed to remove the metal. Mr. Collins and Mr. Ooten met at respondent's local headquarters to obtain the tools and equipment and proceeded to the scene where they removed the piece of metal from the road. Mr. Collins testified that while at the scene he observed the courtesy patrol truck parked on the side of the road back beyond where the piece of metal was located. Mr. Collins stated that he does not know how the piece of metal came loose. Furthermore, he stated that this was the first time such a problem like this had occurred at or near this location.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W. Va.1947). To hold respondent liable, the claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the present claim, the Court is of the opinion that claimant failed to establish by a preponderance of the evidence that respondent had notice of this road defect. This was the first such incident at this location. Further, claimant failed to establish by a preponderance of the evidence that respondent had any knowledge whatsoever that this piece of metal presented a risk of breaking lose and protruding onto the highway.

While the Court is sympathetic to the claimant, there is insufficient evidence of negligence on which to justify an award.

Therefore, in view of the foregoing, the Court is of the opinion and does deny this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 12, 2002

HELEN O'DELL
VS.
DIVISION OF HIGHWAYS
(CC-01-119)

Michael R. Whitt, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. Claimant's residence is located at 410 8th Street, Rainelle, in Greenbrier County.

2. In August 2002, representatives of respondent and of the Town of Rainelle met to discuss the drainage on Greenbrier Avenue, which proceeds through

the Town of Rainelle and is maintained by respondent. At that time, the representative for the respondent was advised that a manhole on Greenbrier Avenue was part of Rainelle's abandoned sanitary sewer system and was no longer in use.

3. Based upon the information obtained from Rainelle's representative, respondent proceeded to remove the manhole from the roadway and fill the abandoned sewer line with concrete. This work was completed in the fall of 2000.

4. Claimant's home was damaged by high water during the month of January 2001. Prior to January 2001 claimant's home had not experienced water problems. Claimant then contacted respondent and was informed that a sewer line on Greenbrier Avenue had been filled with concrete.

5. Employees of respondent and of Rainelle reconnected the abandoned sewer line in February 2001.

6. Claimant has not had any more water problems since the sewer line was reconnected.

7. Although respondent does not admit that its actions were solely responsible for the claimant's property damages, it admits that the work performed contributed to the damages, and therefore, created a moral obligation on the part of respondent to provide compensation to the claimant.

8. The parties are in agreement that $7,000.00 is a fair and reasonable settlement for the property damages incurred by the claimant.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its removal of the manhole and the filling of the sewer line with concrete on Greenbrier Avenue in the Town of Rainelle on the date of this incident; that respondent's negligence proximately caused claimant to incur certain expenses; and that the agreed settlement is fair and reasonable. Thus, claimant may make a recovery for her sustained loss.

Accordingly, the Court is of the opinion to and does make an award to claimant in the amount of $7,000.00.

Award of $7,000.00.

OPINION ISSUED DECEMBER 12, 2002

C. I. CAPERTON
VS.
DIVISION OF HIGHWAYS
(CC-02-097)

Claimant appeared *pro se.*
Andrew F. Tarr, Attorney at Law, for respondent

PER CURIAM:

Claimant brought this action for damage to his 2001 Ford F250 pickup truck which occurred when his vehicle struck a broken sign post while he was traveling on Route 250/219 in Elkins, Randolph County. This portion of Route 250/219 is

maintained by respondent in Randolph County at all times herein. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on February 13, 2002, at approximately 7:30 a.m. It was just turning daylight and there was a little fog outside which reduced visibility. Claimant was traveling southbound on Route 250/219 near the Corridor H Exit in Elkins when he decided to drive his vehicle to the right side of the road and onto the berm so that he could read his map. When claimant drove his truck onto the gravel portion of the berm, both passenger side tires struck a broken metal sign post and were destroyed. Claimant testified that he drove his truck approximately five feet off of the road for safety purposes. However, he stated that he did not see the broken sign post until after the incident due to the poor visibility. According to claimant, the post had been cut off and was protruding approximately six inches from the ground. Claimant submitted a repair bill in the amount of $316.52 which was the cost of replacing the tires. He testified that he did have comprehensive insurance coverage to cover these losses, but the deductible was $500.00.

Claimant asserts that respondent knew or should have known that this hazard existed and that it failed to take proper and timely remedial action.

Respondent contends that it did not have notice of the broken post prior to this incident. Lewis B. Gardner, the Assistant Supervisor for respondent in Randolph County, testified that he is responsible for maintaining the portion of Route 250/219 at issue and he is familiar with the location where this incident occurred. He stated that at this location Route 250/219 is a two lane blacktop road with a double yellow line and white lines on the edges. The driving portion of Route 250/219 at this location is twenty six feet wide. The paved portion of the berm of the road extends eight feet from the white edge line over to the gravel portion of the berm. Mr. Gardner testified that the distance from the edge of the paved portion of the berm to the location of the broken sign post in the gravel was two feet. Therefore, it was a total distance of ten feet from the white edge line to where the claimant's vehicle struck the post. Mr. Garner testified that he had not received prior notice that there was a broken sign post at this location.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (W.Va.1947). To hold respondent liable, the claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to make adequate repairs. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). Respondent has a duty to maintain the berm of a highway in a reasonably safe condition for use when the occasion requires. *Compton v. Division of Highways*, 21 Ct. Cl. 18 (1995). Liability may ensue when a motorist is forced into the berm in an emergency or otherwise necessarily uses the berm of the highway and the berm fails. *Sweda v. Dept. of Highways*, 13 Ct. Cl. 249 (1980).

In the present claim, the evidence established that there is more than adequate space along the berm of Route 250/219 for a driver to maneuver his or her vehicle. Based upon the testimony and the photographs introduced in this claim it is apparent that this was respondent's post. Claimant's use of the berm was reasonable under the circumstances. He was attempting to drive to a safe position off the road while looking at a map in an area with which he was not familiar during a period of reduced visibility. Respondent should have been aware of such a large broken sign

post and taken timely remedial action. Thus, the Court concludes that respondent was negligent in its maintenance of the berm of Route 250/219 on the date of this incident and that this negligence was the proximate cause of claimant's damages.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $316.52.

Award of $316.52.

OPINION ISSUED DECEMBER 12, 2002

DENZIL P. GUMP
VS.
DIVISION OF HIGHWAYS
(CC-01-380)

Claimant appeared *pro se*.

Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On September 22, 2001, claimant was traveling on Route 19 near Coburn in Wetzel County when the horse trailer that he was pulling struck a rock in the road making it break loose from claimant's truck and causing damage to the trailer and injuries to the horses.

2. Respondent was responsible for the maintenance of Route 19 at this location in Wetzel County and respondent failed to maintain properly Route 19 on the date of this incident.

3. As a result of this incident, claimant alleges that he sustained damages in the amount of $2,000.00

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 19 in Wetzel County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that claimant is entitled to damages for his loss. Thus, claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $2,000.00 which the Court has determined to be a fair and reasonable amount to both parties.

Award of $2,000.00.

OPINION ISSUED DECEMBER 12, 2002

JUANITA M. MCQUAIN
VS.
DIVISION OF HIGHWAYS
(CC-01-414)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On September 29, 2001, claimant was traveling on First Street in Moundsville, Marshall County, when her vehicle struck a large hole in the road damaging a rim and a tire.

2. Respondent was responsible for the maintenance of First Street at this location in Moundsville, Marshall County, and respondent failed to maintain properly First Street on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $919.68.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of First Street in Moundsville, Marshall County, on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $919.68.

Award of $919.68.

OPINION ISSUED DECEMBER 12, 2002

UNITED HOSPITAL CENTER
VS.
DIVISION OF CORRECTIONS
(CC-02-377)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $1,775.91 for medical services rendered to inmates in the custody of respondent at Pruntytown Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 DECEMBER 12, 2002

UNITED HOSPITAL CENTER
VS.
DIVISION OF CORRECTIONS
(CC-02-409)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $457.83 for medical services rendered to an inmate in the custody of respondent at Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 DECEMBER 12, 2002

ARAMARK UNIFORM SERVICES
VS.
DIVISION OF CORRECTIONS
(CC-02-382)

Claimant appeared *pro se.*
Heather A. Connolly, 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 $207.83 for providing uniform services for employees at Mount Olive Correctional Complex, a facility of respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid.

In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $207.83.

Award of $207.83.

OPINION ISSUED DECEMBER 12, 2002

PHARMACY ASSOCIATES, DBA OPTION CARE
VS.
DIVISION OF CORRECTIONS
(CC-02-067)

Claimant appears *pro se.*

Heather A. Connolly, 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 payment in the amount of $16,871.59 for medical services rendered to inmates in the custody of respondent at Mount Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 DECEMBER 12, 2002

CABELL COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-02-356)

William T. Watson, Attorney at Law, for claimant.
Heather A. Connolly, 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, Cabell County Commission, is responsible for the incarceration of prisoners who have committed crimes in Cabell County, but have been sentenced to facilities owned and maintained by respondent, Division of Corrections. Claimant brought this action to recover $341.31 in costs for providing housing and/or medical care to 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 custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in *County Comm'n. of Mineral County vs. Div. of Corrections*, 18 Ct. Cl. 88 (1990), that respondent is liable to claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $341.31.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $341.31.

Award of $341.31.

OPINION ISSUED DECEMBER 12, 2002

GENERAL ANESTHESIA SERVICES
VS.
DIVISION OF CORRECTIONS
(CC-02-388)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $1,050.00 for medical services rendered to an inmate in the custody of respondent at Mount Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 DECEMBER 12, 2002

WV REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
VS.
DIVISION OF CORRECTIONS
(CC-02-455)

Chad Cardinal, Attorney at Law, for claimant.

Charles Houdyschell, 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, Regional Jail and Correctional Facility Authority, provides and maintains the Eastern Regional Jail, the Central Regional Jail, the South Central Regional Jail, the Southern Regional Jail, the Southwestern Regional Jail, the Northern Regional Jail, and the Potomac Highlands Regional Jail as facilities for the incarceration of prisoners who have committed crimes in various counties. Some of the prisoners held in these regional jails have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action in the amount of $4,224,565.50 to recover the costs of housing and providing associated services to prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the claimant, these prisoners have had to remain in the regional jails for periods of time beyond the dates of the commitment orders.

Respondent filed an Answer admitting the validity of the claim and that the amount of the claim is fair and reasonable.

This Court has determined in prior claims by claimant for the cost of housing inmates that respondent is liable to claimant for these costs, and the Court has made the appropriate awards. This issue was considered by the Court previously in the claim of *County Comm'n. of Mineral County v. Div. of Corrections*, 18 Ct. Cl. 88 (1990), wherein the Court held that the respondent is liable for the cost of housing inmates.

In view of the foregoing, the Court makes an award to claimant in the amount of $4,224,565.50.

Award of $4,224,565.50.

OPINION ISSUED DECEMBER 12, 2002

C. SCOTT PAULEY
VS.
PUBLIC SERVICE COMMISSION
(CC-02-454)

Claimant appeared *pro se*.
Joy M. Bolling, 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, an employee of the respondent State agency, seeks reimbursement in the amount of $288.03 for travel expenses incurred in his capacity as an employee for respondent. The documentation for the travel expenses was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid.

In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $288.03.

Award of $288.03.

OPINION ISSUED DECEMBER 12, 2002

COMMERCIAL VEHICLE SAFETY ALLIANCE

VS.
PUBLIC SERVICE COMMISSION
(CC-02-402)

Claimant appeared *pro se*.
Joy M. Bolling, 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 $39,291.28 for providing services to the respondent State agency. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $39,291.28.

Award of $39,291.28.

OPINION ISSUED JANUARY 3, 2003

FAIRMONT GENERAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-02-472)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $2,348.25 for medical services rendered to an inmate being held in the Harrison County Jail for the respondent State agency. Respondent, in its Answer, admits the validity of the claim, and further 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 JANUARY 3, 2003

BUREAU OF EMPLOYMENT PROGRAMS
VS.
DIVISION OF CORRECTIONS
(CC-02-423)

Larry D. Taylor, Attorney at Law, for claimant.
Heather A. Connolly, 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 $1,031.39 for reimbursement due for benefits paid for former employees at Anthony Correctional Center, a facility of respondent. In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $1,031.39.

Award of $1,031.39.

OPINION ISSUED JANUARY 3, 2003

WEST PUBLISHING CORPORATION
VS.
DIVISION OF CORRECTIONS
(CC-02-473)

Claimant appeared *pro se*.
Heather A. Connolly, 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 $232.68 for a subscription to the respondent's main office. In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $232.68.

Award of $232.68.

OPINION ISSUED JANUARY 3, 2003

UNITED HOSPITAL CENTER
VS.
DIVISION OF CORRECTIONS
(CC-02-418)

Claimant appeared *pro se.*
Heather A. Connolly, 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 payment in the amount of $2,119.79 for medical services rendered to inmates in the custody of respondent at Pruntytown Correctional Center, a facility of respondent.

Respondent, in its Answer, admits the validity of the claim, but states that the correct amount owed to claimant is $138.42. Respondent further states that there were insufficient funds in its appropriation for the fiscal year in question from which

to pay the claim Claimant, having reviewed the Answer of the respondent, agrees that it will accept the amount of $138.42 as full and complete satisfaction of its 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 JANUARY 3, 2003

ADVIZEX TECHNOLOGIES, LLC
VS.
BUREAU OF EMPLOYMENT PROGRAMS
(CC-02-159)

David A. Barnette, Attorney at Law, for claimant.
Steven E. Dragisich, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On January 19, 2001, AdvizeX was awarded the contract for certain equipment and software.

2. On May 13, 2001, a purchase order was issued by the respondent.

3. A hold was placed on the activity under this contract on June 8, 2001. Prior to this date, claimant had shipped certain equipment which was placed at Big Chimney in Kanawha County for storage pursuant to this agreement.

4. On August 31, 2002, an agreement was reached providing for a 10% payment to claimant for work performed under the now cancelled contract.

5. Respondent agrees that the amount of $56,420.00 in damages as put forth by the claimant is fair and reasonable.

6. AdvizeX, in consideration of this stipulation and not having to bring forth witnesses and expend attorney fees at the scheduled hearing in this matter, agrees to the reduced payment of $46,420.00.

The Court has reviewed the facts of the claim and finds that respondent was responsible for the claimant's loss on the date of this incident; that the action of respondent was the proximate cause of the damages sustained to claimant; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for their sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $46,420.00.

Award of $46,420.00.

OPINION ISSUED JANUARY 3, 2003

JASON R. BROWN
VS.
DIVISION OF NATURAL RESOURCES
(CC-02-264)

Claimant appeared *pro se*.
Kelli Goes, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. That claimant, Jason R. Brown, is the Assistant Superintendent at Panther State Forest in McDowell County and he is required to live in housing provided by respondent.

2. Respondent was responsible for maintaining the housing for employees at Panther State Forest in McDowell County on the date of this incident.

3. On May 2, 2002, Panther State Forest, which is adjacent to Route 3/2 Panther Creek Road, experienced a flood.

4. During this flood claimant's residence was knocked off of its foundation and claimant suffered the loss and damages to personal property.

5. Respondent admits that it is responsible for damage caused by flooding.

6. Claimant seeks $12,518.00 to replace personal property that was ruined as a result of this flood.

7. Respondent agrees that this amount is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent failed to adequately protect the housing for employees at Panther State Forest in McDowell County and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $12,518.00.

Award of $12,518.00.

OPINION ISSUED JANUARY 3, 2003

NATHAN G. HANSHAW
VS.
DIVISION OF NATURAL RESOURCES
(CC-02-307)

Claimant appeared *pro se*.
Kelli Goes, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. That claimant, Nathan G. Hanshaw, is the Superintendent at Panther State Forest in McDowell County, and he is required to live in housing provided by respondent.

2. Respondent was responsible for maintaining the housing for employees at Panther State Forest in McDowell County on the date of this incident.

3. On May 2, 2002, Panther State Forest, which is adjacent to Route 3/2 Panther Creek Road, experienced a flood.

4. During this flood claimant's residence was knocked off of its foundation and claimant suffered the loss and damages to personal property.

5. Respondent admits that it is responsible for damage caused by flooding.

6. Claimant seeks $9,525.00 to replace personal property that was ruined as a result of this flood.

7. Respondent agrees that this amount is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent failed adequately to protect the housing for employees at Panther State Forest in McDowell County and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $9,525.00.

Award of $9,525.00.

OPINION ISSUED JANUARY 3, 2003

LINDA C. GREGORY
VS.
DIVISION OF HIGHWAYS
(CC-02-278)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were set forth as follows:

1. On May 31, 2002, claimant was traveling on Hoop Pole Run Road in Harrison County, when her vehicle struck a piece of shale in the road where a culvert had recently been replaced causing damage to her tire.

2. Respondent was responsible for the maintenance of Hoop Pole Run Road in Harrison County and failed to maintain properly Hoop Pole Run Road on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the sum of $124.02.

4. Respondent agrees that the amount of damages as put forth by claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent its maintenance of Hoop Pole Run Road in Harrison County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $124.02.

Award of $124.02.

OPINION ISSUED JANUARY 3, 2003

KELLY FLETCHER
VS.
DIVISION OF HIGHWAYS
(CC-02-335)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, 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 $268.16 for damage to her vehicle caused by a piece of tile that fell from the ceiling of the Wheeling Tunnel while she was traveling on I-70 in Ohio County.

In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $268.16.

Award of $268.16.

OPINION ISSUED JANUARY 3, 2003

RICHARD VANGILDER AND CRYSTAL VANGILDER
VS.
DIVISION OF HIGHWAYS
(CC-02-050)

Claimants appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimants and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. Claimants' residence is located on Route 4 in Fairmont, Marion County.

2. Respondent is responsible for the maintenance of the creek beds which are adjacent to Route 4 at this location.

3. Respondent was dredging the creek beds along Route 4, also known as Tunnel Hollow Road, when one its employees drove a 22,000 pound end loader across claimants' concrete driveway to gain access to the creek. At that time, the end loader got stuck in the mud and respondent was forced to drive a 39,200 pound Grade-all across claimants' concrete driveway in order to pull out the end loader. During this process the claimants' driveway was damaged.

4. Respondent admits that the claimants' driveway was damaged as a result of its employees driving heavy equipment over claimants' property.

5. Claimants seek reimbursement for the cost of repairing their driveway at $2,800.00.

6. Respondent agrees that the amount claimed as damages is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in damaging claimants' property while performing maintenance on the creek beds along Route 4 at the time of this incident; that respondent's negligence proximately caused claimants to incur certain expenses; and that the amount claimed is fair and reasonable. Thus, claimants may make a recovery for their loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $2,800.00.

Award of $2,800.00.

OPINION ISSUED JANUARY 3, 2003

SPECIAL SERVICES BUREAU, INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-02-496)

Claimant appeared *pro se*.

Joy M. Bolling, 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 $3,550.00 for providing service of process for the Bureau of Child Support Enforcement, a facility of respondent in Berkeley and Harrison

Counties. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid.

In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $3,550.00.

Award of $3,550.00.

OPINION ISSUED JANUARY 3, 2003

RALEIGH GENERAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-02-464)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $7,604.56 for medical services rendered to an inmate in the custody of respondent at Mount Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, but states the correct amount due and owing to claimant is $6,046.20. Claimant is in agreement with the amount of $6,046.20. Respondent 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 JANUARY 3, 2003

MICHAEL COGLEY
VS.
DIVISION OF HIGHWAYS
(CC-02-349)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, 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 $751.74 for damage to his vehicle caused by a piece of tile that fell from the ceiling of the Wheeling Tunnel while he was traveling on I-70 in Ohio County. However, claimant's recovery is limited to the amount of his insurance deductible feature which is $100.00.

In its Answer, respondent admits the validity of the claim and that the amount of $100.00 is fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $100.00.

Award of $100.00.

OPINION ISSUED JANUARY 3, 2003

MARTIN L. BROWN AND ROBERTA J. BROWN
VS.
DIVISION OF HIGHWAYS
(CC-02-187)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimants and respondent wherein certain facts and circumstances of the claim were set forth as follows:

1. On April 15, 2002, claimant, Roberta J. Brown, was traveling south toward Harman in Randolph County on Route 33 when she struck a broken stake causing damage to her tire.

2. Respondent was responsible for the maintenance of Route 33 in Randolph County and respondent failed to maintain properly Route 33 on the date of this incident.

3. As a result of this incident, claimants' vehicle sustained damage in the sum of $100.00.

4. Respondent agrees that the amount of damages as put forth by claimants is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent its maintenance of Route 33 in Randolph County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $100.00.

Award of $100.00.

OPINION ISSUED JANUARY 3, 2003

LIANG WEI
VS.
HIGHER EDUCATION POLICY COMMISSION
(CC-02-403)

Claimant appeared *pro se*.
Jendonnae L. Houdyschell, 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 $150.00 for personal property damaged by flooding at West Virginia University. It its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $150.00.

Award of $150.00.

OPINION ISSUED JANUARY 3, 2003

TMARO CORPORATION
VS.
HIGHER EDUCATION POLICY COMMISSION
(CC-00-031)

Gene W. Bailey, II, Attorney at Law, for claimant.
James R. Watson, Attorney at Law, for respondent.

GRITT, JUDGE:

Claimant contractor, TMARO Corporation, brought this action upon a construction contract entered into with the respondent, Higher Education Policy Commission, for the construction of the Gaston Caperton Center, a facility for Fairmont State College. The Gaston Caperton Center is located in Clarksburg, Harrison County. The original contract cost for the project is in the amount of $5,942,000.00. Claimant asserts that it has not been paid under the terms of its contract for all of the work it performed; that it incurred additional costs for the HVAC system; and that respondent is wrongfully withholding the retainage on the contract, all to the detriment of the claimant. The total amount of the claim before the

Court is in the sum of $98,970.00. The Court heard this claim over a three day period in April 2002 during which time the Court and the parties took a view of the Gaston Caperton Center. The Court is of the opinion to grant an award in this claim for the reasons set forth herein below.

Claimant TMARO Corporation, hereinafter referred to as TMARO, and respondent Higher Education Policy Commission, hereinafter referred to as HEPC, entered into a contract on November 11, 1997, for the construction of a classroom building known as the Gaston Caperton Center which is part of the extended campus of Fairmont State College. Construction began in the spring 1998 with substantial completion occurring on June 24, 1999. During construction, various issues arose on the part of TMARO for certain change proposals which now constitute Count I of this claim. Count II of the claim was an issue of potable water on the project which count was withdrawn by TMARO at the start of the hearing. After the completion of punch list items, final completion was to occur forty-five days later on or about August 13, 1999. At that time there were problems on the project with the balancing of the HVAC (heating, ventilation, and air conditioning) system for the building. Thereafter issues arose regarding the HVAC system which constitute Count III. HEPC maintained that it would withhold the retainage on the contract until such time the HVAC system was operating properly. HEPC has continued to deny payment of the retainage to TMARO. The amount of the retainage constitutes Count IV of this claim.

HEPC takes the position that TMARO has been paid in full for its work on the Gaston Caperton Center; that liquidated damages should be assessed against TMARO since all of its work on the project was not completed until August 2001; and further, that there should be a setoff awarded to HEPC on amounts it asserts is owed by TMARO to it for additional work performed by its architectural firm and for certain engineering work which became necessary after the project was substantially completed.

The Court will address this claim for purposes of this opinion by each Count set forth by the TMARO.

COUNT I

During construction of the Gaston Caperton Center, TMARO submitted various change proposal requests for additional payments to be made for work performed beyond the scope of the project. The change proposals were reviewed by HEPC's architectural firm on the project, Gates Calloway Moore & West, and were denied for payment. Each of these change proposals is discussed herein below:

Change Proposal No. 015 - The subcontractor for excavation on this project was Laurita Excavating. It mobilized its equipment at the project site in the spring 1998; however, on April 29, 1998, TMARO was directed by the representative of the architectural firm, Gates Calloway Moore & West, to halt excavation work because the soil compaction required by the specifications in the contract could not be met. The soil was determined to be unsuitable thus creating problems with stabilization for the parking lot. At that time the engineers determined that it would be necessary to design a "bridge layer" to resolve the soil issue. Laurita Excavating had to decide whether to leave its equipment on the project perhaps causing an additional cost to HEPC for idle equipment charges or to remove the equipment from the project site until the engineers determined a solution to the unsuitable soil problem. Laurita

Excavating made the decision to move the equipment off site whereupon there is an outstanding charge for remobilization of the equipment from and back to the project site. HEPC denied the remobilization charge for which TMARO now claims the amount of $1,560.00.

HEPC asserts that the remobilization claim should be denied as the subcontract was a lump sum bid; therefore, there is no one to determine whether or not the bid was based upon additional remobilizations.

The Court is of the opinion that the remobilization charge is a reasonable charge for the subcontractor Laurita Excavating. The Court is well aware that idle equipment charges would greatly exceed the remobilization charge put forth by the subcontractor herein. It was estimated that idle equipment charges for four pieces of excavating equipment would be approximately $800.00 per day[3] and the equipment would have been idle for at least eight days. It is unreasonable to assume that a subcontractor would plan to have equipment at a construction site for periods when it is not in use and not need that equipment for other contract obligations. Therefore, the Court is of the opinion to make an award in the amount of $1,560.00 for Change Proposal No. 015.

Change Proposal No. 034 - The construction site for this project was on acreage that had been the site of an old hospital which had been razed for a parking lot at some time in the past. Therefore, TMARO's subcontractor for excavation, Laurita Excavating, encountered foundation walls, brick, terra-cotta pipes, and other debris during excavation. Although the contract documents indicate that undercut excavation should not be beyond the one foot to two foot depth, the architect's representative on the project approved undercuts to two feet and, in some instances, to three feet. On this particular project the authorization to undercut to three feet was not an unusual occurrence due to the amount of debris encountered during excavation. On the last day (a Friday) that Laurita Excavating was performing its final excavation on the project in an area for the roadway adjacent to the new building, it encountered materials which it determined should be removed. Laurita Excavating was completing its work on the project so it performed a three foot cut based upon previous approvals it had been given in other areas on the project. In fact, the excavation was completed on this date and the excavating equipment was moved off the project site. Since the undercut was below the two-foot approved cut limit specified in the plans for the project, HEPC denied payment for the extra foot of excavation and backfill. It is the position of HEPC that the contractor did not have the required permission to make the additional one-foot cut and should not be paid even though the architect's subcontractor geotechnical engineering firm, Triad Engineering, may have had authority to approve a cut below the two-foot level, and did approve the undercut to three feet. HEPC asserts that Triad did not have authority to give this approval. TMARO makes a claim in the amount of $1,966.00 for this extra foot of excavation and backfill. The Court has determined that the excavating company performed the undercut in good faith and reliance upon personnel on the project from Triad Engineering. It is not the fault of TMARO that the appropriate

[1]Laurita Excavating based this estimate on a McGraw-Hill rental rate blue book publication for a dozer, a roller, an excavator, and a loader.

personnel for HEPC were not available to be consulted on the project on a Friday afternoon while the cut was being made by the subcontractor. For HEPC now to complain that the extra one-foot undercut was made without authority appears to the Court to be an issue totally within HEPC's own control if the appropriate personnel had been available on the project. It was the responsibility of the architect and the owner, HEPC, to make sure persons appropriate for decision-making purposes were available and were present to make the measurements needed for the calculation of material removed and backfill placed. TMARO acted within reason based upon former decisions made for undercutting areas with debris; therefore, the work performed in the roadway cannot now be said to have been performed without proper authorization. For that reason, the Court makes an award to TMARO in the amount of $1,966.00 for the extra work performed which constitutes Change Proposal No. 034.

Change Proposal No. 047 - The electrical subcontractor for TMARO on this project, William R. Sharpe Incorporated, submitted its bid based upon the electrical drawings provided to it for its bid. These drawings depicted only the electrical portion of the job. During construction, there were two sets of automatic doors with door openers to the building being installed by the glass and glazing subcontractor and these doors required electrical wiring and connections in order to operate. It was not within the scope of that subcontractor to wire the doors so this became the responsibility of the electrical subcontractor. The work performed by the electrical subcontractor involved the installation of four duplex receptacles per door with the necessary wiring to electrical panels located approximately 200 feet from the receptacles at one end of the building. TMARO now claims that this was additional work not within its original bid; therefore, TMARO makes this claim in the amount of $2,971.00 for this work. HEPC asserts that TMARO was responsible for the bid and making sure that all components of the plans were included in its bid on the project. The plans did depict the doors and one would assume that wiring may be needed, but the electrical subcontractor submitted its bid based upon the exact drawings which it received since to guess what other wiring may or may not be needed on the project could have jeopardized its award of the bid. Thus, the subcontractor bid the job based completely upon its set of drawings. The Court has had sufficient experience with construction contract claims heard previously to understand the position of the subcontractor. What is not shown specifically on drawings is not put in a bid. To do otherwise puts a subcontractor at a disadvantage with other bidders. Therefore, the Court has determined that an award be made to TMARO for Change Proposal No. 047 in the amount of $2,971.00 for the extra work performed in wiring the receptacles for the automatic doors.

Change Proposal No. 055a - TMARO alleges that there came a point on the project where HEPC decided to eliminate the installation of a range, range hood and exhaust duct for the range from the contract and, in so doing, it gave a credit to TMARO for this work. The controversy between the parties is that TMARO claims a reasonable credit of $629.00 should be given HEPC rather than the amount of $1,280.00 taken by HEPC. TMARO alleges that this credit taken by HEPC is too much and it claims that the amount of $651.00 is due it for this item. The subcontractor for the duct work was Air Systems Sheet Metal which also installed the duct work for the dryer vent. HEPC based the deduction upon the unit cost for the dryer vent which TMARO claims was not comparing "apples to apples" since the

dryer vent was a different installation situation. The dryer vent was an "add on" to the contract and required complicated duct work through a completed wall. The range hood duct required roof penetration which was a "straight shot" and it was not as complicated as the dryer vent installation. The subcontractor's bid document revealed an amount of $154.13 for the range hood duct work; however, TMARO agrees to a credit amount of $629.00. The Court recognizes that this is a relatively small item, but the credit offered by TMARO appears to be fair and reasonable. Thus, an award in the amount of $651.00 ($1,280.00 less $629.00) is granted for Change Proposal No. 055a.

Change Proposal No. 075 and Change Proposal No. 086 - These two change proposals will be considered by the Court together as these two claims are based upon the same reasoning by TMARO. In the course of construction of the third floor of the building, TMARO requested permission from the architect to lower the ceiling of the third floor hallway in order to fit the duct work and other equipment above the ceiling. Permission was granted by the architect. As construction of two conference rooms on this floor was being performed, TMARO determined that the ceilings in these two rooms would need to be lowered as well due to the fixtures required to be placed above the ceiling. The parties agreed that a solution to the lowering of the ceiling resulted in drywall bulkheads being placed in these rooms and in one conference room it was necessary to change an area of clear glass on the window to Spandrel glass (opaque glass with no visibility from outside the building since such a view would be of the duct work and pipes above the ceiling). This extra work resulted in extra expenses to TMARO of $847.00 for drywall bulkheads and $548.00 for the Spandrel glass. There was an abundance of testimony on these two items. TMARO's position is that the hallway ceiling had to lowered to accommodate the duct work to be installed with the other lines to be placed above the ceiling. When this ceiling was lowered, the sprinkler system pipe would not go directly into the rooms and a diffuser and a VAV box (variable air volume box) would not fit in the space above the planned ceiling level in one room so the lowering of the ceilings was necessary. Further, the VAV box is for the HVAC system, and, as such, it must be accessible to the owner of the building for maintenance purposes, *e.g.*, changing filters. The change proposals submitted by TMARO for work performed for the drywall bulkheads and the Spandrel glass was denied by HEPC.

HEPC asserts that this whole issue was created by TMARO when its subcontractors did not coordinate their work for the installation of the sprinkler system, ducts, electrical conduits, plumbing and any other item which had to run concurrently above the hallway ceiling on the third floor. Since it is the responsibility of the general contractor on a project to submit coordination drawings to the architect, any issues of the many systems that are located above the ceiling having room to fit is the responsibility of the general contractor. On this project, the lack of subcontractor coordination brought about the problem on the third floor so HEPC is not liable to TMARO for any extra work it had to perform in the conference rooms.

The Court had the opportunity to view this situation when it took a view of the building and actually peered into the ceiling area in the conference room with the Spandrel glass issue. Although HEPC vehemently denies the cost for these two change proposals, the Court has determined that TMARO may make a recovery in both instances. Therefore, the Court makes an award of $847.00 for Change Proposal

No. 075 for the drywall bulkheads and $548.00 for Change Proposal No. 086 for the Spandrel glass.

Change Proposal No. 083 - This request is for extending the water supply and the drain lines to the ice maker in the kitchen. The work was performed by TMARO's plumbing subcontractor, Mid-State Mechanical, during the installation of an ice maker. However, the drawings for the plumbing subcontractor did not depict these lines. TMARO alleges that the work was added to the scope of the project for which it now claims the amount of $573.00. HEPC asserts that even though the lines were not on the plans, the subcontractor should have interpreted the fact that an ice maker shown would necessarily imply that there would be piping needed to connect the ice maker to the nearest supply line and drain. Although there was a note on the plans for the ice maker to be connected, TMARO could not know whether that meant providing the plumbing lines or that the connection fittings should be tied in as for other appliances. Therefore, the Court has determined that TMARO may make a recovery for the supply lines to the ice maker in the amount of $573.00 for Change Proposal No. 083.

The award to TMARO for Count I is $9,116.00 plus interest calculated from August 14, 1999, to January 3, 2003, in the amount of $2,648.94 for a total award of $11,764.94. .

This concludes the discussion of Count I and the Court will now address Count II very briefly. Count II involved an issue of TMARO's responsibility for supplying potable water on the project and the issue was resolved by the parties at the beginning of the hearing. Thus, it is no longer a part of this claim.

COUNT III

Count III was brought for the costs incurred by TMARO in its attempts to balance the HVAC (heating, ventilation, and air conditioning) system after completion of the project. TMARO's subcontractors, Hydrair Balance Company, Mid State Mechanical, and Honeywell, as well as TMARO itself incurred extra costs in addressing the problems with the HVAC system. Hydrair Balance Company (hereinafter referred to as Hydrair) sent a technician to the project site for the purpose of "balancing" the HVAC system. This is normally a final step in the installation of the HVAC system as the technician adjusts each room individually for air flows and water flows so the system works correctly. It was estimated that this effort would take four days; however, TMARO contends that Hydrair's technician spent an additional 100 hours in an attempt to balance the HVAC system. In actuality, the balancing of the HVAC system was never accomplished on this project. After much wrangling over the HVAC system, both parties engaged the services of independent consultants to find an explanation for the problems with the HVAC system. It was eventually determined that there are design issues with the HVAC system and these problems had not been resolved even at the time of the hearing. However, TMARO contends that it is owed a total of $30,890.00 broken down as $12,887.00 for TMARO and $18,003.00 for its subcontractors for all of its efforts in attempting to meet the demands of HEPC in addressing issues with the HVAC system. HEPC asserts that the documentation for services rendered by Hydrair is insufficient to establish that the technician spent 100 extra hours on this project. It cannot prove or disprove this assertion. Further, HEPC asserts that it bore costs associated with the HVAC system that constitute a set off on this item. Its consultant employed in January 2000, Elwood S. Tower Corporation - Consulting Engineering, hereinafter referred to as Tower

Engineering, conducted an inspection of the HVAC system and rendered an expert opinion as to the design and construction of this system. During its inspection Tower Engineering determined that various items that make up the HVAC system were not installed correctly, *e.g.*, some VAV boxes were not properly piped, there were supports missing, the boiler was not piped in accordance with the manufacturer's specifications, there were unnecessary "elbows" which affected the amount of water circulating creating added pressure in the system; additionally, an impeller did not meet specifications. TMARO made the corrections which the consultant found , but the system still did not function as anticipated. Tower Engineering ultimately concluded that there were design deficiencies in the HVAC system; thus, the system was not able to function properly as anticipated by HEPC.

The HVAC system issues are quite complicated, but the underlying issue is that the HVAC system has been established to the satisfaction of both parties to have design deficiencies. Thus, the only issue is how to determine what amount is due TMARO and whether HEPC is entitled to a set off for the consultant it engaged to inspect the HVAC system, and if so, what amount is fair and reasonable to both parties. Tower Engineering submitted an invoice for its services to HEPC in the sum of $12,263.50 and it estimates that of that amount thirty percent (30%) of the invoice was for time spent in determining those parts of the HVAC system which were not installed correctly by TMARO. The Court is of the opinion that a fair and reasonable set off for the time spent by the consultant on construction issues versus design issues is twenty-five percent (25%) of the consultant's services to HEPC. The documentation submitted by TMARO for its additional expense appears to the Court to be fair and reasonable. Accordingly, an award is granted to TMARO for the HVAC system expenses in the amount of $30,890.00 less the set off of $3,065.88 for a total award of $27,824.12 for the HVAC system deficiencies.

COUNT IV

In Count IV TMARO claims that it is entitled to recover the full amount of retainage on this contract being held by HEPC. TMARO's position is that the retainage was being held based upon the inability of TMARO to balance the HVAC system. Once it was determined that the HVAC system had design deficiencies for which TMARO is not responsible, then the retainage became due and owning to it by HEPC. HEPC, however, takes the position that the retainage was being held not only for the issues relating to the HVAC system, but also for the sewer line corrections[2] which had to be made when it was determined that there were sags in the sewer line beneath the building and in the lines on the exterior of the building. The Court notes that there was specific reference to the retainage being held by HEPC for the HVAC system in correspondence to TMARO dated November 30, 1999. It appears to the Court that the punch list items were completed although there were warranty issues, *e.g*., the floor refinishing being redone for a multipurpose room, and later there was the sewer line issue, but for all intents and purposes the retainage was due at the time that the parties were in agreement that the HVAC system could not be balanced because there were design deficiencies. Warranty issues are not the basis for denying

[2]TMARO first received notice that there were problems with the sewer line in November 1999.

a contractor the retainage on a contract as the purpose of retainage is to provide security for the owner for the completion of the project. In this claim, the Gaston Caperton Center had substantial completion as of June 23, 1999. The building was occupied by Fairmont State College in August 1999 with classes beginning on schedule. The building had been built by HEPC for this purpose. It is generally anticipated that there may be warranty issues after the construction of a building as occurred herein with the roof problems as raised by HEPC and a myriad of other small issues; however, there are maintenance warranties for these items. Warranty issues do not give the owner (HEPC) the right to withhold retainage on the contract when the project is completed. The Court does recognize that the HVAC system problems have been on-going for more than two years. Accordingly, the Court makes an award to TMARO in the amount of $59,252.00 plus interest based upon the dates when Tower Engineering determined that the HVAC system was malfunctioning because of design deficiencies rather than construction issues and taking into consideration the date at which the construction deficiencies were remedied. The date which will be used by the Court is September 30, 2001, for the completion of its work as the record establishes that Tower Engineering submitted its invoice for the consulting services in October 2001. Interest will be calculated from October 1, 2001, to the date of the issuance of this opinion on January 3, 2003. The interest is calculated in accordance with the terms of the contract at $6,574.09 for a total award of $65,826.09 for the retainage being held by HPEC.

The Court has also considered HEPC's assertion that it is entitled to liquidated damages in the amount of $750.00 per day from the date of substantial completion on June 23,1999, through December 2001. It bases its position on the fact that the sewer line beneath the building had to be replaced due to sags in the line when the soil gave way under the sewer pipes. This particular work was done by TMARO at its expense and at the convenience of Fairmont State College so as to avoid any disruptions to classes being held in the building. The sewer line replacement work took until December 2001 because TMARO's subcontractor worked around the class schedule for the college. During this time, HEPC's architect provided engineering and inspection services for which HEPC now asserts a set off in the amount of $14,766.64 as well as the inconvenience to the college. The additional custodial services needed by the college were reimbursed by TMARO's subcontractor as the work was accomplished. Notwithstanding that the project was completed in August 1999, the issue of liquidated damages was raised by the owner for the first time when it filed its Answer to the claim. The Court is of the opinion that the issue of liquidated damages was raised too late to be considered as an element of set off in this claim. However, the Court is of the further opinion that HEPC is entitled to a set off of $14,766.64 for its direct costs related to the sewer line correction work and the total award to TMARO will be reduced by this amount.

In accordance with the findings of fact as stated herein above, the Court is of the opinion to and does make an award of $105,415.15 reduced by the set off of $14,766.64 granted to HEPC for a total award of $90,648.51. .

Award of $90,648.51.

OPINION ISSUED JANUARY 3, 2003

MICHAEL SHAN SLEVIN
VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-02-404)

Claimant appeared *pro se*.
Joy M. Bolling, 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, an inmate at the Eastern Regional Jail, in Berkeley County, seeks $100.00 for items of personal property that were entrusted to respondent's employees. Thus far, respondent's employees have been unable to produce claimant's personal property.

In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

The Court has taken the position in prior claims that a bailment situation has been created if property of an inmate which is taken from that inmate remains in the custody of respondent, and is not produced for return to the inmate at a later date.

Accordingly, the Court makes an award to the claimant herein in the amount of $100.00.

Award of $100.00.

OPINION ISSUED JANUARY 3, 2003

WEST VIRGINIA ASSOCIATION OF
REHABILITATION FACILITIES
VS.
DEPARTMENT OF ADMINISTRATION
(CC-02-471)

Claimant appeared *pro se*.
John T. Poffenbarger, Attorney at Law, 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 in the amount of $639.84 for providing a temporary typist to respondent's accounting office in Charleston, Kanawha County. Respondent, in its Answer, admits the validity of the claim, and further 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 JANUARY 3, 2003

ANTHONY W. SHACKELFORD
VS.
WV STATE POLICE
(CC-02-439)

Claimant appeared *pro se*.
John A. Hoyer, 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 $205.79 for vehicle damage caused by a spike strip in the roadway while traveling on Route 11 in Berkeley County.

In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $205.79.

Award of $205.79.

OPINION ISSUED JANUARY 17, 2003

SCOTT RODES
VS.
DIVISION OF CORRECTIONS
(CC-02-333)

Claimant appeared *pro se*.
Charles Houdyschell, Jr., 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 $246.74 for travel expenses incurred as an employee of the respondent State agency. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $246.74.

Award of $246.74.

OPINION ISSUED JANUARY 17, 2003

RAVIN BHIRUD, M.D.
VS.
DIVISION OF CORRECTIONS
(CC-02-482)

Claimant appears *pro se.*

Charles Houdyschell, Jr., 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 payment in the amount of $10,316.65 for medical services rendered to inmates in the custody of respondent at Mt. Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further states that the correct amount owed to the claimant is $9,991.65 as one of the invoices included in the claim has been paid. Claimant agrees that the correct amount owed in this claim is $9,991.65. Respondent also 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 JANUARY 17, 2003

CHARLESTON HEART SPECIALISTS
VS.
DIVISION OF CORRECTIONS
(CC-02-448)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $1,780.00 for medical services rendered an inmate in the custody of respondent at Mt. Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JANUARY 17, 2003

UNIVERSITY HEALTH ASSOCIATES
VS.
DIVISION OF CORRECTIONS
(CC-02-257)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $183,332.75 for medical services rendered to inmates in the custody of respondent at Denmar Correctional Center, Mount Olive Correctional Complex, Huttonsville Correctional Center, and Pruntytown Correctional Center, facilities of the respondent. Respondent, in its Answer, admits the validity of the claim, but states the correct amount due and owing to claimant is $154,411.00. Claimant is in agreement with the amount of $154,411.00. Respondent 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 JANUARY 17, 2003

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.
VS.
DIVISION OF CORRECTIONS
(CC-03-008)

Claimant appears *pro se.*
Charles Houdyschell, Jr., 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 payment in the amount of $3,859.08 for medical services rendered to inmates in the custody of respondent at Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JANUARY 17, 2003

GRAFTON CITY HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-02-467)

Claimant appears *pro se.*
Charles Houdyschell, Jr., 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 payment in the amount of $29,820.47 for medical services rendered to inmates in the custody of respondent at Pruntytown Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, but states that the correct amount owed to claimant is $19,897.80. Claimant agrees that it is due the amount of $19,897.80. Respondent further 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 JANUARY 17, 2003

JAN CARE AMBULANCE
VS.
DIVISION OF CORRECTIONS
(CC-02-485)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $595.00 for emergency transportation services rendered to an inmate in the custody of respondent at Mt. Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JANUARY 17, 2003

CHARLESTON CARDIOLOGY GROUP
VS.
DIVISION OF CORRECTIONS
(CC-02-512)

Claimant appears *pro se.*
Heather A. Connolly, 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 payment in the amount of $162.00 for medical services rendered to an inmate in the custody of respondent at Mt. Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 JANUARY 17, 2003

DAVIS MEMORIAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-02-459)

Claimant appears *pro se.*
Charles Houdyschell, Jr., 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 payment in the amount of $22,693.12 for medical services rendered to inmates in the custody of respondent at Huttonsville Correctional Center and Denmar Correctional Center, facilities of the respondent. Respondent, in its Answer, admits the validity of the claim, but states the correct amount due and owing to claimant is $20,702.30. Claimant is in agreement with the amount of $20,702.30. Respondent 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 JANUARY 17, 2003

BRYANT M. HATFIELD, JR.
VS.
DEPARTMENT OF MOTOR VEHICLES
(CC-02-167)

Claimant appeared *pro se*.
Joy M. Bolling, 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 purchased a truck based upon title information issued by the respondent State agency. After purchasing the truck and being issued a clear title, claimant determined that the title should have been noted as a rebuilt title. Claimant purchased the vehicle for $6,000.00. However, the vehicle was worth only $1,000.00; therefore, claimant seeks $5,000.00 in damages.

In its Answer, respondent admits the validity of the claim and that the amount claimed is fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $5,000.00.

Award of $5,000.00.

OPINION ISSUED JANUARY 17, 2003

JOY L. STALNAKER
VS.
DIVISION OF CULTURE AND HISTORY
(CC-02-509)

Claimant appeared *pro se*.
Barry L. Koerber, 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 $4,147.61 for personal services she has rendered and for travel expenses she incurred on behalf of the Weston Hospital Revitalization Committee Center which was created to develop a scope and plan for the preservation and redevelopment of the Weston State Hospital. The Committee entered into an agreement with claimant to compensate her for her services and travel expenses, but the documentation for these services was not processed for payment within the appropriate fiscal years; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount claimed, and states that there were sufficient funds in the grant provided in the Legislative Budget Digest from which the compensation for personal services and travel expenses could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $4,147.61.

Award of $4,147.61.

OPINION ISSUED JANUARY 17, 2003

JEFFREY L. SMITH and CAROLYN SMITH
VS.
DIVISION OF HIGHWAYS
(CC-02-345)

Claimants appeared *pro se.*

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action to recover damages to their 1994 Mitsubishi Mirage which occurred when claimant Jeffrey Smith was driving their vehicle on County Route 73/73 in Marion County and the vehicle struck a hole in the highway. Respondent maintains County Route 73/73 in Marion County as part of the State road system. The Court is of the opinion to make an award to claimants for the reasons set forth herein below.

Claimant Jeffrey Smith, the son of claimant Carolyn Smith, was operating claimants' vehicle on August 13, 2002, on County Route 73/73 in Marion County at about 9:30 p.m. It was dark at that time and he was traveling at approximately 45 miles per hour. There was one vehicle in front of him and two oncoming vehicles. He intended to proceed more to the right side of his lane due to the oncoming traffic when the vehicle struck a large hole on the right side of the highway. He was aware that there was a large hole in the pavement but he was not sure of its exact location that evening since it was dark. Mr. Smith described the hole as being six to eight inches deep Photographs admitted into evidence depict the hole at the edge of the roadway from the berm area into the white edge line on County Route 73/73. The vehicle sustained damage to two wheels, one tire, and it had to be realigned. Claimants incurred costs in the amount of $651.04 for the repairs to their vehicle.

John Michael Barberio, respondent's Highway Administrator in Marion County, testified that he is familiar with County Route 73/73 which is a secondary road that is blacktopped with white edge lines and a yellow center line. It is twenty-two (22) feet wide from edge to edge. It is on a three-year schedule for berm repair and ditching although the road surface is repaired more often for patching holes. He is aware that truck traffic using County Route 73/73 hugs the berm in the right turns and causes the deterioration to the berm.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986).

The Court finds in this claim that respondent had constructive, if not actual, notice of the deteriorated condition of the berm on County Route 73/73 in Marion County on the date of claimant Jeffrey Smith's encounter with the hole at the edge of the pavement. The photographs depict a deep depression from part of the white edge line into the berm. This condition was the proximate cause of the damages to claimants' vehicle. The Court, therefore, will grant a recovery to the claimants for the damages to their vehicle.

Accordingly, the Court is of the opinion to and does grant an award to claimants in the amount of $651.04.

Award of $651.04.

OPINION ISSUED JANUARY 17, 2003

JOYCE E. C. EDGELL and ROBERT N. EDGELL
VS.
DIVISION OF HIGHWAYS
(CC-02-219)

Claimants appeared *pro se.*
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action to recover for damage to their real and personal property from a flood which occurred on or about May 23, 2000. Claimants allege that the flood was the result of respondents' failure to maintain its drainage system on McKimmie Ridge Road (designated as Route 52) in Wetzel County. Respondent was at all times herein responsible for the maintenance of this road and its drainage system. The Court is of the opinion to grant an award to claimants for the reasons stated herein below.

Claimants purchased their property adjacent to McKimmie Ridge Road in the fall 1984. The road circles their property with a hillside and the road above their property to the back of the property. The road proceeds around their property on one side, and then the road circles to the front of the property where the road is below their property. Claimants had experienced no severe water problems on their property for the sixteen years that they resided on the property. According to claimant Mrs. Edgell, in May 2000 respondent replaced a culvert on the upper side of the road during which time respondent also cleaned off the bank along the ditch line; at that same time respondent also removed a "lip" of earth at the edge of the road adjacent to claimants' property; and, respondent slanted the roadway surface toward claimants' property. As described by Mrs. Edgell, the lip of earth along the edge of the road was anywhere from six inches to eighteen inches in height. In her opinion, this lip, consisting of dirt and stone built up during routine maintenance by respondent, acted as a barrier for surface water which flowed in the road. When the lip was removed during the maintenance project, it allowed surface water from the road to flow onto claimants' property. Additionally, she testified that respondent filled in the ditch line on the opposite side of the road from claimants' property. This

ditch had been about a foot to a foot and a half deep, but during the maintenance efforts by respondent, it was filled in and became a shallow area for the water. According to claimant Joyce Edgell, these maintenance efforts by respondent resulted in excess runoff which flowed from the hillside above their property, across McKimmie Ridge Road, over the edge of the road, and onto claimants' property causing damage thereto, all of which occurred during an evening storm beginning around 5:00 p.m. to 6:30 p.m. on May 23, 2000. It rained off and on during that night but the most severe rainfall occurred by 9:30 p.m. Claimant and her husband noticed that more water than usual was flowing onto their property that evening. They worked in the dark by flashlight in an attempt to dig a ditch to protect an out building and their house. In the morning of May 24, 2000, claimants took photographs depicting the conditions surrounding their home and in the yard. As depicted in photographs taken by claimants, the amount of mud and gravel covering the deck, patio, out building, ditch, and their yard in general was considerable.

Claimants assert that another reason for the excessive amount of water flowing onto their property during the flood was the fact that a culvert respondent replaced under McKimmie Ridge Road had not functioned properly prior to being replaced. The new culvert was installed at a location above claimants' property at a location different from the original culvert at the request of the claimants. This new culvert, according to Mrs. Edgell's testimony, was not large enough to handle the amount of water coming from the hillside and it quickly filled up causing more surface water than usual to flow over the road surface and onto claimants' property causing damage to an outbuilding, deck, and covering their yard in dirt and gravel. The mud was approximately two feet deep in places on their property. A ditch that existed on claimants' property to provide for water drainage from the road became filled with mud, dirt, and gravel during the flood and that ditch had to be cleaned out to continue to provide protection to their property from normal runoff from McKimmie Ridge Road. The damages to claimants' real property and personal property which were the result of the flood on May 23, 2000, were documented in the amount of $9,812.00. Claimants also allege annoyance and inconvenience as damages.

Respondent contends that it performed routine maintenance on McKimmie Ridge Road (also referred to by its designated route number as County Route 52 by respondent's employees) on May 15, 2000. Dale Richmond, an equipment operator for respondent in Wetzel County, testified that he operated the backhoe for respondent on May 15, 2000, during the maintenance project on McKimmie Ridge Road. He explained that the existing fifteen-inch culvert was "bad" so it was replaced with an eighteen-inch culvert. The new culvert was placed farther away from the original culvert at the request of claimant Mrs. Edgell. He described the work performed for replacing the culvert and that after the May 23, 2000, incident that the new culvert was filled with cement at the request of the claimants. County Route 52 (McKimmie Ridge Road) is a gravel road with a crown at the center for water to drain to either side of the road. He filled in the ditch line on the road opposite from claimants' property as the ditch was two to three feet deep in places. The filled ditch line was much more shallow after he finished the routine maintenance work.

Joe Mercer, a crew leader for respondent in Wetzel County, testified that McKimmie Ridge Road is a gravel road and a bus route. As such, it is a low priority road for maintenance purposes. He visited claimants' property after the flooding had

occurred on May 23, 2000, and took photographs which depict the ravine from the road proceeding down the hillside through claimants' property. He did not remember the weather conditions on May 23, 2000.

The Court, having reviewed all of the evidence in this claim, is of the opinion that the maintenance efforts of the respondent were performed to improve McKimmie Ridge Road; however, these efforts were performed without regard to the amount of water that flows from the hillside, across the road, and onto the property below the road which is owned by claimants. The "lip" of earth and gravel described by claimant Mrs. Edgell apparently afforded protection to claimants' property from the natural flow of water on McKimmie Ridge Road. While respondent's actions appear to be reasonable under the circumstances, respondent did not take into consideration the amount of water coming off its roadway. Respondent did not provide protection to claimants' property when it removed the "lip" of earth that protected the abutting property. It exacerbated runoff problems when it filled in the ditch line on the opposite side of McKimmie Ridge Road creating more surface water runoff onto the road and thus onto claimants' property. All of its actions were detrimental to claimants' property. Even though claimants' property appears to be in a natural drainage area there had not been severe water problems from runoff until respondent's changes to the road, the ditch line, and the removal of the lip of earth at the edge of claimants' property. An owner of property which is abutting property owned by another is liable for creating a situation whereby excessive water is diverted onto the adjoining property. In the instant claim, claimants had not experienced excessive water problems for sixteen years until the actions by respondent in its maintenance of its road. Therefore, the Court concludes that the actions of the respondent in its maintenance of McKimmie Ridge Road were the proximate cause of the flooding on claimants' property on May 23, 2000.

As to the damages incurred by claimants, they established through estimates the cost for restoring their property and the replacement cost for damaged personal property. The Court calculates actual damages in the sum of $9,812.00. The Court is also of the opinion that claimants suffered annoyance and inconvenience in their efforts to clean up the mud and gravel on their property and in cleaning out their drainage ditch. They spent several days in their efforts to restore their property so as to make it usable. The Court has determined that the amount of $3,000.00 for annoyance and inconvenience is fair and reasonable.

Accordingly, the Court is of the opinion to and does make an award to claimants in the amount of $12,812.00.

Award of $12,812.00.

OPINION ISSUED JANUARY 17, 2003

CLINTON R. HOLCOMB and PATSY HOLCOMB
VS.
DIVISION OF HIGHWAYS
(CC-01-384)

Claimant appeared pro se.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to their 2000 Chevrolet Silverado truck which occurred when Clinton Holcomb was traveling northbound on County Route 9 near Erbacon in Webster County and his vehicle struck numerous large rocks placed in the road by respondent to repair a hole. Respondent was responsible at all times herein for the maintenance of County Route 9. The Court is of the opinion to make an award in this claim for the reasons set forth below.

The incident giving rise to this claim occurred on August 24, 2001, at approximately 9:00 p.m. It was a clear, warm, dry, summer evening. It was just turning dark outside as Mr. Holcomb was traveling back home on County Route 9 between Erbacon and Little Birch in Webster County. He traveled this road almost every day and was familiar with it. He was traveling at approximately fifteen miles per hour in a forty mile per hour zone. As he was approximately two hundred to three hundred yards from his home, his vehicle suddenly struck a section of large rocks placed on the road earlier in the day by respondent. He stated that the rock was not there the last time he drove through this location. Once Mr. Holcomb got home, he noticed that his right rear tire was punctured, and he stated that he heard the air leaking out of the tire. Claimants used a spare tire for a few weeks until they were able to purchase a new one. Mr. Holcomb testified that he observed the location at issue the next day. He testified that respondent filled in a large hole in the road with extremely large rock which he estimated to be the size of a man's fist and that the rock extended the full width of the road. He also testified that the rock fill extended approximately twenty-five yards in length. Mr. Holcomb also introduced a video tape of the location of this incident into evidence which corroborated his testimony regarding the size of the rocks, as well as the size and condition of the entire rock fill. Claimants submitted into evidence a repair bill in the amount of $111.30.

Claimants assert that respondent should have known that rock this size presented a hazardous condition to the traveling public and that smaller gravel should have and could have been used to fill in the holes in the road.

It is respondent's position that it did the best job it could under the circumstances to repair holes in the road and that it had no reason to know that the rock it used presented any hazard to the traveling public.

Jimmy Collins was the County Maintenance Supervisor for respondent in Webster County at the time this incident occurred. His responsibilities include maintaining the highways in Webster County. Mr. Collins was responsible for maintaining County Route 9 at the location of this incident and he is familiar with the road at this location. He testified that County Route 9 is a two lane asphalt road and is considered a priority two road in terms of maintenance. A portion of the road is marked with lines but not at the location of this incident. He stated that there is a high volume of heavy coal trucks using this road and that they cause a great deal of "base failures" at several locations on the road. He stated that respondent does have a difficult time repairing holes and "base failures"on this road and that the rock used at the location of this incident was an attempt to make such a repair. He also testified that the rock used was a temporary fix. However, he admitted that respondent did not put enough "fine" rock in along with the rock used to fill this hole, and that this fill should have had more small gravel with it.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the present claim, the Court is of the opinion that respondent should have known that the rocks it used to fill the holes in the road were too large for vehicles to travel over, and that such large rocks pose a high risk of puncturing tires. The evidence clearly established that respondent should have used smaller gravel to fill this hole in the road and that there was no reason for not doing so. While the Court is aware that coal trucks have caused a great deal of damage to the road at issue, and that respondent was attempting to repair some of this damage, it is of the opinion that respondent was negligent in using large rock to do so. Thus, the Court is of the opinion that respondent is liable for the damage to claimants' vehicle in this claim.

Accordingly, the Court makes an award to the claimants in the amount of $111.30.

Award of $111.30.

OPINION ISSUED JANUARY 17, 2003

REGINA S. JURKOVICH and DANIEL W. JURKOVICH
VS.
DIVISION OF HIGHWAYS
(CC-02-312)

Claimant appeared *pro se.*
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to their 1995 Mercury Villager Van which occurred when claimant Regina Jurkovich was traveling on Route 929, a former orphan road also referred to as Country Lane, in Amma, Roane County, and the vehicle struck a large hole in the road. Respondent was responsible at all times herein for the maintenance of Route 929. The Court is of the opinion to make an award in this claim for the reasons set forth below.

The incident giving rise to this claim occurred on May15, 2002, at approximately 8:00 a. m. It was a clear day and the road surface was dry. Mrs. Jurkovich was driving her two sons to school. She was traveling at approximately ten miles per hour in a fifteen mile per hour zone when she drove the vehicle over the hole which had grown much larger overnight. The impact was forceful enough to cause a significant oil leak which ultimately caused the engine to lock up. The claimants measured the hole at eleven inches deep at the location where the vehicle struck it. Route 929 is a fourth priority dirt and gravel orphan road recently taken into the State road system by respondent. It is approximately 9/10 of a mile from the

entrance of Route 929 to the claimants' home and approximately 7/10 of a mile from the entrance to the location of this incident. Claimants introduced photographs into evidence that depict a hole or crack in the surface of the road. A depression extended from one side of the road to the other. They also introduced photographs depicting a significantly deep hole within a portion of the crack. Mrs. Jurkovich testified that it was this hole that the van struck causing most of the damage and that she had repeatedly called respondent's Amma garage to inform its employees of this hole. She testified that she reported the hole in the road when it first started to develop. She stated that she spoke to one of respondent's employees sometime in early April 2002. Mrs. Jurkovich testified that although she continued to call respondent at the Amma garage over a period of time, no one responded. It was during this time span that the hole extended in width until it went from one side of the road to the other. She stated that she got no response to her complaints. She was often told that the equipment needed to do the job was broken down. Mr. Jurkovich also testified that he had called and spoke to two different employees regarding the same problem and yet got no response. Claimants submitted an invoice in the amount of $530.00 for which they seek recovery. Claimants have comprehensive insurance coverage that covers all the damages in this claim; therefore, they are limited to a recovery of their insurance deductible feature in the amount of $500.00.

Claimants assert that respondent had actual notice of a hazardous road condition and yet failed to make adequate repairs in a timely fashion.

Respondent contends that it acted diligently under the circumstances in responding to a fourth priority road problem.

Virgil A. Ditrapano, Supervisor for respondent at the Amma substation in Roane County at the time this incident occurred, testified that his responsibilities include the maintenance of Route 929. According to Mr. Ditrapano, Route 929 is a fourth priority road which is the lowest priority. He stated that the problem with the road stemmed from a road slip farther up the road which has caused water to flow beneath the road surface which in turn causes a hole in the road surface. He also testified that he had been called by the claimants regarding the road defect at issue prior to this incident. Mr. Ditrapano testified that respondent attempted to remedy the problem prior to this incident by trying to repair the slip and by trying to keep the ditch line clear so as to keep the water off the road. However, he stated that every time that his crew would respond to the location and use gravel and stone on the road to fill the hole the rain would simply wash it off.

Terry Holbert, the transportation crew chief for respondent at Amma in Roane County at the time this incident occurred, testified that he was aware of the hole but he did not believe it to be a hazard at the location of this incident. He testified that he had a difficult time seeing the hole when he responded to a call. He also stated that the primary problem causing this hole is that fact that there are water problems on the hillside where he estimates that there is approximately 1,000 to 1,500 feet of hillside slipping. In his opinion, it would only worsen the slide by placing gravel on it at this time.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action.

Chapman v. Dept. of Highways 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the present claim, the Court is of the opinion that claimants have established by a preponderance of the evidence that respondent had actual notice of this hazard. The evidence established that the claimants had reported the deteriorating condition on Route 929 to respondent's Amma substation on numerous occasions well before this incident occurred. Thus, respondent had more than a reasonable amount of time to take adequate corrective action to resolve this problem and failed to do so.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 17, 2003

FRANCES C. MESSNER
VS.
DIVISION OF HIGHWAYS
(CC-02-370)

Claimant appeared pro se.

Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to her 1998 Chrysler Sebring which occurred when she was traveling on Route 161 between Horse Pen and Bishop in McDowell County and her vehicle struck a large hole in the road. Respondent was responsible at all times herein for the maintenance of Route 161. The Court is of the opinion to make an award in this claim for the reasons set forth below.

The incident giving rise to this claim occurred on August 3, 2002, at approximately 3:00 p.m. Claimant was traveling from Horse Pen to Squire for a family reunion. Claimant's sister was also traveling to the reunion and her sister was in a vehicle in front of claimant by a few car lengths. It was a cloudy but dry day and the road surface was dry. Claimant described this area of Route 161 as a typical curvy McDowell County road. It had double yellow lines and white lines on the edges at the location of this incident. Claimant was traveling at approximately thirty miles-per-hour when she rounded a curve. Suddenly, when she came out of the curve she saw her sister's vehicle swerve, and without warning claimant saw a large hole in the road ahead of her. She attempted to maneuver her vehicle to avoid striking the hole but was unable to do so. She testified that she did not see the hole in time enough to avoid it. The impact was severe enough to damage a rim and a tie rod. The vehicle also had to be realigned. Claimant introduced a photograph into evidence demonstrating the size of the hole and its location. The hole is located in the middle of the road and extends several inches into both lanes of travel. Claimant also testified that the hole was approximately ten inches deep and eighteen inches wide. Claimant's sister, Mona Smith, also testified that she had a difficult time avoiding this hole and barely swerved her vehicle in time to do so. Claimant submitted a repair bill into evidence in the amount of $630.73. However, claimant has comprehensive

insurance coverage on this vehicle with a deductible feature of $250.00. Claimant is limited to recover the amount of her insurance deductible feature.

Claimant contends that respondent knew or should have known that this hole existed and taken timely remedial actions to repair it and that it's failure to do so created a hazardous condition to the traveling public.

Respondent did not present any testimony or evidence in this claim.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the present claim, the evidence established that this portion of Route 161 presented a hazard to the traveling public. The size of this hole, its location in the middle of the road, and the fact that this occurred in the late summer leads the Court to conclude that respondent should have known of this hole and that it had adequate time to take corrective action. Thus, the Court finds respondent negligent in this claim and claimant may make a recovery for the damage to her vehicle. Accordingly, the Court makes an award to claimant in the amount of $250.00.

Award of $250.00.

OPINION ISSUED JANUARY 17, 2003

ROCKSON BUTCHER
VS.
DIVISION OF HIGHWAYS
(CC-01-337)

Claimant appeared *pro se.*
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover for damages to his vehicle, a 1988 Chevrolet Beretta GT, which occurred when he was operating his vehicle on Patrick Street in Charleston, Kanawha County. Respondent maintains this road as a part of the State road system. The Court is of the opinion to make an award to claimant for the reasons set forth herein below.

Claimant was proceeding on Patrick Street on August 26, 2001, when he noticed that the road was in a state of disrepair due to a construction project. He was stopped behind a truck and when he drove forward, his vehicle struck a water main that was protruding from the pavement approximately seven to seven and a half inches. He reported this incident immediately to respondent and an employee in a courtesy truck appeared at the scene. This employee marked the tops of the water main lines with orange paint about an hour after claimant's incident. Claimant's

vehicle sustained damage to the neon light system installed beneath the frame of the vehicle. He incurred an expense of $233.00 for the replacement of the neon light system.

Respondent offered no witnesses in this claim and its defense appears to rest upon the contention that claimant's light system was lower than the frame of an average vehicle.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant claim, the Court has determined that respondent was negligent in its inspection of the on-going construction project[1] on Patrick Street at the time of claimant's accident. The fact that there were several unmarked objects such as a water main protruding above the road surface presented a hazard to the traveling public. A 1988 Chevrolet Beretta has an average clearance height and the light system was attached to the bottom of the frame with the same clearance as the frame. Therefore, the Court is of the opinion to allow a recovery to the claimant for the damages to his vehicle which occurred herein.

Accordingly, the Court makes an award to claimant in the amount of $233.00.

Award of $233.00.

OPINION ISSUED JANUARY 17, 2003

BETTY J. STRICKLAND
VS.
DIVISION OF HIGHWAYS
(CC-02-347)

Claimant appeared *pro se.*
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to her 1997 Subaru Impreza which occurred as she was traveling on Jack's Run Road in Clarksburg, Harrison County. She was negotiating a left turn onto Simpson Road when her vehicle was struck by

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[1]The Court notes that respondent intimated during the hearing of this claim that this incident occurred at a time when there was a construction project being performed by one of its contractors, but no evidence was offered to substantiate this fact. However, the Court is aware that hold harmless clauses are generally a part of construction contracts and respondent has the right to seek reimbursement from the contractor based upon this decision.

an oncoming vehicle. Respondent was responsible at all times herein for the maintenance of Jack's Run Road and Simpson Road. The Court is of the opinion to make an award in this claim for the reasons set forth below.

The incident giving rise to this claim occurred on July 19, 2002, at approximately 4:30 p.m. Claimant was traveling this portion of Jack's Run Road for the first time. She and her husband had just moved from Texas to Clarksburg and claimant was running errands to finish moving into their new home. As she reached the bottom of the hill where Jack's Run Road intersects with Simpson Road, she stopped her vehicle at the stop sign. She was attempting to make a left turn onto Simpson Road, but she testified that she could not see from this location whether or not there was any oncoming traffic. Therefore, she slowly drove her vehicle into Simpson Road. She estimates that she drove her vehicle approximately one-half of a car length past the stop sign so as to see the oncoming traffic on Simpson Road. She testified that she looked in both directions before making a left turn onto Simpson Road. Suddenly, as she drove her vehicle onto Simpson Road across the oncoming traffic lane, a truck came around the curve in that lane and collided into the rear of her vehicle. She described the impact as severe but that it could have been much worse had the driver of the truck not reacted as quickly as he did. She stated that the Dodge Ram truck was heading straight for her front driver's side door when suddenly the driver maneuvered the truck which hit the rear of her car. The truck then struck a row of mailboxes on the side of the road before coming to a stop. Fortunately, neither driver was injured. However, claimant's vehicle was damaged beyond repair and it was considered a total loss by her insurer. Claimant has insurance coverage to cover this loss; however, she paid an insurance deductible of $250.00 for which she seeks a recovery in this claim.

Claimant is of the opinion that the stop sign at the corner of Jack's Run Road and Simpson Road is located entirely too far back from Simpson Road to allow a driver to be able to view whether or not there is traffic coming from the left on Simpson Road. Claimant also testified that there were trees, bushes, and weeds blocking her view of oncoming traffic as well. Claimant introduced numerous photographs into evidence taken shortly after this incident that depict a great deal of foliage obstructing the view of drivers looking to the left side of the intersection for oncoming traffic on Simpson Road. Claimant asserts that respondent failed to cut the trees and other foliage on the hillside at the corner of Jack's Run Road and Simpson Road adequately to allow her to see the oncoming traffic from the left on Simpson's Road and that respondent placed the stop sign too far back from the road.

Respondent contends that it properly maintained the hillside at the corner of Jack's Run Road and Simpson Road and that a reasonably prudent driver could have seen the oncoming vehicle.

John Barberio was the Highway Administrator for respondent in Harrison County at the time this incident occurred. His responsibilities include overseeing the maintenance work for all roads in Harrison County including the area at issue in this claim. He is familiar with the location at issue. He testified that both Jack's Run Road and Simpson Road are blacktopped roads. He testified that the stop sign at the intersection of the two roads is probably located approximately twenty to twenty-five feet from Simpson Road. He admitted that this is not the standard practice to place a sign this far from the road, but at this particular location respondent could not place the sign onto the shoulder of the road. Furthermore, he stated that the postal service

needs room to drive their trucks to the side of the road when they deliver to the numerous mailboxes at this location. Mr. Barberio testified that he does not know of any other accidents at this location. He testified that a driver is supposed to ease his vehicle up to the edge of the intersection, and, once the vehicle is located a foot or two beyond the mailboxes, a driver should have one hundred to one hundred-fifty feet of visibility to the left to observe oncoming traffic. Mr. Barberio also stated that respondent is responsible for trimming the brush along the road and the hillside at this location. He testified that he had not received any complaints prior to this incident regarding obstructive vegetation on the hillside that blocked the traveling public's view of Simpson Road. However, he testified that a driver stopped at the stop sign would not have one hundred to one hundred-fifty feet of visibility for traffic coming from the left on Simpson Road. Finally, Mr. Barberio admitted that there may have been a little problem with a few limbs obstructing a driver's view at the location of this incident.

Paul Lister, an investigator with respondent's Legal Division, testified that his responsibilities include traveling state-wide to investigate accidents for respondent. He investigated this incident and took photographs and measurements of the scene. He took the photographs that were introduced into evidence by respondent. These were taken on September 18, 2002, nearly two months after the incident occurred. According to Mr. Lister, a reasonably prudent driver should have been able to see approximately one hundred-fifty feet from the intersection to the left on Simpson Road. He also testified that he did not believe that the brush or trees prevented or inhibited the view of a driver stopped at the white line at the intersection from viewing oncoming traffic on Simpson Road. Further, he stated that he did not believe that cutting or spraying brush could improve the sight distance for a driver at the intersection by more than ten feet.

It is the well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the present claim, the Court is of the opinion that respondent had at least constructive notice that the intersection at Jack's Run Road and Simpson Road presented a hazard. The photographs illustrate that from the location of the stop sign, it is impossible for a driver to observe any oncoming vehicles traveling from the left at this particular intersection. The claimant was forced to drive her vehicle slowly up to the edge of the intersection and then look for oncoming traffic, but even from this location her sight distance was very limited due to the hillside and the heavy brush and foliage on the trees. The Court is of the opinion that respondent failed to maintain this intersection in such a way as to provide a driver with the ability to observe oncoming traffic and to afford the driver a safe entry onto Simpson Road. Therefore, claimant may make a recovery for her vehicle in this claim.

In accordance with the findings of fact and conclusions of law as stated herein, the Court is of the opinion to and does make an award to the claimant in the amount of her insurance deductible of $250.00.

Award of $250.00.

OPINION ISSUED JANUARY 17, 2003

NANCY C. TYREE and JACKIE L. TYREE
VS.
DIVISION OF HIGHWAYS
(CC-02-136)

Claimants appeared *pro se.*
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to their 2000 Mercury Cougar which occurred when Nancy Tyree was driving the vehicle on County Route 21/5 in Elkins, Randolph County, and the vehicle struck a large hole in the road. Respondent was responsible at all times for the maintenance of County Route 21/5. The Court is of the opinion to make an award in this claim for the reasons set forth below.

The incident giving rise to this claim occurred on February 28, 2001, at approximately 1:30 p.m. Mrs. Tyree was driving the vehicle and Mr. Tyree was the front seat passenger. They were on their way to the hospital where Mr. Tyree had an appointment. It was a clear day and the road surface was dry. Mrs. Tyree testified that she was traveling approximately twenty-five to thirty miles per hour in a thirty-five mile per hour zone. The claimants were traveling northeast on Robert E. Lee Avenue in Elkins which turns into County Route 21/5. They were approximately one tenth of a mile beyond the location where Robert E. Lee Avenue ends and County Route 21/5 begins, when suddenly and without warning the front passenger side tire struck a large hole in the road causing the wheel to strike a manhole cover that was adjacent to the hole. The impact was severe enough to dent the front passenger side wheel. Claimants had to continue their trip to the hospital which was only a few miles. However, on their trip back home claimants felt a vibration coming from the front of the vehicle. They took the vehicle in for an evaluation at which time it was discovered that the front passenger side wheel was bent and had to be replaced. Claimants submitted a repair bill into evidence in the amount of $244.97. Mrs. Tyree testified that she drove this portion of road often and she had probably traveled it the day prior to this incident. However, she did not recall seeing this hole. Mr. Tyree also stated that he had not noticed the hole until after the incident. Mrs. Tyree testified that the hole in the road was approximately half the size of a basketball and Mr. Tyree described the hole as being approximately one foot to one and one-half feet wide and approximately eight inches long. He stated that the hole at issue was located adjacent to the manhole cover and both were within their lane of travel. According to Mr. Tyree, when the tire dropped down into the hole the wheel or rim was bent by the adjacent manhole cover.

Claimants assert that respondent knew or should have known of such a large hole in the road and failed to take timely remedial measures to remedy this hazardous risk to the traveling public.

It is respondent's position that it did not have notice of this hole nor a reasonable amount of time to remedy the problem.

Lewis Gardner, the Assistant County Supervisor for respondent in Randolph County at that time, testified that his responsibilities include the supervision of highway maintenance within Randolph County including the portion of County Route 21/5 at issue. He testified that he is familiar with the location of this incident. He described County Route 21/5 as a two lane, blacktop, flood control route. He also stated that it is a priority two road with no lines or markings and is eighteen feet wide. According to Mr. Gardner, his office did not have any complaints regarding this hole on record prior to February 28, 2001. Further, he testified that either he or his crew "might" check this portion of highway for maintenance purposes once a month, unless there is a complaint in which case he or his crew will drive through the area.

It is a well established principle of law that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the present claim, the Court is of the opinion that respondent had at least constructive notice of the hole which claimants vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole, its location in the travel portion of the highway, and the fact it was adjacent to a manhole cover leads the Court to conclude that respondent had notice of this hazardous condition and had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

Accordingly, the Court makes an award to the claimants in the amount of $244.97.

Award of $244.97.

OPINION ISSUED JANUARY 17, 2003

CATHERINE BRANICKY
VS.
DIVISION OF HIGHWAYS
(CC-02-121)

Claimant appeared pro se.

Andrew F. Tarr, Attorney at Law , for respondent.

PER CURIAM:

Claimant brought this action for damage to her 1988 Eagle Premier which occurred when she was traveling north on Route 2 between Glendale and McMechen in Marshall County and her vehicle struck a large rock in the road. Respondent was responsible at all times herein for the maintenance of Route 2. The Court is of the opinion to make an award in this claim for the reasons set forth below.

The incident giving rise to this claim occurred on February 10, 2002, at approximately 2:30 p.m. Claimant and a friend were on their way back from Glendale. Claimant was driving northbound on Route 2 towards her home in Benwood in Marshall County. It was cloudy outside but the roads were dry. She was traveling in the far right lane. At this location, Route 2 has four lanes. Claimant was just north of Glendale traveling at approximately forty to forty five miles per hour when suddenly her vehicle struck a large rock in the middle of her lane of travel. She stated that she saw the rock just briefly before the vehicle struck it, but she did not have enough time to react so as to avoid it. There was only one other vehicle near her vehicle at the time of the incident, and it was trying to pass her in the left lane. She testified that the rock was approximately twelve to fifteen inches long, eight to nine inches tall, and eight to ten inches wide. The impact was strong enough to destroy the transmission in the vehicle. She was forced to maneuver the vehicle off the road, and wait on a tow truck. Fortunately, no one was injured, but the vehicle was seriously damaged and had to be towed. Claimant stated that she traveled this portion of Route 2 often. The last time she traveled it was approximately four days before this incident. She was aware that this area was a rock fall area, and that it is marked with warning signs. Although she has never seen a rock fall at this location prior to this incident, she testified that she has traveled the same portion of Route 2 and observed numerous clean up crews cleaning up rock falls. Claimant also testified that this area is referred to as the "upper narrows" and is known for having numerous rock falls. Claimant submitted a repair estimate for the cost of replacing the vehicle's transmission. The estimated cost for replacing the transmission was $1,500.00 to $2,000.00. Claimant also submitted into evidence a tow bill in the amount of $35.00. Claimant testified that she gave the repair shop her vehicle because the cost to replace the transmission was more than the value of the vehicle. She purchased the vehicle in 1995 at a price of approximately $4,900.00. The vehicle had approximately fifty-one thousand miles on it when she bought it, and approximately seventy thousand miles when this incident occurred. Further, she testified that a few months prior to the accident a few individuals had told her that the vehicle was worth approximately $800.00 to $1,000.00. Claimant stated that she did not have comprehensive insurance coverage that would cover any portion of this damage. Claimant seeks the value of the vehicle and the cost of the towing bill.

Claimant asserts that respondent knew or should have known that this was a high risk area for rock falls and yet failed to take timely and adequate measures to remedy this hazardous condition.

Respondent did not present any evidence or witnesses in this claim.

To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the present claim, the Court is of the opinion that respondent had at least constructive, if not actual notice, of rock fall hazards in the area at issue. The area on Route 2 commonly referred to as "the narrows" is a section of highway known for dangerous rock falls which are a hazard to the traveling public. The respondent's actions on the date of this incident were not adequate to protect the claimant from the rocks which frequently fall onto the highway. Thus, the Court is of the opinion that

respondent is liable for the damages which flow from its inadequate protection of the traveling public in this specific location of Route 2, and further, that respondent is liable for the damages to claimant's vehicle in this claim. The Court is of the opinion to make an award to the claimant for the fair market value of her vehicle in the amount of $1,000.00, and an award for the cost of the towing bill in the amount of $35.00. Thus, the Court makes a total award to the claimant in the amount of $1,035.00.

In accordance with the finding of facts and conclusions of law as stated herein above, the Court is of the opinion to make an award to the claimant in the amount of $1,035.00.

Award of $1,035.00.

OPINION ISSUED JANUARY 17, 2003

PAULA S. POWELL
VS.
DIVISION OF HIGHWAYS
(CC-02-314)

Claimant appeared *pro se.*
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover for damages to her 2002 Honda Accord which occurred as she was driving on Ingleside Road in Princeton, Mercer County, and her vehicle struck a hole in the surface of the road at the location of a manhole cover. Respondent maintains this road which is known as County Route 27 for maintenance purposes. The Court is of the opinion to make an award in this claim for the reasons set forth herein below.

On August 3, 2002, claimant was driving her automobile on Ingleside Road in Princeton at around 1:00 p.m. Ingleside Road is a two-lane road which claimant does not travel on a regular basis. That summer there had been a paving project and the contractor left the manhole covers at the original pavement level and paved around the manhole covers leaving an area lower than the new pavement. As claimant was traveling in her lane at about twenty-five miles per hour in the midst of traffic, her automobile suddenly went into a depression in the road created at the location of a manhole cover that was lower that the pavement level. She testified that she was unable to avoid this area due to traffic and the fact that it was in the travel area for her automobile. She proceeded to her home where she parked her automobile. The next day, she noticed her automobile vibrating when she was driving it and she discovered that the right front wheel was bent. She stated that she is certain that the damage occurred when her automobile struck the hole created by the depression in the pavement at the manhole cover which had not been raised to the new pavement level. Claimant submitted photographs in her claim which depict the roadway and illustrate that the difference in the road level and the manhole cover. Claimant estimated the difference in the level of the pavement to the manhole cover as being approximately

four inches. Claimant spent $238.50 for a new wheel and this amount represents the damages in her claim.

Melvin Blankenship, respondent's crew leader supervisor in Mercer County, testified that he is familiar with County Route 27 which is locally known as Ingleside Road. He explained to the Court that there had been a paving project performed by an independent contractor on County Route 27 where claimant had her accident. The project took place in May 2002 and it was the responsibility of the utility company which owned the manhole cover to raise it to the same level as the new pavement. He had no explanation for why the paving took place in early May 2002 yet the manhole cover had not been raised as of August 3, 2002, the date of claimant's accident. He testified that there would have been an inspector present for respondent during the paving project, but the normal procedure is to leave the manhole covers for the utility to raise to the level of the new pavement. Respondent's employees do not take any measures to make sure that the utility raises the manhole covers. Any depressed areas remain in the road. He stated that he may have been over this area County Route 27, but he did not notice the depth of the difference in the road level and the hole created by the lower manhole cover.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986).

A review of the facts in this claim establishes that respondent had constructive, if not actual, notice of the fact that the manhole cover which is the subject matter in this claim was left by the paving contractor at a level much lower than the new pavement level. This condition created a hazard for the claimant as she had no warning to avoid driving over the depression in the road created by the lower manhole cover. The Court finds that respondent was negligent in its failure at least to warn the traveling public of the condition of that particular manhole and that this negligence was the proximate cause of the damages to claimant's automobile; therefore, the Court will make an award in this claim.

Accordingly, the Court is of the opinion to and does make an award in the amount of $238.50 to claimant for the damages to her automobile.

Award of $238.50.

OPINION ISSUED JANUARY 17, 2003

RICHARD DILLON and PATTY DILLON
VS.
DIVISION OF HIGHWAYS
(CC-01-339)

Claimants appeared *pro se*.
Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

PER CURIAM:

Claimants brought this action for water damage to their personal property which they allege was caused by respondent's negligence in paving over a curb adjacent to their home in Bluefield, Mercer County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on July 8, 2001. Claimants reside in a house owned by their son where they have personal property including property in the basement. The residence is located at 1201 Carolina Avenue in Bluefield, Mercer County, and is situate on the slope of a small hillside below Cherry Street which is also designated as Route 52. The house has a set of steps which are located on the slope from the sidewalk to the basement. Claimants have a fence in front of their home which is adjacent to the sidewalk. Claimants are responsible for maintaining the sidewalk. On the opposite side of the sidewalk there is a small grassy area adjacent to a six to eight inch curb and below the curb is Route 52. Mrs. Dillon testified that prior to the incident at issue, the asphalt curb was at least six to eight inches higher than the road surface and that it provided a barrier to keep surface water from flowing off the road and onto their property. Mrs. Dillon testified that they had lived in this home for ten years and they had never had any flooding problems. Further, she stated that the curb was in place during this time period. According to Mrs. Dillon, respondent or its contractor paved Route 52 sometime in June 2001. When respondent had the road paved, the entire curb in front of claimants' home totally disappeared. Mrs. Dillon testified that this caused the surface of the road to be level with the sidewalk and the grassy area. On July 8, 2001, there was a very heavy rain and the surface water from the road washed down the hill and into claimants' basement bringing a large amount of gravel with it. Mrs. Dillon testified that there was more than a foot of water in the basement as a result of this flooding. The water and gravel that washed into the basement destroyed a washer, dryer, and a freezer that was full of food. Mrs. Dillon also stated that practically all of the food items in the freezer were destroyed when it stopped working. Mrs. Dillon stated that these appliances were purchased during Christmas 2000 and were therefore only seven months old. The washer and dryer were purchased at a cost of $647.00 and the freezer at $354.00. Claimants also seek recovery for the food items destroyed in the amount of $250.00. Thus, claimants seek a total award in the amount of $1,251.00.

Claimants contend that respondent was negligent for allowing the road in front of their home to be paved such that the curb was no longer an actual curb and that it knew or should have known that this would cause surface water from the roadway to flow onto claimants' home and property.

Respondent asserts that it was not responsible for the asphalt that was allegedly placed over the curbing and that it did not have notice that there was a potential for flooding at this location. Regardless, respondent also asserts that even if there was a curb in place on the date of this flood, it rained so much and in such a short amount of time that a curb might not have stopped the water.

Melvin Blankenship, the crew leader supervisor for respondent in Mercer County at the time of this incident, testified that his responsibilities include supervising the maintenance of Route 52 including the location of this incident. He testified that respondent is responsible for paving Route 52 and any ditch work along Route 52. However, the City of Bluefield is responsible for snow and ice removal. Respondent maintains Route 52 from curb to curb. According to Mr. Blankenship,

the paving job was performed by a private contractor on respondent's behalf. He testified that Route 52 was dug up and widened at the same time the Easley Bridge was being built. The local water company was installing two new water lines next to Route 52, and to do so, it had to make cuts across Route 52. Mr. Blankenship testified that the water company asked respondent if it would extend the asphalt another one hundred fifty to two hundred yards up the hill farther than respondent originally planned, so as to cover up the cuts made across Route 52 by the water company. This was done so as to prevent a hazard in the road especially during the winter months. However, Mr. Blankenship testified that he was informed by the contractor that there would be only one inch of asphalt added to the road in front of claimants' home. He stated that an inch of asphalt should not have covered up a six inch curb. Mr. Blankenship also testified that there is a funeral home located above claimants' house and a great deal of water flows from that property when it rains. He stated that this is due to the fact that the shoulder of the road is sloped slightly towards the claimants' property and their home is three feet below the shoulder of the road. In his opinion, this could be where a lot of the water came from. Finally, he testified that on July 8, 2001, there were three and one-half to four inches of rainfall within approximately an hour, and that given that large amount of water even a six inch curb would not have prevented the roadway surface water from flowing down hill onto the claimants' property.

This Court previously has held that to hold respondent liable for damages caused by inadequate drainage, claimants must prove by a preponderance of the evidence that respondent had actual or constructive notice of the existence of the inadequate drainage system and a reasonable amount of time to take corrective action. *Orsburn v. Division of Highways*, 18 Ct. Cl. 125 (1991); *Ashworth v. Division of Highways*, 19 Ct. Cl. 189 (1993).

After a review of the testimony in this claim, the Court is of the opinion that the proximate cause of the damage to claimants' personal property was the fact that respondent paved to the top of the curbing along Route 52 in front of claimants' home and property. Respondent is responsible for the acts and omissions of its contractor. Respondent knew or should have known that surface water would flow from the road onto claimants' property if the curb was not there as a barrier. The evidence established that claimants' property was at least three feet below the surface of the road. The paving project took place in June 2001, and the flood incident occurred on July 8, 2001, thus respondent had adequate time to take corrective action. The Court has determined that claimants may make a recovery for the damage to their property in the amount of $1,000.00, which the Court has determined to be a fair and reasonable recovery for the washer, dryer, and freezer after taking into consideration the diminution in value of these items.

Accordingly, the Court is of the opinion to and does make an award to claimants in the amount of $1,000.00.

Award of $1,000.00.

OPINION ISSUED JANUARY 17, 2003

GOLDIE GOODRICH

VS.
DIVISION OF HIGHWAYS
(CC-02-166)

Claimant appeared *pro se.*
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant Goldie Goodrich brought this action for damage to her 1996 Mitsubishi Eclipse which occurred when her son Verner Goodrich was traveling off of the I-79 southbound exit ramp at Frametown in Braxton County and the vehicle struck a broken sign post on the berm of the road. Respondent was responsible at all times herein for the maintenance of this I-79 exit ramp. The Court is of the opinion to make an award in this claim for the reasons set forth below.

The incident giving rise to this claim occurred on March 28, 2002, between 10:00 a.m. and 10:45 a.m. Claimant's son Verner Goodrich was driving her vehicle with his friend Justin Carter in the front passenger seat. They were returning from college classes in Summersville. It was a hazy day with no precipitation, but the roads and ground were still damp. Mr. Goodrich exited the I-79 southbound exit ramp at Frametown and proceeded to travel down the exit ramp where he planned to turn left onto Route 4 to drive home. However, when he reached the bottom of the exit ramp he heard a strange noise underneath his vehicle and also felt a strange sensation coming from his tires. He thought that he may have had a flat tire so he maneuvered the vehicle to the right side of the white line and onto the gravel berm to check the tires. He testified that he was traveling less than five miles per hour as he maneuvered his vehicle onto the wide gravel area. As he did so, he felt a strong scrape-like sensation underneath the vehicle. He brought the vehicle to a complete stop but was afraid that there may have been something dragging underneath. He put the vehicle into reverse and backed it up approximately eight inches in an attempt to get whatever was dragging underneath the vehicle loose. Then, he and Mr. Carter got out of the vehicle to see what was wrong. At this point, they both observed a broken sign post protruding up from the ground. Mr. Goodrich and Mr. Carter both testified that it was approximately six to eight inches high. It was a grayish-type color with holes in it. According to Mr. Goodrich, the driver's side portion of the front bumper absorbed the most serious impact. In addition, the sign post pierced a hole through the front bumper and caused significant damage as it was dragging underneath the car. Mr. Goodrich testified that the entire front bumper was ripped off of the vehicle. The driver's side headlight was destroyed as well as the oil cooler. Mr. Carter also testified that when he got out of the vehicle he also observed the bumper detached from the vehicle. Both Mr. Goodrich and Mr. Carter testified that they did not observe the sign post prior to the vehicle striking it. Further, they both stated that the sign post was gray and blended in with the gravel making it difficult to see. The claimant submitted a repair estimate into evidence in the amount of $1,715.08.

Claimant contends that respondent knew or should have known that the broken sign post presented a hazard to the traveling public and yet failed to remedy it in a timely fashion or to at least warn the traveling public of the hazardous condition.

Respondent asserts that it responded to the hazard as soon as it reasonably could and it asserts that the driver of the vehicle acted in a negligent manner by parking the vehicle at this location.

Frederick Allen, Supervisor for respondent in Braxton County, was responsible for the maintenance of I-79 from the Big Otter Exit to the Flatwoods exit. He is also responsible for all ramps and interchanges on I-79 within this area. He is familiar with the exit ramp at issue in this claim. He described the exit as a normal one-lane concrete ramp with an approximate two-foot asphalt berm to the right of the white line followed by gravel on the other side of the asphalt. According to Mr. Allen, he was informed on March 27, 2002, at approximately 3:00 p.m. that respondent's stop sign at the I-79 south bound Frametown exit was stolen and it needed to be replaced. He testified that he followed proper procedure by reporting it to the District Seven sign shop and ordering a new one. However, the sign shop closes at 4:00 p.m. so it could not be replaced until the afternoon of March 28, 2002. He stated that his office does not keep extra signs at its facility. Mr. Allen testified that the location where Mr. Goodrich parked is not intended to be a parking area. However, there are no signs warning the traveling public to not park at this location. Mr. Allen admitted that respondent has had a great number of signs stolen in this area. He also stated that someone in his crew probably passes the location of this incident every day. Furthermore, Mr. Allen stated that it is his crew who places the sign anchors into the ground which Mr. Goodrich drove over. However, his office does not have a policy of placing any warning signs, cones, or flags in the event that one of the anchors remains exposed.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). Respondent has a duty to maintain the berm of a highway in a reasonably safe condition for use when the occasion requires. *Compton v. Division of Highways*, 21 Ct. Cl. 18 (1995). Liability may ensue when a motorist is forced onto the berm for either an emergency or otherwise necessarily uses the berm and it fails. *Sweda v. Dept. of Highways*, 13 Ct. Cl. 249 (1980).

In the present claim, Mr. Goodrich had a right to maneuver the vehicle to the gravel berm to check on the tires and he had a right to rely on the safety of the berm. The evidence established that respondent had notice of the broken sign post but failed to provide any warning to the traveling public. The fact that respondent was going to replace the sign in approximately twenty-four hours is not adequate protection for the traveling public. This leaves a window of opportunity for an unsuspecting traveler to drive onto the post which is exactly what occurred. This incident could have been prevented had respondent placed some sort of temporary warning to the traveling public that there was an eight to ten inch post protruding from the ground. The failure to do so in this case was negligence and the proximate cause of claimant's damages.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $1,715.08.

Award of $1,715.08.

OPINION ISSUED JANUARY 17, 2003

RAYMOND SCOTT
VS.
DIVISION OF HIGHWAYS
(CC-02-149)

Claimant appeared *pro se.*
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover for damages to his 1996 Cadillac SLS Seville which occurred when he was traveling on I-79 in Marion County. Claimant was unable to avoid a piece of concrete in the highway when he was driving across a bridge on the interstate. His automobile struck the piece of concrete and sustained damages. Respondent is responsible for the maintenance of I-79 in Marion County. The Court is of the opinion to make an award to claimant for the damages to his vehicle for the reasons set forth herein below.

Claimant was proceeding southbound on I-79 in Marion County on March 25, 2002, at about 9:50 a.m. in a misty rain when he observed an object approximately one hundred feet in front of him on the bridge deck. He was traveling at around 70 miles per hour. There was a tractor-trailer passing him in the left lane and the bridge abutment to his right so he was unable to avoid driving over the object in his lane of travel. The object was a piece of concrete described by claimant as being about the size of a basketball. Claimant returned to the accident scene a few days later and observed the broken pieces of the concrete on the edge of the bridge. He was of the opinion that it was a piece of concrete that had come up from the surface in the middle of the bridge. The concrete struck the underneath portion of claimant's automobile causing damage to the fuel tank and the pump module. It was necessary for claimant to have his automobile towed from the scene. He incurred $1,127.04 for the repairs and towing bill but he has a $1,000.00 deductible provision in his comprehensive insurance coverage so any recovery will be limited to the amount of the deductible.

Respondent's transportation crew chief for this portion of I-79, Norman Cunningham, testified that he was familiar with this particular bridge and that the bridge deck had cracks in the concrete which allowed pieces of concrete to come up from the deck. On March 23, 2001, respondent's employees had been working on I-79 to fill various holes with cold mix. He opined that the crew would have removed any loose concrete if it was noticed by the crew. However, there is no way for respondent's employees to know when a piece of concrete is going to come out of a bridge deck.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986).

The Court has reviewed the particular circumstances of this claim and has determined that claimant may make a recovery. I-79 is a major artery in Marion County, and, as such, it is maintained on a first priority basis. Where the surface of a bridge is in a state such that large chunks of concrete come up from the bridge deck creating a hazardous condition for the traveling, the respondent has a duty to be aware of such condition and to take measures to protect the traveling public. This was not done in the instant claim. Therefore, the Court finds respondent was negligent in its maintenance of the bridge deck on the date of claimant's accident and claimant may make a recovery for the damages to his automobile.

Accordingly, the Court makes an award to claimant in the amount of $1,000.00.

Award of $1,000.00.

OPINION ISSUED JANUARY 17, 2003

MARY FRANCES MAZZIE
VS.

DIVISION OF HIGHWAYS
(CC-01-361)

Claimant appeared *pro se.*
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover for damages to her 1990 Nissan Stanza which occurred when she was operating her vehicle at the intersection of Green Street (a State and Local Service Route) and Philippi Pike. Claimant's vehicle went over the end of a slotted drain pipe at the right edge of Green Street as she was making a right turn onto Philippi Pike. Respondent is responsible for the maintenance of this State and Local Service Route which is in Clarksburg, Harrison County. The Court is of the opinion to make an award to the claimant for the reasons stated herein below.

Claimant was driving her vehicle on August 19, 2001, in the afternoon. As she attempted a right turn from Green Street onto Philippi Pike, the right front tire of her vehicle went over the edge of the roadway and she heard a loud noise. She determined that her tire had been cut and it was flat. There is a slotted drain pipe across Green Street and claimant's right front vehicle tire had gone over the end of that pipe which was sticking out from the pavement and it had a sharp edge. She was proceeding slowly to make the turn and there was oncoming traffic turning onto Green Street at the time. Photographs which she had taken later that same day depict the slotted pipe and the edge of the pipe located at the very edge of the pavement. She stated that she had not noticed the jagged edge of the pipe on previous trips on Green Street and she did not notice it on the date of the incident herein. Claimant incurred expenses for having her vehicle towed, for new tire and rim, and for realignment in the amount of $166.37.

John Michael Barberio, respondent's Highway Administrator for Harrison County, testified that he is familiar with Green Road and the slotted drain pipe which crosses the road edge to edge. The pipe was installed in the 1991 or 1992 to alleviate water standing in the road at the bottom of Green Street. The pipe is at the intersection of Green Street and Philippi Pike. He stated that the edge of the pipe was in a jagged condition probably because the blacktop has eroded away. He also stated that he had not received complaints about the edge of the pipe prior to claimant's incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986).

A review of the facts in this claim leads the Court to conclude that respondent was negligent in its maintenance of the slotted drain pipe on Green Street to the detriment of the claimant. There was a jagged edge on the pipe at the very edge of the road where the traveling public would be driving when making a right turn. As depicted in the photographs, the pipe had to have been in this jagged condition for more that just a short period of time. Thus, respondent had constructive, if not actual, notice of the hazard to the traveling public. The edge of the pipe was not easily observable by drivers making a right turn so it is not inconceivable that a driver would inadvertently drive to the right with oncoming traffic also turning onto Green Road as was the situation for claimant on the date of her encounter with this pipe. Therefore, the Court is of the opinion that respondent's negligent maintenance of Green Road was the proximate cause of the damages to claimant's vehicle for which she may make a recovery.

Accordingly, the Court is of the opinion to and does make an award to claimant in the amount of $166.37.

Award of $166.37.

OPINION ISSUED JANUARY 17, 2003

WILLIAM MAHOOD
VS.
DIVISION OF CORRECTIONS
(CC-02-138)

Claimant appeared *pro se.*
Charles P. Houdyschell, Jr., Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, an inmate at Mount Olive Correctional Complex, brought this claim to recover the value of certain personal property items that he alleges were lost by the respondent. Claimant was serving a term of confinement in lock-up for a few months. When he was released from lock-up to the mainline population, several items

of his personal property were missing. Claimant placed a value of $102.58 upon the lost items.

A hearing was conducted by the Court in this claim on November 15, 2002, at which time the claimant testified as to the facts and circumstances giving rise to this claim. Mr. Mahood was in a double cell with another inmate until September 6, 2001, at which time he was sent to lock-up. Mr. Mahood testified that only some of his property was removed from his double cell by respondent and taken to the state shop for storage while he was in lock-up. He testified that certain items were not taken to the state shop as required including an Aiwa Walkman radio cassette player with headphones, an A.C. adapter, two cassette tapes, one gray t-shirt, two mirrors, and many assorted food items including twenty-six cans of soda. Mr. Mahood testified that his "Resident's Personal Property Form" listed only some of his property items. However, he stated that the items he is seeking an award for were not listed on this form. Therefore, he is of the opinion that the state shop did not ever receive the items which were lost and that it was the fault of the person or persons who removed his property from his cell. According to Mr. Mahood, he told the personnel at lock-up that there were several items missing on his "Resident's Personal Property Form", but they informed him to go ahead and sign it and to make a list later of the missing property once he got back to the regular unit. Mr. Mahood was released from lock-up on November 28, 2001, and made the list of his missing property. Once he was back in the mainline population, he had to file a "G-1" grievance to the warden regarding the missing property. He introduced a copy of the "G-1" grievance form into evidence at the hearing of this matter which indicated that the reason the food items were not returned was that the state shop did not store them due to health and safety reasons. The "G-1" grievance denied claimant relief as to the remaining property items due to the fact that claimant signed the "Resident's Personal Property Form" which states in part that by signing the property form claimant cannot hold respondent liable for items not included on the property form, and that by signing the form he acknowledges that he has checked his property and accepts it as complete and correctly itemized. The property items claimant alleged were missing were not listed on the form. Claimant also introduced into evidence his "property form" which respondent uses to inventory property sent from outside the prison to the inmates, and on this form was listed the Aiwa Walkman, the A.C. adapter, and a T-shirt. Finally, claimant testified that the A.C. adapter was permissible property at the time he received it, but it was later banned by the warden sometime after the claimant's incident.

Claimant asserts that respondent was responsible for his property once he was removed from the double cell and sent to lock-up and that a bailment relationship existed at the time when he no longer had control or possession of his property.

Respondent contends that it was not responsible for claimant's property and that it followed proper procedures in removing his property from the cell to the state shop.

Patrick Whittington, a Supervisor 1 in the state shop at Mt. Olive Correctional Complex at the time of this incident, testified that when an inmate is taken from general population to lock-up his property is packed up, and taken to the state shop for either storage or disposition. He testified that the only thing the state shop is permitted to store is nonperishable food items and that the food items Mr. Mahood is seeking replaced are all considered perishable. This includes cans of soda.

The reason for this policy is to prevent health hazards as well as pests, and rodents from being attracted to the area. Therefore, the food items listed by Mr. Mahood would have been destroyed and not stored in the state shop.

Arietta King, an employee at Mt. Olive Correctional Complex, testified that she was the person who removed claimant's property from the double cell and inventoried it. She testified that she did not find any of the items claimant alleges are missing. She stated that had those items been in his cell she would have listed it on the inventory form. However, Ms. King admitted that she did not collect and inventory claimant's property until September 7, 2001, the day after claimant was removed from his cell to lock-up. She also stated that claimant's property was left in the double cell with the other inmate overnight. According to Ms. King, it is not standard procedure to search the other cell mate or go through his property to look for the cell mate's property that is being inventoried. Therefore, she stated that she did not do so in this instance. In this instance, she simply asked the other remaining cell mate what property belonged to the claimant and packed it up and inventoried it.

This Court has held that a bailment exists when respondent records the personal property of an inmate and takes it for storage purposes, and then has no satisfactory explanation for not returning it. *Page v. Division of Corrections*, 23 Ct. Cl. 238 (2000); *Heard v. Division of Corrections*, 21 Ct. Cl. 151 (1997). In the present claim, the evidence adduced at the hearing established that the claimant had a Aiwa Walkman cassette player, an A.C. adapter, two cassette tapes, two mirrors, a t-shirt, and numerous perishable food items in his possession while an inmate at Mt. Olive. However, when he was released from lock-up to his cell, none of these items was found and returned to the claimant. The property was in the control and possession of respondent while claimant was in lock-up. However, respondent has no plausible explanation for what happened to the property items other than the food items which were destroyed consistent with respondent's health and safety policies. Respondent was responsible for the other personal property items when claimant was taken to lock-up. Claimant did not have any means to guard or watch over his property during this time period. Respondent was in position to safeguard claimant's property once he was removed from his cell and should have secured the property immediately after the claimant was removed from the double cell. The Court finds that respondent was responsible for securing certain items of claimant's property, excluding the perishable food items, and failed to take the appropriate action to do so. Therefore, the Court is of the opinion to make an award to the claimant for the value of his two mirrors, t-shirt, two cassette tapes, A.C. adapter, and Aiwa Walkman with headphones. The Court is of the opinion that $71.47 represents a fair and reasonable reimbursement to claimant for the lost property.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $71.47.

Award of $71.47.

OPINION ISSUED MARCH 14, 2003

SUSAN KANE
VS.

DIVISION OF HIGHWAYS
(CC-02-301)

Claimant appeared *pro se.*
Andrew F. Tarr, Attorney at Law, for respondent

PER CURIAM:

Claimant brought this action for damage to her 1995 Toyota Tercel which occurred when she was traveling north on Route 2 near Wheeling in Ohio County and her vehicle struck a muffler in the road. Respondent was responsible at all times herein for the maintenance of Route 2. The Court is of the opinion to deny this claim for the reasons set forth below.

The incident giving rise to this claim occurred on July 16, 2002, at approximately 11:00 a.m. Claimant was traveling north on Route 2 from Moundsville to Wheeling. At this location, Route 2 is a four-lane divided highway with two lanes going in each direction. She was on her way home from seeing a client in Moundsville. It was a clear, warm, sunny day and the road surface was dry. Claimant stated that she was traveling at approximately fifty to fifty-five miles per hour in the right lane of travel when she saw a muffler on the road ahead of her. It appeared to extend across her lane of travel. She stated that she quickly slowed the vehicle down to approximately thirty to thirty-five miles per hour. She testified that if she had swerved to the left she would have collided with another vehicle, and if she swerved to the right she would have been on the berm. Thus, she decided that she had no choice but to straddle the muffler with her vehicle. She was able to maintain control of the vehicle and was not injured. However, her vehicle sustained damage resulting in two flat tires and two damaged wheels as a result of striking the muffler. The front left tire and wheel were destroyed as well as the back right tire and wheel. After striking the muffler with the vehicle, she drove slowly to the state police detachment in Wheeling and from there her vehicle was towed to the garage for repairs. Claimant stated that this incident occurred between McMechen and Wheeling on Route 2. Claimant testified that she called both respondent's local office to report this incident and the local state police detachment on August 23, 2002. They informed her that there was nothing logged in their records regarding a muffler in the road on the portion of Route 2 at issue. Claimant had comprehensive insurance that covered most of her damages. She paid a $250.00 deductible for the property damage and her insurer paid the remainder. Claimant also submitted a bill in the amount of $70.60 for the cost she incurred in renting a vehicle. Thus, claimant seeks a total award of $320.60.

Claimant contends that respondent knew or should have known that this muffler was present in the travel portion of the road and taken remedial action. Its failure to do so created a hazardous condition for the traveling public.

Respondent asserts that it had no notice of this hazard and thus had no reasonable opportunity to take remedial actions.

Terry Kuntz, the interstate supervisor for respondent in Ohio County at the time of this incident, testified that as interstate supervisor his job responsibilities also included overseeing the maintenance of the portion of Route 2 at issue. He is familiar with the portion of Route 2 at issue but Mr. Kuntz was on vacation at the time of this

incident and Jean Moon, another employee for respondent, was responsible while he was gone. Jean Moon was not available to testify at the hearing. Mr. Kuntz testified that he reviewed the records kept by respondent regarding this incident. He testified that the records indicated that claimant called respondent's office and reported striking the muffler in the road. According to respondent's records, an employee went to the location of the incident and did not find the muffler or any debris as a result of this incident. Mr. Kuntz admitted that he could not testify as to whether or not there was a muffler present prior to claimant calling respondent's office.

It is a well established principle of law that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). Claimant herein failed to establish that respondent was negligent in any manner whatsoever with regard to this incident. While sympathetic to the claimant for the damage to her vehicle, the Court is of the opinion that claimant failed to produce sufficient evidence at the hearing of this matter to establish that respondent had prior notice of the muffler in the road.

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

Claim disallowed.

OPINION ISSUED MARCH 14, 2003

ROBERT J. HALL
VS.
DIVISION OF HIGHWAYS
(CC-02-049)

Claimant appeared *pro se.*

Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 1991 Buick Regal which occurred when he was traveling on Route 89 in Wetzel County and the vehicle struck a large rock in the road. Respondent was responsible at all times herein for the maintenance of County Route 89. The Court is of the opinion to deny this claim for the reasons set forth below.

The incident giving rise to this claim occurred on January 4, 2002, between approximately 2:30 p.m. and 3:00 p.m. The weather was clear and the road surface was dry. Claimant had two other passengers in the vehicle with him. They were on their way to work at the Willow Island Power Plant. Claimant was traveling westbound on Route 89 and was approximately one mile from the junction of Route 2. According to claimant, the road has two consecutive S-turns at this location. Claimant stated that the second S-turn is sharper than the first one, and when he

approached the second turn, he could not see around it. As soon as he rounded the second S-turn, he saw a large rock in the middle of his traveling lane. According to claimant, he did not have any way to avoid the rock. He was afraid to swerve into the left lane due to the possibility of oncoming traffic and there was no room to maneuver to the right side of the road. Edward Wade, Jr., was a backseat passenger. He stated that when the vehicle impacted with the rock there was a loud scraping type noise underneath the car. Claimant testified that the rock ripped a hole in the center of his gas tank approximately three inches long. The front seat passenger, James Warren, testified that he observed a large amount of gas leaking from underneath the car. Fortunately, no one was injured and claimant was able to drive the vehicle to respondent's New Martinsville garage to report the incident. Claimant testified that the rock at issue was one foot long, six inches wide, and six or seven inches thick. Claimant and both passengers testified that it appeared to them that respondent had recently cut some brush along the portion of Route 89 where this incident occurred. In addition, claimant and the two passengers testified that there were brush piles stacked along the side of the road. Claimant stated that he believed that the rock probably fell from the hillside due to the brush cutting by respondent. He submitted a repair estimate in the amount of $462.58 for the damage to his vehicle and he submitted into evidence a pay stub indicating his lost wages for the day at issue in the amount of $212.04. Further, claimant was unable to go to work this day due to this incident. Thus, claimant seeks a total award of $674.62.

Claimant contends that respondent knew or should have known that there was a risk of rock falls at this location due to the brush cutting it had just performed in the area.

Respondent asserts that it had no notice of a rock fall hazard at this location prior to this incident and it asserts that it had not performed any recent work activities at this location that would have caused or contributed to this rock fall.

Jack Mason, crew leader for respondent in Wetzel County at the time of this incident, testified that his responsibilities include the daily supervision of work crews and overall maintenance of the roads. Mr. Mason was responsible for the maintenance of Route 89 at the location of this incident and he is familiar with the road. He stated that Route 89 is a two-lane road with a yellow line in the center and white lines on the edges. It is approximately twenty feet wide at this location. Mr. Mason recalls that the claimant reported this incident in person at respondent's local office. In response, he sent a couple of employees to retrieve the rock but they could not find it. Mr. Mason stated that he did not have prior knowledge of this rock, nor did respondent have any prior knowledge that this was a rock fall area. Mr. Mason testified that he has never responded to a rock fall at this location. He also testified that there was no record that brush cutting work was performed by respondent at or near the location of this incident, and he was personally unaware of any such work being performed by respondent. Furthermore, he stated that, even if respondent had performed brush cutting at this location, he has never known of brush cutting to cause a rock to fall.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept.*

of Highways 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). In rock fall claims, this Court has held that the unexplained falling of a rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award. *Coburn v. Dept. of Highways*, 16 Ct. Cl. 68 (1985); *Hammond v. Dept. of Highways*, 11 Ct. Cl. 234 (1977). In the present claim, claimant failed to establish that respondent had prior notice of this rock in the road or that respondent should have known of a rock fall hazard at this particular location on County Route 89.

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

Claim disallowed.

OPINION ISSUED MARCH 14, 2003

ROSALEE H. DOLAN
VS.
DIVISION OF HIGHWAYS
(CC-02-184)

Claimant appeared pro se.

Xueyan Zhang, Attorney at Law, for the respondent.

PER CURIAM:

Claimant brought this action for damage to her vehicle after it struck an object laying on U.S. Route 50 in Harrison County. Respondent was responsible at all times herein for the maintenance of U.S. Route 50. The Court is of the opinion to deny this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred mid-morning on April 10, 2002. Claimant was driving her 2001 Alero Oldsmobile on U.S. Route 50 between the Bridgeport Exit and Emily Drive. Claimant testified that she was in transit to Wal Mart when she heard something strike her vehicle. When she was ready to leave Wal Mart she noticed her tire was nearly flat. At the time she had her tire replaced, she determined that her vehicle had struck what appeared to be a welding rod on the road. Ms. Dolan also testified that the portion of U.S. Route 50 where she was traveling was restricted by cones and barrels to one-lane of traffic and appeared to be a construction area. Claimant submitted into evidence a repair bill in the amount of $231.08.

Claimant contends that respondent knew or should have known that a welding rod was on the road and that it should have taken adequate measures to remove this hazard.

Respondent asserts that it had no notice of this welding rod on U.S. Route 50 and that it acted reasonably and diligently in this claim.

David Adams, transportation crew chief for respondent in Harrison County, testified that his office did not have anyone working at or near the location of this incident and he did not have any record of anyone such as a contractor performing work in that area. He also testified that a welding rod is not something that respondent normally uses on a job. Respondent also submitted into evidence

respondent's daily work report for April 10, 2002, establishing that no work was performed on this area of U.S. Route 50.

It is well established that the respondent is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (1947). This Court has consistently held that an award cannot be based on speculation. *Perine v. Division of Highways*, unpublished opinion issued December 10, 2991, CC-94-124; *Mooney v. Department of Highways*, 16 Ct. Cl. 84(1986).

After a review of the evidence, the Court finds that claimant failed to establish by sufficient evidence that the damage to her vehicle was the result of any negligence on the part of respondent. While sympathetic to the claimant's position, the Court cannot speculate as to the nature or origin of the object that damaged the tire on claimant's vehicle.

Thus, in view of the foregoing, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED MARCH 14, 2003

DAVID DEMARY and MICHELE DEMARY
VS.
DIVISION O HIGHWAYS
(CC-02-137)

Claimants appeared *pro se.*
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM

Claimants brought this action for damage to their 1996 Pontiac Firebird which occurred when their daughter was operating their automobile on U.S. Route 19 at its intersection with County Route 19/7. At that time, claimants' daughter came upon a patch of ice on the roadway whereupon she lost control of the automobile and skided across the ice into an embankment. Respondent was at all times herein responsible for the maintenance of U.S. Route 19 and County Route 19/7. The Court is of the opinion to deny this claim for the reasons set forth herein below.

On the morning of January 25, 2002, Chandra Lee DeMary was driving her parents' automobile on the way to Fairmont Senior High School. Ms. DeMary's sister was a passenger in the front seat. According to Ms. DeMary it was a very cold morning and she testified that she thought it was light outside although it was 7:10 a.m. She testified she was proceeding at approximately 50 to 55 miles per hour on U.S. Route 19 when the automobile started to skid on an isolated patch of ice. She stated that when she realized the automobile was starting to slide on the road, she slammed on the brakes, the automobile slid from side to side, then the automobile went towards the river on her left, so she grabbed the steering wheel and tried to turn the automobile around to go the other direction away from the river when the automobile slid into the hillside on her right. She described the patch of ice as being one spot on an otherwise ice-free road. The place of this accident was at the mouth

of the intersection of U.S. Route 19 and County Route 19/7 (locally referred to as Hockenberry Hollow). She was familiar with U.S. Route 19 as she traversed this road on her way to and from school each day. She became a licensed driver in June 2001. Fortunately, neither Ms. DeMary nor her sister received personal injuries in this accident, but the automobile was rendered a total loss.

Claimant David DeMary testified that his daughter telephoned him on her cell phone after the accident so he immediately went to the scene. He stated that he observed his daughters and the automobile against the hillside and his truck began to slide prior to his observation of the patch of ice which he described as "black ice" on the road surface where moisture was in the center of the road. He estimated the patch of ice to be 25 feet in length. Photographs taken by Mr. DeMary depict the scene of the accident. He described the weather as being extremely cold and that it was twilight at that time of the morning. He stated that it is his opinion that water on the road came from a railroad above the roadway which flowed towards Hockenberry Hollow and then onto U.S. Route 19, the main road. Since it had rained the day prior to and the night prior to the accident, he said there was probably more water draining in the area where the accident occurred. He was familiar with this road as he travels it daily. He had not reported this condition to respondent prior to his daughter's accident. He further testified that the automobile was a total loss and its value was about $5,100.00 at that time.

Corporal Mark Fetty, a Marion County deputy sheriff, testified that he investigated the accident herein. He testified that it occurred on U.S. Route 19 north of Fairmont close to Hockenberry Hollow. While he was at the scene, he notified respondent that there was a problem so the road could be treated with salt and cinders. He described the accident as occurring when the driver was traveling south on U.S. Route 19 where there was water and ice on the roadway and the driver lost control of her vehicle and the vehicle struck the bank. This was the only incident that morning on this portion of U.S. Route 19. After his investigation, he concluded that the driver failed to maintain control. He marked his accident report form at the box under contributing circumstances for Ms. DeMary's failure to maintain control. He described the patch of ice as covering both lanes of U.S. Route 19, but he did not measure it. He was of the opinion that traveling this section of U.S. Route 19 at 55 miles per hour was too fast for the conditions with the wet spot.

Janet Sammons, crew supervisor for respondent in Marion County, testified that she was on night shift the night of January 24, 2002, until 7:00 a.m. on January 25, 2002. She described U.S. Route 19 as a two-lane, blacktop road marked with a yellow center line and white edge lines. She stated that it is a heavily traveled, main artery running from Rivesville into downtown Fairmont. She had not received any notification of a problem with a wet spot on U.S. Route 19 prior to this incident. She did not have any notice while she was on duty that night of any icy spots at the Hockenberry Hollow intersection with U.S. Route 19.

This Court has held in prior claims that respondent 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. *Richards v. Division of Highways* 19 Ct. Cl.71 (1992); *McDonald v. Dept. of Highways*, 13 Ct. Cl. 13 (1979); Christo v. Dotson, 151 W.Va. 696, 155 S.E.2d 571 (1967).

In the instant claim, claimants have failed to establish that respondent knew or should have known that the area of U.S. Route 19 at its intersection with County Route 19/7 or Hockenberry Hollow posed a hazardous condition for the traveling public. Respondent did not have notice of excessive water flow across U.S. Route 19 or of the icy conditions that existed there on the date of Ms. DeMary's accident. The Court also notes that the investigating officer was of the opinion that the driver lost control of her automobile and that speed may have been a contributing factor. The Court concludes that Ms. DeMary was driving her automobile in excess of a reasonable speed for the conditions then and there existing. For these reasons, the Court finds that respondent was not negligent in its maintenance of U.S. Route 19 on the date of the accident herein.

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

Claim disallowed.

OPINION ISSUED MARCH 14, 2003

JANET L. STATLER
VS.
DIVISION OF HIGHWAYS
(CC-02-128)

Claimant appeared pro se.

Xueyan Zhang, Attorney at Law, for the respondent.

PER CURIAM:

Claimant brought this action for damage to her vehicle after encountering an object on I-68 in Monongalia County. Respondent was responsible at all times herein for the maintenance of I-68. The Court is of the opinion to deny this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on February 23, 2002, at approximately 11:00 a.m. Claimant's daughter was driving claimant's 2001 Ford Taurus eastbound on I-68 near the Pierpont Exit when the vehicle struck a piece of metal on the road. Claimant was the front seat passenger at the time of this incident. She testified that the piece of metal was roughly ten to twelve feet long and was lying across the road. Claimant estimated that her daughter was traveling approximately seventy miles per hour. She also testified that her daughter was unable to avoid hitting the piece of metal due to traffic surrounding her. The impact damaged the right rear tire. Claimant submitted into evidence a repair bill in the amount of $85.31.

Claimant contends that respondent knew or should have known that this piece of metal was on the road and that it should have taken adequate measures to remove this hazard.

Respondent asserts that it had no notice of this piece of metal on I-68 and that it acted reasonably and diligently in this claim.

Roger Keith Jones, maintenance crew leader for respondent in Monongalia County, was responsible for the maintenance for this portion of I-68. He is also responsible for keeping track of when equipment is used and where work is

performed. He testified that there was only one telephone call to respondent's office concerning a piece of metal, and an employee was sent to the location. The debris had been removed from I-68 prior to the employee reaching the scene of claimant's accident.

It is well established that the respondent is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (1947). The general rule is that for the respondent to be held liable for road hazards of this sort, the claimant must prove that the respondent had actual or constructive notice of the road defect and a reasonable amount of time to take corrective action. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986).

The Court is of the opinion that claimant failed to establish by a preponderance of the evidence that respondent had notice of the debris on I-68. While sympathetic to the claimant's position, the Court cannot speculate as to the nature or origin of the object that was encountered. Therefore, in view of the foregoing, the Court is constrained by the evidence and the law to deny the claim.

Claim disallowed.

OPINION ISSUED MARCH 14, 2003

RAYMOND JONES
VS.
DIVISION OF HIGHWAYS
(CC-02-327)

Claimant appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of a falling tree when he was traveling south on Route 20 in Harrison County. Respondent was responsible at all times herein for the maintenance of Route 20. The Court is of the opinion to deny this claim for the reasons set forth below.

Claimant testified that he was driving his 1983 GMC Blazer on August 14, 2002, between 3:00 p.m. and 3:30 p.m. on Route 20 which is a two-lane road. The weather was clear. As he crested a hill, a tree fell on the hood of his vehicle and onto the right side of his windshield. Mr. Jones testified that he did not have any warning of the falling tree. He also testified that some of the tree had leaves on it, but not many. Claimant stated that he travels this road every day on his way to work. Claimant submitted into evidence an estimate for damage to the hood and windshield in the amount of $1,600.00. Claimant did not have any insurance available to cover the damage to his vehicle.

Claimant contends that respondent knew or should have known of the potential of the tree to fall into the roadway and that it should have taken adequate measures to remove this hazard.

Respondent asserts that it had no notice that this tree presented a hazard and that it acted reasonably and diligently in this claim.

Respondent's County Maintenance Supervisor for Harrison County, John Michael Barberio, testified that this portion of Route 20 is a two-lane blacktopped road. Mr. Barberio testified that his office did not receive any telephone calls about the tree nor did respondent have any notice that the tree presented a risk of falling. After reviewing the location of the tree, respondent could not conclude that the tree was on respondent's right of way.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). This Court has previously held that when the evidence indicates that respondent does not have notice of a hazard, such as a fallen tree, and a reasonable opportunity to remove it, respondent cannot be held liable. *Jones v. Division of Highways*, 21 Ct. Cl. 45 (1995).

The Court, having reviewed the record in this claim, has determined that respondent was not negligent in its maintenance of Route 20 on the date of claimant's accident. Respondent had no notice that this particular tree had a potential for falling or that it posed a hazard to the traveling public. Consequently, there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED MARCH 14, 2003

LARRY G. FERREN and KELLY A. FERREN
VS.
DIVISION OF HIGHWAYS
(CC-02-256)

Claimant appeared *pro se.*
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to their 2002 Chevrolet Suburban which occurred when claimant Kelly Ferren was traveling on County Route 3 near Bridgeport in Taylor County and their vehicle collected tar and gravel, staining portions of the vehicle's paint. Respondent was responsible at all times herein for the maintenance of County Route 3. The Court is of the opinion to deny this claim for the reasons set forth below.

The incident giving rise to this claim occurred on May 30, 2002, at approximately 2:40 p.m. Mrs. Ferren was traveling County Route 3 on her way to pick up her children at school. It was at least eighty degrees outside and there was no rain at or near the time of this incident. Mrs. Ferren stated that, as she was traveling downhill on County Route 3, it seemed as though she was driving through a construction zone where the road had just been paved. She stated that her tires left

"grooves" in the road which made it seem as though she was traveling through a recently paved road. Mrs. Ferren had traveled this portion of County Route 3 at least four times per week during the past three years. The next day claimants discovered that tar had splashed up on the side of the vehicle and its fender wells. Mrs. Ferren contacted respondent and drove the vehicle to the Taylor County headquarters. Respondent's employees offered to provide claimants a liquid solution to apply to the areas covered by tar. However, claimants were afraid that this might damage the paint on their vehicle so they chose not to use it. Claimants took their vehicle to a private body shop that detailed it and successfully removed the tar and rock-chips. Claimants submitted a repair bill in the amount of $93.34.

Claimants contend that respondent should have had warning signs in place to give notice to the traveling public of this hazardous condition.

Respondent asserts that it had no notice that County Route 3 presented a hazard of bleeding tar to the traveling public.

Larry Weaver, transportation crew supervisor for respondent in Taylor County, testified that he is familiar with the portion of County Route 3 at issue and travels it often. He stated that County Route 3 has a tar and chip road surface which is created by placing a tar strip and then covering it with chips. He described County Route 3 as an unmarked secondary highway. Mr. Weaver stated that he took the photographs of the claimants' vehicle depicting some areas with tar on it. He testified that the reason that tar may get on a vehicle like this is that tar and chip roads have a tendency for the tar to rise to the surface of the road during hot weather. He stated that this is a characteristic of a tar and chip road surface when the temperature rises above eighty degrees. He also stated that some roads are more likely to bleed than others such as those roads with a higher volume of traffic and those roads that have less shaded areas. He testified that there are some roads in Taylor County that are more likely to do this than others based upon his past experience; however, County Route 3 is not a route that has had this problem in the past. Furthermore, he stated that there have been no prior complaints regarding bleeding tar problems on County Route 3.

It is a well established principle of law that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); Pritt v. Dept. of Highways, 16 Ct. Cl. 8 (1985).

In this claim, the evidence established that County Route 3 is a low priority tar and chip road in terms of maintenance. Respondent had not experienced any problem with this road bleeding tar prior to this incident. Further, respondent did not have prior notice that County Route 3 was bleeding tar at the time claimants' vehicle was damaged. The evidence also established that respondent made a reasonable offer to assist claimants in cleaning their vehicle with a solution free of charge. The Court is of the opinion that the respondent acted diligently, and further, that there is insufficient evidence of negligence on which to justify an award.

Therefore, in view of the foregoing, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED MARCH 14, 2003

LEE COOKE and DEBRA COOKE
VS.
DIVISION OF HIGHWAYS
(CC-02-102)

Claimant appeared pro se.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to their 1999 GMC Sierra which occurred when claimant Lee Cooke was traveling on Route 4 in Braxton County and the vehicle struck a large rock in the road. Respondent was responsible at all times herein for the maintenance of Route 4. The Court is of the opinion to deny this claim for the reasons set forth below.

The incident giving rise to this claim occurred on February 20, 2002, between 7:30 p.m. and 8:00 p.m. Claimant Lee Cooke was traveling southbound on Route 4 between Flatwoods and Gassaway. He had been to the Heart Transplant Center in Pittsburgh and he was on his way home to Gassaway. The weather was clear and dry. The road surface was also dry. Claimant had the vehicle headlights on. Mr. Cooke was approximately four miles from his home and approximately one mile south of the I-79 exit when he proceeded around a slight curve to the right. Once he drove around the curve, he suddenly saw three rocks in the road. The largest rock was in the middle of his lane of travel and the two smaller rocks were scattered towards the center line of the road. He stated that he did not have time to apply his brakes. He maneuvered the vehicle to avoid striking the largest rock head-on. However, the passenger side of the vehicle and the right rear tire struck the rock causing significant damage. Mr. Cooke drove the vehicle a short distance and maneuvered it off of the road. He telephoned his wife who in turn made a telephone call to 911 for help. Mr. Cooke described the rock his vehicle struck as being approximately the size of a "twenty- seven inch portable television." He also estimated that it weighed approximately two thousand pounds. Mr. Cooke stated that he travels this portion of Route 4 almost everyday. In his opinion, the rocks fell from a cliff on the right side of the southbound lane. He stated that this cliff has a large number of rocks on it and that there have been numerous rock falls at this location as a result. He testified that he has lived near this location for eleven years and he has observed rocks on the road at this location approximately five times. He also stated that in his opinion there should be guardrail in place at this location to stop the rocks from reaching the road. In addition, Mr. Cooke stated that he does not recall seeing "rock fall" warning signs at or near this location. Claimants have comprehensive insurance coverage which covers this damage with a deductible feature of $500.00. Claimants submitted into evidence a repair estimate in the amount of $751.75. Claimants seek reimbursement for the cost of their insurance deductible in the amount of $500.00.

Claimants allege that respondent knew or should have known of this rock fall and failed to take adequate remedial action. Claimant also alleges that respondent has failed to adequately warn the traveling public of a hazardous condition.

Respondent asserts that it had no notice of the rock fall and that it acted reasonable in placing the rock fall warning signs near the location of this incident.

Jack Belknap, maintenance supervisor for respondent in Braxton County at the time of this incident, testified that his responsibilities include maintaining the roads. He testified that Route 4 is a two-lane, asphalt highway. It has a yellow center line and white lines on the edges. It is approximately twenty two feet wide and is a priority one road. Mr. Belknap is familiar with the location of this incident and stated that it is a known rock fall area. He testified that there are approximately five rock falls at this location each year. He also testified that there is a "falling rock" warning sign approximately nine hundred feet prior to the location of this incident and that Mr. Cooke would have passed the sign just prior to this incident. According to Mr. Belknap, the sign has been present since at least August 2001.

Gary Moore, assistant supervisor for respondent in Braxton County at the time of this incident, testified that he became aware of this rock fall after Braxton Control 911 Center called him at approximately 8:30 p.m. Mr. Moore then called an assistant who drove to the scene and observed that two night shift mechanics were already removing the rocks from the road. Mr. Moore also testified that this location has a high number of rock fall incidents. According to Mr. Moore, this location has more rock fall incidents than any other area in Braxton County. He estimated that there are probably four or five rock fall incidents at this location each year.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 46 S.E.2d 811 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl.103 (1986); *Pritt v. Dept. of Highhways,* 16 Ct. Cl. 8 (1985). In rock fall claims, this Court has held that the unexplained falling of a rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award.
Coburn v. Dept. of Highways, 16 Ct. Cl. 68 (1985); *Hammond v. Dept. of Hiighhway*, 11 Ct 24

In the present claim, claimants failed to establish sufficient evidence that respondent failed to take adequate measures to protect the safety of the traveling public on Route 4 in Braxton County. Respondent has placed "falling rock" warning signs to warn the traveling public of the potential for rock falls at this location and respondent reacted as soon as it received notice to the scene of this incident to remove the rocks from the road. While the Court is sympathetic to claimants' plight, the fact remains that there is no evidence of negligence on the part of respondent upon which to base an award.

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 MARCH 14, 2003

ROY KEVEN DOBSON and EDITH GERALDINE DOBSON
VS.
DIVISION OF HIGHWAYS
(CC-01-332)

Claimant appeared *pro se.*
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for water damage to their property which they allege was caused by the negligent maintenance of the berm and its support structure along County Route 48 in Webster County. The Court is of the opinion to deny this claim for the reasons set forth below.

The incident giving rise to this claim occurred on or about July 29, 2001. Claimant, Edith Geraldine Dobson, is the titled owner of the home and property at issue. Her son, Roy Keven Dobson, has contracted with her to purchase the home and property. Mr. Dobson has made numerous payments under this contract and currently resides at the home. The home and property are located along what is referred to as Cranberry Ridge Road near Webster Springs in Webster County. Cranberry Ridge Road is designated as County Route 48. Claimants' home is located approximately five or six feet from County Route 48. They own approximately two and one-fourth acres of land including the house. There is a small berm on the side of County Route 48 where claimants' property is located followed by a small but sharp drop-off that levels out into a small valley behind their house. It is in this small valley area that Mr. Dobson plants his garden which he has done since 1999. There are a few homes on the other side of County Route 48 that are adjacent to the road. These homes are located at the base of a significantly steep hill. County Route 48 is a two-lane, blacktopped, secondary highway. Mr. Dobson has lived in this home for approximately three years and plans to purchase it and the property in full. He stated that his garden was fenced off in a square-like manner. On July 29, 2001, there was a heavy rain in Webster Springs and the surrounding area including the claimants' home. According to Mr. Dobson, it began raining hard early in the day and continued into the afternoon. It was sometime in the afternoon that Mr. Dobson noticed a heavy stream of water flowing from an easterly direction along County Route 48 and downhill towards claimants' property. He stated that there was a great deal of rock, trash, and other debris flowing with the water. According to Mr. Dobson, the force of the water and debris caused a portion of the side of County Route 48 to break in half and collapse which allowed the water and debris to wash over the hill and onto claimants' property and garden. In addition to the damage caused by the water, there was approximately two and one-half to three feet of rock which piled up on claimants' property and garden. Photographs introduced into evidence by Mr. Dobson demonstrate that the rock and debris completely destroyed his garden and most of the fence around it. The rock extended approximately one-half acre across claimants' property. Mr. Dobson testified that had respondent placed "gabion baskets" underneath the berm to provide it with support on the hillside, the road would not have broken lose at this location and his property would not have been damaged. Mr.

Dobson also testified that he planted the garden primarily for his own consumption, but that if he had a lot left over he would sell it. He planted and grew approximately ten rows of each of the following; tomatoes, green beans, corn, cucumbers, cabbage, brussels sprouts, carrots, beets, and potatoes. All of this was destroyed by the flood, as was approximately fifty-five feet of his fence surrounding the garden. Claimants' value the loss of their garden at $2,000.00. They were unable to place a value on their fence. Mr. Dobson estimated that it would cost between $10,000.00 and $15,000.00 to have someone use heavy equipment to remove all the rock and debris off their property and restore the land as it was prior to the flood.

Claimants assert that respondent was negligent in failing to provide a proper foundation and support for the edge of the road and the berm at this location which proximately caused the road to break and water and debris to wash onto their property.

It is respondent's position that it did not have notice of any potential hazard with the edge of the road or the berm at this location. Further, respondent asserts that there was an unforeseeable heavy rainfall at the time of this incident which caused the damages to claimants' property.

Jimmy Collins, maintenance supervisor for respondent in Webster County at the time of this incident, testified that he is responsible for maintaining the roads in Webster County including the portion of County Route 48 at issue in this claim. Mr. Collins is personally familiar with the road at this location. He testified that respondent had no prior notice of a problem or potential problem with the portion of County Route 48 at issue. According to Mr. Collins, his crew placed "shoulder stone" at this location and the surrounding area along the berm of County Route 48 approximately one week prior to this incident. Mr. Collins stated that he was of the opinion that the "shoulder stone" was sufficient, at that time, to support the road. Mr. Collins also testified that the extraordinary heavy rainfall that occurred between July 26, 2001, and July 29, 2001, caused the berm of the road to wash away, and the subsequent damage to claimants' property. Respondent submitted into evidence the "Record of Rainfall Reporter" which is a record of the daily rainfall in Webster County kept by respondent at its headquarters in Webster County. The record for the month of July, 2001, indicated that between July 28, 2001, and July 30, 2001, there was rainfall in the amount of 3.05 inches. Further, the same record indicated that from July 26, 2001, through July 30, 2001, there was a total rainfall of 6.25 inches. Mr. Collins stated that this amount of rainfall in the Webster Springs area is well above normal. Mr. Collins also testified that on July 29, 2001, his crew was involved in emergency services along County Route 48 due to flooding. Respondent also introduced evidence demonstrating that it responded to numerous emergencies on July 29, 2001, including overflowing streams, clogged culverts, fallen trees, and slips in many berm areas. Mr. Collins also testified that the culvert located near claimants' property could not possibly handle the large amount of rainfall received in such a short period. He also stated that the water which overflowed from this culvert contributed to the volume of water on and along the road. Finally, Mr. Collins testified that respondent placed "gabion baskets" at the location where the berm of the road washed away in order to create a foundation for the new berm and to provide stability and support. However, he testified that this could not have been done until after the flooding stopped.

For respondent to be held liable for the damages caused by inadequate drainage, claimant must prove that respondent had actual or constructive notice of the existence of the defect and a reasonable amount of time to take corrective action. *Orsburn v. Division of Highways*, 18 Ct. Cl. 125 (1991); *Davis v. Dept. of Highways*, 11 Ct. Cl. 150 (1976).

In the present claim, the Court is of the opinion that the claimants failed to establish sufficient evidence to establish that respondent had prior notice that the berm would slip or wash away at this location. The evidence established that respondent had just recently placed "shoulder rock" along the berm of County Route 48 and had no reason to believe that it would slip or wash away. Furthermore, there was an extraordinary rainfall on the date of this incident, as well as the three proceeding days. The culvert that was in place to handle the usual water flow could not have done so under these extraordinary circumstances. Respondent was operating under emergency circumstances on the date of this incident and acted reasonably and diligently under these circumstances. While the Court is sympathetic to the claimants' loses, it is constrained by the evidence to deny this claim.

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

Claim disallowed.

OPINION ISSUED MARCH 14, 2003

BRUCE HOBBS and ELIZABETH HOBBS
VS.
DIVISION OF HIGHWAYS
(CC-01-278)

Mark Hobbs, Attorney at Law, for claimants.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to real estate located in Mingo County which property is adjacent to County Route 1, commonly referred to as East Fork of Twelve Pole Road. Damage has occurred to claimants' property as the result of a drain placed beneath East Fork of Twelve Pole Road in 1976 at which time claimants gave respondent an easement for drainage across their property. As a result of the water flowing from the culvert installed by respondent beneath East Fork of Twelve Pole Road, claimants have had water flowing onto their property such that it is now unsuitable for the purposes for which claimants wish to use the property. Respondent is responsible for the maintenance of East Fork of Twelve Pole Road in Mingo County. The Court is of the opinion to deny this claim for the reasons set forth herein below.

Claimant Elizabeth Hobbs purchased three tracts of property adjacent to East Fork of Twelve Pole Road in Mingo County in 1975. In 2002, she deeded the property to her husband, claimant Bruce Hobbs. In 1976, claimants conveyed an easement to respondent for a drainage area to extend from East Fork of Twelve Pole Road across their property to the East Fork of Twelve Pole Creek. The permanent

easement was described as being fifteen feet in width and extending from the road across claimants' property to the creek. At that time, respondent installed a culvert beneath the East Fork of Twelve Pole Road to provide for drainage of surface water from the hillside above the road which had been accumulating on the surface of the road and creating problems for the traveling public. At that time this was a dirt road and muddy conditions were not uncommon in this area of East Fork of Twelve Pole Road. Over the years claimants noticed that the water flowing from the road through the culvert covered more than the fifteen feet width of the permanent easement. The approximate distance from the end of the culvert beneath East Fork of Twelve Pole Road through claimant's property to the creek is 70 feet. The property near this area has experienced an excessive amount of water which has resulted in a pooling of the water on claimants' property causing swampy conditions. Claimants contend that they are unable to use their property for any purpose while these conditions exist. Claimants desire to use this tract of land for a mobile home park but are unable to do so while the present water problems exist. Claimants obtained an estimate in the amount of $9,800.00 which represents the cost of placing culvert pipe from the road to the creek to contain the water across the right of way granted in the permanent easement

Respondent asserts that its responsibility for the drainage of the water through the culvert beneath East Fork of Twelve Pole Road ends at the end of the culvert pipe where it empties onto claimants' property. The permanent easement was for the construction of the pipe only and not for the provision of any structure across claimants' property. Therefore, respondent is not liable for any damage to claimants' property resulting from the water flowing across claimants' property from the culvert beneath East Fork of Twelve Pole Road.

Claimant Bruce Hobbs testified about the property which is the subject matter in this claim. He purchased the property which is composed of four tracts on both sides of East Fork of Twelve Pole Road or County Route 1 for his wife in 1975. He farmed the land for two years as it had been farmed by the previous owner. The top soil was in good condition and his farming efforts were successful. In 2002, his wife deeded the property to him in its entirety. He and his wife signed the permanent easement agreement with respondent in 1976 or shortly after purchasing the four tracts of land. East Fork of Twelve Pole Road at that time was not a paved road and water accumulated on the surface resulting in difficulty for travelers on the road. The culvert installed beneath East Fork of Twelve Pole Road allowed water to empty out onto claimants' property and then flow to Twelve Pole Creek which was on the other side of claimants' property. Mr. Hobbs first noticed a problem with water on his property in 2002. Mr. Hobbs described the flow of water across the easement and how it has now created problems on his property as it flows from the culvert in excessive amounts which then ponds over an area approximately seventy-five feet from the easement boundary. This has rendered the property unusable as there is not only a pool of water up to seven to nine inches deep at times, but also the area stays in a swampy condition during most of the year.

Respondent asserts that it is not responsible for the maintenance of the permanent easement as this easement was for the construction of the culvert beneath East Fork of Twelve Pole Road. Once the culvert was installed, respondent had no further duty to claimants. The permanent easement agreement entered into by the parties does not provide for maintenance of the easement area on claimants' property.

Terry Ooten, assistant supervisor for respondent in Mingo County, testified that respondent's responsibility is to maintain the pipe which crosses beneath the road and that is the extent of its responsibility. In fact, he visited the property and he explained that the water flowing onto claimants' property is flowing there because that is the natural drainage area for the hillside on the opposite side of East Fork of Twelve Pole Road. The water is flowing to the creek. He also testified that the culvert beneath East Fork of Twelve Pole Road is thirty-six inches in diameter and its outlet end is on the side of the road to claimants' property. He described East Fork of Twelve Pole Road as being a secondary road that is eighteen to twenty feet wide. The right of way is thirty feet or fifteen feet on either side of the center line. He stated that respondent maintains the ditches, the shoulders, and patches the road as needed. The area of the permanent easement is not maintained by respondent.

Photographs were submitted of the area by both parties. Various areas were pointed out by witnesses to demonstrate to the Court the portion of claimants' property that has water flowing from the culvert onto the permanent easement area and standing on claimants' property. Water flows into an area on claimants property approximately seventy-five feet from the area of the permanent easement. There is a heavy growth of trees and brush on the property. The culvert empties onto the easement area which is below the level of the culvert. Testimony from two witnesses, Elmer McCloud, a former owner of the property, and Jeffrey Marcum, a neighbor who took photographs for claimants, both testified that they observed a pool of water on claimants' property and both witnesses testified that the water flowed from the culvert located beneath the road that empties onto the property. Mr. McCloud stated that he had not had any problems when he lived on the property because the drain pipe was not located beneath East Fork of Twelve Pole Road at that time.

The estimate submitted by claimants to establish the cost to remediate permanently the water problem was prepared by Joe Mullins who testified that placing an elevated drain pipe the same size as the culvert across the permanent easement to the creek and covering the drain pipe with fill would take care of the water flowing onto claimants' property from the permanent easement area. His estimate, based upon using top soil from claimants' property to cover the newly placed drain pipe, is in the amount of $9,800.00.

The general law with respect to easements provides that the dominant tenement, *i.e.*, respondent in the instant claim, has a duty to maintain an easement, and he must so use his own privileges as not to do any unnecessary injury to the grantor, i.e., claimants herein. *Armstrong v. Pinnacle Coal & Coke Co.*, 101 W.Va.15, 131 S.E. 712 (1926). In using the right the grantee must assume care. *Hayes v. Aquia Marina, Inc.*, 243 Va. 255, 414 S.E. 2d 820 (1992). The law also provides that so long as an easement is legitimately used to carry out a known purpose for which it was acquired, without resultant damage to abutting property, there is no right within the boundary line of the easement itself not specifically reserved, and not legitimately acquired by the long user. *State v. Sanders*, 125 W. Va. 143, 23 S.E. 2d 113 (1942). Therefore, respondent in the instant claim would have a duty to use the permanent easement granted by claimants so as not to do any damage to that portion of the property outside the boundary of the permanent easement.

However, the Court in the instant claim also must examine the specific terms of the conveyance made by the claimants to respondent.

A critical issue in this claim is whether the permanent easement granted by claimants to respondent on May 24, 1976, requires respondent to maintain the easement such that water flowing from the culvert beneath East Fork of Twelve Pole Road must be confined to and within the boundary of the permanent easement. The boundary of the permanent easement as described in the easement agreement appears to be approximately seventy feet in length to the creek and fifteen feet in width through claimants' property. One of the paragraphs in the permanent easement provides as follows:

> And for the consideration hereinbefore set forth the Grantor does hereby release Grantee from any and all damages that have been occasioned or that may be occasioned to the residue of the property of Grantor by reason of the construction to be performed on the above described easement and by reason of the construction and **maintenance of Project No. 330-1-2. 60**, and covenant further that the easement hereby granted is free of all liens and encumbrances. (Emphasis supplied.)

This paragraph in the easement agreement appears to release respondent from any responsibility for the maintenance of the area of the permanent easement which claimants conveyed to respondent in 1976. The Court does not have in evidence a full description of the project performed by respondent at that time. Thus, the Court must rely upon the language in the easement agreement. The language states very clearly and in unambiguous terms that respondent is released from "any and all damages that have been occasioned or that may be occasioned to the residue of the property ... by reason of the construction and maintenance of Project No. 330-1-2. 60..." The Court is of the opinion that it is constrained by this language in the easement agreement to hold that respondent is not liable to claimants for the damage to their property caused by the flow of water from the culvert beneath East Fork of Twelve Pole Road. This does not mean that the claimants do not have a right to enter onto the property which is the subject matter of the easement agreement to perform that which may prevent damage to their property, *i.e.*, the servient tenement. The Court is of the further opinion that claimants may enter onto the easement agreement to do that which may be required to protect their property, such as placing a drainage ditch or a drainage system as described in their estimate, to alleviate the excess flow of water onto their property from the easement area. As long as the work performed does not affect the purpose for which the easement was granted to respondent, claimants may protect their property as necessary.

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

Claim disallowed.

OPINION ISSUED MARCH 14, 2003

JOHN DEPTO and MARY ANN DEPTO
VS.
DIVISION OF HIGHWAYS

(CC-02-056)

Claimants appeared pro se.
Andrew F. Tarr, Attorney at Law, for respondent

PER CURIAM:

Claimants brought this action to recover costs incurred from water damage to their real estate and personal property allegedly due to the negligent maintenance of the drainage system along County Route 86 in Marshall County. At the hearing of this claim, the Court amended the style of the claim to reflect that Mary Ann Depto is a joint owner of the real estate and property at issue and is a party in interest, along with her husband John Depto. Respondent is at all times herein responsible for the maintenance of County Route 86 in Marshall County. The Court is of the opinion that respondent is liable in this claim for the reasons stated more fully below, and, further, the Court considers the claim to have been heard on the issue of liability only.

Claimants' property and home are situate on Grandview Road designated as County Route 86 in Glendale, Marshall County. Claimants bought the real estate and home in October of 1978, where they have resided ever since. The property consists of approximately three-hundred feet of frontage property along County Route 86. County Route 86 is a two-lane blacktop highway with double yellow lines and white lines along the edges. Respondent re paved the portion of County Route 86 adjacent to claimants' property in 1990. County Route 86 has a gradual slope toward claimants' property. There is a ditch line on the opposite side of the road from the claimants' property. The property north of claimants' property rises to a higher elevation and levels off into a plateau. The plateau extends back to the right away from County Route 86 toward claimants' property. Claimants' property is lower than County Route 86. The claimants have a gravel driveway in front of their home which is on an uphill incline at an approximate ten degree angle from their home and it extends from their garage up the hill where it intersects with County Route 86. There is a ditch line in front of claimants' property which should connect to a culvert beneath the driveway, but claimants assert that respondent covered this culvert and it no longer carries water flowing from respondent's ditch line. The driveway is elevated near the garage where it is also used as a small parking lot. At this location, there is a cinder-block retaining wall that retains the portion of the elevated driveway next to the garage. Claimants assert that this wall cracked over a period of time due to water seeping into the cinder-block foundation and freezing. The wall was eventually replaced by the claimants at their own expense. The drainage system at issue is located between County Route 86 and claimants' property. It begins north of claimants' property and extends south underneath claimants' driveway and underneath their neighbor's driveway to the south. According to Mr. Depto, prior to respondent covering up the culvert in 1990 with asphalt, the water would flow from the culvert into a catch basin at the bottom of the hill, at which point it would continue to flow down hill. Mr. Depto testified that the culvert pipe at issue is approximately ninety feet long from start to finish and approximately ten to twelve inches in diameter.

Claimants contend that respondent is responsible for the maintenance of the drainage system located between County Route 86 and claimants' property, and that it negligently covered the inlet of a culvert underneath claimants' driveway with asphalt proximately causing water to drain onto claimants' property. Claimants also

contend that respondent negligently diverted the flow of water onto their property when it re paved County Route 86.

It is respondent's position that it did not cover or otherwise block the claimants' culvert, and that it is not responsible for maintaining culverts or drainage systems on or under private driveways. Respondent also asserts that there are other causes to claimants' flooding problems for which it is not responsible.

Mr. Depto testified that he recalls respondent re paving the portion of County Route 86 adjacent to his property twice in the twenty-five years that he and his wife have resided there. The most recent re paving project was in 1990. Mr. Depto testified that ever since the 1990 re paving project the claimants' property has been flooded during most heavy rainstorms. Claimants introduced into evidence numerous photographs depicting a large amount of rain water washing down onto their driveway during a storm in the spring of 1996 or 1997. Mr. Depto also testified that when there are heavy rainstorms during the winter the water often freezes and creates a thick layer of ice. According to Mr. Depto, this ice has prevented him and his wife from driving their vehicles out of the driveway on numerous occasions over the years, and it has caused several vehicles to slide off the driveway and over a hill. Fortunately, there have not been any serious injuries. Claimants also introduced into evidence photographs depicting the cinder-block retaining wall cracking and breaking apart, allegedly due to water seeping into the foundation and freezing. Mr. Depto testified that this is a result of the numerous flooding incidents, especially those during the winter months that have caused the foundation to crack and give away. Mr. Depot stated that prior to the re paving work performed in 1990, the culvert which runs underneath the driveway was open on both the north and south ends. Further, he stated that they had not had flooding problems prior to the re paving. According to Mr. Depot, during the re paving respondent extended the asphalt apron over too far onto his driveway covering the northern inlet side of the culvert with asphalt. Thus, no water has been able to flow into the culvert from this location since 1990. Mr. Depot also testified that he contacted respondent on numerous occasions in an attempt to remedy this problem. However, he stated that respondent did not want to uncover the clogged culvert but instead wanted to dig another ditch in his yard and divert the water in another direction. He stated that respondent did not offer any viable solution to the problem despite numerous visits by it agents and employees. In addition to the blocked culvert, Mr. Depto testified that respondent raised the height of County Route 86 significantly which has made it higher than the claimants' property. Now, instead of the excess water draining off the opposite side of the road and into the ditch line where there are no homes, most of it flows onto the claimants' driveway.

Roger Cain, the Resurfacing Coordinator for the respondent in Marshall County at the time of this incident, testified that he is responsible for overseeing all resurfacing projects in Marshall County. He recalls overseeing the resurfacing project at issue in 1990. He testified that respondent removed the excess build up of shoulder material, so as to divert water from the roadway to the ditch line. Mr. Cain does recall putting down an asphalt apron at the claimants' driveway, but he stated that he and his crew did not pave over any pipe in that area that they could see. Furthermore, Mr. Cain testified that the asphalt apron did not extend in toward the claimants' driveway quite as far as Mr. Depto indicated. However, Mr. Cain did state that respondent dug a ditch line north of the claimants' property. When asked where he thought that the water in the ditch line would go, Mr. Cain stated that possibly it was just going to

disperse into the claimants' driveway or wherever it went before this project. Then, he stated that he really did not know where the water was going to go. He knew that it was going onto the road prior to this project which respondent was trying to stop. According to Mr. Cain, the respondent does not install driveway pipes on State projects such as this one. He stated that only in some areas where there is a federally funded project does the State install driveway pipes. Finally, Mr. Cain stated that he did not know if the claimants had a culvert pipe underneath their driveway, but if they did, and it was located where the claimants' allege it is, then it would be close to the respondent's right-of-way.

Ron Faulk, the County Supervisor for the respondent in Marshall County at the time of this incident, testified that he was responsible for supervising the maintenance of the highways in Marshall County including County Route 86. He recalls being contacted by Mr. Depto in 1990 regarding this flooding problem. Specifically, he recalls Mr. Depto complaining about the culvert being blocked. He testified that he sent a couple of employees to the claimants' property to search for the entrance to the culvert that Mr. Depto was alleging was blocked. The employees were unsuccessful in finding the culvert. Further, he also stated that the County Maintenance Organization was not permitted to install culverts under private driveways in most circumstances. Thus, even if the respondent had found a culvert under claimants' driveway, he could not simply uncover the claimants' culvert and install a new one. Mr. Faulk did admit that there was a drainage system with culverts near claimants' property and that the water flowed under the claimants' neighbor's driveway and then over the hill. However, he is not sure who installed this culvert because it was done before he came to work for respondent. Mr. Faulk testified that he and a few engineers tried to suggest methods to resolve the claimants' problem but none of the suggestions were suitable for the claimants. Mr. Faulk testified that ultimately it is the property owners' responsibility to install a culvert under their driveway, and that respondent has a procedure that requires a property owner to apply for a permit based upon a detailed plan of what is going to be done. Further, the property owner's plan must meet respondent's specifications and the property owner must perform the job and pay for it. Then, at that point the respondent will assist in the maintenance of the culvert.

Robert Whipp, the Assistant District Engineer for the respondent in Marshall County at the time of this incident, testified that he is responsible for supervising maintenance work, construction work, and basically all other departments within his district which includes Marshall County. He is familiar with the portion of County Route 86 at issue as well as the drainage system. He stated that he first became aware of claimants' problem with flooding shortly after respondent re paved County Route 86 in 1990. Mr. Whipp testified that County Route 86 in front of claimants' property is super elevated which means that the road is titled from one side to the other. According to Mr. Whipp, the portion of County Route 86 adjacent to claimants' property is the high side of the road and the opposite side of the road is the low side. He visited the claimants' property last year to make this and other observations regarding the flooding problem. Mr. Whipp also stated that "where the dirt and ground beside the road is higher than the ditch line and you get to where that dirt drops below the road you just take your ditch line into that area to drain the water away from the road, and at that time it becomes the land owner's responsibility." He stated that it is the property owner's responsibility to maintain driveways. Further,

he testified that it is respondent's policy and practice to divert water off of its highways and it becomes the responsibility for the surrounding property owners to divert the water off of their properties. Additionally, Mr. Whipp testified that in his opinion there are independent contributing factors to the claimants' water problems that are not the fault of the respondent whatsoever. First, most of the water is coming off of claimants' northern neighbor's property and flowing down hill onto their property. The reason being that the neighbor's property is elevated higher which is causing this water to flow down hill onto the claimants' property. Second, he stated that the claimants need to reestablish the driveway pipe to help divert the flow of some of the water flowing onto their driveway.

To hold respondent liable for damages caused by inadequate drainage, claimant must prove by a preponderance of the evidence that respondent had actual or constructive notice of the existence of the inadequate drainage system and a reasonable amount of time to correct it. *Ashworth v. Div. of Highways* 19 Ct. Cl. 189 (1993); *Orsburn v. Div. of Highways*, 18 Ct. Cl. 125 (1991).

In the present claim, the Court is of the opinion that the proximate cause of the damage to claimants' property is respondent's failure to maintain an adequate drainage system for the water flowing from County Route 86. The evidence established that respondent knew of the drainage problem at this location since the 1990 re-paving project. However, respondent failed to provide an adequate drainage system despite numerous requests for help from the claimants. The claimants also established the fact that an excessive amount of water was flowing from County Route 86 onto their driveway and not from the claimants' neighbor's property. Further, claimants established that respondent knew or should have known that it negligently covered the inlet of claimants' culvert with asphalt and yet failed to correct this mistake. Thus, the Court has determined that the claimants herein may make a recovery for the damages proximately caused to their property. Finally, the Court is concerned about discovering from respondent's own witnesses that it has a "policy" of diverting water from the State's roads and highways onto adjacent property owners to deal with at their own peril, and then offer little or no assistance to the property owners after doing so. This policy neither conforms with the law of this State nor is it fair and equitable to place such a burden on the property owners of the State of West Virginia.

In accordance with the findings as stated herein above, the Court directs the Clerk of the Court to set this claim for hearing on the issue of damages as soon as may be practicable.

OPINION ISSUED MARCH 14, 2003

SHARON MUELLER
VS.
HIGHER EDUCATION POLICY COMMISSION
(CC-02-297)

Claimant appeared *pro se.*
Kristi A McWhirter, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action for breach of an alleged contract entered into with Shepherd College, a facility of the respondent. Claimant alleges that she and representatives of Shepherd College agreed that a tract of land which she owns near the campus of Shepherd College would be leased to the college for parking purposes. In reliance upon the lease agreement claimant alleges that she incurred expenses in preparing her property for parking in accordance with direction from a representative of the college. This claim was heard on October 30, 2002, by the Honorable David M. Baker, Judge, sitting as a hearing examiner for the whole Court, and the claim was submitted for decision at that time. The Court is of the opinion to deny this claim based upon the reasons set forth herein below.

Claimant purchased a parcel of real property in Shepherdstown, Jefferson County, in July1998. The tract of property is one hundred three feet in width fronting on a twelve-foot alley and it is thirty-six feet deep. There is a garage building located at the eastern end of the property. It is the vacant portion of the property that is the subject matter of this claim. Claimant stated that based upon a discussion she and her husband had with the Mayor of Shepherdstown, she approached officials with Shepherd College about the possibility of leasing the vacant portion of her lot to the college for parking purposes. She thereupon began discussions with K. Alan Perdue, in house counsel for the college, who was also acting as the temporary supervisor of facilities for the college. Mr. Perdue, having been informed of the availability of the vacant lot, viewed the property himself, first with the Mayor, and then with other employees of the college. This viewing occurred in the fall 1998. Claimant and her husband informed Mr. Perdue that they desired to lease the vacant lot portion of their property to the college for parking purposes. On or about October 5, 1998, claimant contacted Mr. Perdue and informed him that she was going to make certain improvements to her lot at a cost of $2,393.88 plus $142.16 for gravel, and even though he discouraged her from this action, she proceeded to have the lot prepared. Eventually, in November 1998, after many discussions with the claimant, Mr. Perdue informed the claimant that the college was no longer interested in leasing the property. Claimant protested this decision by approaching the President of Shepherd College, Dr. David L. Dunlop, and requested his intervention. This eventually resulted in a letter from Dr. Dunlop to claimant outlining a proposal to offer claimant twenty dollars per space per year for the eight spaces estimated to be available on the lot for parking purposes. Claimant received the offer and she thereupon made a telephone call to the office of the President accepting the offer. However, it was then necessary for the college to obtain a lease to be approved by the Leasing Section of the Finance Division of the Department of Administration in Charleston. In January 1999 the Chief Procurement Officer for Shepherd College sent a letter proposing to lease space from claimant for additional parking near the college and this letter included a draft lease prepared by Mr. Perdue. The college later learned that such a lease must be "created" by such Leasing Section and approved as to form by the Attorney General. In April 1999 the college was informed that this letter and draft lease had not been received by the Leasing Division so no lease agreement had been prepared for the college to lease the space from claimant. During the months of January through April, claimant and her husband were in continuing contact with officials at Shepherd College regarding the terms of the proposed lease, and in May 1999 Mr. Perdue advised claimants in a letter dated May 14, 1999, that Shepherd College was no longer

interested in leasing the vacant lot from claimant and that there would be no further discussions regarding a lease by the college with claimant for her vacant property. The college has continued to maintain this position with regard to leasing claimant's parking spaces.

Claimant alleges that she had a lease agreement with Shepherd College for her vacant property; that she expended certain funds in the amount of $2,536.04 to improve her property for the benefit of the college; and that she is entitled to an award from this Court for the loss of rent and the expenses incurred in making improvements to her property in contemplation of the lease.

Respondent avers that it never entered into a lease agreement with claimant and that any improvements to her vacant property were made by her acting on her own behalf for which it has no responsibility.

The Court has reviewed the transcript, documents in evidence, and the Findings of Fact proffered to the Court by the Honorable David M. Baker, Judge. It appears to the Court that this claim is actually a claim *ex contractu*, i.e., one based upon contract law. Claimant asserts she had a contract for the lease of her property to Shepherd College for which she has not been paid the agreed upon rent for the spaces on her property for parking, and, further, she acted in reliance upon statements made to her by representatives of the college to make improvements to her property for which she desires to be reimbursed. Thus, claimant is asserting a breach of contract on the part of the respondent. Basic contract law requires that there be a "meeting of the minds" in order for a contract to be entered into by the parties to the contract. There can be no breach of contract until it first is established that there was a contract between the parties. In the instant claim the Court can find no basis for finding that a contract ever existed between the claimant and Shepherd College. Throughout the testimony of the claimant herself at the hearing, she expressed her opinion that the parties were in a constant state of negotiation for the amount to be paid to her for the rental of the parking spaces to the college. She also stated that during the months of January through April 1999 she attempted to rent the parking spaces to others[1] and she went so far as to advertise the parking spaces for rent in the *Shepherdstown Chronicle*, the local newspaper. On May 14, 1999, correspondence was sent to the claimant by Mr. Perdue indicating the position of the college that the possibility of leasing the space from claimant was at a close. This letter stated in part:

> Inasmuch as the College believes that your premises in Shepherdstown are of very limited potential to us, and inasmuch as **you have repeatedly attempted to renegotiate the price figures since your telephone acceptance of the President's terms of offer,** and inasmuch as you have proceeded to lease out several of the limited number of spaces to other users, we hereby withdraw any continuing interest in renting any space from you. Please be advised that this represents a FINAL decision of the College on the matter and there will absolutely not be any further negotiations or discussions by any college administrators about renting any of your space. (Emphasis supplied.)

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[1]Claimant testified that she attempted negotiations for the parking spaces with a computer company, a florist, and the police department. She also advertised the spaces in the college bulletin.

The language in this letter to the claimant acknowledges that there were ongoing negotiations after the first offer by the college. In order for a contract in the form of a lease agreement to have existed as alleged by claimant there would have had to have been a firm agreement on the rent to be paid by the college to claimant for her property. The law refers to *consensus ad idem*, a clear mutual understanding and agreement as to all the material terms of the contract. The fact that claimant continued to attempt to negotiate a lease amount for her property certainly is indicative of the fact that the parties never had a "meeting of the minds" with regard to the lease which is the subject matter of this claim. Case law supports this statement. In *Hancock v. Fletcher*, 169 S.E. 457, 113 W.Va. 624 (1933) the Supreme Court of Appeals of West Virginia stated that "The acceptance is always required to be identical with the offer, or there is no meeting of minds and no agreement. 13 Corpus Juris, 267." In the case of *Stark Elec. v. Huntington Housing Auth.*, 375 S.E.2d 772, 180 W.Va. 140 (1988) the Supreme Court held that "A party to whom an offer of contract is made must either accept it wholly or reject it wholly. A proposition to accept on terms varying from those offered is a rejection of the offer, and a substitution in its place of the counter proposition. It puts an end to the negotiation so far as the original offer is concerned." Thus, the Court herein is required to find that claimant has failed to establish that the parties had a "meeting of the minds" such that a contract or lease agreement ever existed, and, further, that claimant's claim for breach of contract fails.

As to claimant's assertion that she is entitled to recover the amount she expended for the improvements to her property to meet the requirements of the college for leasing the property, the Court concludes that claimant admitted herself that she decided on her own to go forward with the improvements in spite of the protestations of Mr. Perdue to the contrary. Claimant must bear the full responsibility for making the improvements to her property as she is responsible for making the decision to have the improvements made. This portion of her claim fails based upon the fact testimony in the record.

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

Claim disallowed.

The Honorable David M. Baker, Judge, heard this claim in its entirety and filed a report of his findings with the Court. He did not take part in the decision of the claim.

OPINION ISSUED APRIL 10, 2003

CAROL SUE MCCAULEY and EBBLES NICOLE MAYNARD
VS.
DIVISION OF HIGHWAYS
(CC-02-132)

Claimants appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this claim for damage to their 2001 Dodge Grand Caravan as claimant Carol Sue McCauley was driving on County Route 50/73 when the vehicle went into a drainage ditch at the edge of the roadway. Respondent maintains County Route 50/73 which proceeds through the City of Salem in Harrison County. The Court is of the opinion to make an award to claimants for the reasons stated herein below.

Claimants were returning to their home in Salem, Harrison County, from a physical therapy session for claimant Pebbles Nicole Maynard on March 11, 2002. It was between 3:00 and 3:30 p.m., and the Hardin Grade School was letting its students out for the day so the traffic was heavy on County Route 50/73 in front of the school. Claimant Carol Sue McCauley was driving slowly due to the traffic when she observed an oncoming truck with a large flat bed behind it. She drove to the right in her lane to avoid being too close to the truck when her vehicle went into the drainage channel at the edge of the pavement. The drainage channel is about a foot to a foot and a half deep. The sidewalk adjacent to the drainage channel is higher than the drainage channel itself. Claimants' van went into the drainage channel and it scraped against the side of the sidewalk causing damage to the passenger side. Claimants submitted photographs of the area which depict the drainage area at the edge of the road and the sidewalk immediately adjacent thereto. The photographs also illustrate the broken white edge line adjacent to the drainage channel. The damages to claimants' van are estimated to be in the amount of $1,042.40, but claimants maintain insurance with a $100.00 deductible provision so any recovery is limited to the amount of the deductible.

John M. Barberio, respondent's Highway Administrator in Harrison County, testified that he is familiar with County Route 50/73. He described the drainage channel next to the roadway as the channel to respondent's pipe which is a foot to a foot and half lower than the road surface. He explained that the drainage system has been that way on County Route 50/73 for at least the last twenty-four years. He measured the road at a width of twenty feet nine inches with the lane adjacent to the drainage channel at eight feet eight inches from the yellow center line to the inside edge of the white line. He stated that he has not had any complaints about the drainage channel. He also testified that the sidewalk is maintained by the City of Salem.

After reviewing the facts in this claim, the Court finds that the drainage channel adjacent to County Route 50/73 poses a hazard to the traveling public especially in an area where the edge of the pavement is broken at the white edge line. Respondent is aware of the depth of the drainage channel and its proximity to the sidewalk for the school. County Route 50/73 is not wide in this area and it is not unreasonable to find that claimant Carol Sue McCauley found it necessary to drive to the right edge of the road in the face of an oncoming truck. When she did so, she placed her van in an untenable position of going into the drainage channel and scraping against the sidewalk causing damage to the vehicle. Therefore, the Court has determined that claimants may make a recovery of their insurance deductible as damages in this claim.

Accordingly, the Court makes an award to claimants in the amount of $100.00.

Award of $100.00.

OPINION ISSUED APRIL 10, 2003

MARIAN ASHLEY
VS.
DIVISION OF HIGHWAYS
(CC-01-277)

Greg Holsclaw, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover costs associated with water damage to her basement and personal property which she alleges was caused by the negligent maintenance of the drainage system for Route 60/16, also referred to as George's Drive, and Kanawha Terrace in St. Albans, Kanawha County. The hearing of this matter was held on November 14, 2002. Prior to the beginning of the hearing of the claim, the Court visited the scene of the incident. The Court is of the opinion to make an award in this claim for the reasons set forth more fully below.

Claimant's residence is located at 3303 Campbell Lane in St. Albans, Kanawha County. Her home is situate on one and one-fourth acres of land which abuts Campbell Lane at its intersection with George's Drive. Campbell Lane is a private road whereas George's Drive is a paved State road to the west of claimant's home. Claimant's driveway extends from her home and intersects with Campbell Lane. George's Drive and Campbell Lane both intersect with Kanawha Terrace just a few yards northwest of claimant's driveway. The portion of Kanawha Terrace at issue extends a short distance to the north of claimant's property where it intersects with U.S. Route 60. There is a railroad underpass at the intersection of Kanawha Terrace and U.S. Route 60. The ditch line along George's Drive proceeds from west to east and the ditch line for Campbell's Lane runs from east to west. The water in the ditch lines flows in an easterly direction. There is a confluence of the two ditch lines just north of the boundary of claimant's property. Claimant's basement has a drainage system that directs water into the State's drainage system described herein. The basement has a cement floor which lies above three drains that flow into a common drain under her home. From this location, the water flows north in the drain buried under her porch and through approximately three-fourths the length of her front yard at which point the drain then angles to the west directing water from the drain into the ditch line adjacent to George's Drive. At this point, the water flows through the culvert under George's Drive which empties the water into the Kanawha Terrace ditch line where it then flows through the culvert under Route 60 and eventually empties into the Kanawha River. According to claimant, the drainage system in her basement is the same as it was when the house was built.

In the summer of 1999, respondent employed a contractor to pave George's Drive which had been a gravel road. The ditch lines adjacent to the road were cleaned and new drainage pipes were installed in an effort to improve drainage in the area. George's Drive also was widened when this work was performed. As a result of this project, claimant contends that respondent increased the volume of water in the ditch line along George's Drive; that the terminus of her drainage pipe was covered during the project; and that these actions on the part of the respondent prevented the water from draining properly from her property, thus resulting in flooding in her basement. Claimant also contends that there was a build up of silt in her drainage pipe caused by the back flow of water from George's Drive. Claimant acknowledges that prior to the performance of the paving project, utility companies moved their lines located in front of claimant's home as well as the other residents' homes to the east of her home. She testified that she had not experienced any drainage or flood problems during the sixty-eight years she has resided in this home until December 14, 1999, at which time the first of three floods occurred in her basement. A second flood occurred on February 14, 2000, and the third flood occurred on February 18, 2000. As a result of the three floods which occurred in claimant's basement, she sustained total damages in the amount of $14,571.37.

Claimant was out of town on December 14, 1999, when her basement first flooded. She returned home the next day to find the damage. Although most of the water had receded, it damaged her furnace, water tank, washer and dryer, and some cabinets. The water level in her basement reached approximately one foot and remained there for one day. The water eventually flowed out through the common drain in the basement which empties into the George's Drive drain. This flood resulted in damages sustained by claimant in the amount of $3,133.60. Claimant notified respondent about the flood, which occurred at the same time the underpass at the juncture of Kanawha Terrace and U.S. Route 60 was flooded. Claimant stated that the underpass had been flooding for many years, but that it had never caused any flooding on her property.

In response to the first flood, Chet Burgess, Kanawha County Superintendent for respondent, went to claimant's residence on December 15, 1999, listened to her complaints, observed her basement, and reviewed the surrounding drainage systems. According to Mr. Burgess, he searched for a possible break in claimant's drain line but was unable to find one. He also testified that her yard was very wet on this date. At that time, respondent dug into an area around the lower side of Campbell Lane toward the underpass but could not locate any drainage pipes. As a result of the underpass flooding, complaints of water flowing into local residents' yards, as well as claimant's flooding problem, respondent decided to undertake a substantial project to alter a portion of the drainage system in this area. Respondent contracted with a contractor to replace the old drainage pipes that extended from the underpass to Route 60 where new pipes were placed for water to flow into the existing pipes that exit into the Kanawha River. According to Mr. Burgess, the old pipe was full of railroad ballast which had built up over the years. Claimant was confident that the work done by the respondent would alleviate her flooding problems and she was grateful and complimentary to Mr. Burgess on his quick response to her problem.

However, on February 14, 2000, at approximately 2:00 a.m., claimant awoke to find her basement flooded again. This time the water was approximately

twelve to fourteen inches deep. As a result of this flooding, she suffered additional damage to her basement and personal property. She had to have more work done on her furnace in an attempt to salvage it as well as having the duct system sanitized and cleaned. This second flood resulted in damages sustained by claimant in the amount of $624.54 Claimant testified that she contacted respondent, but no one was able to help her during the flooding or immediately afterwards due to other emergencies in the area. The day after the second flood, claimant hired Al Marino Inc., to come to her home to determine the cause of the flooding. An employee of Al Marino Inc., performed a dye test starting at the northern most drain in her basement, which is a terra-cotta drain, to determine where the problem was located. According to the testimony of Al Marino, Jr., his employee observed the dye exiting from the ground in the ditch line located at the confluence of George's Drive and Campbell Lane. Claimant's photographs admitted into evidence depict this green dye seeping from the ditch line at this same location. Claimant asserts that these photographs support the testimony that there was no drain pipe terminus for claimant's drainage system at this location. Further, the employee for Al Marino Inc., used an eel to determine whether there was any problem area within claimant's drainage pipes. The employee determined that there was silt build up in claimant's terra cotta pipe located approximately in the middle of her yard. Claimant testified that the employee who operated the eel told her that the silt was coming from water in George's Drive that was backing up into her pipe with significant force and pushing silt into the pipe. Further, he informed claimant that this was preventing the water in her basement from draining out. Claimant testified that respondent again came to her home on February 17, 2000, at which time its employees unearthed her drainage pipe in and around the location that the dye had exited her drainage system. There is a dispute between the parties as to whether or not respondent left claimant's drainage line uncovered overnight on February 17, 2000, and whether or not respondent found a crushed portion of plastic pipe inserted between two portions of claimant's terra cotta drain pipe on February 17, 2000. Regardless, it is uncontested by the parties that claimant suffered a serious flood on February 18, 2000.

Claimant testified that on February 18, 2000, at approximately 7:15 a.m., a steady rain began. The rain continued into the afternoon and was much heavier by 4:00 p.m. It was described by claimant as a "torrential rain." Claimant and her daughter, Phyllis Holsclaw, who lives next door, monitored the rainfall and the basement all day. At approximately 4:00 p.m., the water began slowly to back up into her basement. She called respondent numerous times but was unable to get assistance from respondent that evening. Once the water reached approximately two and one-half feet deep, she called the Jefferson Fire Department. The fire department arrived and pumped out approximately thirty thousand gallons of water from her basement. Claimant testified that she sustained more damage during this flood than she had as a result of the other two floods combined. As a result of this third flood, claimant sustained damages in the amount of $10,813.23.

Phyllis Holsclaw, claimant's daughter, grew up in claimant's house, moved away for some years and then moved into the house next door to claimant where she has lived for the last twenty-five years. She testified that she is aware of and familiar with the drainage system within claimant's home as well as respondent's drainage system nearby. She stated that it is her opinion that claimant's drainage problems are not related to surface water run off or her down spouts. She stated that the down

spouts flow away from the house approximately three or four feet and divert the water away from the house. According to Mrs. Holsclaw, claimant's flooding problems stem from a combination of heavy rains and claimant's terra cotta pipe being partially blocked which forced muddy water to back up into claimant's basement. Photographs which she took for the claimant were admitted into evidence at the hearing. These photographs depict the flow of the green dye used by Al Marino Inc., to find the terminus of her basement drain line. The dye seeped out of the ground in the ditch line located at the entrance of George's Drive. These photographs establish that claimant had no drain line protruding into the ditch line at this location. Mrs. Holsclaw stated that there is supposed to be a drainage pipe at this location and that the photographs establish that respondent apparently covered up the terminus of claimant's drain during the paving project on George's Drive. However, she also stated that she did not see if there was a pipe protruding at this location and whether water was flowing out of it prior to the road work and the flooding in 1999. Neither party can state with certainty if there was a working pipe at this location prior to 1999, but Mrs. Holsclaw testified that claimant's drainage system worked well until the respondent made changes to George's Drive in 1999. She also is of the opinion that when respondent deepened the ditch line along George's Drive, it provided drainage for substantially more water from a greater distance and directed it to the ditch line at the entrance of George's Drive located near claimant's property at the terminus of her drain. At this location, the water was directed to flow toward the underpass drain, but Mrs. Holsclaw states that the underpass drain was not properly maintained and as a result more water was backing up. She stated that this particular drainage system was faulty in that it would not carry such a substantial amount of water as was required in heavy rains. Further, Mrs. Holsclaw testified that the work done by respondent at the underpass following the flooding on December 14, 1999, did not help claimant's flooding problem because claimant had another flood on February 14, 2000.

According to Mrs. Holsclaw, respondent responded to claimant's telephone call regarding the second flood on February 16, 2000. She testified that respondent dug up the ground in an attempt to uncover claimant's drain line terminus. She introduced photographs which she testified were taken on February 16, 2000, that depict respondent's employees digging in and around the end of the drain at George's Drive and Campbell's Lane at the location of the terminus of claimant's drain. Mrs. Holsclaw stated that she observed the terminus of the drain and estimated that it was buried approximately three feet deep. She also introduced a photograph showing claimant's drain line terminus and that water was flowing from it as of February 16, 2000. She testified that once respondent uncovered the end of the pipe the employees were satisfied for the time being and placed barrels around the edge of the hole to warn motorists. She stated that respondent did not cover the portion of the pipe back up that evening and that it remained uncovered until March 14, 2000. On February 18, 2000, Mrs. Holsclaw was concerned that claimant's basement would flood because of the heavy rainfall that day. Therefore, she helped claimant watch the basement all day and night for flood water. A photograph in evidence depicts the main drain and that all three drains in her basement exit into this drain. Clear water was flowing out of the drain. This was approximately 8:00 a.m. on the morning of February 18, 2000. Mrs. Holsclaw took additional photographs between 6:00 p.m. and 7:00 p.m. later the same day which depict high water and a

lot of debris in the ditch line at the end of George's Drive where claimant's drain terminus is located. Claimant's composite exhibit number 1.24, also a photograph of the George's Drive ditch line demonstrates that the water in the ditch line was swift and high enough to cover the terminus of claimant's drain pipe for water exiting the drain from George's Drive. According to Mrs. Holsclaw, by this time water was backing up and quickly rising in claimant's basement. Further, Mrs. Holsclaw testified that the large volume of swift water, the debris, and the fact that respondent had exposed the terminus of claimant's drain created the problem which resulted in water and silt backing up into claimant's basement. The water then swirled around in a whirlpool type manner preventing the water from flowing through the culvert pipe and exiting through the drainage system as intended. Mrs. Holsclaw testified that the force of the water flowing from the George's Drive ditch line easterly toward claimant's drain terminus simply would not allow the water from claimant's drain to flow into the drainage ditch as intended. Instead, the force of the water from George's Drive forced muddy water to back up into claimant's terra cotta drain pipe creating an even greater problem as the water with silt and debris backed up into claimant's drainage system resulting in the third flood on February 18, 2000.

It is respondent's position that it adequately maintained the drainage system along George's Drive and the surrounding area; that it did not cover up claimant's drain pipe terminus; and that its construction on George's Drive did not interfere with claimant's drainage system. Further, it is of the opinion that one of the utility companies performing work in front of claimant's property in her driveway crushed or broke claimant's drain line and replaced the broken pipe with an inadequate slip line plastic pipe which was the proximate cause of claimant's flooding in her basement and the resulting damages.

Chet Burgess is of the opinion that respondent took adequate steps to protect claimant's property when respondent received notice of the first flood on December 15, 1999. Mr. Burgess testified that he does not recall going back to claimant's residence until March 14, 2000, nor does he recall any of his employees responding to claimant's residence until March 14, 2000. Respondent introduced into evidence a DOH-12 which established that respondent did in fact perform major work on claimant's drainage system on March 14, 2000. Mr. Burgess testified that he and two other employees searched three days for DOH -12's for February 16, 2000, and could not find work orders to confirm that respondent had performed any work on or around claimant's drain line. The DOH - 12's that were found were related to work performed by respondent on February 16, 2000, at other locations. He stated that it was on March 14, 2000, that respondent uncovered claimant's drain line while undertaking a project to connect the drain beneath claimant's driveway after the third flood. He claims that it was then that respondent discovered claimant's drain line was broken and crushed. Mr. Burgess stated that when respondent unearthed claimant's terra cotta drain line he observed that a section of the terra cotta pipe had been broken and that someone tried to repair it by taking a piece of green plastic sewer pipe and using it as a slip line. However, he stated that the plastic slip line pipe was broken and it had collapsed. Mr. Burgess is of the opinion that this crushed pipe was the cause of claimant's flooding because the water coming from the basement could only seep through the crushed pipe slowly if at all. Further, he stated that when respondent removed the slip line pipe water came gushing out and filled the hole respondent had dug around it. Mr. Burgess estimated

that between 200 and 300 gallons of water flowed out of claimant's pipe. Further, Mr. Burgess is also of the opinion that prior to March 14, 2000, claimant's flooding problems were aggravated or worsened by surface water run off due to the heavy rains. He is of the opinion that the surface water probably drained around claimant's footer drains and into the terra cotta drain that was crushed and partially blocked. Further, he stated that the crushed drain line was remedied by work performed by respondent and this action cured claimant's water problems. Respondent performed this project to assist claimant, but it was not a project required by respondent to remedy any drainage problem on its property. According to respondent, claimant was the beneficiary of respondent's project. This was a project performed by respondent gratuitously for claimant since it did work on claimant's property off its right of way. Therefore, respondent concludes that it is not responsible for any of the flooding that occurred in claimant's basement.

The Court has held that respondent has a duty to provide adequate drainage of surface water from its property, and that its drainage systems must be maintained in a reasonable state of repair. *Haught v. Dept. of Highways*, 21 Ct. Cl. 237 (1980). To hold respondent liable for damages caused by an inadequate drainage system, claimant must prove that respondent had actual or constructive notice of the existence of an inadequate drainage system and a reasonable amount of time to take corrective action. *Orsburn v. Div. of Highways* 18 Ct. Cl. 125 (1991); *Ashworth v. Div. Of Highways*, 19 Ct. Cl. 189 (1993).

The Court, having considered all of the testimony and evidence in this claim, has determined that the photographs of the work performed by respondent depict the issues related to the cause of the flooding in claimant's basement. The evidence established that respondent made changes to George's Drive and the ditch line adjacent to it during the summer of 1999. The dye test performed by Al Marino Inc., proved that claimant's drain line terminus was covered with at least two to three feet of dirt. This made it practically impossible for any water to drain out of claimant's basement. The testimony also established that respondent had lived in her home for sixty-eight years during which time she had not experienced any flooding problems until December 14, 1999, approximately four or five months following respondent's paving project on George's Drive. Further, the photographs taken on the night of February 17, 2000, established that the end of the George's Drive ditch line where claimant's drain terminus is located was backed up with a large volume of swirling water and debris. The photographic evidence and statements of the witnesses considered together establish that respondent, albeit inadvertently, created a serious drainage problem for claimant when changes were made to George's Drive and its adjacent drainage ditch. In the opinion of the Court, these alterations were the proximate cause of flooding on claimant's property. The Court is mindful that respondent attempted to resolve claimant's drainage problems when it performed work on the underpass and along Kanawha Terrace following the claimant's first flood in December 1999. However, this action was not adequate because claimant's drain line terminus remained buried under two to three feet of dirt causing her to experience flooding on two more occasions. It was not until respondent completed its work to reroute claimant's drain line and terminus on March 14, 2000, that her flooding problem was resolved. The Court is of the opinion that respondent received appropriate and timely complaints from the claimant for respondent's employees to investigate the area further for potential drainage problems. The Court is aware that

respondent's employees visited the claimant's home on numerous occasions in a good faith effort to provide assistance to her. However, respondent had constructive notice of the drainage problem in the area and a reasonable amount of time to take corrective action. Therefore, the Court has determined that claimant may make a recovery for the damages caused by the flooding in her basement.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $14,571.37.

Award of $14,571.37.

OPINION ISSUED APRIL 10, 2003

STEVE HOLBERT and JACK HOLBERT
VS.
DIVISION OF HIGHWAYS
(CC-02-053)

Claimants appeared *pro se*.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to their 2002 Kia Sedona which occurred when Teresa Holbert, wife of claimant Steve Holbert, was driving the vehicle on County Route 54 near Maidsville, Monongalia County. Respondent maintains this route which is a part of the State road system. The Court is of the opinion to make an award in this claim for the reasons set forth herein below.

Teresa Holbert was driving claimants vehicle on the evening of December 5, 2001. It was 5:25 p.m. so it was getting dark. She was proceeding southbound on County Route 54 from her home in Mount Morris, Pennsylvania, to her mother's home near Granville in Monongalia County.

She had her three children in the vehicle with her. She testified that she was driving thirty to forty miles per hour when she observed a truck coming toward her in the opposite lane. She drove to the right side of her lane of travel to avoid the truck when the vehicle went over a concrete block at the edge of the pavement. The right rear tire struck the concrete block causing damage to the tire and the wheel. The tire went flat so she drove to a safe place to notify her husband that she needed assistance. Although Mrs. Holbert stated that she drove this stretch of County Route 54 on a frequent basis, she had not noticed the concrete blocks at the edge of the road in the area of a culvert. She did not know how the concrete blocks came to be there. Photographs admitted in this claim depict the concrete blocks below the level of the road in an area with a culvert. There appears to be no berm at this location on County Route 54. As a result of this incident, claimants had to replace the tire and rim and have some paint work done where the rear window popped out due to the impact with the concrete block at a total cost of $227.57.

William Henderson, a crew leader for respondent in Monongalia County, testified that he is familiar with County Route 54. He went to the scene of Mrs.

Holbert's accident and noticed the concrete blocks in an area where County Route 54 has a narrow place. There is a culvert that crosses beneath the road and the water empties from the culvert in that area. He was not aware that the concrete blocks were placed there and he added that respondent does not use concrete blocks similar to the ones in place there that claimants' vehicle struck. County Route 54 is a secondary road and it is a blacktop, two-lane road marked with a center line but no edge lines. It is sixteen feet in width. The concrete blocks appeared to be parking lot curbs. He travels this road approximately once a month for maintenance purposes. There was no berm for County Route 54 in the area where the concrete blocks were situated.

The general principle followed by this Court in claims of this nature where a driver proceeds onto the berm and the berm is in a state of disrepair is that respondent will be found liable for the damages suffered by the claimant in those instances where the driver proceeded onto the berm in an emergency situation or for a valid reason. If a driver proceeds onto the berm of a road inadvertently while driving, then the driver takes the berm as he/she finds it and the Court denies the claim. In the instant claim, the driver of claimants' vehicle went to the berm in the face of oncoming traffic, *i.e.*, a truck coming toward her in a narrow section of road. *Sweda v. Dept. of Highways*, 13 Ct. Cl. 249 (1980); *Compton v. Division of Highways*, 21 Ct. Cl. 18 (1995). See also *Hinkle v. Division of Highways*, unpublished opinion issued December 10, 1990, CC-89-97. The berm on County Route 54 was nonexistent at the location where claimant attempted to maneuver onto the berm but the concrete blocks were there. There was no warning for her such as a hazard paddle to indicate the lack of a berm. Therefore, the Court finds that respondent was negligent in its maintenance of the berm at this location on County Route 54 on the date that Mrs. Holbert had her accident and that this negligence was the proximate of the damage to claimants' vehicle.

Accordingly, the Court is of the opinion to and does make an award in the amount of $227.57 to claimants for the damages to their vehicle.

Award of $227.57.

OPINION ISSUED APRIL 10, 2003

DOUGLAS PLOCK and CHRISTINE PLOCK
VS.
DIVISION OF HIGHWAYS
(CC-02-126)

Claimant appeared pro se.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for costs incurred in trimming and topping numerous trees adjacent to their property and U.S. Route 40 in Ohio County. These costs allegedly arise from respondent's representation that the trees were located on claimants' property. However, it was later determined that the trees were within

respondent's right of way. Respondent was responsible at all times herein for the maintenance of U.S. Route 40 in Ohio County. The Court is of the opinion to deny this claim for the reasons set forth more fully below.

Claimants own real estate adjacent to U.S. Route 40 in Valley Grove, Ohio County which is located near the Pennsylvania State line. Claimants have numerous trees near the edge of their property line adjacent to respondent's right of way along U.S. Route 40. Their residence is located several yards from the road. The facts and circumstances giving rise to this claim began in May 2001, when an individual was accidentally struck and killed by a vehicle while directing traffic around a tree which had fallen onto U.S. Route 40. This tragic incident occurred near claimants' property causing them to be concerned about preventing future incidents regarding tree falls. Claimant Douglas Plock called respondent's Triadelphia office the day after that incident to inquire whether a crew would be coming to the area near their home to remove any dangerous trees near U.S. Route 40. Mr. Plock stated that the individual he spoke to had no information regarding the removal of trees but he was told that the respondent's right of way was thirteen feet from the edge of the road. Mr. Plock testified that based upon this information he determined that there were numerous trees on his property near U.S. Route 40. He was of the opinion that he was responsible for trimming and cutting some of these trees to protect the traveling public and to avoid potential liability. Thereafter, claimants hired a tree service company sometime in the middle of August 2001, and they bought a "wood chipper" machine to help clean up the debris. He stated that he informed the company to take out those trees that looked as if they were going to fall onto the road, otherwise he wanted the tree limbs cut and the trees topped. He also testified that he was going to clean up the debris in order to save money. Claimants incurred expenses in the amount of $795.00 as a result of this work. However, Mr. Plock returned home from work one day in late October 2001, to find that all of the trees he had professionally trimmed and topped were now completely cut down. He testified that he called respondent's Triadelphia office to see what had happened. He was informed that respondent's right of way was thirty-three feet from the centerline and that the trees had been previously scheduled to be cut down.

Claimants contend that they reasonably relied to their detriment upon respondent's representation that its right of way was thirteen feet from the edge of the road, whereas the actual right of way extended thirty-three feet from the centerline. Thus, claimants incurred unnecessary expenses in having trees trimmed and topped that were the responsibility of respondent.

Respondent asserts that claimants were not under an obligation to have the trees trimmed and topped and did so of their own accord making them volunteers. Further, claimants should have known where their property line was located and their reliance on the representation of one of respondent's employees was not reasonable under the circumstances.

Milton M. Davis, Jr., a County Highway Administrator II for respondent in Ohio County, testified that he is familiar with the location where this incident occurred along U.S. Route 40 and that he is responsible for the supervision of road maintenance at this location. Mr. Davis testified that after the individual was killed while trying to remove a downed tree off of U.S. Route 40, there were liability concerns regarding the remaining trees near that location. He also testified that Mr. Plock called respondent's local office regarding the trees on and near his property.

According to Mr. Davis, he also asked about the width of respondent's right of way along U.S. Route 40 in front of his property. Although Mr. Davis was not sure with whom Mr. Plock spoke, he does believe that someone from respondent's local office told him that respondent's right of way was thirteen feet from the edge of the road. However, Mr. Davis testified that respondent researched the situation after Mr. Plock's inquiry and determined that respondent's right of way was, in fact, sixty-six feet in total width. The right of way extends thirty-three feet from the centerline in both directions. Based upon this information, respondent hired a contractor to remove select trees within one mile of the area at issue including the trees in front of claimants' property. Mr. Davis testified that the trees within respondent's right of way and adjacent to claimants' property had been groomed prior to respondent's cutting the trees down, but he is not sure when this was done. However, he is certain that all the trees that respondent cut down adjacent to claimants' property were within respondent's right of way.

The Court is of the opinion that respondent is not liable for the costs incurred by the claimants in this claim. The evidence adduced at the hearing of this matter established that claimants' reliance upon respondent's representation was not reasonable in that Mr. Plock called one of respondent's local offices and spoke to an unknown individual who provided incorrect information that the width of respondent's right of way was thirteen feet from the edge of the pavement at this location. Based solely upon this information, claimants employed professionals to trim and top the trees. Claimants had a duty to ascertain their own property boundary line. Therefore, the Court is of the opinion that claimants' reliance upon the representation of one of the respondent's employees under these circumstances was not reasonable.

Therefore, in view of the foregoing, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED APRIL 10, 2003

DAVID STEEN MYERS
VS.
DIVISION OF CORRECTIONS
(CC-02-313)

Claimant appeared *pro se*.
Charles P. Houdyschell Jr., Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action seeking lost wages he alleges are owed to him as a result of being wrongfully terminated from a job he held while an inmate at St. Mary's Correctional Center. In addition, claimant seeks to recover the value of certain personal property items he alleges were lost by respondent while he was an inmate at St. Mary's Correctional Center as well as the postage costs incurred in bringing this claim.

A hearing was conducted by the Court on November 15, 2002, at which time the claimant testified as to the facts and circumstances giving rise to this claim. Claimant was incarcerated at St. Mary's Correctional Center. He worked as a "kitchen worker 2" until February 15, 2002,when he was forced to stop working due to a serious health condition. He was paid a salary of $45.00 per month. On February 27, 2002, a coordinator at St. Mary's offered claimant a new job contract as a "kitchen worker 2" with a pay raise. The new job contract increased claimant's monthly salary from $45.00 to $47.25. The contract was backdated and became effective as of February 1, 2002. Claimant accepted the contract and the conditions therein. A few days later claimant was sent to Charleston Area Medical Center where he had double bypass open heart surgery. After successful surgery, he spent a few days in recovery. On March 1, 2002, claimant was transferred to Mt. Olive Correctional Center because it was better equipped to handle claimant's medical condition and to monitor his recovery. When claimant was transferred from St. Mary's Correctional Center to Mt. Olive Correctional Center, his personal property was inventoried by respondent and transferred to Mt. Olive Correctional Center. Claimant also submitted into evidence a "resident's personal property form"dated March 1, 2002, that inventoried all personal property claimant had in his possession while an inmate at St. Mary's Correctional Center. Claimant was in Mt. Olive recovering from his surgery until April 18, 2002, when he was transferred back to St. Mary's Correctional Center. He introduced into evidence a "resident's personal property form" dated April 17, 2002, that inventoried his personal property entrusted to Mt. Olive Correctional Center which was being transferred back to St. Mary's Correctional Center with the claimant. Likewise, claimant introduced a "resident's personal property form" dated April 18, 2002, that inventoried his property entrusted to St. Mary's Correctional Center after he was transferred from Mt. Olive Correctional Center. Claimant testified that certain clothing items were missing once he returned to St. Mary's Correctional Center. He testified that he is unable to place an exact value on these items because they were bought as gifts for him by family members. However, he estimated that three t-shirts and two pairs of shorts were worth approximately $20.00.

Claimant also testified that once he returned to St. Mary's Correctional Center he was ready and able to resume his former job. He submitted an application to get his former job back but was informed by his boss that he had to submit an application for new employment. Further he was informed that he was to be paid his former salary of $45.00 per month instead of what he was to be paid in the new contract which was $47.25 per month. Claimant exhausted all grievance procedures and administrative remedies in this claim. He seeks an award in the amount of $450.01 for lost wages, reimbursement for the value of his lost personal property, and $10.16 for postage costs.

Claimant contends that respondent breached the contract between the two parties and wrongfully terminated him from his new job causing him lost wages and other expenses. He also contends that respondent lost some items of his personal property.

It is respondents' position that its "Policy Directive" requires that a job position vacated by an inmate who leaves the prison facility for any reason must be refilled with another inmate immediately, and that it simply followed this procedure

in this claim and did not wrongfully terminate claimant's position. Respondent also asserts that it did not lose any items of claimant's personal property.

Karol Payne, the Work Assignment Coordinator for respondent at St. Mary's Correctional Center, testified that she was present when claimant signed the job contract granting him a pay raise. She testified that claimant was terminated from his position because of respondents' "Policy Directive" that requires an inmate's job position to be terminated when the inmate leaves the facility for any purpose. Ms. Payne also stated that the reason for this policy is that respondent has to fill the job position with another inmate immediately. Respondent submitted a copy of the "Policy Directive" referred to as West Virginia Division of Corrections Policy Directive #500.00 and #3.10-1 to the Court and the claimant after the hearing of this matter.

The Court is of the opinion to deny claimant an award for lost wages and back pay based upon respondent's "Policy Directive" and the reasoning behind the policy. With regard to claimant's lost property claim, this Court has held that a bailment exists when respondent records the personal property of an inmate and takes it for storage purposes, and then has no satisfactory explanation for not returning it. *Heard v. Division of Corrections* 21 Ct. Cl. 151 (1997). In this claim, the Court has determined that a bailment existed, and that respondent had possession and control over claimant's personal property. Claimant alleges that respondent failed to return to him three t-shirts and two pairs of shorts. Respondent listed five t-shirts on claimant's "resident's personal property form" on April 17, 2002, but only listed four t-shirts on April 18, 2002, upon returning to St. Mary's Correctional Center. The last listing of any shorts made by claimant on any of his "property forms" was March 1, 2002. There were two other property inventories performed after March 1, 2002, and neither one listed claimant's shorts. Thus, the evidence established that respondent lost or otherwise misplaced one t-shirt and two pairs of shorts. Claimant could not state an exact amount on the value of these items, but estimated that the value of his three t-shirts and two pairs of shorts was approximately $20.00. Therefore, the Court has determined the value of one t-shirt and two pair of shorts to be $12.00.

Accordingly, the Court makes an award to the claimant in the amount of $12.00.

Award of $12.00.

OPINION ISSUED MAY 7, 2003

WV SCHOOL SERVICE PERSONNEL ASSOCIATION
VS.
BUREAU OF EMPLOYMENT PROGRAMS/
WORKERS' COMPENSATION PROGRAMS
(CC-03-012)

Claimant appeared *pro se*.
Joy M. Bolling, 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 $103.95 for reimbursement of court reporting services incurred in the prosecution of a compensable claim before the respondent State agency. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been reimbursed.

In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $103.95.

Award of $103.95.

OPINION ISSUED MAY 7, 2003

PEGGY M. NELSON
VS.
BUREAU OF EMPLOYMENT PROGRAMS/
WORKERS' COMPENSATION PROGRAMS
(CC-03-011)

Claimant appeared *pro se*.

Joy M. Bolling, 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 $500.00 for reimbursement of the cost of an independent medical examination performed in the prosecution of a compensable claim before the respondent State agency. The documentation for the medical examination was not processed for payment within the appropriate fiscal year; therefore, claimant has not been reimbursed.

In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $500.00.

Award of $500.00.

OPINION ISSUED MAY 7, 2003

TYREE COOK
VS.

DIVISION OF CORRECTIONS
(CC-02-073)

Claimant appeared *pro se*.
Charles P. Houdyschell, Jr., Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this claim to recover the value of a cross pendant and chain that he alleges were lost when he was transferred to Mount Olive Correctional Complex. The Court is of the opinion to deny this claim for the reasons set forth more fully below.

A hearing was conducted by this Court on November 15, 2002, at which time the claimant testified as to the facts and circumstances that gave rise to this claim. Claimant was moved from Southwestern Regional Jail to Mount Olive Correctional Complex on or about October 25, 2001, at which time an officer took all of his property, including the cross pendant and chain, and placed it in a bag with claimant's name and number on it. Claimant testified that his property was returned on approximately October 29, 2001, and at that time he discovered his cross pendant and chain were missing. Claimant spoke with his counselor about the missing items and was told to file a grievance. Claimant filed a G-1 Grievance form on November 9, 2001, which was sent to the Warden and the response from the Warden was that there was no record of a cross pendant or chain in his personal property when it went to the State Shop. Claimant then filed a G-2 Grievance form to appeal and was then transferred to Huttonsville Correctional Center on or about December 5, 2001. The response to the claimant's G-2 Grievance was issued. The evidence established that claimant did not appeal the G-2 Grievance response to the Commissioner of the Division of Corrections as required by respondent's "Policy Directive 335.00". Claimant submitted into evidence a receipt for the cross pendant and chain in the amount of $175.00.

Claimant asserts that respondent was responsible for his property once he gave it to an intake officer at Mount Olive Correctional Complex and that respondent negligently lost his property.

Respondent contends that it never had possession of claimant's cross pendent and chain and thus did not negligently misplace it. Further, respondent contends that claimant failed to exhaust his administrative remedies in this claim and that it should therefore be dismissed.

Respondent submitted into evidence a copy of the Inmate Grievance Procedures and two "Resident's Personal Property Forms" from Mount Olive Correctional Complex which claimant signed for his property but failed to note any missing items. Respondent also submitted into evidence a "G-1 Grievance Form" completed by claimant with a response that the property was never received by the State Shop. Thus, the Court is of the opinion that claimant failed to establish by a preponderance of the evidence that respondent ever had possession of claimant's cross pendant and chain.

Furthermore, W.V. Code § 25-1A-2, referred to as the "West Virginia Prison Litigation Reform Act", precludes the filing of most actions until claimant has fully exhausted his administrative remedies. In the present claim, the Court, having reviewed the evidence has determined that claimant failed to exhaust his

administrative remedies by failing to appeal the G-2 Grievance response to the Commissioner as required by the Division of Corrections "Policy Directive 335.00". Thus, claimant is also statutorily barred from bringing this action before the Court.

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

OPINION ISSUED MAY 7, 2003

THOMAS MEMORIAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-03-098)

Claimant appears *pro se.*
Charles Houdyschell, Jr., 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 payment in the amount of $5,472.50 for medical services rendered to an inmate in the custody of respondent at Mount Olive Correctional Complex, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further 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 MAY 7, 2003

LAWRENCE C. HARRAH and GENEVIEVE HARRAH
VS.
DIVISION OF HIGHWAYS
(CC-01-252)

Claimants appeared pro se.
Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

PER CURIAM:

Claimants brought this action for water damage to their residence and property which they allege was caused by the negligent design and maintenance of

the drainage system for U.S. Route 60 in Clintonville, Greenbrier County. This portion of U.S. Route 60 is maintained at all times herein by respondent in Greenbrier County. At the hearing of this claim, the Court consolidated two claims (CC-01-252 and CC-01-320) into one claim since both claims relate to the same set of facts and circumstances. Further, the Court heard the claim on the issue of liability only. The Court is of the opinion to deny this claim for the reasons stated more fully below.

Claimants' residence is located adjacent to U.S. Route 60 in Clintonville, Greenbrier County. Their home is situate on eight and one-half acres of land. Claimants first rented their home in 1978 and purchased it in 1979 with one acre of land. In 1988, claimants purchased an additional seven and one-half acres of land. Claimants have made additions to their home and property by adding a driveway, car port, and a garage. There is a split rail fence between claimants' property and U.S. Route 60 with a gravel berm that extends from the highway back to the claimants' property that is approximately five yards wide. Claimants' residence is located approximately fifteen yards from U.S. Route 60. The property and highway are in a rural mountainous area and claimants' property is situate near the head of a hollow. U.S. Route 60 extends past the claimants' property in a westerly direction winding around the hill above claimants' property. There is a small parcel of land at the top of the hill directly above claimants' property line which is owned by the Brownings, one of claimants' neighbors. This small parcel of property has a hunting or camping lodge on it and abuts U.S. Route 60. There is a fence line located between claimants' property and the Brownings' property. The fence is approximately seventeen feet in length and it has attached to it a plastic silt barrier approximately five feet high. Claimants placed the silt barrier along the fence to prevent dirt and debris from sliding down the hill onto their property from the Brownings' property and to prevent the erosion of their hillside. To the east of claimants' property line is the Heaster property which is a small parcel of land also abutting U.S. Route 60. The Heaster property line extends westerly up the hill above claimants' property and ends at the eastern corner of the Brownings' property line. The Heaster property is situate between U.S. Route 60 and claimants' property. The ditch line for this portion of U.S. Route 60 is located on the side of the road opposite claimants' property. The water from the ditch line flows through a new twenty-one inch by fifteen inch elliptical culvert underneath U.S. Route 60 and onto the Heaster property where it then flows in an open ditch before reaching claimants' property. This culvert was installed by respondent in April 2000 to replace an existing culvert due to a complaint made by Mr. Harrah to respondent to clean the ditches in order to help his drainage problem. The old culvert was eighteen-inches in diameter. Respondent found that the culvert was collapsed while cleaning the ditches. It had to be replaced in order to allow the flow of drainage water from the hillside and the ditch line along U. S. 60. According to respondent, the new pipe is equivalent in size to the old pipe.

There is also a creek on the claimants' property in which the water flows down the hillside through an open natural channel until it reaches the flat valley portion of claimants' property. Mr. Harrah estimates that it is approximately 125 to 200 yards from their home to the culvert opening above his property. The creek stops flowing through its open natural channel just prior to the center of claimants' backyard. At this location, claimants have attempted to enclose the creek by

channeling it with corrugated pipe and fifty-five gallon barrels opened at both ends all the way to their home. Claimants testified that they used barrels instead of pipe because they could not afford to buy enough pipe to cover the entire area. The artificial channel is approximately three and one-half feet deep and three and one-half feet wide in most locations. At approximately the middle of claimants' backyard, the creek naturally splits with one small branch flowing toward a natural spring located behind claimants' home, and the main portion of the creek flowing toward their home. Claimants built a small spring house structure over the natural spring. They use this natural spring for water when the water pump at their well quits working occasionally. Mr. Harrah stated that the water in the spring house does not flow out of the building unless there is a heavy rainstorm. He also stated that the water level in the spring remains at approximately three and one-half feet deep and that it has never completely dried up. The main portion of the creek flows a few yards away from the spring house and empties into a channel made by claimants which is located a few yards in front of the spring house. This channel is made of tin and it is approximately three to three and one-half feet deep. The creek flows through the channel which is located adjacent to claimants' garage and twelve feet away from their home. It then directs the flow of the water under claimants' driveway where the water empties into respondent's three foot by three foot box culvert underneath U.S. Route 60 and empties on the other side of the highway. This box culvert has been restricted by claimants who placed an eighteen-inch culvert pipe surrounded by rocks and soil inside the box culvert. The water flowing through claimants' pipe inside the box culvert flows under the highway and into the four feet by four feet box culvert.

Claimants both testified that they have had some flooding problems since 1979 but these problems became much worse in April 2000 after respondent performed work on the local drainage system. Claimants allege that their property has been damaged by flooding on numerous occasions due to excessive water flowing through the creek and onto their property. Claimants are of the opinion that their problems with surface water are the result of actions on the part of the respondent. First, they allege that respondent permitted a neighbor to remove part of the silt barrier attached to the fence located on the hill above their home which allowed more water to flow directly onto their property washing additional silt, rock, and mud onto their land. According to the claimants, this caused the erosion of a portion of their property and clogged up the culverts they had placed to channel the water through their property. Claimants stated that prior to the neighbor removing the silt barrier from the fence, the surface water did not flow directly onto their property as it was diverted in another direction. Second, claimants allege that respondent caused flooding problems by installing a new and larger culvert beneath U.S. Route 60 above their property. Mr. Harrah also testified that the new culvert is located in a different location and it has caused a much higher volume of water to flow onto their property. According to Mrs. Harrah, the flooding has washed out part of their driveway and caused cracks in the driveway. The garage flooded, and on at least one occasion the water was three feet deep, leaving behind water stains and mud. Claimants' basement also has flooded and surface water flowed into their water well contaminating it. Mrs. Harrah testified that there were certain dates when heavy rain falls caused the majority of their damages. The first incident occurred on April 13, 2000, and this incident was followed by another flood on May 14, 2000.

Coincidentally, Mrs. Harrah testified that the next serious flood occurred on May 14 and May 15, 2001. Mrs. Harrah stated that one of the worst floods occurred on July 8, 2001. The last flood occurred on September 3, 2002, at which time many of the barrels in the channel collapsed.

Mr. Harrah testified that he has attempted to use self-help measures to resolve or alleviate the flow of water onto his property by using the barrels and some corrugated pipe. In addition to not wanting to look at an open creek on their property, claimants were of the opinion that by channeling the water it would reduce the flooding. Mr. Harrah testified that he used twelve-inch diameter and fifteen-inch diameter corrugated pipe to channel a portion of the creek. However, he has used more fifty-five gallon barrels in place of corrugated pipe because of its high expense. According to Mr. Harrah, this channeling method has helped to reduce the flooding over the years. He stated that he does not see the water flowing across the road in front of his house as often. Further, he believes it has enhanced the aesthetic value of the property because the creek is primarily enclosed and cannot be seen flowing through the middle of the property and down the side of their house. However, Mr. Harrah also testified that the flooding problems have been exacerbated by respondent when it replaced the old culvert on U.S. Route 60 above claimants' property. He is of the opinion that the new culvert is too large and is therefore dumping more water onto claimants' property. He testified that since April 2000, when respondent put in the new culvert pipe, the water channel on his property has increased in height and width. According to Mr. Harrah, the channel was one and one-half feet deep in most places prior to April 2000. It is now approximately three to three and one-half feet deep in most places. He testified that on September 3, 2002, he observed that many of the barrels had collapsed. He and his son, Stanley Harrah, had to dig up most of the barrels and remove them. He attributes the barrels collapsing to water running through them, keeping them damp as well as the salt from the road flowing with the water which slowly erodes the barrels on the inside. However, Mr. Harrah admits that he placed these barrels in the creek channel approximately twenty-three years ago.

Claimants contend that respondent negligently increased the amount of surface water flowing onto their property by using a culvert that is too large for claimants' drainage system to adequately handle and that respondent negligently allowed the removal of the silt barrier attached to the fence above their residence resulting in the flow of more water and mud onto their property causing erosion.

It is respondent's position that it has not caused claimants' flooding problems because the new culvert pipe did not increase the volume of water flow onto claimants' property. Also, respondent maintains that the proximate cause of claimants' flooding problem is due to the fact that their property is located in a natural drainage area and that claimants' self-help measures of channeling the water have caused the water problems to be exacerbated.

Joe Hayes Jr., currently the FEMA coordinator for respondent, testified that he was the District 9 Administrator for respondent in the spring of 2000. As District 9 Administrator, he was responsible for overall road maintenance and construction in Greenbrier County. Mr. Hayes described the terrain in this particular area of U.S. 60 as having a hillside on the opposite side of the highway above claimants' property which is an area of approximately 20 acres all of which drains toward claimants' property in addition to the eight acres of hillside on claimants' property. All the rain

falling on this hillside and onto claimants' hillside property eventually drains onto claimants' property as it is the natural drainage area. He testified that sometime during the spring of 2000 he was instructed to clean the ditch lines and all culvert pipes along the portion of U.S. Route 60 near claimants' property. According to Mr. Hayes, this work was performed at the request of Mr. Harrah when he complained that water was flowing across the highway rather than in the ditch line which had leaves and debris. Mr. Hayes immediately had the ditch lines cleaned and attempted to clean out the existing culvert pipe above claimants' property but discovered that it was collapsed. Thus, respondent replaced the old eighteen-inch, round culvert with a new flat bottom elliptical culvert that is twenty-one inches wide and fifteen inches high. According to Mr. Hayes, the new pipe has the same capacity and equivalency as the older eighteen-inch pipe so it does not increase the volume of water onto claimants' property. Mr. Hayes stated that this was all of the work respondent performed on the local drainage system. He also stated that prior to this work he observed a large amount of surface water flowing across U.S. Route 60 into the natural drainage area which was on claimants' property. According to Mr. Hayes, whether the water flows across the road or through the ditch line and culvert, it ends up flowing into the "natural drainage area" which is through claimants' property. Mr. Hayes also testified that Mr. Harrah came to his office regarding the excavation and removal of the silt barrier on the fence by one of claimants' neighbors. Mr. Hayes stated that claimants' neighbors did a poor job of re-seeding the area they had excavated and that there was some erosion on claimants' property as a result. However, he testified that respondent did not remove the silt barrier at the fence or give approval to claimants' neighbors that they could make a change at the fence line. Mr. Hayes testified that this was a private fence on private property and that respondent had absolutely nothing to do with this incident. Finally, Mr. Hayes testified that U.S. 60 and the surrounding drainage system had been the same configuration since the road was widened in1955.

Dr. George Alan Hall, a Geotechnical Research Engineer with respondent's Engineering Division and its drainage expert for this particular claim, testified that he visited the site of claimants' property and U.S. 60 in February 2002. He observed the drainage system and the surrounding area and he had his investigator photograph the same. Dr. Hall also worked with topographical mapping of the area and made hydrologic and hydraulic analyses in preparing his testimony for this claim. Dr. Hall is of the opinion that the proximate cause of claimants' flooding problems stem from two factors. The first factor is that there has always been a flooding problem at this location because it is situate in a hollow where claimants' house and garage are virtually acting as a dam for the water. The second factor causing claimants' flooding problems stems from Mr. Harrah's self-help measures in creating numerous makeshift channels using a mixture of corrugated pipe and barrels to direct the flow of water throughout his property. Dr. Hall testified that by using different size pipes and barrels claimants have inadvertently restricted the flow of water due to the fact that every time water goes through a different size drainage head it loses its head flow strength or energy. According to Dr. Hall's analysis, claimants' drainage system will not carry the quantity of water needed to carry it past their house. He also stated that the twelve-inch pipe that is under claimants residence and connects to respondent's culvert in front of their home has only a thirty percent flow of water due to a loss of head flow. Dr. Hall testified that the current system of channels

claimants have created will only handle a less than one year storm which will result in numerous floods in the future. He opined that the fact that timber on the hillsides above claimants' home has been removed by claimants and/or the power company is also a contributing factor to the amount of water flowing onto the property. Dr. Hall concluded that respondent did not create or worsen the claimants' flooding conditions by placing the new culvert beneath U.S. 60.

The Court previously has held that respondent has a duty to provide adequate drainage of surface water, and that drainage systems must be maintained in a reasonable state of repair. *Haught v. Dept. of Highways*, 21 Ct. Cl. 237 (1980). To hold respondent liable for damages caused by an inadequate drainage system, claimants must prove that respondent had actual or constructive notice of the existence of an inadequate drainage system and a reasonable amount of time to take corrective action. *Orsburn v. Div. of Highways*, 18 Ct. Cl. 125 (1991); *Ashworth v. Div. of Highways*, 19 Ct. Cl. 189 (1993).

The Court, after a careful review of the evidence in this claim, is of the opinion that the flooding and the related damage to claimants' property were caused by a combination of circumstances, including the lay of the land, the location of claimants' home and garage at the end of the hollow, and the self-help measures taken by claimants. The evidence establishes that claimants' property is located at the head of a hollow where there have been known flooding problems for many years. The evidence also establishes that due to their location claimants' home and garage both acted as dams for the water flowing down the hill. Further, Dr. Hall's testimony establishes that while Mr. Harrah attempted to reduce the flooding on claimants' property, he has inadvertently made it worse and each time there was a heavy rain, the channel could not contain the water so it could flow through the culvert underneath U.S. Route 60 and away from their property as it's supposed to do. There is insufficient evidence to establish that any actions on the part of the respondent caused or contributed to claimants' flooding problems. Respondent acted diligently in cleaning the ditches along U.S. Route 60 and replacing the collapsed culvert once claimants notified respondent about their drainage problems in April 2000. While the Court is sympathetic to the claimants' situation, the Court is of the opinion that there is insufficient evidence of negligence on the part of respondent upon which to justify an award. It should be noted that during the hearing of this matter Dr. George A. Hall offered to visit claimants' property and to provide his expert advice in correcting their flood problems. This is a generous offer and one which the Court believes would be in the best interest of the claimants to pursue.

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 13, 2003

DONALD V. EDWARDS
VS.
DIVISION OF HIGHWAYS
(CC-02-180)

Claimant appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 2000 Chevrolet Cavalier which occurred when his vehicle struck a portion of a broken sign post while maneuvering it off of Willow Drive in Kanawha County, to avoid an oncoming vehicle. Respondent was responsible at all times herein for the maintenance of Willow Drive in Kanawha County. The Court is of the opinion to deny this claim for the reasons set forth more fully below.

The incident giving rise to this claim occurred on April 4, 2002, between 2:00 p.m. and 4:00 p.m. Claimant described Willow Drive as a blacktop "narrow road" approximately one and one-half lanes wide. There are no stripes in the middle of the road and no white edge lines. Claimant stated that at the location of this incident the road is not wide enough for two oncoming vehicles to safely pass one another. As claimant was approaching the intersection of Willow Drive and Route 214, he suddenly met an oncoming Chevrolet Truck which forced him to maneuver his vehicle off the road where he stopped the vehicle. He estimates that his vehicle was approximately two feet off of the gravel berm resting on the grassy field when he heard a loud "crunch" noise. It was then, that he discovered that a portion of his right front bumper and fender had struck a broken sign post. Claimant admitted that he maneuvered his vehicle too far off the road. Claimant testified that there is a gravel berm about three or four feet wide just off the travel portion of the road. Once the gravel berm ends, there is a large grassy field. Claimant estimates that the grass was between one foot to eighteen inches high. He also estimated that the broken metal sign post was between six to ten inches high. He stated that the metal post was just high enough to catch his front bumper. Although claimant testified that he has lived near this location on Willow Drive for approximately two years, he has never noticed a sign or the sign post at this location. However, claimant introduced a photograph of a "narrow road" warning sign which was knocked over and laying in the grassy area near the broken sign post.

Claimant's vehicle suffered significant damage to the front bumper and fender as well as the gravel guard. He submitted a repair bill in the amount of $521.70. However, claimant had comprehensive insurance coverage to cover this damage with a deductible feature of $250.00.

Claimant asserts that respondent knew or should have known about this broken sign post and removed it within a reasonable amount of time.

Respondent did not present any witnesses or evidence at the hearing of this matter.

It is a well established principle of law that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads and highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (W.Va. 1947). In order to hold respondent liable for a road defect of this sort, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Hamon v. Dept. of Highways*, 16 Ct. Cl. 127 (1986), *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). In claims pertaining to the condition of berms, the Court has held that

respondent has a duty to maintain the berm or shoulder area of a highway in a reasonably safe condition for use when the occasion requires. *Compton v. Div. of Highways*, 21 Ct. Cl. 18 (1995). Liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway and it fails. *Sweda v. Dept. of Highways*, 13 Ct. Cl. 249 (1980).

In the present claim, the Court is of the opinion that claimant's actions in maneuvering his vehicle off of the travel portion of the road by at least five to six feet was unreasonable under these circumstances. Thus, the Court fails to find that respondent was negligent in this claim. The evidence established that claimant had a significant and adequate amount of the gravel berm to rest his vehicle upon while the oncoming vehicle passed. The gravel berm was safe and well maintained by respondent. Claimant admitted in his own testimony that he drove too far off the side of the road. It was not foreseeable nor reasonable for respondent to expect or anticipate the traveling public to drive in the location at issue. While sympathetic to claimant's damages, the Court is constrained by the evidence to deny this claim.

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

Claim disallowed.

OPINION ISSUED JUNE 13, 2003

GOODYEAR TIRE AND RUBBER COMPANY
VS.
STATE FIRE COMMISSION
(CC-03-123)

Claimant appeared *pro se*.

Joy M. Bolling, 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 $446.58 for merchandise and services received by respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid.

In its Answer, respondent admits the validity of the claim, but states that the amount of $438.54, rather than the amount claimed of $446.58, is fair and reasonable. Claimant is in agreement with the amount of $438.54. Respondent states that there were sufficient funds expired in the appropriate fiscal year from which the invoices could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $438.54.

Award of $438.54.

OPINION ISSUED JUNE 13, 2003

WV SCHOOL SERVICE PERSONNEL ASSOCIATION
VS.
BUREAU OF EMPLOYMENT PROGRAMS/
WORKERS' COMPENSATION DIVISION
(CC-03-013)

Claimant appeared *pro se*.
Joy M. Bolling, 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 purchased seeks $500.00 for reimbursement of a fee paid to a treating physician for professional services rendered during a deposition taken by the parties in a Workers' Compensation claim.

In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $500.00.

Award of $500.00.

OPINION ISSUED JUNE 13, 2003

AMY H. CARTE
VS.
BOARD OF EXAMINERS FOR
REGISTERED PROFESSIONAL NURSES
(CC-03-196)

Claimant appeared *pro se*.
Joy M. Bolling, 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 $3,300.00 for consultant services provided to respondent . The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid.

In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $3,300.00.

Award of $3,300.00.

REFERENCES

- **BERMS – See also Comparative Negligence and Negligence**
- **BRIDGES**
- **CONTRACTS**
- **COMPARATIVE NEGLIGENCE – See also Berms; Falling Rocks and Rocks; Negligence & Streets and Highways**
- **DAMAGES**
- **DRAINS and SEWERS**
- **FALLING ROCKS AND ROCKS – See also Comparative Negligence and Negligence**
- **JURISDICTION**
- **LEASES**
- **MOTOR VEHICLES**
- **NEGLIGENCE – See also Berms; Falling Rocks and Rocks & Streets and Highways**
- **NOTICE**
- **PEDESTRIANS**
- **PRISONS AND PRISONERS**
- **PUBLIC EMPLOYEES**
- **STATE AGENCIES**
- **STIPULATED CLAIMS**
- **STREETS & HIGHWAYS – See also Comparative Negligence and Negligence**
- **TREES and TIMBER**
- **VENDOR**
- **VENDOR – Denied because of insufficient funds**
- **W. VA. UNIVERSITY**

The following is a compilation of head notes representing decisions from July 1, 2001 to June 30, 2003. Because of time and space constraints, the Court has decided to exclude certain decisions, most of which involve vendors, typical road hazard claims and expense reimbursements.

BERMS – See also Comparative Negligence and Negligence

CAPERTON VS. DIVISION OF HIGHWAYS (CC-02-097)

Claimant's vehicle was damaged when he maneuvered it onto the berm of the road to read a map and drove it over a broken sign post. The Court held that respondent had at least constructive if not actual notice of the broken post and a reasonable amount of time to take corrective action. Thus, the respondent failed to maintain the berm in a reasonably safe manner. *See Compton v. Division of Highways*, 21 Ct. Cl. 18 (1995); *Sweda v. Dept. of Highways*, 13 Ct. Cl. 249 (1980). Award of $316.52. . . . . p. 226

CRITILLI VS. DIVISION OF HIGHWAYS (CC-01-335)

Where claimant's vehicle struck a broken sign post on the berm of the road, the Court held that respondent negligently maintained the berm by not removing the sign post which was high enough that respondent knew or should have known it was present while performing routine maintenance. Award of $819.00. . . . . p. 211

DOBSON VS. DIVISION OF HIGHWAYS (CC-01-332)

Claimants' property was damaged when a portion of the side of County Route 48 broke in half and collapsed which allowed water and debris to wash over the hill and onto claimants' property and garden. The Court held that the claimants failed to establish that respondent had prior notice that the berm would slip or wash away at this location. Furthermore, there was an extraordinary rainfall on the date of this incident, as well as the three proceeding days. The culvert that was in place to handle the usual water flow could not have done so under these unusual circumstances. Claim disallowed. . . . . p. 298

FRALEY VS. DIVISION OF HIGHWAYS (CC-00-374)

Where claimant established that the berm of the road was badly deteriorated and contained large holes, the Court concluded that the berm had been in poor condition for a significant period of time; therefore, respondent had actual or constructive notice of the road defect. Award of $285.11. . . . . p. 78

FRALEY VS. DIVISION OF HIGHWAYS (CC-00-374)

The Court stated that the berm plays an integral part of any highway in that it allows the driver to drive the vehicle off the road when he needs to and it provides assistance to a driver who drifts to the edge of the road. It gives a driver more time to regain control of the vehicle in the event an emergency arises. The Court is of the opinion that the berm is for safety purposes and it must be maintained in reasonably good condition for travelers of its highways. *See Compton v. Division of Highways*, 21 Ct. Cl. 18 (1995); *Sweda v. Dept. of Highways,* 13 Ct. Cl. 249 (1980). . p. 78

GOODRICH VS. DIVISION OF HIGHWAYS (CC-02-166)

Claimant's vehicle was damaged when her son drove it over a broken sign post on the berm of the road at the I-79 exit ramp at Frametown. The Court held that respondent failed to maintain the berm of the road in a reasonably safe condition for claimant who had a right to reasonably rely on the berm when he maneuvered the vehicle there to check on a tire. Award of $1,715.08. See Compton v. Division of Highways, 21 Ct. Cl. 18 (1995); *Sweda v. Dept. of Highways*, 13 Ct. Cl. 249 (1980); *Cecil v. Dept. of Highways*, 15 Ct. Cl. 73 (1984). . . . . p. 279

LEMLEY VS. DIVISION OF HIGHWAYS (CC-01-081)

Where the claimant established that she was forced to use the berm to avoid an oncoming vehicle and the berm had a steep drop off, the Court held that the berm was not adequate and it presented a hazard to the traveling public. The Court has previously held that the berm or shoulder area must be maintained in a reasonably safe condition for use when the occasion requires. Award of $1,254.09. See *Sweda*

v. Dept. of Highways, 13 Ct. Cl. 249 (1980); *Cecil v. Dept. of Highways*, 15 Ct. Cl. 73 (1984). . . . . p. 65

SIPPLE VS. DIVISION OF HIGHWAYS (CC-00-160)

Claimant brought this action for personal injuries and damage to their vehicle as a result of a poorly maintained berm. Claimants were forced to maneuver the vehicle to the berm to avoid an oncoming coal truck. The uneven berm caused claimant to lose control of her vehicle when she drove it back onto the road across two lanes and over a hill. The Court held that respondent had actual notice of the hazardous condition of the berm and had a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986). p. 117

SIPPLE VS. DIVISION OF HIGHWAYS (CC-00-160)

The Court held that respondent had a duty to maintain the berm of a highway in a reasonably safe condition for use when the occasion requires. *Compton v. Division of Highways*, 21 Ct. Cl. 18 (1995). Liability may ensue when a motorist is forced onto the berm of the highway and it fails. *Sweda v. Dept. of Highways*, 13 Ct. Cl. 249 (1980). . . . . p. 117

BRIDGES

CROSS VS. DIVISION OF HIGHWAYS (CC-00-195)

This claim came before the Court upon a stipulation. The Court having reviewed it, adopts it as its own, and holds that respondent was negligent in its maintenance of Route 119 Webster Bridge in Taylor County.
Award of $631.76. . . . . p. 36

EVANS V. DIVISION OF HIGHWAYS (CC-01-120)

Claimant's vehicle struck a large drop off on a bridge causing serious damage. Claimant asserted that the bridge was not adequately maintained and that respondent failed to place warning signs. The Court held that respondent had notice of the hazardous condition and a reasonable time to take corrective action. Award of $900.00. See *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986). . . p. 179

FAULKNER VS. DIVISION OF HIGHWAYS (CC-01-312)

This claim came before the Court upon a stipulation. The Court having reviewed it, adopts it as its own, and holds that respondent was negligent in not repairing a portion of guardrail which was protruding into the travel portion of the bridge causing damage to claimant's vehicle. Award of $290.31. . . . . p. 19

GALLENTINE VS. DIVISION OF HIGHWAYS (CC-01-345)

Claimant's horse trailer was damaged when he was pulling it with his truck and it struck a large tree stump on the edge of the road. The Court held respondent negligently maintained the berm by failing to remove the stump which it had notice was present. Award of $500.00. . . . . p. 218

GODBEY VS. DIVISION OF HIGHWAYS (CC-00-272)

This claim came before the Court for decision upon a stipulation entered into by the partes. The Court having reviewed the facts and the stipulation finds that the respondent was negligent in its maintenance of the expansion joint this bridge at the entrance to the West Virginia Turnpike in Kanawha County.
Award $106.00. . . . . p. 37

LUCAS VS. DIVISION OF HIGHWAYS (CC-99-422)

Claimant brought action for personal injuries and property damage to her vehicle which she alleges occurred as a result of a poorly maintained bridge and respondent's failure to warn. She alleges that her vehicle tires struck rotten and protruding boards on the bridge deck that caused her vehicle to raise up and spin out of control striking both sides of the bridge. The Court held that claimant failed to establish by a preponderance of the evidence that respondent's failure to maintain the bridge was the proximate cause of her damages. Claim disallowed. . . . . p. 120

LUCAS VS. DIVISION OF HIGHWAYS (CC-99-422)

In claims for negligence, the claimant must establish by a preponderance of the evidence that respondent had actual or at least constructive notice of the hazardous condition and that respondent had a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986). p. 120

LUCAS VS. DIVISION OF HIGHWAYS (CC-99-422)

The Court held that respondent must establish not only that respondent had notice of the hazardous bride condition but that respondent's negligence was the proximate cause of claimant's damages. *Roush v. Johnson* , 139 W.Va. 607; 80 S.E.2d 857 (1954). The Court also held that there are two requisites of proximate causation. One requisite of proximate causation is the doing of an act or the failure to do an act that a person of ordinary prudence could foresee may naturally or probably produce an injury. Second, the act or omission must in fact produce the injury. *Matthews v. Cumberland & Allegheny Gas Co.* 138 W.Va. 639; 77 S.E.2d 180. . . . . p. 120

LUCAS VS. DIVISION OF HIGHWAYS (CC-99-422)

Where claimant alleged loose, rotten and protruding boards on the bridge caused her to lose control of her vehicle, the Court held that claimant failed to establish where on the bridge there was a specific defect that proximately caused her damages and the fact that the bridge was in poor condition was not sufficient to establish liability. Claim disallowed. *Roush v. Johnson*, 139 W.Va. 607; 80 S.E.2d 857 (1954); *See also Matthews v. Cumberland & Allegheny Gas Co.* 138 W.Va. 639; 77 S.E.2d 180. Further, for the Court to hold respondent liable in this claim would require the Court to resort to speculating as to the proximate cause of claimant's damages which it will not do. *Mooney v. Dept. of Highways,* 16 Ct. Cl. 84 (1986); *Phares v. Division of Highways,* 21 Ct. Cl. 92 (1996). . . . . p. 120

SPRINGER ET AL. VS. DIVISION OF HIGHWAYS (CC-97-347)

Claimant brought this action for the wrongful death of her husband after the vehicle he was driving slid off a bridge on County Route 1/1, Webster County.

Claimant alleged that respondent was negligent in its maintenance of the bridge and that the design of the bridge was faulty. The Court determined that negligent maintenance of the bridge was not the proximate cause of the accident. Claim disallowed. Roush v. Johnson, 139 W.Va. 607; 80 S.E.2d 857 (1954) See also *Matthews v. Cumberland & Alleheny Gas Co.* 138 W.Va. 639; 77 S.E.2d 180. . . . . p. 42

SCOTT VS. DIVISION OF HIGHWAYS (CC-02-149)

Where claimant's vehicle struck a large piece of broken concrete on a bridge on I-79 in Marion County, the Court held that respondent should have been aware of the hazardous condition on the bridge as large chunks of concrete had been rising up from the deck of the bridge. Award of $1,000.00. *See Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986). . . . . p. 281

WHITEHAIR VS. DIVISION OF HIGHWAYS (CC-89-433)

Claimants, Larry, Sharon, Dale, and Amy, were seriously injured when their vehicle encountered ice and slid out of control on the northbound lane of the Little Sandy Bridge, in Kanawha County. The Court held that respondent was not negligent in maintaining the bridge in that it did not have timely notice that there was a hazardous condition on the bridge. Claim disallowed. See *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986). . . . . p. 202

WHITEHAIR VS. DIVISION OF HIGHWAYS (CC-89-433)

The Court held that respondent acted reasonably under the circumstances then and there existing. Respondent did not have adequate notice of the icy conditions on the bridge and did not have a reasonable amount of time to take corrective action. Further, respondent had salted the bridge just fifteen minutes prior to this incident according to respondent's regular procedures. Respondent cannot be expected to keep its highways absolutely free of ice and snow at all times, and the presence of an isolated patch on a highway during winter months is normally insufficient to charge respondent with negligence. See *McDonald v. Dept. of Highways,* 13 Ct. Cl. (1979). . . . . p. 202

WHITEHAIR VS. DIVISION OF HIGHWAYS (CC-89-433)

The Court rejected claimants' theory that flashing warning signs would have been effective in preventing this incident as well as the theory of using sensors and detection type devices. The Court concluded that based upon the evidence that such devices were not proven reliable at the time of this incident. Claim disallowed. . . . . p. 202

WHITEHAIR VS. DIVISION OF HIGHWAYS (CC-89-433)

The Court rejected claimants' theory that pre-treating the bridge with chemicals would have prevented this incident. The evidence established that pre-treatment is not a viable option especially on an interstate with a heavy volume of traffic that would remove the substance. Further, the evidence established that such substances are also water soluble and only a moderate amount of rain, which there was in this case, would wash it off the bridge. . . . . p. 202

CONTRACTS

HOURLY COMPUTER SERVICES VS. DEPARTMENT OF HEALTH AND HUMAN SERVICES (CC-00-191)

Claimant brought this claim to recover finance charges incurred during the completion of a contract involving the sale and installation of computers and software for respondent. Claimant refers to the finance charges as interest and seeks the reimbursement of $13,476.67, which claimant incurred allegedly as a result of not being paid by respondent in a timely manner due to numerous disputes that arose during the completion of the contract. The Court denied this claim in that there was no basis under the contract, statute, or case law by which claimant could be awarded interest as an element of its overhead costs. Claim disallowed. . . . . p. 197

HOURLY COMPUTER SERVICES VS. DEPARTMENT OF HEALTH AND HUMAN SERVICES (CC-00-191)

W.Va Code §14-2-12, which sets forth the general powers of the Court, states in part "interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest." Upon review of the contract, the Court determined that there were no provisions for the payment of interest. Therefore, claimant cannot recover any interest as a part of its claim that is traditionally described as "contract interest". Claim disallowed. . . . . p. 197

HOURLY COMPUTER SERVICES VS. DEPARTMENT OF HEALTH AND HUMAN SERVICES (CC-00-191)

The Court denied claimant any pre-award and post-award interest holding that W.Va. Code §14-2-12 is in essence a bar to such a recovery unless specifically required by contract between the parties. . . . . p. 197

HOURLY COMPUTER SERVICES VS. DEPARTMENT OF HEALTH AND HUMAN SERVICES (CC-00-191)

Claimant attempted to equate the finance charges it incurred as an element of its overhead expense to interest that may be paid to a vendor under W.Va. Code §5A-3-54 "The Prompt Pay Act of 1990". The Court rejected this theory stating that it is a mistake to equate finance charges incurred by a vendor as overhead expense with statutory interest that is required under "The Prompt Pay Act." There is no statutory or case law authority by which to grant an award for finance charges incurred as an element of overhead expense by a vendor. . . . . p. 197

HOURLY COMPUTER SERVICES VS. DEPARTMENT OF HEALTH AND HUMAN SERVICES (CC-00-191)

The Court rejected respondent's claim that the Court lacked subject matter jurisdiction to hear this claim since claimant allegedly had a potential remedy in the regular courts of this State if claimant proceeds under "The Prompt Pay Act." The Court held that it does have jurisdiction to make an award of interest due a vendor under "The Prompt Pay Act." . . . . . p. 197

HOURLY COMPUTER SERVICES VS. DEPARTMENT OF HEALTH AND HUMAN SERVICES (CC-00-191)

The Court stated that to the extent it has "impliedly assumed jurisdiction" to hear claims for interest due a vendor pursuant to the provisions of the immediate predecessor to "The Prompt Pay Act" in *R.L. Banks & Associates, Inc. vs. Public Service Commission* 17 Ct. Cl. 159 (1988) said implication is expressly denied. . . . . p. 197

MUELLER VS. HIGHER EDUCATION POLICY COMMISSION (CC-02-297)

Claimant brought this action for breach of an alleged contract entered into with Shepherd College. Claimant alleges that she and representatives of Shepherd College agreed that a tract of land which she owns near the campus of Shepherd College would be leased to the college for parking purposes. In reliance upon the lease agreement claimant alleges that she incurred expenses in preparing her property for parking in accordance with direction for a representative of the college. The Court found that this claim is actually a claim *ex contractu,* i.e., one based upon contract law. There can be no breach of contract until it first is established that there was a contract between the parties. The Court found no contract ever existed between the claimant and Shepherd College. . . . . p. 308

MUELLER VS. HIGHER EDUCATION POLICY COMMISSION (CC-02-297)

The fact that claimant continued to attempt to negotiate a lease amount for her property is indicative of the fact that the parties never had a "meeting of the minds" with regard to the lease which is the subject matter of this claim. Thus, no contract existed between the parties. Claim disallowed. . . . . p. 308

STALNAKER VS. DIVISION OF CULTURE AND HISTORY (CC-02-509)

Claimant seeks $4,147.61 for personal services rendered and travel expenses incurred on behalf of the Weston Hospital Revitalization Committee Center as part of an agreement entered into with respondent to develop a plan for preservation and revitalization. Respondent admits the validity and amount of the claim but states that the documentation for these services was not processed for payment within the appropriate fiscal year and claimant has not been paid. Award of $4,147.61. . . . . p. 259

TMARO CORPORATION VS. HIGHER EDUCATION POLICY COMMISSION (CC-00-31)

Claimant, TMARO Corporation, seeks an award in the amount of $98,970.00 for breach of contract against respondent for the construction of a building on the campus of Fairmont State College. The original contract was for $5,942,000.00 of which claimant asserts it has not been paid. Claimant asserts that respondent issued certain "change proposals" which cost claimant money. Claimant also asserts that it has not been paid for the costs incurred in installing the HVAC system and that respondent has wrongfully withheld the retainage on the contract. The Court made an award of $ 90,648.51. . . . . p. 244

TMARO CORPORATION VS. HIGHER EDUCATION POLICY COMMISSION (CC-00-31)

In Count I of the complaint, claimant alleges that it submitted eight "change proposals" and requested additional payments to be made for work performed beyond the scope of the project and was wrongly denied payment for said additional work. The respondent halted work due to the soil being unsuitable. During such time, claimant's subcontractor was forced to remove the equipment off site and incurred an outstanding remobilization charge in the amount of $1,560.00, which the Court held to be reasonable. It would be unreasonable to assume that a subcontractor would plan to leave equipment idle at a construction site for such a period of time. . . . . p. 244

TMARO CORPORATION VS. HIGHER EDUCATION POLICY COMMISSION (CC-00-31)

Claimant alleges that respondent unreasonably rejected payment for a "change proposal" made by claimant's excavating company (subcontractor) which requested authorization to perform an undercut of three additional feet. Respondent's argument that the subcontractor did not have permission was rejected by the Court; in that the subcontractor had acted in good faith and reliance upon the personnel on the project from respondent's engineering firm who approved the additional cut. Award of $1,966.00. . . . . p. 244

TMARO CORPORATION VS. HIGHER EDUCATION POLICY COMMISSION (CC-00-31)

Claimant seeks an award in the amount of $2,971.00 for a "change proposal" sought by its electrical subcontractor who faced more difficult work that went beyond the scope of the work stated in the original bid. The Court held that respondent failed to show the wiring specificity in the drawing given to claimant's electrical subcontractor and as a result incurred additional expenses in the amount of
$2,971.00. . . . . p. 244

TMARO CORPORATION VS. HIGHER EDUCATION POLICY COMMISSION (CC-00-31)

Where respondent decided to eliminate the installation of a range and the exhaust, duct work and other parts, the Court determined that the reasonable amount of the credit to be given respondent to be $651.00 as opposed to $1,280.00 which respondent asserts. In reaching this conclusion, the Court looked at the subcontractor's bid document and took into consideration that the range installation was not as difficult and costly as respondent estimated it to be. . . . . p. 244

TMARO CORPORATION VS. HIGHER EDUCATION POLICY COMMISSION (CC-00-31)

Claimant seeks an award in the amount of $847.00 for increased costs incurred when it had to lower a ceiling in order to fit the duct work in correctly. Claimant submitted a "change proposal" for this but respondent denied payment. Claimant also submitted a "change proposal" that involved replacing regular glass with Spandrel glass which involved extra work at a cost of $548.00. The Court held both "change proposals" were necessary and reasonable and granted an
award. . . . . p. 244

TMARO CORPORATION VS. HIGHER EDUCATION POLICY COMMISSION (CC-00-31)

The Court granted claimant's increased costs it incurred due to a "change proposal" it made for extending water supply and drain lines to the ice maker because respondent failed to depict these lines in its drawings for the claimant's plumbing subcontractor. Award of $573.00. . . . . p. 244

TMARO CORPORATION VS. HIGHER EDUCATION POLICY COMMISSION (CC-00-31)

In Count three of its complaint, claimant seeks an award for costs it and its subcontractors incurred in attempts to balance the HVAC system. While respondent claimed that the problems were construction in nature and caused by claimant, an independent third party consultant determined that there were "design issues" and "design deficiencies" with this HVAC system, as did a consultant hired by respondent

The Court determined that claimant and its subcontractors were entitled to reimbursement for extra costs incurred minus a "set off" for respondent for the consultant it hired to determine those parts of the HVAC that claimant did not install correctly. . . . . p. 244

TMARO CORPORATION VS. HIGHER EDUCATION POLICY COMMISSION (CC-00-31)

The Court held that a fair and reasonable "set off" for the time spent by the respondent's consultant on construction issues versus design issues was 25% of its services to respondent. The consultant's services cost respondent $12,263.50. The set off of this amount by 25% is $3,065.88, which is due respondent. Claimant incurred a total cost on the HVAC of $30,890.00 minus the set off to respondent of $3,065.88 which equals a total award of $27,824.12 for the HVAC system deficiencies. Award of $27,824.12. . . . . p. 244

TMARO CORPORATION VS. HIGHER EDUCATION POLICY COMMISSION (CC-00-31)

The Court held that claimant is entitled to recover the full amount of retainage on this contract. Respondent's assertion that it was rightfully withholding it due to claimant's inability to balance the HVAC system was unjustified and the retainage was due at the time the parties agreed that the HVAC system could not be balanced due to design deficiencies. Warranty issues is not a basis for denying a contractor the retainage on a contract when the project is completed. Thus, the Court makes an award to claimant in the amount of $59,252.00 plus interest in the amount of $6,574.09 for a total award of $65,826.09. . . . . p. 244

COMPARATIVE NEGLIGENCE - See also Berms; Falling Rocks and Rocks; Negligence & Streets and Highways

PIERCE VS. DIVISION OF HIGHWAYS (CC-01-282)

Claimants brought this action for damage to their vehicle which occurred while their daughter was driving the vehicle and struck a large hole in the road. The

Court held that respondent had at least constructive if not actual notice of this hole. *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985) , *Hamon v. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The Court was of the opinion that a hole this large would have developed over a significant period of time and respondent should have seen it and remedied the problem. . . . . p. 127

PIERCE VS. DIVISION OF HIGHWAYS (CC-01-282)

Although the Court found that respondent was negligent in this claim, it also stated that a driver has duty to use reasonable care in exercising her driving privileges.
Copley v. Division of Highways, 22 Ct. Cl. 144 (1998). Claimants' daughter knew of the holes existence for a substantial period of time prior to the incident and given this knowledge the Court could have applied the comparative negligence principle in this claim. However, the law in this State is that the negligence of a driver may not be imputed to the owner of the vehicle. *See Bartz v. Wheat*, 285 S.E.2d 894, 169 W.Va. 86 (1982). Award of $531.19. . . . . p. 127

SIPPLE VS. DIVISION OF HIGHWAYS (CC-00-160)

While the Court found that respondent was negligent in its maintenance of the berm of the road, the Court also found that the driver, Mrs. Sipple, failed to maintain control of the vehicle and that her negligence is equal to or greater than respondent's. Therefore, based upon the rule of comparative negligence, no award may be granted to the driver Mrs .Sipple. However, the Court held that Mrs Sipple's negligence cannot be imputed to Mr. Sipple who was an innocent guest passenger. *Bartz v. Wheat*, 169 W.Va. 86, 285 S.E.2d 894 (1982). Thus, the Court granted him $700.00 for personal injuries he received and $2,300.00 for the loss of his vehicle. Award of $3,000.00. . . . . p. 117

HENRY WILLIAMS VS. DIVISION OF HIGHWAYS (CC-01-061)

Claimant's vehicle struck excess gravel on the road, left from a salt compound applied by respondent, causing the vehicle to strike a hillside. Claimant, an employee of respondent's helped apply the salt a few nights prior to the incident. The Court held respondent was negligent in leaving excess gravel in a sharp curve, but also held claimant knew or should have known the gravel was present, and thus granted a 70% award of $208.50. . . . . p. 94

DAMAGES

COLEMAN VS. DIVISION OF HIGHWAYS (CC-01-163)

Where claimant's vehicle suffered $857.70 worth of damages when it struck a large hole in the road, the Court granted claimant an award of $200.00. Since he had comprehensive insurance coverage to cover this loss, claimant is limited to recover his insurance policy deductible feature. Award of $200.00. *See also; Sommerville/State Farm Fire and Casualty*, 18 Ct. Cl. 110 (1991). . . . . p. 193

DAY, D.V.M. VS. WV RACING COMMISSION (CC-01-476)

The Court held that despite the parties stipulation to pay interest W.Va. Code §4-2-12 states in part that "interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest." Thus, the Court disallowed the $849.00 payment of interest but granted the principal amount owed. Award of $8,280.00. . . . . p. 77

EDGELL VS. DIVISION OF HIGHWAYS (CC-02-219)

Claimants' real and personal property was damaged by flooding as a result of respondents failure to properly maintain its drainage system. The Court established through estimates the costs of restoring their property and the replacement costs for damaged personal property and concluded that the actual damages were $9,812.00. Award of $12,812.00. . . . . p. 261

EDGELL VS. DIVISION OF HIGHWAYS (CC-02-219)

Claimants' real and personal property was damaged by flooding as a result of respondents failure to properly maintain its drainage system. The Court determined that $3,000.00 was a fair and reasonable amount for their annoyance and inconvenience in cleaning up the mud, gravel, debris, and the drainage ditch. Award of $12,812.00. . . . . p. 261

EVANS V. DIVISION OF HIGHWAYS (CC-01-120)

Claimant's vehicle struck a large drop off on a bridge causing serious damage to the vehicle in the amount of $2,382.44. The vehicle was a 1994 model that claimant had purchased seven months prior to the incident for $900.00. The Court determined that the purchase price of the vehicle was fair and reasonable under the circumstances. Award of $900.00. . . . . p. 179

FREEMAN VS. DIVISION OF HIGHWAYS (CC-01-076)

Claimant sought $1,161.87 for damage to the tailgate of his 1986 Ford truck. The Court made an award of $700.00 which was calculated as a fair and reasonable award for the depreciated value of a tailgate that was 15 years old. Award of $700.00. . . . . p. 62

FULLER VS. DIVISION OF HIGHWAYS (CC-99-003)

Claimant brought this action for damages he alleged occurred as a result of respondent's trespass onto his land. While the Court found that respondent's contractor did commit a trespass onto claimant's land, claimant failed to establish any damages to his property. The Court held that any award would be based on mere speculation which the Court declines to do. Claim disallowed. *Phares vs. Division of Highways*, 21 Ct. Cl. 92 (1996); See also; *Mooney vs. Department of Highways*, 16 Ct. Cl. 84 (1986). . . . . p. 102

GOLDEN VS. DIVISION OF HIGHWAYS (CC-01-233)

The Court granted a partial award to the claimants for damage caused to their vehicle when it struck a large hole. Claimants sought a recovery for three tires they purchased five months after the incident alleging that the vehicle was not handling correctly as a result of the initial incident. The Court granted an award for the damage caused to the vehicle shortly after the incident but held that the alleged

damages which occurred five months later were not compensable due to the lapse of time from the incident. Award of $250.00. . . . . p. 63

HAMBY VS. DIVISION OF HIGHWAYS (CC-01-192)

Claimant's vehicle was damaged when a dead tree fell from respondent's right-of-way onto her vehicle as she was traveling Route 49, in Mingo County. The Court held that the estimates submitted to the Court were higher than the value of the vehicle at the time of the incident so the award granted was based upon the difference between the market value of the vehicle before the incident and the value of the vehicle after the incident which was determined to be $250.00. The Court also granted claimant an award in the amount of $500.00 for repair costs claimant had already incurred, plus an additional $350.00 to replace the destroyed windshield and mirror. Award of $1,100.00. . . . . p. 184

HART VS. DIVISION OF HIGHWAYS (CC-01-115)

Claimants' vehicle struck a large hole in the road causing significant damage to the two passenger side tires and wheels for which claimants submitted into evidence a $537.95 estimate for four tires and wheels. However, claimants did not actually incur this as an out-of-pocket expense but instead replaced the damaged tires, which they had recently purchased at a cost of $450.00, with the original factory tires and wheels. Thus, suffering two damaged tires and wheels, claimants are entitled to recover their out-of-pocket expenses for the two tires in the amount of $225.00 plus $24.00 for an alignment. Award of $249.00. . . . . p. 188

LEWIS VS. ALCOHOL BEVERAGE CONTROL ADMINISTRATION (CC-01-017)

Claimants brought action to recover $58,750.00 from respondent for a bond claimants paid to reserve a liquor license for a store in Charleston. Due to a mistake in the information regarding the market zone that was given to claimant by respondent, claimants were not able to open a store in the area they desired and thus did not complete the purchase causing the bond to be forfeited pursuant to *WV Code §60-3A-10(f).* The Court held that claimants were inadvertently misled by the bidding documents to their financial detriment and equity demanded that they be reimbursed. Award of $58,750.00. . . . . p. 84

LEWIS VS. ALCOHOL BEVERAGE CONTROL ADMINISTRATION (CC-01-017)

Where the respondent retained claimants' bid bond and claimants received nothing in return, the Court held that respondent was unjustly enriched under the facts in this particular claim. The Court also held that the unjust enrichment constitutes an inequity that is unconscionable on the part of respondent. Equity and good conscience demand that moral obligations of the State be recognized by this Court. Award of $58,750.00. . . . . p. 84

MESSNER VS. DIVISION OF HIGHWAYS (CC-02-370)

Claimant's vehicle was damaged when it struck a large hole in the road. Claimant submitted a repair bill into evidence in the amount of $630.73. However, claimant had insurance coverage on the vehicle to cover this loss and may only

recover the amount of her insurance deductible of $250.00. *See Sommerville/State Farm Fire and Casualty vs. Division of Highways,* 18 Ct. Cl. 110 (1991). p. 267

MILLER VS. DIVISION OF HIGHWAYS (CC-01-238)

Respondent stipulated liability for vehicle damages sustained as a result of striking a pile of cold mix on route 250 in Marshall County. The Court made a fair and reasonable award for damages incurred. Award $67.43. . . . . p. 42

RHODES, INDIVIDUALLY AND AS NEXT FRIEND OF ROMAN ALEXANDER TARANTINI, AN INFANT (CC-97-431)

This claim came before the Court based upon a stipulation entered into between the parties wherein certain facts and circumstances were agreed to between the parties. Claimant, Macel Rhodes, and her son Roman Tarantini were traveling on I-79 near Amma, Roane County, when claimant's vehicle struck a large boulder in the road, causing serious injuries to Ms. Rhodes. The Court awarded her $105,000.00 for her past and future pain and suffering, estimated out of pocket past and future medical expenses and estimated lost wages.
Award of $105,000.00. . . . . p. 139

RHODES, INDIVIDUALLY AND AS NEXT FRIEND OF ROMAN ALEXANDER TARANTINI, AN INFANT (CC-97-431)

This claim came before the Court based upon a stipulation entered into between the parties wherein certain facts and circumstances were agreed to between the parties. Claimant, Macel Rhodes, and her son Roman Tarantini were traveling on I-79 near Amma, Roane County, when claimant's vehicle struck a large boulder in the road causing minor injuries to claimant's son. Claimant, Macel Rhodes as the legal guardian of Roman Tarantini, an infant received $5,000.00 for medical expenses and for loss of consortium, love, affection, medical expenses, society, and companionship of and from his mother during period she was hurt. . . . . p. 139

ULLUM VS. DIVISION OF HIGHWAYS (CC-01-236)

The parties stipulated that claimant experience real property damage as a result of a retaining wall in front of the residence and abutting WV Route 40 which fell onto claimants' property. The Court made an award based upon the stipulation in the amount of $3,680.00. . . . . p. 48

DRAINS, SEWERS and WATER DAMAGE

ASHLEY VS. DIVISION OF HIGHWAYS (CC-01-277)

Claimant brought this action to recover costs associated with water damage to her basement and personal property allegedly caused by the negligent maintenance of the drainage system for Route 60/16 in Kanawha County. The Court held that respondent has a duty to provide adequate drainage of surface water from its property, and that its drainage systems must be maintained in a reasonable state of repair. *Haught v. Dept. of Highways,* 21 Ct. Cl. 237 (1980). In addition, respondent had constructive notice of the drainage problem in the area and a reasonable amount of time to take corrective action. Award of $14,571.37. . . . . p. 312

DILLON VS. DIVISION OF HIGHWAYS (CC-01-339)

Claimants suffered water damage to their personal property when respondent paved over a curb adjacent to their property in Bluefield, Mercer County, which allowed surface water from the road to flow onto claimants' property and home. The Court held that respondent knew or should have known that the curb provided a barrier to claimants' property which was three feet below the surface of the road; therefore, respondent should have taken corrective action to prevent the surface water from flowing onto claimants' property. Award of $1,000.00. *See Orsburn v. Division of Highways*, 18 Ct. Cl. 125 (1991); *Ashworth v. Division of Highways*, 19 Ct. Cl. 189 (1993). . . . . p. 277

EDGELL VS. DIVISION OF HIGHWAYS (CC-02-219)

Claimants' real and personal property was damaged by flooding as a result of respondents failure to maintain properly its drainage system. Respondent removed a "lip" of earth along the edge of the road above claimants' property that protected claimants' property from excess water from draining onto their property. Respondent failed to adequately divert or account for the excess water that flowed off the road and onto claimants' property. Award of $12,812.00. . . . . p. 277

EDGELL VS. DIVISION OF HIGHWAYS (CC-02-219)

Claimants' real and personal property was damaged by flooding as a result of respondent's failure to maintain properly its drainage system. The Court held that respondent exacerbated the water runoff problems when it filled in a ditch line on the opposite side of the road from claimants' property which created more surface water runoff on the road and onto claimants' property. Award of $12,812.00. . . p. 261

EDGELL VS. DIVISION OF HIGHWAYS (CC-02-219)

Claimants' real and personal property was damaged by flooding as a result of respondent's failure to maintain properly its drainage system. The Court held that an owner of property which is abutting property owned by another is liable for creating a situation whereby excessive water is diverted onto the adjoining property. . . . . p. 261

EDGELL VS. DIVISION OF HIGHWAYS (CC-02-219)

Where claimants' property had not flooded in sixteen years but suddenly experienced excessive flooding after respondent's road maintenance, the Court concluded that respondent's actions were the proximate cause. Award of $12,812.00. . . . . p. 261

HARRAH VS. DIVISION OF HIGHWAYS (CC-01-252)

This Court has held that respondent has a duty to provide adequate drainage of surface water, and that drainage system must be maintained in a reasonable state of repair. *Haught v. Dept of. Highways*, 21 Ct. Cl. 237 (1980). . . . . p. 327

HARRAH VS. DIVISION OF HIGHWAYS (CC-01-252)

To hold respondent liable for damages caused by an inadequate drainage system, claimants must prove that respondent had actual or constructive notice of the

existence of an inadequate drainage system and a reasonable amount of time to take corrective action. *Orsburn v. Div. of Highways*, 18 Ct. Cl. 125 (1991); *Ashworth v. Div. of Highways*, 19 Ct. Cl. 189 (1993). . . . . p. 327

HARRAH VS. DIVISION OF HIGHWAYS (CC-01-252)

Claimants brought this action for water damage to their residence and property which they allege was caused by the negligent design and maintenance of the drainage system for U.S. Route 60 in Greenbrier County. The Court held that the flooding and the related damage to claimants' property were caused by a combination of circumstances, including the lay of the land, the location of claimants' home and garage at the end of the hollow, and the self-help measures taken by claimants. There is insufficient evidence to establish that any actions on the part of the respondent caused or contributed to claimants' flooding problems. Claim disallowed. . . . . p. 327

HOBBS VS. DIVISION OF HIGHWAYS (CC-01-278)

Claimants brought this action for damage to real estate located in Mingo County. Damage occurred to claimants' property as the result of a drain placed beneath East Fork of Twelve Pole Road in 1976, at which time claimants gave respondent an easement for drainage across their property. As a result of the water flowing from the culvert installed by respondent, claimants have had water flowing onto their property such that is now unsuitable for the purposes for which claimants wish to use the property. Respondent asserts that its responsibility for the drainage of the water through the culvert ends at the end of the culvert pipe where it empties onto claimants' property. The general law with respect to easements provides that the dominant tenement has a duty to maintain an easement, and he must so use his own privileges as not to do any unnecessary injury to the grantor. *Armstrong v. Pinnacle Coal & Coke Co.*, 101 W.Va. 15, 131 S.E. 712 (1926). However, a paragraph in the easement agreement appears to release respondent from any responsibility for the maintenance of the area of the permanent easement. Claim disallowed. . . . . p. 300

KELLEY VS. DIVISION OF HIGHWAYS (CC-98-186)

The parties stipulated that claimant experienced real property damage as a result of flooding from a culvert on Glenwood Road in Cabell County. The Court made an award based upon the stipulation in the amount of $39,220.00. . . p. 10

LEATHERMAN VS. DIVISION OF HIGHWAYS (CC-00-288)

This wrongful death claim was Stipulated to by the parties wherein the parties and the Court agreed to an award of $2,000.00 which represents the contribution amount owed by respondent to the decedent's estate. The parties agreed that decedent's vehicle struck a patch of ice on the road next to her property causing her to crash into an oncoming vehicle resulting in her death. The parties agreed that the ice was proximately caused by runoff from claimant's property and/or respondent's drainage ditch. Claimant sought indemnification and/or contribution from respondent on basis that respondent was responsible.
Awards of $2,000.00. . . . . p. 83

LEFTWICH VS. DIVISION OF HIGHWAYS (CC-00-260)

The parties stipulated that claimant experienced property damage occasioned by the negligent maintenance of a storm drain in front of claimant's house that had a defective pipe and resulted in excessive water flowing onto the property. The Court has held previously that respondent has a duty to provide adequate drainage of surface water and devices must be maintained in a reasonable state of repair.

Award $339.84. . . . . p. 22

PETERS VS. DIVISION OF HIGHWAYS (CC-99-190)

Claimants brought this action for water damage to their real estate and personal property which they allege was the result of respondent's inadequate drainage system and its negligent maintenance thereof. The Court determined that there were many factors that brought about the flooding on claimants' property. The Court held that respondent was not liable for the flood damages to claimants' property. . . . . p. 53

RYAN VS. DIVISION OF HIGHWAYS (CC-00-175)

Claimant's vehicle was totaled when it struck a large pond of water on the road allegedly caused by respondent's clogged culvert under the road. The Court held that even though the culvert was clogged by trash respondent was not liable for these damages, because it did not have actual or constructive notice of the water problem. Claim disallowed. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986). The Court does not place the burden of anticipating all problems with the roads and highways on the respondent. . . . . p. 108

STOUT VS. DIVISION OF HIGHWAYS (CC-01-138)

Claimant brought this action for personal injuries and property damage allegedly caused by respondent's negligent maintenance of a drainage ditch. The Court held that claimant failed to establish by a preponderance of the evidence that respondent had notice that a drainage ditch overflowed causing ice to form on the road. Claim disallowed. . . . . p. 153

TAYLOR VS. DIVISION OF HIGHWAYS (CC-01-319)

Claimant brought this action to recover costs associated with water damage to her real estate which she alleges is due to respondent's negligent maintenance of the drainage system for U.S. Route 52 in McDowell County. This claim was bifurcated and heard on the issue of liability only. The Court held that respondent was liable for damages caused by it's inadequate drainage system in that it had actual notice of the existence of the drainage problems claimant was having, yet respondent had done nothing to remedy the problem which for many years. *Ashworth v. Division of Highways* 19 Ct. Cl. 189 (1993). . . . . p. 186

ULLUM VS. DIVISION OF HIGHWAYS (CC-01-236)

The parties stipulated that claimant's real property damage was a result of a retaining wall in front of the residence and abutting WV Route 40 which fell onto claimants' property. The Court made an award based upon the stipulation in the amount of $3,680.00. . . . . p. 48

FALLING ROCKS AND ROCKS - See also Comparative Negligence and Negligence

BRANICKY VS. DIVISION OF HIGHWAYS (CC-02-121)

The Court held that respondent had at least constructive, if not actual, notice of rock fall hazards in the area known as the "narrows" on Rt. 2 between Glendale and McMechen in Marshall County. Thus, the Court granted claimant an award for damage to her vehicle as a result of a rock fall at this location. Award of $1,035.00. . . . . p. 273

BRANICKY VS. DIVISION OF HIGHWAYS (CC-02-121)

The Court held the actions taken by respondent to protect claimant from the rocks which frequently fall onto the portion of Rt.2 known as the "narrows" was inadequate and that respondent is liable for the damages which flow from its inadequate protection of the traveling public. Award of $1,035.00. . . . . p. 273

COOKE VS. DIVISION OF HIGHWAYS (CC-02-102)

Claimant, Lee Cooke, was traveling on Route 4 in Braxton County when the vehicle struck a large rock in the road. The Court held that respondent was not negligent in that it did not have notice that there was a rock fall potential at this location. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). The unexplained presence of rocks or debris upon the highway without a showing that respondent had notice of a dangerous condition posing a risk to the traveling public is insufficient evidence to justify an award. Claim disallowed. *Hammond v. Dept. of Highways*, 11 Ct. Cl. 234 (1977); *Coburn v. Dept. of Highways*, 16 Ct. Cl. 68 (1985). . . . . p. 296

CUSICK VS. DIVISION OF HIGHWAYS (CC-02-172)

Where respondent had warning signs, numerous lights in place, and patrolmen monitoring Route 2 in the area, referred to as the "narrows", the Court held that these actions were an inadequate remedy to protect the traveling public and that respondent had constructive notice of the rock fall hazard in the area at issue. Award of $1,360.09. . . . . p. 216

HALL VS. DIVISION OF HIGHWAYS (CC-02-092)

Claimant's vehicle was damaged by falling rocks while traveling Route 2 in the area referred to as the "narrows." The Court held that respondent had constructive notice of the rock fall hazards at this location and using patrolmen to monitor the area has not proven adequate to protect the traveling public. Thus, respondent is liable for the damages which flow from this inadequate protection. Award of $432.81. . . . . p. 212

BRADFORD and TWYMAN VS. DIVISION OF HIGHWAYS (CC-01-214)

Mr. Twyman was operating Ms. Bradford's vehicle on State Rt. 46 in Mineral County when the vehicle struck numerous large rocks in the road. The Court held that respondent was not negligent in that it did not have notice that there was a

rock fall potential at this location. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). The unexplained presence of rocks or debris upon the highway without a showing that respondent had notice of a dangerous condition posing a risk to the traveling public is insufficient evidence to justify an award. Claim disallowed. *Hammond v. Dept. of Highways*, 11 Ct. Cl. 234 (1977); *Coburn v. Dept of Highways*, 16 Ct. Cl. 68 (1977). . . . . p. 190

HALL VS. DIVISION OF HIGHWAYS (CC-02-049)

Claimant brought this action for damage to his vehicle which occurred when he was traveling on Route 89 in Wetzel County and the vehicle struck a large rock in the road. The Court held that respondent was not negligent in that it did not have notice that there was a rock fall potential at this location. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). The unexplained presence of rocks or debris upon the highway without a showing that respondent had notice of a dangerous condition posing a risk to the traveling public is insufficient evidence to justify an award. Claim disallowed. *Hammond v. Dept. of Highways*, 11 Ct. Cl. 234 (1977); *Coburn v. Dept of Highways*, 16 Ct. Cl. 68 (1977). . . . . p. 287

MANNING VS. DIVISION OF HIGHWAYS (CC-01-091)

Claimant's vehicle was damaged by a rock in the road on Springfield Grade Road in Hampshire County. Claimant failed to prove that the respondent had actual or constructive notice of the falling rock. Claim disallowed. . . . . p. 11

MEDLEY VS. DIVISION OF HIGHWAYS (CC-00-127)

Claimant's vehicle was damaged by rocks which had fallen onto the road. The Court held that respondent did not have notice of this particular rock fall until after the incident and neither did respondent have a reasonable amount of time to take corrective action. Thus, respondent was not negligent. Claim disallowed. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). . . . . p. 113

MERKLE VS. DIVISION OF HIGHWAYS (CC-01-123)

A rock fell from a mountainside and struck the hood of claimants' vehicle causing serious damage. The Court held that claimants failed to establish by a preponderance of the evidence that claimant had actual or constructive notice that the rock presented a hazard to the public and that respondent had a reasonable amount of time to take corrective action. Claim disallowed.*Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986), *Pritt v. Dept. of Highways* 16 Ct. Cl. 8 (1985). . . p. 107

MERKLE VS. DIVISION OF HIGHWAYS (CC-01-123)

The Court held that the respondent had placed the proper warning signs to warn the traveling public of falling rocks. In this type of claim, the Court is left with no option but to deny the claim where a rock suddenly falls from a mountain without warning. To do otherwise would place an untenable burden on respondent in maintaining the mountainous roads and highways of this State.
Claim disallowed. . . . . p. 107

WRIGHT VS. DIVISION OF HIGHWAYS (CC-00-440)
A claim for damage to a vehicle which struck a rock in the road was denied where the evidence established that "Falling Rock" signs were posted by respondent and there was no notice to respondent of the rock fall. There was no negligence established on the part of the respondent. . . . . p. 15

JURISDICTION

MONONGALIA HOME CORPORATION dba SUNDALE NURSING HOME, VS. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-00-459)
This claim arises out of a contract dispute between the parties in which the Court granted respondent's motion to dismiss for a lack of subject matter jurisdiction under W.Va. Code §14-2-14(5) which states that the jurisdiction of this Court shall not extend to any claim "with respect to which a proceeding may be maintained against the State, by or on behalf of claimant in the courts of the State." Claim disallowed. . . . . p. 115

MONONGALIA HOME CORPORATION dba SUNDALE NURSING HOME, VS. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-00-459)
The Court held that it did not have subject matter jurisdiction under W.Va. Code §14-2-14(5)because the claim could have been heard in the circuit courts of this State. Claimant had access to an administrative appeal under the *Department of Health and Human Resources' Medicaid Regulations Chapter 700,§751,* and claimant had access to relief under the Administrative Procedure Act under W.Va. Code §29A-5-4. Once all potential remedies have been exhausted then claimant has access to the circuit court. Claim disallowed. . . . . p. 115

MONONGALIA HOME CORPORATION dba SUNDALE NURSING HOME, VS. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-00-459)
The Court stated that if at any time claimant has or had access to the regular courts of the State, this Court is without jurisdiction. As a statutorily created Court, the Court may not broaden its jurisdiction to decide the merits of a claim as to do so would be a violation of its statutory authority. Claim disallowed. *See W.Va. Code* § 14-2-15(5). . . . . p. 115

MOTOR VEHICLES

FIRST VIRGINIA BANK-BLUE RIDGE VS. DIVISION OF MOTOR VEHICLES (CC-00-087)
Claimant brought action to recover the value of a lien it asserts that respondent failed to record on a title it processed for a vehicle. The Court held that respondent did not present sufficient evidence to demonstrate that claimant ever received notice of claimant's lien when it issued the title. Claim disallowed. p. 131

CASDORPH VS. DIVISION OF MOTOR VEHICLES (CC-02-057)

Claimant seeks an award for paying a traffic fine while stopped by a WV State Policeman, who ran a check on claimant's driver's license with the respondent who mistakenly indicated that it was suspended. Respondent admits the validity and amount of the claim. Award of $70.00. . . . . p. 120

HATFIELD VS. DIVISION OF MOTOR VEHICLES (CC-02-167)

Claimant purchased a vehicle based upon inaccurate title information in which the title should have been noted as a "rebuilt title". Claimant purchased the vehicle for $6,000.00 but it was only worth $1,000.00, thus claimant was awarded $5,000.00 in damages which both parties agreed was fair and reasonable. Award of $5,000.00. . . . . p. 259

RINE VS. DIVISION OF MOTOR VEHICLES (CC-01-306)

This claim came before the Court for decision upon a stipulation entered into by the partes. The Court having reviewed the facts and the stipulation, finds that the respondent was negligent for requiring claimant to pay taxes for the same automobile twice and agrees that the amount of damages as stipulated is fair and reasonable. . . . . p. 24

ROSS VS. DIVISION OF MOTOR VEHICLES (CC-02-291)

Claimant brought this action for $150.00 which was the cost she incurred for paying bail as a result of being arrested for driving on an alleged suspended license. However, respondent failed to note that claimant had paid for a ticket prior to her deadline. Claimant is entitled to be reimbursed for her sustained loss. Award of $150.00. . . . . p.162

NEGLIGENCE - See also Berms; Falling Rocks and Rocks & Streets and Highways

ALBRIGHT VS. DIVISION OF HIGHWAYS (CC-00-264)

Claimant was traveling on WV Route 75 when her vehicle struck a large hole damaging her vehicle. The Court held that respondent had constructive notice of this hole. The claimant's award was limited to the amount of her insurance deductible feature of $250.00. . . . . p. 26

ALFORD VS. DIVISION OF HIGHWAYS (CC-00-035)

Claimant was traveling at the intersection of State Route 13 and State Route 1 when he lost control of his vehicle due to ice on the road causing minor injuries and vehicle damage. The Court held that respondent knew or should have known that when they covered up the tile with dirt at this drainage ditch it would force water to run off onto the road. The Court made an award in the amount of $2,201.00. . . . . p. 1

ARANGO VS. DIVISION OF HIGHWAYS (CC-01-073)

Claimant's vehicle struck a large piece of cement in the road. The cement had broken off from a curb that belonged to the City of Weirton. The Court held since respondent had an agreement with the City of Weirton to maintain "curb to

curb"and the piece of concrete came from the curb, the respondent was not responsible for the maintenance of the curb adjacent to the road. Thus, respondent was not negligent in this claim. Claim disallowed. . . . . p. 96

BETTINGER VS. DIVISION OF HIGHWAYS (CC-00-239)

Claimant was traveling on County Route 50/5 in Wood County when a portion of the road slipped and gave way. The Court determined that respondent failed to provide adequate warning to the traveling public of a hidden danger which was the proximate cause of the damages to claimant's vehicle.
Award $1,060.00. . . . . p. 31

BOWMAN AND SMITH VS. DIVISION OF HIGHWAYS (CC-98-225)

Claimants brought this action for personal injuries and damage to the vehicle allegedly caused by respondent's negligence in placing an open box culvert too close to the highway. As a result, claimant's vehicle's tire got caught in the box culvert when she was forced to the berm by an oncoming vehicle and the vehicle flipped and skidded on its top. The Court held that while respondent may have been negligent in the location and maintenance of the hole adjacent to Route 214, respondent's negligence was not the proximate cause of claimant's injuries.
Claim disallowed. . . . . p. 143

BOWMAN AND SMITH VS. DIVISION OF HIGHWAYS (CC-98-225)

To be actionable, respondent's negligence must be a proximate cause of claimants' injuries. In this instance, the Court held respondent's negligence was not a proximate cause of claimants' damages. *Tracy v. Cottrell*, 206 W.Va. 363; 524 S.E.2d 879 (1999); *Louk v. Isuzu Motors, Inc.* 198 W.Va. 250; 479 S.E.2d 911 (1996); *Roush v. Johnson*, 139 W.Va. 607, 80 S.E.2d 857 (1954).
Claim disallowed. . . . . p. 143

BOWMAN AND SMITH VS. DIVISION OF HIGHWAYS (CC-98-225)

Drivers have a duty of reasonable care in operating their vehicles while driving on West Virginia Highways. This duty includes properly maintaining control of the vehicle under the circumstances then and there existing.
Claim disallowed. . . . . p. 143

BOWMAN AND SMITH VS. DIVISION OF HIGHWAYS (CC-98-225)

The Court held that the evidence established that claimant did not properly maintain control of her vehicle under the circumstances, in that she had sufficient time and space while on the gravel berm to bring her vehicle under control. A reasonably prudent driver would have been able to maintain control and claimant's failure to maintain control of the vehicle was the sole proximate cause of the accident.
Claim disallowed. . . . . p. 143

BRAGG VS. DIVISION OF HIGHWAYS (CC-00-267)

This claim came before the Court for decision upon a stipulation entered into by the parties. The Court, having reviewed the facts and the stipulation, finds that the negligence of respondent was the proximate cause of the damages sustained

to claimant's vehicle, and agrees that the amount of damages as stipulated is fair and reasonable. . . . . p. 32

BRAITHWAITE VS. DIVISION OF HIGHWAYS (CC-00-454)
This claim came before the Court for decision upon a stipulation entered into by the parties. The Court, having reviewed the facts and the stipulation, finds that the respondent was negligent in not removing a broken sign post from the berm of the highway which caused damage to claimant's vehicle, and agrees that the amount of damages as stipulated is fair and reasonable. . . . . p. 2

CARPENTER VS. DIVISION OF HIGHWAYS (CC-01-090)
The parties stipulated that claimant's vehicle struck a hole in the road surface; that respondent was aware of the condition of the road; and that respondent was negligent. The Court made an award in the amount of $237.13. . . . . p. 17

CARPENTER VS. DIVISION OF HIGHWAYS (CC-01-190)
Claimant's vehicle was damaged by excess rock and gravel left on County Route 218/81in Marion County after respondent performed patchwork on holes in the road. Claimant's award was limited to the amount of her insurance deductible feature of $250.00. . . . . p. 33

CHRISTIAN VS. DIVISION OF HIGHWAYS (CC-01-228)
Where claimant's vehicle struck a large hole in the road causing serious damage, the Court held that respondent had actual or constructive notice of the hole and a reasonable amount of time to take corrective action. The Court reasoned that the size of the hole and its location in the driving portion of the road was evidence that it had been present for a significant period of time. Award of $730.00. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). . . . . p. 76

CLEEK VS. DIVISION OF HIGHWAYS (CC-00-026)
The parties stipulated that claimant's vehicle struck a hole in the road surface; that respondent was aware of the condition of the road; and that respondent was negligent. The claimant's award was limited to the amount of his insurance deductible feature of $250.00. . . . . p. 4

COGLEY VS. DIVISION OF HIGHWAYS (CC-02-349)
Claimant's vehicle was damaged when a piece of ceiling tile fell from the Wheeling Tunnel while he was traveling I-70 in Ohio County. While claimant sought $751.74, he had insurance coverage for the loss and was limited to the amount of his deductible feature of $100.00. Respondent admits the validity of the claim and the amount of $100.00. Award of $100.00. . . . . p. 243

COLPO VS. DIVISION OF HIGHWAYS (CC-01-016)
This claim came before the Court for decision upon a stipulation entered into by the parties. The Court, having reviewed the facts and the stipulation, finds that the respondent was negligent in not removing a broken metal reflector post from the berm of the highway which caused damage to claimant's vehicle.

Award of $264.00. . . . . p. 18

COX VS. DIVISION OF HIGHWAYS (CC-99-247)

The parties agreed to stipulate this claim for damage done to claimant's vehicle in the amount of $91.63. The parties agreed that respondent failed to maintain Yeager Airport Road in Kanawha County on the date of this incident. . . . . p. 4

DARDEN VS. DIVISION OF HIGHWAYS (CC-01-134)

Where claimant's vehicle struck a large hole on Route 19 in Marion County during construction by respondent's contractor, the Court held that respondent was negligent for failing to inspect the work site conditions. Respondent knew or should have known that the holes were present and its failure to timely remedy the problem presented a hazard to the traveling public. Award of $284.84. .....p. 60

DEMARY VS. DIVISION OF HIGHWAYS (CC-02-137)

Claimant's daughter was traveling on U.S. Route 19 at its intersection with County Route 19/7 when she lost control of the vehicle and skidded across ice into an embankment. The Court held that respondent 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. *Richards v. Division of Highways,* 19 Ct. Cl. 71 (1992); *McDonald v. Dept. of Highways,* 13 Ct. Cl. 13 (1979); *Christo v. Dotson,* 151 W. Va. 696, 155 S.Ed. 2d 571 (1967). In addition, the Court concluded that Ms. DeMary was driving her automobile in excess of a reasonable speed for the conditions then and there existing. . . . . p. 290

FAULKNER VS. DIVISION OF HIGHWAYS (CC-01-312)

This claim came before the Court upon a stipulation. The Court having reviewed it, adopts it as its own, and holds that respondent was negligent in not repairing a portion of guardrail which was protruding into the travel portion of the bridge causing damage to claimant's vehicle. Award of $290.31. . . . . p. 19

FLETCHER VS. DIVISION OF HIGHWAYS (CC-02-335)

Claimant's vehicle was damaged when a piece of tile fell from the ceiling of the Wheeling Tunnel. Respondent admits the validity of the claim and the amount in its Answer. Award of $268.16. . . . . p.240

FREEMAN VS. DIVISION OF HIGHWAYS (CC-01-076)

The tailgate on claimant's truck was damaged when wind caused a large drum to roll off the top of a stack of drums located on respondent's property. The Court held that respondent failed to adequately secure the drums and that respondent should have foreseen that wind could blow the stack of drums over and damage nearby property. Award of $700.00 . . . . . p.62

GOLDEN VS. DIVISION OF HIGHWAYS (CC-01-233)

Claimant's vehicle struck a large hole in Route 24 in Shinnston, Harrison County, causing significant damage to tires, wheels, and steering. The Court held that respondent was negligent in not repairing the hole. Respondent patched the portion of road at issue 18 days prior to incident and yet claimant encountered a hole 14-15 inches long and significantly deep. Further, the Court found that respondent was aware that heavy coal trucks frequently used this road and created holes in it and therefore knew or should have known that this hole was present.
Award of $250.00. . . . . p. 63

HALL VS. DIVISION OF HIGHWAYS (CC-02-049)

Claimant brought this action for damage to his vehicle which occurred when he was traveling on Route 89 in Wetzel County and the vehicle struck a large rock in the road. The Court held that respondent was not negligent in that it did not have notice that there was a rock fall potential at this location. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). The unexplained presence of rocks or debris upon the highway without a showing that respondent had notice of a dangerous condition posing a risk to the traveling public is insufficient evidence to justify an award. Claim disallowed. *Hammond v. Dept. of Highways*, 11 Ct. Cl. 234 (1977); *Coburn v. Dept of Highways*, 16 Ct. Cl. 68 (1977). . . . . p. 287

HARRINGTON VS. DIVISION OF HIGHWAYS (CC-99-210)

Claimant's vehicle struck a hole on Route 50 just west of Romney, Hampshire County. The Court held that respondent had constructive notice of the hole. Award of $286.96. . . . . p. 7

HAZELTON VS. DIVISION OF HIGHWAYS (CC-99-112)

Claimant's vehicle struck a large patch of ice causing it to overturn and to eject the claimant causing severe injuries. As a result of these injuries, he has no recollection of the events which took place immediately prior to the accident. The Court held that there is a general standard to be followed regarding the presumption of the exercise of due care when no evidence has been received to the contrary. The general presumption is that one will exercise due care for the safety of himself and other persons. Lambert v. Great Atlantic and Pacific Tea Company, Inc., 155 W.Va. 397, 407, 184 S.E.2d 118 (1971) citing Atlantic Coast Line Railroad Company v. Brown, 82 Ga. App. 889, 892, 62 S.E.2d 736, 739. . . . . p. 147

HAZELTON VS. DIVISION OF HIGHWAYS (CC-99-112)

Evidence that claimant was or was not wearing a seatbelt may not be used as evidence of negligence, contributory negligence, or comparative negligence in an action, but may only be applied as to damages as set forth under W.Va. Code § 17C-15-49(d). . . . . p. 147

HAZELTON VS. DIVISION OF HIGHWAYS (CC-99-112)

The Court has consistently held that respondent cannot be expected or required to keep its highways absolutely free of ice and snow at all times, and the presence of an isolated patch of ice on a highway during winter months is normally insufficient to find respondent negligent. *McDonald v. Dept. of Highways*, 13 Ct.

Cl. 13 (1979). However, the Court has also consistently held that respondent owes a duty to travelers to exercise reasonable care and diligence in the maintenance of highways. *Lewis v. Dept of Highways,* 16 Ct. Cl. 136 (1986). . . . . p. 147

HAZELTON VS. DIVISION OF HIGHWAYS (CC-99-112)

In claims dealing with ice and slick road conditions, the Court has held that a claimant must prove that the respondent had actual or constructive notice of the icy or slick conditions of the road and a reasonable amount of time to take corrective action. *Bartram v. Dept. of Highways,* 15 Ct. Cl. 23 (1983). . . . . p. 147

HAZELTON VS. DIVISION OF HIGHWAYS (CC-99-112)

The Court held that while respondent had actual notice of the ice, it did not have a reasonable amount of time to take corrective action before claimant's accident occurred. The evidence established that respondent only had a few minutes between the time it noticed the ice and the time of the accident to take corrective action. Claim disallowed. . . . . p. 147

HIGH VS. DIVISION OF HIGHWAYS (CC-00-156)

Claimant's vehicle was damaged when an object struck his vehicle while he was traveling northbound on I-81 near the Falling Waters Exit in Berkeley County. The Court held that claimant felled to establish the damage to his vehicle was caused by any negligence on the part of the respondent and the Court would not speculate as to what caused the incident. Claim disallowed. . . . . p. 9

HOPPER VS. DIVISION OF HIGHWAYS (CC-01-100)

The parties agreed to stipulate this claim in the amount of $272.39. Claimant's vehicle was damaged when the oil pan on his vehicle struck a very high center of pavement in the road causing the oil pan to rupture The parties agreed that respondent failed to maintain Route 22, Harrison County, on the date of this incident. . . . . p. 20

JEFFREY VS. DIVISION OF HIGHWAYS (CC-00-168)

Claimant's vehicle struck an iron sign post protruding from the ground on the berm portion of Alternate Route 10 in Cabell County. The Court determined that respondent was negligent in its maintenance of the berm. Award $225.00. *Ginger B. Compton v. Division of Highways,* 21 Ct. Cl. 18 (1995). . . . . p. 38

LEATHERMAN VS. DIVISION OF HIGHWAYS (CC-00-288)

This wrongful death claim was Stipulated to by the parties wherein the parties and the Court agreed to an award of $2,000.00 which represents the contribution amount owed by respondent to the decedent's estate. The parties agreed that decedent's vehicle struck a patch of ice on the road next to her property causing a collision with an oncoming vehicle resulting in her death. The parties agreed that the ice was proximately caused by runoff from claimant's property and/or respondent's drainage ditch. Claimant sought indemnification and/or contribution from respondent on basis that respondent was responsible.
Awards of $2,000.00 . . . . . p. 83

MARSHALL VS. DIVISION OF HIGHWAYS (CC-99-437)

The parties agreed to stipulate this claim in the amount of $198.18. Claimant's vehicle sustained damage as a result of a large hole. The parties agreed that respondent failed to maintain Route 14, Wood County, on the date of this incident. . . . . p. 12

MICK VS. DIVISION OF HIGHWAYS (CC-00-418)

Claimant's vehicle sustained damaged as a result of a large hole located on County Route 11 in Harrison County. The Court held that respondent had constructive notice of this hazard and a reasonable amount of time to make repairs. The Court also stated that the claimant was twenty percent at fault in failing to exercise due care as he was driving too fast. Award $862.70. . . . . p. 40

PRICHARD VS. DIVISION OF HIGHWAYS (CC-00-251)

Claimants brought this action for damage to their real property as a result of the negligent maintenance of respondent's drainage ditch adjacent to their property. The Court held that respondent failed to timely and adequately respond to claimants' complaints about standing water in the ditch line which ultimately resulted in the large land slide which damaged claimants' property.
Award of $6,000.00. . . . . p. 88

PRICHARD VS. DIVISION OF HIGHWAYS (CC-00-251)

Where respondent negligently failed to respond to claimants' request to remove a large rock in a ditch line that was causing the pooling of water, the Court held that the pooling of water in the ditch line along with the saturated soil did in fact contribute to the slide that damaged claimants' property. . . . . p. 88

SUDER VS. DIVISION OF HIGHWAYS (CC-01-131)

Claimant's vehicle struck a large piece of concrete in the road causing damage to the undercarriage of the vehicle. Claimant alleged that the piece of concrete broke off a barrier on the road. However, the Court held that claimant failed to establish that the piece of concrete was respondent's, how it got in the roadway, and whether respondent was responsible for it being in the road. Claimants failed to establish their burden of proof. The Court would be speculating if it held respondent liable. Claim disallowed. . . . . p. 110

TRANSAM TRUCKING, INC. VS. DIVISION OF HIGHWAYS (CC-01-140)

Claimant brought this action for damages caused to its truck when an overhead light fell from an interstate sign. Respondent was at the scene when this incident occurred. It was attempting to repair the light which was dangling by a wire as a result of being struck by another truck which had clipped the light creating this situation. The Court held that respondent acted in a timely fashion to an unusual situation and had no notice that the light was going to fall.
Claim disallowed. . . . . p. 195

VELEGOL VS. DIVISION OF HIGHWAYS (CC-99-244)

Claimants brought this action for damage to a well that provided water to their home. Claimants allege that respondent negligently conducted core borings

during a construction project that proximately caused the loss of water flow from the well. The Court held that claimants did not establish by a preponderance of evidence that any actions by respondent proximately caused the damages.
Claim disallowed. . . . . p. 128

VELEGOL VS. DIVISION OF HIGHWAYS (CC-99-244)

Claimants brought this action for damage to a well that provided water to their home. Claimants allege that respondent negligently conducted core borings during a construction project that proximately caused the loss of water flow from the well. The expert testimony provided by both parties was not conclusive; therefore, the Court used its discretion and consulted a third party expert who specialized in hydrology to help make its decision. . . . . p. 128

VELEGOL VS. DIVISION OF HIGHWAYS (CC-99-244)

The claimant failed to establish by a preponderance of the evidence that respondent acted negligently in conducting the core borings and failed to establish that this negligence was the proximate cause of the damage to claimants' well. *Roush v. Johnson,* 139 W.Va. 607; 80 S.E.2d 857 (1954). Absent specific evidence that the core borings were the proximate cause of claimants' damages, the Court is constrained to deny the claim. *Stephenson v. Division of Highways,* 22 Ct. Cl. 98 (1998). . . . . p. 128

VELEGOL VS. DIVISION OF HIGHWAYS (CC-99-244)

Absent proof by the claimants as to the proximate cause of their damages, the Court is left to speculate as to the cause which it cannot do. Claim disallowed. *Mooney v. Department of Highways* 16 Ct. Cl. 84 (1986); *Phares v. Division of Highways,* 21 Ct. Cl. 92 (1996). . . . . p. 128

WARNER VS. DIVISION OF HIGHWAYS (CC-01-473)

This claim came before the Court based upon a stipulation. Claimant's vehicle was damaged by falling ceiling tile which broke lose and fell onto his vehicle while traveling through the Wheeling Tunnel. The Court held respondent was negligent in its maintenance of the ceiling tile. The Court granted an award of $250.00 which was the amount of claimant's deductible. . . . . p. 93

WOODALL VS. DIVISION OF HIGHWAYS (CC-00-231)

Claimant sustained damage to his motorcycle and personal injuries when his motorcycle slid on sand on WV Route 10 in Cabell County. The parties agreed to stipulate this claim in the amount of $3,551.22. . . . . p. 50

NOTICE

BARTRAM D/B/A/ B&M WRECKER SERVICE VS. DIVISION OF HIGHWAYS (CC-01-070)

Claimant was towing another vehicle when the tow truck he was driving struck a large ditch that extended across the road. Respondent dug the 24 inch ditch across the road in order to placer a drain pipe across the road to remedy a drainage

problem. The Court held respondent had actual or constructive notice that this ditch would settle and create a hazard. Further, respondent was negligent in not placing any warning signs prior to the ditch. Award of $4,031.30. . . . . p. 74

CHRISTIAN VS. DIVISION OF HIGHWAYS (CC-01-228)

Where claimant's vehicle struck a large hole in the road causing serious damage, the Court held that respondent had actual or constructive notice of the hole and a reasonable amount of time to take corrective action. The Court reasoned that, given the size of the hole and its location in the driving portion of the road, that it had to be present for a significant period of time. Award of $730.00. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). . . . . p. 76

COLEMAN VS. DIVISION OF HIGHWAYS (CC-01-163)

Where claimant's vehicle struck a large hole in the road on County Rt. 20 in Kanawha County, the Court held that given the size of the hole and its location in the travel portion of the road, the respondent had at least constructive notice of its presence and a reasonable amount of time to make adequate repairs. Award of $200.00. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). . . . . p. 193

DILLARD VS. DIVISION OF HIGHWAYS (CC-00-078)

Claimant suffered injuries and his vehicle was damaged as a result of striking a portion of guardrail head on. The Court held that respondent did not have any notice, actual or constructive, of this road hazard. The Court is of the opinion that the claimant failed to maintain control of his vehicle and denied the claim. . . . . p. 5

DUFFICY VS. DIVISION OF HIGHWAYS (CC-01-267)

Where claimant's vehicle was damaged by a large chunk of broken concrete which flew under the vehicle, the Court held that respondent did not have actual or constructive notice of the defect, or a reasonable amount of time to take corrective actions. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986) Claim disallowed. . . . . p. 100

ELLISON VS. DIVISION OF HIGHWAYS (CC-02-062)

The Court made an award to claimant whose vehicle struck a large hole near the edge of the road on Rt. 19/21 in Raleigh County. Respondent had actual notice of the hole and given its size and location, it was a hazardous condition for the traveling public. Award of $238.53. . . . . p. 201

FOUSE VS. DIVISION OF HIGHWAYS (CC-01-274)

Claimant's vehicle struck a large piece of broken asphalt while he was traveling through the Wheeling Tunnel. The Court held that respondent did not have actual or constructive notice of the road defect that caused the asphalt to come lose, or a reasonable amount of time to take corrective action in that the asphalt came from a hole outside the tunnel and was dragged by a tractor trailer into the tunnel where it came lose and struck claimant's vehicle. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). Claim disallowed. . . . . p. 101

HALL VS. DIVISION OF HIGHWAYS (CC-00-218)

Where claimant's vehicle struck a large hole in the travel portion of the road, the Court held that, while respondent did not have actual notice of the hole, it should have known of the hole, and therefore, it had constructive notice and should have made adequate repairs. Award of $911.69. . . . . p. 80

HART VS. DIVISION OF HIGHWAYS (CC-01-115)

Where claimants' vehicle struck a large hole in the travel portion of Rt.2 in Cabell County, the Court held that respondent had at least constructive, if not actual, notice of the hole. Given the location and size of the hole, it is apparent to the Court that the hole has been present for a significant period of time.
Award of $249.00. . . . . p. 188

HOLESTEIN VS. DIVISION OF HIGHWAYS (CC-01-160)

Where claimants' vehicle struck a large hole in the road while traveling Rt.114 near Elkview, Kanawha County, the Court held that respondent had at least constructive, if not actual, notice of the hole. The Court stated that the size and location of the hole in the travel portion of the road leads the Court to conclude that it had been present long enough for respondent to remedy the hazard. Award of $250.00. . . . . p. 192

HUTCHISON VS. DIVISION OF HIGHWAYS (CC-01-200)

Claimant's trailer was damaged when it struck a large hole in the road. The Court found that respondent knew of the hole and had a reasonable amount of time to take corrective action. Thus, respondent was negligent.
Award of $195.00. . . . . p. 172

JEWELL VS. DIVISION OF HIGHWAYS (CC-02-135)

Where claimant was forced to maneuver her vehicle to avoid an oncoming vehicle and it struck a large hole in the road, the Court held that respondent had at least constructive notice of the holes and failed to remedy the problem within a reasonable amount of time. Claimant was awarded the amount of her insurance deductible. Award of $500.00. *Chapman v. Dept. of Highways,* 16 Ct. Cl.103 (1986); *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). . . . . p. 221

JURKOVICH VS. DIVISION OF HIGHWAYS (CC-02-312)

Where claimants' vehicle struck a large hole in the road causing damage to their vehicle, the Court held that respondent knew that the hole was present based on numerous telephone calls from the claimants prior to this incident, and that respondent had a reasonable amount of time to take corrective action. Award of $500.00. See *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). . . . . p. 265

KRACK VS. DIVISION OF HIGHWAYS (CC-01-024)

Claimants allege that respondent failed to clear the road of ice which caused the driver to lose control of the vehicle and collide with an oncoming vehicle. The Court held that claimant failed to establish by a preponderance of the evidence that

respondent had notice of the ice patch. Claim disallowed. *Chapman v. Dept. of Highways* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). . . . . p. 104

KRACK VS. DIVISION OF HIGHWAYS (CC-01-024)

Where claimants' vehicle was damaged when the driver lost control due to a patch of ice and struck another vehicle, the Court held that while respondent owes a duty to travelers to exercise reasonable care and diligence in maintaining the highways, it cannot be expected or required to keep its highways absolutely free of ice and snow at all times, and the presence of an isolated patch of ice during the winter months is normally not sufficient to charge respondent with liability. Claim disallowed. *McDonald v. Dept. of Highways,* 13 Ct. Cl. (1979); *See also Lewis v. Dept. of Highways,* Ct. Cl. 136 (1986). . . . . p. 104

LITTON VS. DIVISION OF HIGHWAYS (CC-01-315)

Where claimant had to maneuver her vehicle to the edge of the pavement to avoid an oncoming coal truck and the vehicle was damaged when it struck a large hole, the Court held that respondent had at least constructive, if not actual, notice of the hole and granted an award. Award of $1,000.00 . . . . . p. 180

MANNING VS. DIVISION OF HIGHWAYS (CC-01-091)

Claimant's vehicle was damaged by a rock in the road while traveling on Springfield Grade Road in Hampshire County. Claimant failed to prove that the respondent had actual or constructive notice of the road defect. Claim disallowed. . . . . p. 11

MEDLEY VS. DIVISION OF HIGHWAYS (CC-00-127)

Where claimant's vehicle was damaged by falling rocks, the Court held that respondent did not have prior notice of the particular rock fall and there was no pattern of multiple repeated rock falls at this location prior to the incident. Further, respondent had in place falling rock warning signs and responded to the incident in a timely fashion. Thus, respondent was not negligent. Claim disallowed. . p. 113

MICK VS. DIVISION OF HIGHWAYS (CC-00-418)

Claimant's vehicle sustained damaged as a result of a large hole located on County Route 11 in Harrison County. The Court held that respondent had constructive notice of this hazard and a reasonable amount of time to make repairs. The Court also stated that the claimant was twenty percent at fault in failing to exercise due care as he was driving too fast. Award $862.70. . . . . p. 40

MYERS VS. DIVISION OF HIGHWAYS (CC-01-106)

Where claimant's vehicle struck a metal plate covered with blacktop on an interstate exit ramp, the Court held that respondent did not have notice that the metal plate presented a risk to the traveling public. Claim disallowed. . . . . p. 177

ROBERTSON VS. DIVISION OF HIGHWAYS (CC-00-025)

Claimant's vehicle struck a hole on State Route 62 just west of Clifton, Mason County. The Court held that respondent did not have constructive notice of the defect and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986). Claim disallowed. . . . . p. 14

SMITH VS. DIVISION OF HIGHWAYS (CC-01-290)

The Court held that respondent had notice of the large hole in the road which damaged respondent's vehicle, since it was within the travel portion of the road and had obviously been present for a significant period of time. Award of $809.79. *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). . . . . p. 173

SMITH VS. DIVISION OF HIGHWAYS (CC-02-345)

The Court held that respondent had at least constructive, if not actual, notice of the poor condition of the edge of the road along the white line and had a reasonable amount of time to take corrective action but failed to do so. Thus, respondent was negligent in failing to maintain the road. Award of $651.04. *Pritt v. Dept. of Highways, 16 Ct. Cl. 8 (1985).* . . . . . p. 260

TYREE VS. DIVISION OF HIGHWAYS (CC-02-136**)**

Where claimants' vehicle was damaged when it struck a large hole in the road, the Court held that claimant established by a preponderance of the evidence that respondent had at least constructive notice of the defect. Further, the Court stated that the location of the hole in the travel portion of the road and its size lead the Court to conclude that respondent had a reasonable amount of time to take corrective action. . . . . p. 272

PEDESTRIANS

BRANHAM VS. DIVISION OF HIGHWAYS (CC-99-380)

Claimant was walking on Division Road in Huntington when she fell in an area of the road where a portion of the asphalt had been broken off causing injuries. The parties agreed to stipulate this claim in the amount of $6,000.00. . . . . p. 51

PRISONS and PRISONERS

BARBOUR COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-01-186)

Claimant brought an action to recover costs for housing prisoners who have been sentenced to a State penal institution, but who have remained in the custody of claimant. Award of $7,189.00. *County Comm'n of Mineral County vs. Division of Corrections,* 18 Ct. Cl. 88 (1990). . . . . p. 17

BHIRUD VS. DIVISION OF CORRECTIONS (CC-02-482)

Claimant seeks payment in the amount of $10,316.65 for medical services rendered to inmates in the custody of respondent at Mt. Olive Correctional Complex. Respondent admits the validity but states the correct amount owed is $9,991.65. Claimant agrees to this amount; however, there were insufficient funds in

respondent's appropriation for the fiscal year from which to pay the claim. Claim disallowed. *Airkem Sales and Services, et al. vs. Dept. of Mental Health,* 8 Ct. Cl. 180 (1971) . . . . . p. 254

CABELL COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-02-356)

Claimant brought this action to recover costs for providing housing and/or medical care to prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant due to circumstances beyond the control of the county have had to remain in the custody of the county beyond the date of the commitment order. Award of $341.31. *County Comm'n of Mineral County vs. Division of Corrections,* 18 Ct. Cl. 88 (1990). . . . . p. 232

CHARLESTON RADIATION THERAPY VS. DIVISION OF CORRECTIONS (CC-02-087)

Claimant brought an action to recover $8,339.00 for medical services provided to an inmate at Mt. Olive Correctional Center. The Court disallowed the claim as there were insufficient funds expired in the appropriate fiscal year. *Airkem Sales and Services, et al. vs. Dept. of Mental Health,* 8 Ct. Cl. 180 (1971). p. 98

COOK VS. DIVISION OF CORRECTIONS (CC-02-073)

Claimant brought this claim to recover the value of a cross pendant and chain that he alleges were lost when he was transferred to Mount Olive Correctional Complex. The Court held that claimant failed to establish by a preponderance of the evidence that respondent ever had possession of claimant's cross pendant and chain. Furthermore, the Court determined that claimant failed to exhaust his administrative remedies before filing this claim. Claim disallowed. . . . . p. 325

COLLINS VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-01-465)

This claim came before the Court upon a stipulation wherein the parties agreed to the validity and amount of the claim. Claimant, an inmate at the Southern Regional Jail, sought an award for lost property. The Court held that a bailment relationship existed where respondent had custody and control of claimant's property and failed to produce that property for return to claimant.
Award of $1,070.00. . . . . p. 99

GRANT VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-02-145)

Claimant sought $192.00 for items of personal property that he entrusted to respondent's employees at Central Regional Jail but was missing from his storage unit. Respondent admits the validity of the claim but states the amount is $92.00, which claimant agrees is fair and reasonable. The Court held that a bailment relationship existed in that respondent took custody of claimant's property for a period of time but was unable to return it to the inmate at a later date. Award of $92.00. See Heard v. Division of Corrections 21 Ct. Cl. 151 (1997). . . . p. 136

MAHOOD VS. DIVISION OF CORRECTIONS (CC-02-138)

Claimant, an inmate at Mt. Olive, sought an award of $102.58 for lost property items. The Court held that, where claimant turned his property items over to respondent for storage purposes while he was in lock up and had no explanation for not returning it, that a bailment relationship existed. The Court held that $71.47 represents a fair and reasonable amount for claimant's lost property. Award of $71.47 *See Page v. Division of Corrections,* 23 Ct. Cl. 238 (2000); *Heard v. Division of Corrections,* 21 Ct. Cl. 151(1997). . . . . p. 283

MARION COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-01-126)

Claimant brought an action to recover costs for housing prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $1,089.92. *County Comm'n of Mineral County vs. Division of Corrections,* 18 Ct. Cl. 88 (1990). . . . . p. 72

MASON COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-01-176)

Claimant brought an action to recover costs for housing prisoners who have been sentenced to a State penal institution, but who have remained in the custody of claimant. Award of $7,189.00. *County Comm'n of Mineral County vs. Division of Corrections,* 18 Ct. Cl. 88 (1990). . . . . p. 23

McFARLIN VS. DIVISION OF CORRECTIONS (CC-00-279)

Claimant, an inmate at Mt. Olive, sought $1,471.80 in damages for various leather hides and products that respondent did not return to him. The Court held that a bailment existed since respondent recorded the property of the inmate , took it for storage purposes and failed to return it. Award of $993.10. *See Heard vs. Division of Corrections* 21 Ct. Cl.151 (1997). . . . . p. 86

McFARLIN VS. DIVISION OF CORRECTIONS (CC-00-279)

Claimant, an inmate at Mt. Olive, sought $1,471.80 for lost property. Claimant alleged that his finished leather items were valued at $1,359.70 and the three leather hides at $112.00. However, the Court determined that the evidence established that the value of the finished leather products was inflated and awarded $881.00 which was the fair market value. . . . . p. 86

MITCHELL VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-02-298)

Claimant, an inmate at the North Central Regional Jail, brought this claim in the amount of $3,000.00 for a diamond ring which she had entrusted to respondent for safe keeping but was never returned. Respondent admits the validity and amount of the claim. The Court holds that a bailment relationship existed where respondent took possession and control of claimant's property and did not produce it for return at a later date. Award of . . . . . p. 195

MYERS VS. DIVISION OF CORRECTIONS (CC-02-313)

Claimant brought this action seeking lost wages he alleges are owed to him as a result of being wrongfully terminated from a job he held while an inmate at St. Mary's Correctional Center. In addition, claimant seeks to recover the value of

certain personal property items he alleges were lost by respondent while he was an inmate. The Court denied claimant an award for lost wages and back pay based upon respondent's "Policy Directive" and the reasoning behind the policy. Also, the Court determined that a bailment existed, such that respondent had possession and control over claimant's personal property. Award $12.00. . . . . p. 321

NEWMAN VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-02-140)

Claimant, an inmate at Southwestern Regional Jail, sought $175.00 for a ring he entrusted to the respondent's care. Respondent admits the validity of the claim but states that the amount is $75.00, which claimant agreed was fair and reasonable. Award of $75.00. The Court also held that a bailment relationship existed in this instance. *See Heard vs. Division of Corrections* 21 Ct. Cl.151 (1997). . . . . p. 137

RANDOLPH COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-02-014)

Claimant brought an action to recover costs for housing prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $800.00. *County Comm'n of Mineral County vs. Division of Corrections,* 18 Ct. Cl. 88 (1990). . . . . p. 74

RODES VS. DIVISION OF CORRECTIONS (CC-02-333)

Claimant seeks an award in the amount of $246.74 for travel expenses incurred as an employee of the respondent State agency. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore claimant has not been paid. Sufficient funds were expired at the end of the fiscal year from which the invoice could be paid. Award of $246.74. . . . . p. 254

SAMPLES VS. DIVISION OF CORRECTIONS (CC-00-460)

Claimant's property was lost by respondent while he was an inmate at Mt. Olive Correctional Facility. The Court held that a bailment relationship existed where respondent was in control and possession of claimant's property during the time period that claimant was in lock-up. Respondent was in the position to safeguard claimant's property and was responsible for its safekeeping once claimant was removed from his cell and away from his property. Award of $383.44. See *Heard vs. Division of Corrections* 21 Ct. Cl. 151 (1997). . . . . p. 91

SARRETT VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-02-211)

Claimant, an inmate at Southern Regional Jail, seeks an award of $85.00 for a pair of shoes that he entrusted to respondent when taken to the facility, but upon his release respondent was unable to produce them. Respondent admits the validity of the claim and the amount. The Court also held that a bailment relationship existed in that property was taken from an inmate and kept in respondent's custody for a period of time but was not produced for return. *See Heard vs. Division of Corrections*, 21 Ct. Cl. 151 (1997). Award of $85.00 . . . . . p. 138

SHACKELFORD VS. WV STATE POLICE (CC-02-439)

This claim was submitted upon the allegations in the Notice of Claim and respondent's Answer in which claimant seeks payment in the amount of $205.79 for vehicle damage caused by a spike strip laid in the roadway by respondent. Respondent admits the validity and the amount of the claim.

Award of $205.79. . . . . p. 253

SIMMS VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-01-435)

Claimant, an inmate at the North Central Regional Jail was awarded $23.90 for personal property items entrusted to respondent but never found. Respondent stipulated to the validity and amount of the claim and agreed that it was fair and reasonable. The Court also held that a bailment relationship was created since respondent had possession and control of claimant's property but was unable to produce it. *See Heard vs. Division of Corrections,* 21 Ct. Cl. 151 (1997).

Award of . . . . . p. 68

SLEVIN VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-02-404)

Claimant, an inmate at the Eastern Regional Jail, was awarded $100.00 for items of personal property that were entrusted to respondent's employees who were unable to return them to claimant. The Court held that a bailment relationship existed where respondent took property of an inmate into its custody and was unable to produce it for the inmate at a later date. Award of $100.00. *See Heard vs. Division of Corrections,* 21 Ct. Cl. 151 (1997). . . . . p. 252

THOMAS MEMORIAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-02-038)

The Court disallowed a claim for $35,206.13 for medical services provided to inmates at Mt. Olive. Respondent admitted the validity of the claim but stated there were insufficient funds expired in the proper fiscal year from which the claim could have been paid. *Airkem.* . . . . . p. 93

UNIVERSITY HEALTH ASSOCIATES VS. DIVISION OF CORRECTIONS (CC-02-257)

Claimant seeks an award of $183,332.75 for medical services rendered to inmates in the custody of respondent at numerous facilities. Respondent admits the validity of the claim, but states that the correct amount owed is $154,411.00. There were insufficient funds expired in the appropriate fiscal year from which to pay the claim. Claim disallowed. *Airkem Sales and Services, et al. vs. Dept. of Mental Health* 8 Ct. Cl. 180 (1971). . . . . p. 255

WILLIAMS VS. DIVISION OF CORRECTIONS (CC-00-330)

Claimant sought the value of personal property items he alleges were not returned to him or mailed to a relative at his request when he was transferred from work release to Huttonsville Correctional Center. Claimant told respondent he wanted to mail the property but he did not have the $17.00 for the shipping costs. The Court held that respondent did not breach any duty to claimant and provided

claimant with an opportunity to ship his property to any address he wanted. The Court held that respondent does not have a burden of maintaining an inmate's property as long as the inmate is given an opportunity to ship the property to an address of his choosing. Claim disallowed. *State ex rel. Antesy v. Davis*, 203 W.Va. 538, 509 S.E.2d 579 (1998). . . . . p. 112

WOOD COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-02-041)

Claimant brought this action to recover costs for providing housing and/or medical care for prisoners who have been sentenced to a State penal institution , but who have remained in the custody of claimant for periods of time beyond the date of the commitment order. Award of $43,015.51. *County Comm'n. Of Mineral County vs. Division of Corrections* 18 Ct. Cl. 88 (1990). . . . . p. 96

WV REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY VS. DIVISION OF CORRECTIONS (CC-01-430)

Claimant provides and maintains six regional jails as facilities for the incarceration of prisoners who committed crimes in various counties. Claimant brought this action to recover costs of housing and providing services for these inmates who have been sentenced to State penal institutions but who have remained in the regional jails for periods of time beyond the dates of the commitment orders. This Court has held that respondent is liable for these costs in the claim of *County Comm'n. Of Mineral County v. Div. of Corrections*, 18 Ct. Cl. 88 (1990). Award of $1,712,838.00. . . . . p. 70

WV REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY VS. DIVISION OF CORRECTIONS (CC-02-455)

Claimant provides and maintains six regional jails as facilities for the incarceration of prisoners who committed crimes in various counties. Claimant brought this action to recover costs of housing and providing services for these inmates who have been sentenced to State penal institutions but who have remained in the regional jails for periods of time beyond the dates of the commitment orders. This Court has held that respondent is liable for these costs in the claim of *County Comm'n. Of Mineral County v. Div. of Corrections*, 18 Ct. Cl. 88 (1990). Award of $4,224,565.50. . . . . p. 233

WYATT VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-02-309)

Where respondent took possession and control of claimant's personal property while an inmate at Southern Regional Jail and was unable to return it to him at a later date, the Court held a bailment relationship existed. Award of $450.00. . . . . p. 196

STATE AGENCIES

DIVISION OF HIGHWAYS VS. ALCOHOL BEVERAGE CONTROL ADMINISTRATION (CC-01-199)

Claimant sought $1,179.38 for providing service and repairs to numerous vehicles of the respondent's. The documentation was not processed for payment within the appropriate fiscal year; sufficient funds were expired. . . . . p.

SPECIAL SERVICES VS. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-02-496)

Claimant seeks $3,550.00 for providing service of process for the Bureau of Child Support Enforcement, a facility of respondent. The documentation for these services was not provided in the proper fiscal year; therefore claimant was not paid. Respondent admits the validity and the amount of the claim and states that sufficient funds were available. Award of $3,550.00. . . . . p. 241

STALNAKER VS. DIVISION OF CULTURE AND HISTORY (CC-02-509)

Claimant seeks $4,147.61 for personal services rendered and travel expenses incurred on behalf of the Weston Hospital Revitalization Committee Center as part of an agreement entered into with respondent to develop a plan for preservation and revitalization. Respondent admits the validity and amount of the claim but states that the documentation for these services was not processed for payment within the appropriate fiscal year and claimant has not been paid. Award of $4,147.61. . . . . p. 259

WEI VS. HIGHER EDUCATION POLICY COMMISSION (CC-02-403)

Claimant seeks an award of $150.00 for personal property damaged by flooding at West Virginia University. Respondent admits the validity and the amount of the claim. Award of $150.00. . . . . p. 244

STIPULATED CLAIMS

These claims were submitted to the Court based upon stipulations.

ADVIZEX VS. BUREAU OF EMPLOYMENT PROGRAMS, LLC (CC-02-159)

Claimant was awarded a contract for the sale of equipment and software. Claimant shipped some equipment and placed it in storage pursuant to the contract when a hold was placed on the activity under the contract. Respondent agreed to pay 10% of the total payment to claimant for work performed. Claimant agreed to a reduced payment of $46,420.00 in lieu of attorney fees and Court costs in trying this claim. Award of $46,420.00. . . . . p. 237

BROWN VS. DIVISION OF NATURAL RESOURCES (CC-02-264)

Claimant, an employee of respondent, seeks an award of $12,518.00 to replace certain personal property items destroyed by the flooding of the apartment provided by respondent which he is required to live in. Respondent agrees to the validity and amount of the claim. The Court finds respondent was responsible for the damages and that the amount agreed upon is fair and reasonable. Award of $12,518.00. . . . . p. 238

BROWN VS. DIVISION OF HIGHWAYS (CC-02-187)

Claimants' vehicle was damaged when it struck a broken stake in the road on Rt. 33 near Harman, in Randolph County. Respondent agrees to the validity and the amount of the claim. Award of $100.00. . . . . p. 243

CHAPMAN VS. DIVISION OF HIGHWAYS (CC-01-336)

Claimants' vehicle sustained damage in the amount of $444.00 when it struck a hole in the road. Respondent was responsible for the road at issue and agrees that the amount is fair and reasonable. Award of $444.00. . . . . p. 156

ELKINS VS. DIVISION OF HIGHWAYS (CC-01-262)

Claimant's vehicle struck a large hole in the road causing $78.00 in damage. Respondent admits the validity and agrees that the amount is fair and reasonable. Award of $78.00. . . . . p. 152

GHIZ VS. DIVISION OF HIGHWAYS (CC-01-172)

Claimant's vehicle struck a hole in the road causing damage in the amount of $135.33 to which the respondent agreed was fair and reasonable. Award of $135.33. . . . . p. 152

GREGORY VS. DIVISION OF HIGHWAYS (CC-02-278)

Claimant's vehicle was damaged when it struck a piece of shale in the road. Respondent admits the validity and amount of the claim.
Award of $124.02. . . . . p. 239

GUMP VS. DIVISION OF HIGHWAYS (CC-01-380)

Claimant was traveling Rt. 19 near Coburn, Wetzel County, when the horse trailer his truck was pulling struck a large rock in the road damaging the trailer and causing injuries to the horses. Respondent agrees that the amount of damages as put forth are fair and reasonable. Award of $2,000.00. . . . . p. 228

HADDAL VS. DIVISION OF HIGHWAYS (CC-00-518)

Claimant's vehicle struck a storm drain sunk below the road surface causing damage. The Court after reviewing the claim and the stipulation finds respondent was negligent and the amount of the damages is fair and reasonable.
Award of $200.00. . . . . p. 126

HANSHAW VS. DIVISION OF NATURAL RESOURCES (CC-02-307)

Claimant, an employee of respondent, seeks an award of $9,525.00 to replace certain personal property items destroyed by the flooding of the apartment provided by respondent which he is required to live in. Respondent agrees to the validity and amount of the claim. The Court finds respondent was responsible for the damages and that the amount agreed upon is fair and reasonable. Award of $9,525.00. . . . . p. 239

MCQUAIN VS. DIVISION OF HIGHWAYS (CC-01-414)

Respondent agreed that it failed to maintain properly the road which proximately caused claimant to strike a large hole with her vehicle causing damage.

Respondent agrees that the amount of damages as put forth by claimant is fair and reasonable. Award of $916.68. . . . . p. 229

MILLER VS. DIVISION OF HIGHWAYS (CC-02-084)

Claimants' vehicle struck a large crack in the road causing damage in the amount of $258.63. However, the claimants are limited to the amount of their insurance deductible of $250.00, which all parties agreed was fair and reasonable. Award of $250.00. . . . . p. 151

MOORE VS. DIVISION OF HIGHWAYS (CC-01-260)

The Court, having reviewed the facts and the stipulation, finds that the respondent was negligent in not repairing a hole in the road.
Award of $500.00. . . . . p. 157

O'DELL VS. DIVISION OF HIGHWAYS (CC-01-119)

This claim came before the Court based upon stipulation between the parties. Respondent, based upon a representation from representatives of the Town of Rainelle, filled what it was informed was an abandoned sewer line on Greenbrier Ave. with concrete. However, the line was not abandoned and claimant's home was subsequently damaged by flood waters a few months later. Although respondent does not admit its actions were the sole cause of claimant's damages, it admits that the work performed contributed to claimant's damages; and therefore has a moral obligation to pay for these damages in the amount of $7,000.00. The Court agrees that respondent was responsible for the damages and that the agreed amount is fair and reasonable. Award of $7,000.00. . . . . p. 225

POLK VS. DIVISION OF HIGHWAYS (CC-01-285)

Claimant's vehicle struck a piece of metal damaging her gas tank for which she seeks $250.00 in damages. Respondent agrees that it was responsible for the road at issue and agrees that the amount is fair and reasonable.
Award of 250.00. . . . . p. 155

REED VS. DIVISION OF HIGHWAYS (CC-01-165)

Claimant's vehicle struck a hole causing damage in the amount of $500.00 which respondent agreed that it was responsible and that the damages are fair and reasonable. Award of $500.00. . . . . p. 157

RHODES, INDIVIDUALLY AND AS NEXT FRIEND OF ROMAN ALEXANDER TARANTINI, AN INFANT (CC-97-431)

Claimant, Macel Rhodes, and her son Roman Tarantini were traveling on I-79 near Amma, Roane County, when claimant's vehicle struck a large boulder in the road, causing injuries to both claimants. Although respondent did not have notice of this particular boulder falling onto the road, the Court held that it did have notice that rock falls were occurring with increasing frequency at this location. However, respondent failed to place warning signs at this location which the Court held was negligence on the part of respondent. Award of $105,000.00 to Macel Rhodes and $5,000.00 to her son Roman Tarantini. . . . . p. 217

URCHASKO VS. DIVISION OF HIGHWAYS (CC-01-230)

Claimant's vehicle struck two large holes in the road causing $107.68 in damages. The Court having reviewed the facts and stipulation finds that the respondent was negligent in not repairing the holes and the respondent agrees that the amount is fair and reasonable. Award of $107.68. . . . . p. 159

VANGILDER VS. DIVISION OF HIGHWAYS (CC-02-050)

Claimants' concrete driveway was damaged when respondent's 22,000 pound end loader got stuck in mud near claimants' driveway and had to be pulled out by a 39,200 pound Grade-all which had to be driven across respondent's driveway. Claimants seek $2,800.00 to repair their driveway. Respondent agrees to the validity of the claim and that the amount is fair and reasonable.
Award of $2,800.00. . . . . p. 241

WARREN VS. DIVISION OF HIGHWAYS (CC-01-271)

Claimants' vehicle struck a large hole in the road causing $572.87 in damages. However, claimants had insurance coverage with a deductible amount of $250.00. Respondent agreed that the amount of $250.00 was fair and reasonable.
Award of $250.00. . . . . p. 158

STREETS AND HIGHWAYS - See also Comparative Negligence and Negligence

ADAMS VS. DIVISION OF HIGHWAYS (CC-01-113)

Claimant sought award for property damage when her vehicle slid on a patch of ice and slid over a hill. The Court held that respondent did not have notice of the icy condition of the road on the date of this incident. The Court also found that respondent was operating under snow removal and ice control procedures taking care of the primary routes first. The road at issue was a third priority route and unless respondent receives a telephone call about a problem with the road, it is not checked. Claim disallowed. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). . . . . p. 124

ALFORD VS. DIVISION OF HIGHWAYS (CC-00-035)

Claimant was traveling at the intersection of State Route 13 and State Route 1 when he lost control of his vehicle due to ice on the road causing minor injuries and vehicle damage. The Court held that respondent knew or should have known that when they covered up the tile with dirt at this drainage ditch it would force water to run off on this road. The Court made an award in the amount of
$2,201.00. . . . . p. 1

BARTRAM D/B/A/ B&M WRECKER SERVICE VS. DIVISION OF HIGHWAYS (CC-01-070)

Claimant was towing another vehicle when the tow truck he was driving struck a large ditch that extended across the road. Respondent dug the 24 - inch wide ditch across the road in order to placer a drain pipe across the road to remedy a drainage problem. The Court held respondent had actual or constructive notice that

this ditch would settle and create a hazard. Further, respondent was negligent in not placing any warning signs prior to the ditch. Award of $4,031.30. . . . . p. 74

BETTEM VS. DIVISION OF HIGHWAYS (CC-01-226)

Claimant's vehicle sustained damage when it struck a large hole on State Route 7, Wetzel County. The Court made an award as respondent had constructive notice, if not actual notice, of the hole. . . . . p. 28

BLAIR VS. DIVISION OF HIGHWAYS (CC-02-070)

This claim was consolidated with claim CC-02-122, both claims having arisen out of the same or similar set of facts and circumstances. Claimants' were traveling U.S. Route 119 in Upper Shephard's Town, Mingo County, when their vehicles struck a large piece of metal protruding into the road. The Court held that claimants failed to establish by a preponderance of the evidence that respondent had notice and a reasonable amount of time to take corrective action regarding this hazardous condition. Claim disallowed. . . . . p. 222

BUTCHER VS. DIVISION OF HIGHWAYS (CC-01-337)

Claimant's vehicle was damaged while traveling on Patrick Street, in Charleston, which was under construction at the time. As a result of the construction, a water main was protruding from the road by at least seven inches. Claimant's vehicle struck the water main destroying a neon light attached under the frame. The Court held that leaving an unmarked water main protruding this high was a hazard to the traveling public. Award of $233.00. . . . . p. 268

CLEEK VS. DIVISION OF HIGHWAYS (CC-00-026)

The parties stipulated that claimant's vehicle struck a hole in the road surface; that respondent was aware of the condition of the road; and that respondent was negligent. The claimant's award was limited to the amount of his insurance deductible feature of $250.00. . . . . p. 4

COX VS. DIVISION OF HIGHWAYS (CC-99-247)

The parties agreed to stipulate this claim for damage to claimant's vehicle in the amount of $91.63. The parties agreed that respondent failed to maintain Yeager Airport Road in Kanawha County on the date of this incident. . . . . p. 4

DARDEN VS. DIVISION OF HIGHWAYS (CC-01-134)

Where claimant's vehicle struck a large hole on Route 19 in Marion County during construction by respondent's contractor, the Court held that respondent was negligent for failing to inspect the work site conditions. Respondent knew or should have known that the holes were present and its failure to remedy the problem in a timely manner presented a hazard to the traveling public.
Award of $284.84. . . . . p. 60

DEMARY VS. DIVISION OF HIGHWAYS (CC-02-137)

Claimant's daughter was traveling on U.S. Route 19 at its intersection with County Route 19/7 when she lost control of the vehicle and skidded across ice into an embankment. The Court held that respondent 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. *Richards v. Division of Highways,* 19 Ct. Cl. 71 (1992); *McDonald v. Dept. of Highways,* 13 Ct. Cl. 13 (1979); *Christo v. Dotson,* 151 W. Va. 696, 155 S.Ed. 2d 571 (1967). In addition, the Court concluded that Ms. DeMary was driving her automobile in excess of a reasonable speed for the conditions then and there existing. . . . . p. 290

DOLAN VS. DIVISION OF HIGHWAYS (CC-02-184)

Claimant's vehicle was damaged after it struck an object laying on U.S. Route 50 in Harrison County. The Court held that claimant felled to establish the damage to his vehicle was caused by any negligence on the part of the respondent and the Court would not speculate as to what caused the incident. Claim disallowed. . . . . p. 289

EDWARDS VS. DIVISION OF HIGHWAYS (CC-02-180)

Claimant's vehicle struck a portion of a broken sign post while maneuvering it off of Willow Drive in Kanawha County, to avoid an oncoming car. The Court held that claimant's action in maneuvering his vehicle off of the travel portion of the road by at least five to six feet was unreasonable under these circumstances. Claim disallowed. . . . . p. 332

FERREN VS. DIVISION OF HIGHWAYS (CC-02-256)

Claimants' vehicle was damaged when claimant, Kelly Ferren, was traveling on County Route 3 in Taylor County and their vehicle collected tar and gravel, staining portions of the vehicle's paint. The Court held that respondent did not have prior notice that County Route 3 was bleeding tar at the time claimants' vehicle was damaged. Claim disallowed. . . . . p. 294

HIGH VS. DIVISION OF HIGHWAYS (CC-00-156)

Claimant's vehicle was damaged when an object struck his vehicle while he was traveling northbound on I-81 near the Falling Waters Exit in Berkeley County. The Court held that claimant failed to establish the damage to his vehicle was caused by any negligence on the part of the respondent and the Court would not speculate as to what caused the incident. Claim disallowed. . . . . p. 9

HOLBERT VS. DIVISION OF HIGHWAYS (CC-02-053)

Claimants' vehicle was damaged when it struck a concrete block at the edge of the pavement. The driver of the vehicle went to the berm in the face of oncoming traffic, *i.e.,* a truck coming toward her in a narrow section of road. *Sweda v. Dept. of Highways,* 13 Ct. C.. 249 (1980); *Compton v. Division of Highways,* 21 Ct. Cl. 18 91995). The Court held that respondent was negligent in its maintenance of the berm. Award $227.57. . . . . p. 318

HOLCOMB VS. DIVISION OF HIGHWAYS (CC-01-384)

Claimants' vehicle was damaged when it struck numerous large rocks in the road which respondent had intentionally placed there to repair a hole. The Court

held respondent knew or should have known that such rocks were too large for vehicles to safely pass over and that it posed a high risk of damaging tires. Award of $111.30. See *Chapman v. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). . . . . p. 264

HOPPER VS. DIVISION OF HIGHWAYS (CC-01-100)

The parties agreed to stipulate this claim in the amount of $272.39. The parties agreed that respondent failed to maintain Route 22, Harrison County, on the date of this incident. Award $225.00 . . . . . p. 20

JEFFREY VS. DIVISION OF HIGHWAYS (CC-00-168)

Claimant's vehicle struck an iron sign post protruding from the ground on the berm portion of Alternate Route 10 in Cabell County. The Court determined that respondent was negligent in its maintenance of the berm. Award $225.00. *Ginger B. Compton v. Division of Highways*, 21 Ct. Cl. 18 (1995). . . . . p. 38

KANE VS. DIVISION OF HIGHWAYS (CC-02-301)

Claimant's vehicle struck a muffler in the road while traveling on Route 2 in Ohio County. To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). Claim disallowed. . . . . p. 286

KARLEN VS. DIVISION OF HIGHWAYS (CC-01-028)

The parties stipulated that claimant's vehicle was damaged when it struck a hole on Route 33 in Lewis County. The Court reviewed the claim and made an award to claimant based upon the stipulation. . . . . p. 21

MARINO VS. DIVISION OF HIGHWAYS (CC-01-122)

The parties stipulated that claimant's vehicle was damaged when it struck a hole on Route 73 in Monongalia County. The Court reviewed the claim and made an award to claimant based upon the stipulation. . . . . p. 23

MARKEL VS. DIVISION OF HIGHWAYS (CC-99-341)

Claimants seek damages for future medical costs, lost wages, and the loss of their vehicle, allegedly as a result of respondent's failure to place a warning sign prior to a sharp curve in the road. The Court cited the well established principle that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645;46 S.E.2d 81 (1947). . . . . p. 181

MARKEL VS. DIVISION OF HIGHWAYS (CC-99-341)

Claimants seek damages for future medical costs, lost wages, and the loss of their vehicle, allegedly as a result of respondent's failure to place a warning sign prior to a sharp curve in the road. To hold respondent liable for failure to place the proper warning signs, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect and a

reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). . . . . p. 181

MARKEL VS. DIVISION OF HIGHWAYS (CC-99-341)

Claimants seek damages for future medical costs, lost wages, and the loss of their vehicle, allegedly as a result of respondent's failure to place a warning sign prior to a sharp curve in the road. The Court held that claimant failed to establish by a preponderance of the evidence that respondent knew or had reason to know that the curve at issue posed a hazard to the traveling public, in where there were no prior incidents or complaints at this location. Claim disallowed. . . . . p. 181

MARSHALL VS. DIVISION OF HIGHWAYS (CC-99-437)

The parties agreed to stipulate this claim in the amount of $198.18. The parties agreed that respondent failed to maintain Route 14 in Wood County on the date of this incident. . . . . p. 12

MAZZIE VS. DIVISION OF HIGHWAYS (CC-01-361)

Where claimant's vehicle tire was damaged when she drove her vehicle over the sharp and jagged end of a slotted drain pipe at the edge of the road, the Court held that respondent was negligent in its maintenance of the pipe in that it had at least constructive notice that drain slot presented a risk to the traveling public. Award of $166.37. . . . . p. 282

MCCAULEY AND MAYNARD VS. DIVISION OF HIGHWAYS (CC-02-132)

Claimant, Carol Sue McCauley, was traveling on County Route 50/73 in Harrison County when the vehicle went into a drainage ditch at the edge of the roadway. The Court found that the drainage channel adjacent to County Route 50/73 poses a hazard to the traveling public especially in an area where the edge of the pavement is broken at the white edge line. The Court determined that claimants may make a recovery of their insurance deductible as damages in this claim. . . p. 311

MESSER VS. DIVISION OF HIGHWAYS (CC-02-122)

This claim was consolidated with claim CC-02-070, both claims having arisen out of the same or similar set of facts and circumstances. Claimants' were traveling U.S. Route 119 in Upper Shephard's Town, Mingo County, when their vehicles struck a large piece of metal protruding into the road. The Court held that claimants failed to establish by a preponderance of the evidence that respondent had notice and a reasonable amount of time to take corrective action regarding this hazardous condition. Claim disallowed. . . . . p. 224

MICK VS. DIVISION OF HIGHWAYS (CC-00-418)

Claimant's vehicle sustained damaged as a result of a large hole located on County Route 11 in Harrison County. The Court held that respondent had constructive notice of this hazard and a reasonable amount of time to make repairs. The Court also stated that the claimant was twenty percent at fault in failing to exercise due care as he was driving too fast. Award $862.70. . . . . p. 40

POWELL VS. DIVISION OF HIGHWAYS (CC-02-314)

Where claimant's vehicle struck a hole in the road next to a manhole cover that was uneven with the road causing damage to her vehicle, the Court held that respondent had constructive if not actual notice of the defect, and yet failed to remedy the defect or at least warn the public. Award of $238.50. . . . . p. 275

ROBERTSON VS. DIVISION OF HIGHWAYS (CC-00-025)

Claimant's vehicle struck a hole on State Route 62 just west of Clifton, Mason County. The Court held that respondent did not have constructive notice of the defect and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986). Claim disallowed. p.14

STATLER VS. DIVISION OF HIGHWAYS (CC-02-128)

Claimant's vehicle struck a piece of metal in the road while traveling eastbound on Route I-68. The general rule is that for the respondent to be held liable for road hazards of this sort, the claimant must prove that the respondent had actual or constructive notice of the road defect and a reasonable amount of time to take corrective action. *Pritt vs. Dept. of Highways,* 16 Ct. Cl. 8 (1985), Hamon vs. Dept. of Highways, 16 Ct. Cl. 127 (1986). . . . . p. 292

STRICKLAND VS. DIVISION OF HIGHWAYS (CC-02-347)

Claimant's vehicle was struck by an oncoming vehicle as she attempted to make a left turn from a stop sign at an intersection. Claimant was forced to drive her vehicle past the stop sign by one-half a car length in order to check for oncoming traffic. She also had a difficult time seeing due to heavy brush and trees. The Court held that respondent had at least constructive notice that this intersection presented a hazard due to the stop sign being located in a poor location as well as the heavy brush. Both combined to limit claimant's view of oncoming traffic and were the proximate cause of this incident. Award of $250.00. . . . . p. 270

WEASENFORTH VS. DIVISION OF HIGHWAYS (CC-01-175)

The parties agreed to stipulate this claim for damage done to claimant's vehicle in the amount of $858.44. The parties agreed that respondent failed to maintain Route 50 in Clarksburg, Harrison County, on the date of this incident. . . . . p. 25

WOODALL VS. DIVISION OF HIGHWAYS (CC-00-231)

Claimant sustained damage to his motorcycle and personal injuries when his motorcycle slid on sand on WV Route 10 in Cabell County. The parties agreed to stipulate this claim in the amount of $3,551.22. . . . . p. 50

TREES AND TIMBER

BLAKE VS. DIVISION OF HIGHWAYS (CC-01-246)

Claimant's vehicle struck a large tree limb hanging over the road. The Court held that respondent did not have a reasonable amount of time to take corrective action and therefore disallowed the claim. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986). Claim disallowed. . . . . p. 97

HAMBY VS. DIVISION OF HIGHWAYS (CC-01-192)

Claimant's vehicle was damaged when a dead tree fell from respondent's right-of-way onto her vehicle as she was traveling Route 49 in Mingo County. Claimant must establish by a preponderance of the evidence that respondent had notice that this tree presented a potential hazard to the traveling public and that respondent had a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986). Award of $1,100.00. . . . . p. 184

HAMBY VS. DIVISION OF HIGHWAYS (CC-01-192)

Claimant's vehicle was damaged when a dead tree fell from respondent's right-of-way onto her vehicle as she was traveling Route 49 in Mingo County. The Court held that respondent is liable for dangerous trees or tree limbs on its rights-of-way. The general rule is that if a tree is dead and poses an apparent risk, then respondent may be held liable. *Wiles v. Division of Highways*, 22 Ct. Cl. 170 (1999). Award of $1,100.00. . . . . p. 184

HAMBY VS. DIVISION OF HIGHWAYS (CC-01-192)

The Court held that respondent had notice of the hazard presented by this tree and it had a reasonable amount of time to take corrective action. The evidence established that the tree was within respondent's right-of-way and it was dead. Further, the evidence established that respondent had been doing construction work and had made a cut into the hillside from which the tree fell and that the construction work had damaged the tree's soil and root system. Award of $1,1000.00. p. 184

HENSLEY VS. DIVISION OF HIGHWAYS (CC-02-077)

Where claimant's vehicle was damaged by a falling tree while parked in his driveway, the Court held that claimant failed to establish by a preponderance of the evidence that respondent had notice that the tree presented an apparent risk. Claim disallowed. The general rule regarding tree fall claims is that if a tree is dead and poses an apparent risk, then respondent may be liable. When a healthy tree falls as a result of a storm, the Court has held there is insufficient evidence to hold respondent liable. *Wiles v. Division of Highways*, 22 Ct. Cl. 170 (1998); *Gerritsen v. Dept. of Highways*, 16 Ct. Cl. 85 (1986). . . . . p. 214

HYATT VS. DIVISION OF HIGHWAYS (CC-01-269)

The Court held that respondent had no notice, either constructive or actual, of a fallen tree in the road and thus had to deny the claim for damages to claimant's vehicle. *Wiles v. Division of Highways*, 22 Ct. Cl. 170 (1999).
Claim disallowed. . . . . p. 103

JACOB VS. DIVISION OF HIGHWAYS (CC-02-051)

This claim was submitted to the Court upon a Stipulation wherein the parties and the Court agreed that respondent was negligent in permitting its contractor to cut down two trees on claimant's property.
Award of $450.00. . . . . p. 82

JONES VS. DIVISION OF HIGHWAYS (CC-02-327)

Claimant's vehicle was damaged by a tree that fell on his vehicle when he was traveling south on Route 20 in Harrison County. The Court held that when the evidence indicates that respondent does not have notice of a hazard, such as a fallen tree, and a reasonable opportunity to remove it, respondent cannot be held liable. *Jones v. Division of Highways,* 21 Ct. Cl. 45 (1995). Claim disallowed. . p. 293

MORRIS VS. DIVISION OF HIGHWAYS (CC-00-242)

Claimant's vehicle was damaged by a dead tree limb which fell on her vehicle while it was parked on a lot owned and maintained by respondent. The Court held that if a tree is dead and poses an apparent risk, then the respondent may be held liable. *Wiles v. Division of Highways,* 22 Ct. Cl. 170 (1999). The Court made an award in the amount $500.00 for reimbursement of the deductible feature on her insurance policy. . . . . p. 12

PLOCK VS. DIVISION OF HIGHWAYS (CC02-126)

Claimants brought this action for costs incurred in trimming and topping numerous trees adjacent to their property and U.S. Route 40 in Ohio County. Claimants assert that they relied to their detriment upon respondent's representation of its right of way. However, it was later determined that the trees were within respondent's right of way. The Court held that claimants' had a duty to ascertain their own property boundary line and that reliance upon the representation of one of the respondent's employees under these circumstances was not reasonable. p. 319

SMITH VS. DIVISION OF HIGHWAYS (CC-00-369)

Claimants sought an award for damage caused to their building by a large tree which fell from respondent's property onto the building. The Court held that respondent did not have notice that the tree at issue posed a risk of falling. Claim disallowed. *See Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). . . . . p. 174

SMITH VS. DIVISION OF HIGHWAYS (CC-00-369)

Claimants sought an award for damage caused to their building by a large tree which fell from respondent's property onto the building. The general rule is that if a tree is dead and poses an apparent risk, then respondent may be liable. *Wiles v. Dept. of Highways,* 22 Ct. Cl. 170 (1999). . . . . p. 174

SMITH VS. DIVISION OF HIGHWAYS (CC-00-369)

When a healthy tree falls and causes property damage as a result of a storm, the Court has held that there is insufficient evidence of negligence upon which to justify an award. *Gerristen v. Dept. of Highways,* 16 Ct. Cl. 85 (1986). . . . . p.

SMITH VS. DIVISION OF HIGHWAYS (CC-00-369)

Claimant failed to establish by a preponderance of the evidence a logical explanation as to why the tree fell and how respondent had notice of the risk. For the Court to determine why the tree fell on the date of the incident would require the Court to speculate which it will not do. *Mooney v. Dept. of Highways,* 16 Ct. Cl. 84 (1986); *Phares v. Division of Highways,* 21 Ct. Cl. 92 (1996). . . . . p. 174

VENDOR

ALLEGHENY VOICE & DATA, INC. VS. PUBLIC SERVICE COMMISSION (CC-01-283)

Award of $831.55 for providing technical labor and services for the installation of fax lines to the respondent State agency. Documentation was not processed for payment in the proper fiscal year. The Court made an award for these services. . . . . p. 27

ALLTEL CORPORATION VS. DIVISION OF CORRECTIONS (CC-01-048)

Claimant sought $1,181.36 for providing telephone services to respondent. Claimant and respondent reviewed the Answer of the respondent and the parties agreed that the correct amount owed is $600.00. The Court made an award for the services. . . . . p. 28

ARAMARK UNIFORM SERVICES VS. DIVISION OF CORRECTIONS (CC-02-382)

Claimant seeks $207.83 for uniform services it provided to respondent's employees. The documentation was not provided for payment in the proper fiscal year; therefore, claimant has not been paid. Respondent admits the validity and the amount of the claim and that there were sufficient funds available.
Award of $207.83. . . . . p. 231

AT&T CORPORATION VS. DEPARTMENT OF ADMINISTRATION (CC-01-397)

This claim was submitted to the Court for decision upon the Petition, Answer, and Memorandum of Understanding filed by the parties wherein the facts and circumstances of the claim were agreed upon. Claimant provided telecommunications services to various State agencies during fiscal years 1999 and 2000 for which claimant has not received reimbursement. The Court held that respondent has a legal and moral obligation to compensate claimant in the amount of $627,977.83. . . . . p. 73

BREWER & COMPANY OF WEST VIRGINIA, INC. VS. DIVISION OF JUVENILE SERVICES (CC-01-457)

Award of $500.00 for providing sprinkler system inspections at a facility of respondent. Documentation was not processed for payment in the proper fiscal year. . . . . p. 58

BUREAU OF EMPLOYMENT PROGRAMS VS. DIVISION OF CORRECTIONS (CC-02-423)

The Court made an award of $1,031.39 for benefits due former employees at Anthony Creek Correctional Center a facility of the respondent. The documentation was not processed for payment in the proper fiscal year and respondent admits the validity and the amount of the claim. . . . . p. 235

CARTE VS. BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES (CC-03-196)

Award of $3,300.00 for providing consultant services to respondent. The documentation was not processed for payment in the proper fiscal year and respondent admits the validity and the amount of the claim. . . . . p. 334

CHARLESTON PSYCHIATRIC GROUP, INC. VS. DIVISION OF JUVENILE SERVICES (CC-01-239)

Award of $1,300.00 for providing medical services to a juvenile at respondent's facility. Documentation was not processed for payment in the proper fiscal year. . . . . p. 3

CITIZENS COMMUNICATIONS CO. OF WEST VIRGINIA VS. DEPARTMENT OF ADMINISTRATION (CC-01-281)

The parties agreed to stipulate this claim for telecommunication services provided to various State agencies during fiscal years 1998, 1999, and 2000, in the amount of $821,053.59. . . . . p. 35

COMMERCIAL VEHICLE SAFETY ALLIANCE VS. PUBLIC SERVICE COMMISSION (CC-02-402)

Claimant seeks an award of $39,291.28 for providing services to respondent State agency. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore claimant was not paid. There were sufficient funds expired. Award of $39,291.28. . . . . p. 234

DAY D.V.M. VS. WV RACING COMMISSION (CC-01-476)

Claimant sought $8,280.00 plus $849.00 in interest for providing veterinarian services to respondent at Mountaineer Racetrack. Respondent admits the validity of the claim and the amount including the interest charges. The documentation for these services was not provided by claimant within the appropriate year; there were sufficient funds expired at the end of the proper fiscal year from which the bill could have been paid. The Court held that claimant was due an award of $8,280.00. but no interest was awarded. W.V. Code §4-2-12 does not allow for the payment of interest unless the contract specifically provides for interest. . . . . p. 77

DEPARTMENT OF ADMINISTRATION VS. DIVISION OF JUVENILE SERVICES (CC-02-028)

Award of $7,649.73 for providing vehicle services to various employees of respondent. The documentation for these services was not processed in the proper fiscal year; there were sufficient funds available at the end of the proper fiscal year from which the bill could have been paid. . . . . p. 77

DIVISION OF HIGHWAYS VS. ALCOHOL BEVERAGE CONTROL ADMINISTRATION (CC-01-199)

Claimant sought $1,179.38 for providing service and repairs to numerous vehicles of the respondent's. The documentation was not processed for payment

within the appropriate fiscal year; sufficient funds were expired. The Court made an award for the services. . . . . p. 7

DIVISION OF LIFELONG LEARNING - OHIO UNIVERSITY VS. DIVISION OF JUVENILE SERVICES (CC-02-023)

Claimant seeks award for conference fees for two employees of respondent's. The documentation for the services was not processed within fiscal year; therefore claimant was not paid. There were sufficient funds expired to pay the invoice. Award of $3,700.00. . . . . p. 78

DUNNETT VS. RACING COMMISSION(CC-01-412)

Claimant provided consultant services and expert testimony for respondent. The documentation was not processed for payment within the appropriate fiscal year; sufficient funds were expired. The Court made an award for the services. . p. 52

EURO SUITES HOTEL VS. ATTORNEY GENERAL (CC-01-398)

Claimant provided hotel services for an employee of the respondent for which it was not paid in the proper fiscal year. The Court made an award for these services. . . . . p. 36

FLAT IRON DRUG STORE, INC. V. DIVISION OF CORRECTIONS (CC-01-351)

Award $103.59 for providing pharmacy services for inmates in the custody of respondent but being housed temporarily in the McDowell County Jail. The documentation for these services was not processed in the proper fiscal year; sufficient funds expired. . . . . p. 71

GOODYEAR TIRE AND RUBBER COMPANY VS. STATE FIRE MARSHALL (CC-03-123)

Award $438.54 for merchandise and services received by respondent. The documentation for these services was not processed in the proper fiscal year; sufficient funds was expired. . . . . p. 333

JOHNSON CONTROLS, INC. VS. PUBLIC SERVICE COMMISSION (CC-01-356)

Award $2,504.25 for heating, air conditioning, and ventilation services to respondent. The documentation for these services was not processed in the proper fiscal year; sufficient funds was expired. . . . . p. 39

NELSON VS. BUREAU OF EMPLOYMENT PROGRAMS/WORKERS' COMPENSATION PROGRAMS (CC-03-011)

Claimant was awarded $500.00 for reimbursement of the cost of an independent medical examination performed in the prosecution of a compensable claim before the respondent State agency. The documentation for these services was not processed in the proper fiscal year. Respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired from which the bill could have been paid. . . . . p. 324

OHIO VALLEY MEDICAL CENTER VS. DIVISION OF JUVENILE SERVICES (CC-01-363)

Claimant was awarded $165.07 for providing medical services to a juvenile at the Northern Reg. Juvenile Detention Center. The documentation for these services was not processed in the proper fiscal year. Respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired from which the bill could have been paid. . . . . p. 66

PAULEY VS. PUBLIC SERVICE COMMISSION (CC-02-454)

Claimant, an employee of respondent, seeks $288.03 for reimbursement of travel expenses incurred in his capacity as an employee for respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore claimant has not been paid. Respondent admits the validity of the claim and the amount, and states that sufficient funds were expired. Award of $288.03.. . . . . p. 234

PITNEY BOWES CREDIT CORPORATION VS. DIVISION OF JUVENILE SERVICES (CC-01-459)

Claimant seeks an award of $639.02 for providing equipment to respondent's facility. The documentation for these services was not processed for payment in the appropriate fiscal year. Respondent admits the validity and amount of claim and states that sufficient funds were expired in appropriate fiscal year. Award of $639.02. . . . . p. 67

RIDGE RUNNER INDUSTRIES VS. STATE FIRE MARSHALL (CC-02-182)

Claimant seeks an award of $2,136.00 for three camper tops purchased by respondent. The documentation for these services was not processed for payment in the appropriate fiscal year, therefore, respondent has not been paid. Respondent admits the validity and amount of the claim and that sufficient funds were expired. Award of $2,136.00. . . . . p. 139

SMITH VS. DIVISION OF LABOR (CC-01-379)

Claimant sought $1,000.00 for classroom training provided to students seeking contractor's license. The documentation for these services was not processed for payment within the appropriate fiscal year and therefore, claimant was not paid. There were sufficient funds expired in appropriate fiscal year from which bill could have been paid. Award of $1,000.00. . . . . p. 68

SPECIAL SERVICES VS. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-02-496)

Claimant seeks $3,550.00 for providing service of process for the Bureau of Child Support Enforcement a facility of respondent. The documentation for these services was not provided in the proper fiscal year; therefore claimant was not paid. Respondent admits the validity and the amount of the claim and states that sufficient funds were available. Award of $3,550.00. . . . . p. 241

STATEWIDE SERVICE, INC. VS. DIVISION OF CORRECTIONS (CC-01-184)

Claimant repaired and installed necessary parts on equipment at a facility of respondent for which it was not paid in the proper fiscal year. The Court made an award for these services. . . . . p. 15

TELEPAGE COMMUNICATION SYSTEMS VS. DIVISION OF JUVENILE SERVICES (CC-02-269)

Claimant seeks $105.30 for providing paging services to respondent Respondent admits the validity of the claim as well as the amount and that there were sufficient funds expired. Award of $105.30 . . . . . p. 161

THE WATER SHOP VS. WEST VIRGINIA GRIEVANCE BOARD (CC-02-100)

Claimant seeks $410.00 for providing bottled water to respondent's facility. The documentation was not processed within the appropriate fiscal year, therefore, claimant has not been paid. Respondent admits the validity and amount and sufficient funds were expired. Award 0f $410.00. . . . . p. 124

WEST PUBLISHING CORPORATION VS. DIVISION OF CORRECTIONS (CC-02-473)

Claimant seeks $232.68 for a subscription sent to the respondent's main office. Respondent admits the validity and the amount of the claim. The Court, being aware that respondent does not have a method for paying claims of this nature, makes an award for this claim in the amount of $232.68. . . . . p. 236

WEST GROUP, A THOMPSON COMPANY VS. DIVISION OF CORRECTIONS (CC-01-443)

Claimant seeks $161.00 for legal reference books it provided to Pruntytown Correctional Center. The documentation for the books was not processed within the appropriate fiscal year, therefore, claimant has not been paid. Respondent admits validity of claim and that sufficient funds were expired from which the invoice could have been paid. Award of $161.00. . . . . p. 69

WEST VIRGINIA NETWORK FOR EDUCATIONAL TELECOMMUTING VS. DIVISION OF CORRECTIONS (CC-02-068)

Claimant seeks $20.00 for providing educational telecommuting services to Mt. Olive Correctional Complex. The documentation for these services was not processed in the appropriate fiscal year, therefore, claimant has not been paid. Respondent admits the validity and the amount of the claim and that sufficient funds were expired. Award of $20.00. . . . . p. 111

WEST VIRGINIA SCHOOL SERVICE PERSONNEL ASSOCIATION VS. BUREAU OF EMPLOYMENT PROGRAMS/ WORKERS' COMPENSATION DIVISION (CC-03-012)

Claimant seeks reimbursement of court reporting services incurred in the prosecution of a compensable claim before the respondent. Respondent admits the validity and the amount of the claim and that sufficient funds were expired. Award of $103.95. . . . . p. 324

WEST VIRGINIA SCHOOL SERVICE PERSONNEL ASSOCIATION VS. BUREAU OF EMPLOYMENT PROGRAMS/ WORKERS' COMPENSATION DIVISION (CC-03-013)

Claimant seeks reimbursement of a fee paid to a treating physician for professional services rendered during a deposition taken by the parties in a Workers' Compensation claim. Respondent admits the validity and the amount of the claim and that sufficient funds were expired. Award of $500.00 . . . . . p. 334

WEST VIRGINIA UNIFORMS VS. DIVISION OF CORRECTIONS (CC-02-083)

Claimant provided trousers to Mt. Olive Correctional Complex. The documentation was not processed for payment within the appropriate fiscal year, and thus claimant has not been paid. Respondent admits the validity and amount of the claim and sufficient funds expired. Award of $934.80. . . . . p. 111

WV STATE COLLEGE/WV EDNET VS. DIVISION OF BANKING (CC-01-374)

Claimant provided teleconferencing services to respondent. The documentation for these services was not processed in the proper fiscal year; sufficient funds expired. Award $45.75. . . . . p. 50

XEROX CORPORATION VS. ALCOHOL BEVERAGE CONTROL ADMINISTRATION (CC-02-142)

Claimant seeks an award of $1,408.72 for monthly maintenance charges for a copier. Respondent admits the validity of the charges but states the actual amount owed is $1,408.68. There were sufficient funds expired in the proper fiscal year. Award of $1,408.68. . . . . p. 139

XEROX CAPITAL SERVICES, LLC VS. DEPARTMENT OF TAX AND REVENUE (CC-02-263)

Claimant seeks payment in the amount of $818.00 for monthly equipment, services and supplies. The documentation for these services was not processed in the appropriate fiscal year therefore claimant has not been paid. Respondent admits the validity and the amount and states that sufficient funds were expired. Award of $818.00. . . . . p. 162

VENDORS - Denied because of insufficient funds - see opinion **:** *Airkem Sales and Services, et al. vs. Dept. of Mental Health,* 8 Ct. Cl. 180 (1971). Although the Court denied the following claims, the Legislature considered the claims in Overexpenditure Bills; declared the claims to be moral obligations of the State; and funds to pay the claims were provided to the Court.

ANTHONY CREEK RESCUE SQUAD VS. DIVISION OF JUVENILE SERVICES (CC-02-217)

The Court disallowed a claim in the amount of $481.50 for providing medical transportation services for an inmate at Anthony Correctional Center. Respondent admitted the validity of the claim but stated there were insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. Claim disallowed. . . . . p. 137

ARAMARK CORRECTIONAL FOODSERVICE VS. DIVISION OF CORRECTIONS (CC-01-385)

The Court disallowed a claim for food services provided to a facility of the respondent. Respondent admitted the validity of the claim but stated there were insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. . . . . p. 57

ASSOCIATED RADIOLOGISTS, INC. VS. DIVISION OF CORRECTIONS (CC-02-285)

The Court disallowed a claim for $127.00 for medical services rendered to an inmate in the custody of the respondent, as there were insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. Claim disallowed. . . . . p. 170

BHIRUD VS. DIVISION OF CORRECTIONS (CC-02-215)

Claimant sought payment of $4,400.36 for medical services provided to inmates. Respondent admits the validity of the claim but states the amount is $4,015.36. However, there were insufficient funds available in the appropriate fiscal year from which the claim could have been paid. Claim disallowed. . . . . p. 161

BHIRUD VS. DIVISION OF CORRECTIONS (CC-02-482)

Claimant seeks payment in the amount of $10,316.65 for medical services rendered to inmates in the custody of respondent at Mt. Olive Correctional Complex. Respondent admits the validity but states the correct amount owed is $9,991.65. Claimant agrees to this amount; however, there were insufficient funds in respondent's appropriation for the fiscal year from which to pay the claim. Claim disallowed. . . . . p. 254

CARILION PATIENT TRANSPORTATION, LLC VS. DIVISION OF CORRECTIONS (CC-01-447)

The Court disallowed a claim for medical transportation services provided for an inmate in the custody of respondent. Respondent admitted the validity of the claim but stated there were insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. . . . . p. 58

CHARLESTON AREA MEDICAL CENTER VS. DIVISION OF CORRECTIONS (CC-01-303)

The Court disallowed a claim for medical services provided to an inmate in the custody of respondent. Respondent admitted the validity of the claim but stated there were insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. . . . . p. 19

CHARLESTON AREA MEDICAL CENTER VS. DIVISION OF CORRECTIONS (CC-01-300)

The Court denied a claim for medical services provided to an inmate in the custody of respondent. Respondent admitted the validity of the claim, but stated there were insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. . . . . p. 34

CHARLESTON CARDIOLOGY GROUP VS. DIVISION OF CORRECTIONS (CC-02-512)

The Court disallowed a claim for $162.00 for medical services rendered to an inmate in the custody of respondent at Mt. Olive Correctional Complex, as there were insufficient funds available in the appropriate fiscal year from which to pay the claim. Claim disallowed. . . . . p. 258

CHARLESTON HEART SPECIALISTS VS. DIVISION OF CORRECTIONS (CC-02-448)

The Court denied a claim for $1,780.00 for medical services rendered to an inmate in the custody of respondent at Mt. Olive Correctional facility, as there were insufficient funds available from which to pay the claim.
Claim disallowed. . . . . p. 255

CHARLESTON PSYCHIATRIC GROUP, INC. VS. DIVISION OF CORRECTIONS (CC-02-321)

The Court denied this claim for $1,766.78 for medical services rendered to inmates at the Northern Correctional Facility, as there were insufficient funds expired in the proper fiscal year from which to pay this claim. Claim disallowed. p. 168

CHARLESTON RADIATION THERAPY VS. DIVISION OF CORRECTIONS (CC-02-087)

Claimant brought an action to recover $8,339.00 for medical services provided to an inmate at Mt. Olive Correctional Center. The Court disallowed the claim as there were insufficient funds expired in the appropriate fiscal year. . p. 98

CORRECTIONAL MEDICAL SERVICES, INC. VS. DIVISION OF CORRECTIONS (CC-01-432)

The Court denied a claim for $67,872.01for medical services rendered to inmates in the custody of respondent. Respondent admitted the validity of the claim, but stated there were insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. . . . . p. 59

COTTRILL'S CARS, INC. VS. DIVISION OF CORRECTIONS (CC-02-168)

The Court disallowed a claim in the amount of $522.65 for expenses incurred by claimant when an inmate from St. Mary's Correctional Center escaped and stole one of claimant's cars. Respondent admits the validity of the claim, but states that there were insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. Claim disallowed. . . . . p. 135

DAGHER VS. DIVISION OF CORRECTIONS (CC-02-338)

The Court disallowed this claim in the amount of $1,275.00 for medical services provided to an inmate at Mount Olive Correctional Center, as there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim. Claim disallowed. . . . . p. 165

DAVIS VS. DIVISION OF CORRECTIONS (CC-01-413)

The Court disallowed a claim for medical services provided to inmates at Huttonsville Correctional Center, as there were insufficient funds expired in the appropriate fiscal year. . . . . p. 61

DAVIS MEMORIAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-02-188)

The Court denied a claim for $498.00 for medical services rendered to an inmate, as there were insufficient funds expired in the appropriate fiscal year. Claim disallowed. . . . . p. 133

DAVIS MEMORIAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-02-300)

The Court denied a claim for $20,000.65 for medical services provided to inmates at Huttonsville Correctional Center, as there were insufficient funds expired in the appropriate fiscal year. Claim disallowed. . . . . p. 163

DAVIS MEMORIAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-02-459)

Claimant seeks an award in the amount of $22,693.12 for medical services provided to inmates in the custody of respondent at Huttonsville Correctional Center and Denmar Correctional Center. Respondent admits the validity of the claim but states that the correct amount due is $20,702.30 and that there were insufficient funds in its appropriation for the fiscal year from which to pay the claim. Claim disallowed. . . . . p. 258

FAIRMONT GENERAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC02-472)

The Court denied a claim in the amount of $2,348.25 for medical services rendered to an inmate being held at the Harrison County Jail for respondent, as there were insufficient funds expired in the proper fiscal year from which to pay the claim. Claim disallowed. . . . . p. 235

GALL VS. DIVISION OF CORRECTIONS (CC-02-332)

The Court denied a claim in the amount of $1,310.00 for medical services provided to an inmate, as there were insufficient funds expired in the proper fiscal year. Claim disallowed. . . . . p. 164

GENERAL AMBULANCE, INC. VS. DIVISION OF CORRECTIONS (CC-02-341)

The Court denied a claim in the amount of $1,067.50 for medical services rendered to an inmate, as there were insufficient funds expired in the proper fiscal year. Claim disallowed. . . . . p. 168

GENERAL ANESTHESIA SERVICES VS. DIVISION OF CORRECTIONS (CC02-388)

The Court disallowed a claim in the amount of $1,050.00 for medical services rendered to an inmate in the custody of respondent at Mount Olive

Correctional Complex, as there were insufficient funds expired in the proper fiscal year from which to pay the claim. . . . . p. 232

GRAFTON CITY HOSPITAL VS. DIVISION OF CORRECTIONS (CC-02-002)
The Court disallowed a claim for $31,006.11 for medical services rendered to inmates in the custody of respondent. Respondent admitted the validity of the claim, but stated there were insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. . . . . p. 72

GRAFTON CITY HOSPITAL VS. DIVISION OF CORRECTIONS (CC-02-467)
Claimant seeks payment for $29,820.47 for medical services rendered to inmates in the custody of respondent at Pruntytown Correctional Center. Respondent admits validity of the claim, but states the actual amount owed is $19,897.80. There were insufficient funds expired in the proper fiscal year from which to pay the
claim. . . . . p. 256

HEALTHNET AEROMEDICAL SERVICES VS. DIVISION OF CORRECTIONS (CC-02-195)
The Court disallowed a claim for $8,530.99 for medical transportation services provided for an inmate at Huttonsville Correctional Center. Respondent admitted the validity of the claim, but there were insufficient funds expired in the fiscal year from which the claim could have been paid. . . . . p. 132

HEALTHNET AEROMEDICAL SERVICES VS. DIVISION OF CORRECTIONS (CC-02-328)
The Court disallowed a claim for $5,064.15 for transportation services rendered to an inmate at Pruntytown Correctional Center, as there were insufficient funds expired in the proper fiscal year from which to pay the claim.
Claim disallowed. . . . . p. 164

HEALTHNET AEROMEDICAL SERVICES VS. DIVISION OF CORRECTIONS (CC-02-223)
The Court denied this claim for $4,070.96 for medical transportation services provided for an inmate at Pruntytown Correctional Center, as there were insufficient funds expired in the proper fiscal year from which to pay the claim.
Claim disallowed. . . . . p. 170

HENDERSON VS. DIVISION OF CORRECTIONS (CC-02-190)
The Court denied this claim for $1,181.74 for medical services rendered to an inmate at Huttonsville Correctional Center, as there were insufficient funds available in the proper fiscal year from which to pay the claim.
Claim disallowed. . . . . p. 171

HIGH VS. DIVISION OF CORRECTIONS (CC-00-156)
Claimant sought $408.00 for medical services rendered to inmates in the custody of respondent. The Court disallowed the claim as there were insufficient funds expired in the appropriate fiscal year. . . . . p. 9

INTEGRATED HEALTHCARE PROVIDERS VS. DIVISION OF CORRECTIONS (CC-02-052)

Claimants sought $50,520.01 for medical services rendered to inmates. Respondent admits the validity of the claim, but the parties stipulated the actual amount at $35,290.71. The Court disallowed the claim due to insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. . . . . p. 82

JAN CARE AMBULANCE VS. DIVISION OF CORRECTIONS (CC-02-485)

The Court disallowed a claim for $595.00 for emergency transportation services rendered to an inmate in the custody of respondent, as there were insufficient funds expired at the end of the fiscal year.
Claim disallowed. . . . . p. 257

KATRIB VS. DIVISION OF CORRECTIONS (CC-02-318)

Claimant seeks $74.68 for medical services he provided to an inmate at one of respondent's facilities. Respondent admits the validity and the amount but states that there were insufficient funds in its appropriation from which to pay the bill.
Claim disallowed. . . . . p. 165

KATRIB VS. DIVISION OF CORRECTIONS (CC-02-317)

The Court denies this claim in the amount of $84.23 for medical services rendered by the claimant at Mount Olive Correctional Complex, as there were insufficient funds expired at the end of the fiscal year.
Claim disallowed. . . . . p. 166

KATRIB VS. DIVISION OF CORRECTIONS (CC-02-339)

The Court denies this claim in the amount of $84.23 for medical services rendered by the claimant at Mount Olive Correctional Complex, as there were insufficient funds expired at the end of the fiscal year.
Claim disallowed. . . . . p. 166

MCDOWELL COUNTY AMBULANCE SERVICE AUTHORITY, INC. VS. DIVISION OF CORRECTIONS (CC-02-040)

The Court denies this claim in the amount of $2,042.50 for transportation services rendered to inmates in the custody of respondent being held in the McDowell County Jail, as there were insufficient funds expired at the end of the fiscal year. Claim disallowed. . . . . p. 169

MEDICAL PARK ANESTHESIOLOGISTS VS. DIVISION OF CORRECTIONS (CC-02-320)

Claimant sought $715.00 for medical services provided to an inmate at Northern Regional Jail. The Court disallowed the claim as there were insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. Claim disallowed. . . . . p. 163

MCGINNIS, M.J., M.D. VS. DIVISION OF CORRECTIONS (CC-02-008)

The Court disallowed a claim for $350.00 for dental services rendered to an inmate in the custody of respondent. Respondent admitted the validity of the claim, but stated there were insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. . . . . p. 71

MONTGOMERY RADIOLOGISTS, INC. VS. DIVISION OF CORRECTIONS (CC-02-225)

The Court denied a claim for $150.00 for medical services rendered to an inmate at Mount Olive Correctional Complex, as there were insufficient funds expired in the appropriate fiscal year. Claim disallowed. . . . . p. 169

NORONHA VS. DIVISION OF CORRECTIONS (CC-02–192)

The Court disallowed a claim for $286.00 for medical services rendered to an inmate in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year. Claim disallowed. . . . . p. 133

NORONHA VS. DIVISION OF CORRECTIONS (CC-02-289)

The Court disallowed a claim for $1,181.74 for medical services rendered to an inmate in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year. Claim disallowed. . . . . p. 171

PHARMACY ASSOCIATES, DBA OPTION CARE VS. DIVISION OF CORRECTIONS (CC-02-067)

The Court disallowed a claim for $16,871.59 for medical services rendered to inmates in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year from which to pay the claim. Claim disallowed. p. 231

POCAHONTAS MEMORIAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-01-407)

The Court disallowed a claim for $10,922.13 for medical services rendered to inmates. Respondent admitted validity of the claim, but stated that there were insufficient funds available in the appropriate fiscal year from which the claim could have been paid. . . . . p. 67

POCAHONTAS MEMORIAL HOSPITAL (CC-02-206)

The Court disallowed a claim for $3,629.12 for medical services provided to inmates in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year. Claim disallowed. . . . . p. 134

RALEIGH GENERAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-02-464)

Claimant seeks an award of $7,604.56 for medical services rendered to an inmate in the custody of respondent. Respondent admits the validity of the claim in its Answer but states the actual amount due is $6,046.20 with which claimant agrees. However, respondent states that there were insufficient funds available in its appropriation for the fiscal year from which to pay the claim.
Claim disallowed. . . . . p. 242

THOMAS MEMORIAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-03-098)

The Court denied a claim for $5,472.50 for medical services rendered to an inmate in the custody of respondent at Mount Olive Correctional Complex. Respondents admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year from which to pay the claim. Claim disallowed. . . . . p. 326

THOMAS MEMORIAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-02-038)

The Court disallowed a claim for $35,206.13 for medical services provided to inmates at Mt. Olive. Respondent admitted the validity of the claim but stated there were insufficient funds expired in the proper fiscal year from which the claim could have been paid. . . . . p. 93

UNITED HOSPITAL CENTER VS. DIVISION OF CORRECTIONS (CC-02-377)

The Court disallowed a claim for $1,775.91 for medical services rendered to inmates at respondent's facility, as there were insufficient funds available in the appropriate fiscal year from which to pay the claim. . . . . p. 230

UNITED HOSPITAL CENTER VS. DIVISION OF CORRECTIONS (CC-02-418)

Claimant seeks an award of $2,119.79 for medical services rendered to an inmate in the custody of respondent at Pruntytown Correctional Center a facility of the respondent. While respondent admits the validity of the claim, it states the correct amount owed is $138.42 and that there are insufficient funds available from which to pay the claim. Claim disallowed. . . . . p. 236

UNIVERSITY HEALTH ASSOCIATES VS. DIVISION OF CORRECTIONS (CC-02-257)

Claimant seeks an award of $183,332.75 for medical services rendered to inmates in the custody of respondent at numerous facilities. Respondent admits the validity of the claim, but states that the correct amount owed is $154,411.00. There were insufficient funds expired in the appropriate fiscal year from which to pay the claim. Claim disallowed. . . . . p. 255

UNITED HOSPITAL CENTER VS. DIVISION OF CORRECTIONS (CC-02-409)

The Court disallowed a claim for $457.83 for medical services rendered to inmates at respondent's facility, as there were insufficient funds available in the appropriate fiscal year from which to pay the claim. . . . . p. 230

UNIVERSITY HEALTH ASSOCIATES VS. DIVISION OF CORRECTIONS (CC-01-222)

The Court disallowed a claim for $64,677.34 for medical services rendered to an inmate in the custody of respondent. Respondent admitted the validity of the claim, but stated there were insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. . . . . p. 49

VERIZON WEST VIRGINIA, INC. VS. DEPARTMENT OF

ADMINISTRATION (CC-01-399)
This claim was submitted to the Court for decision upon a Memorandum of Understanding entered into by claimant and respondent. Claimant provided telecommunication services to various State agencies during fiscal years 1998, 1999, and 2000. The Court made an award based upon the Memorandum of Understanding in the amount of $2,474,623.99. . . . . p. 57

VISION HEALTH CARE, INC. VS. DIVISION OF CORRECTIONS (CC-02-207)
The Court disallowed a claim for $19.00 for medical services rendered to an inmate in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year from which to pay the claim. . . . . p. 142

WELCH COMMUNITY HOSPITAL VS. DIVISION OF CORRECTIONS (CC-01-366)
The Court disallowed a claim for $19,341.00 for medical services rendered to an inmate in the custody of respondent. Respondent admitted the validity of the claim, but stated there were insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. . . . . p. 49

WEST VIRGINIA ASSOCIATION OF REHABILITATION FACILITIES VS. DEPT. OF ADMINISTRATION (CC-02-471)
The Court denied a claim for $639.84 for providing a temporary typist to respondent's accounting office in Charleston as there were insufficient funds expired in the appropriate fiscal year. Claim disallowed. . . . . p. 253

WEST VIRGINIA UNIVERSITY HOSPITALS VS. DIVISION OF CORRECTIONS (CC-01-433)
The Court disallowed a claim for $471,602.81for medical services provided to inmates in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year from which to pay the claim. . . . . p. 69

WEST VIRGINIA UNIVERSITY HOSPITALS VS. DIVISION OF CORRECTIONS (CC-02-212)
The Court disallowed a claim in the amount of $612.50 for medical services rendered to inmates in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year from which to pay the claim.
Claim disallowed. . . . . p. 140

WEST VIRGINIA UNIVERSITY HOSPITALS VS. DIVISION OF CORRECTIONS (CC-02-157)
The Court disallowed a claim in the amount of $2,867.09 for medical services rendered to an inmate at Pruntytown Correctional Center, as there were insufficient funds expired in the appropriate fiscal year from which to pay the claim.
Claim disallowed. . . . . p. 140

WEST VIRGINIA UNIVERSITY HOSPITALS VS. DIVISION OF CORRECTIONS (CC-02-156)

The Court disallowed a claim in the amount of $2,062.44 for medical services provided to an inmate in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year from which to pay the claim. Claim disallowed. . . . . p. 141

WEST VIRGINIA UNIVERSITY HOSPITALS INC. VS. DIVISION OF CORRECTIONS (CC-02-220)

The Court disallowed a claim in the amount of $28,084.66 for medical services rendered to inmates in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year from which to pay the claim. Claim disallowed. . . . . p. 160

WEST VIRGINIA UNIVERSITY HOSPITALS VS. DIVISION OF CORRECTIONS (CC-02-155)

The Court disallowed a claim for $19,918.15 for medical services rendered to inmates, as there were insufficient funds expired in the appropriate fiscal year from which to pay the claim. Claim disallowed. . . . . p. 160

WEST VIRGINIA UNIVERSITY HOSPITALS INC. VS. DIVISION OF CORRECTIONS (CC-03-008)

The Court disallowed a claim for $3,859.08 for medical services rendered to inmates in the custody of respondent at Huttonsville Correctional Center, a facility of the respondent, as there were insufficient funds available in its appropriation for the fiscal year from which to pay the claim. Claim disallowed. . . . . p. 256

WHEELING HOSPITAL VS. DIVISION OF CORRECTIONS (CC-02-201)

The Court disallowed a claim for $13,302.75 for medical services rendered to an inmate in respondent's custody, as there were insufficient funds expired in the appropriate fiscal year from which to pay the claim. . . . . p. 135

WHEELING HOSPITAL VS. DIVISION OF CORRECTIONS (CC-02-209)

The Court disallowed a claim for $2,565.56 for medical services rendered to an inmate in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year from which to pay the claim. Claim disallowed. p. 141

WHEELING HOSPITAL VS. DIVISION OF CORRECTIONS (CC-02-208)

The Court disallowed a claim for $242.54 for medical services rendered to an inmate in the custody of respondent at Huttonsville Correctional Center, as there were insufficient funds expired in the appropriate fiscal year from which to pay the claim. Claim disallowed. . . . . p. 142

W. VA. UNIVERSITY

SCRAGG VS. HIGHER EDUCATION POLICY COMMISSION (CC-01-026)

This claim for damages to claimant's personal property came before the Court for decision upon a stipulation entered into by the partes. The Court having reviewed the facts and the stipulation finds that the respondent was negligent in its

maintenance of Brooke Towers and agrees that the amount of damages as stipulated is fair and reasonable. . . . . p. 25