STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the Period from July 1, 2003

to June 30, 2005

by

CHERYLE M. HALL

CLERK

Volume XXV

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OF THE
STATE COURT OF CLAIMS

HONORABLE DAVID M. BAKER . . . . . Presiding Judge

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

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

HONORABLE ROBERT B. SAYRE . . . . . Interim Judge

HONORABLE GEORGE F. FORDHAM . . . . . Judge

CHERYLE M. HALL . . . . . Clerk

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

FORMER JUDGES

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

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

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

HONORABLE W. LYLE JONES . . . . . July 1,1974 to June 30, 1976

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

HONORABLE BENJAMIN HAYS WEBB, II . . . . . March 17, 1993 to March 17, 2004

INTERIM JUDGES

HONORABLE GEORGE F. FORDHAM . . . . . April 7, 2004 to May 30, 2005

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 three to June thirty, two thousand five.

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

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OPINION ISSUED JULY 17,2003

DENNIS L. COOK and WILMA COOK
VS.
DIVISION OF HIGHWAYS
(CC-01-381)

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

BAKER, JUDGE:

Claimants brought this action for personal injuries and damage to their vehicle which occurred when claimant Wilma Cook was operating their vehicle on State Route 85 near Quinland, Boone County, and the vehicle struck a hole on the edge of the road causing claimant Wilma Cook to lose control of the vehicle whereupon it crossed the road and struck the guardrail. Respondent was responsible at all times herein for the maintenance of State Route 85. 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 September 28, 2001, at approximately 10:30 a.m. Claimant Wilma Cook was driving a 1991 LTD Crown Victoria on State Route 85. She was traveling from her home in Gordon to Madison, in Boone County. The weather was sunny and the roads were dry. There was very little traffic on the road. According to Mrs. Cook, she recalls only one car near her at the time of this incident and that was the vehicle behind her. She testified that she could not recall passing any oncoming vehicles at the location of this incident, but she does not believe she did. At the location of this incident, State Route 85 is a two-lane, blacktop highway with double yellow center lines and white edge lines. Mrs. Cook testified that she has traveled this road all of her life. She estimated that she probably travels it once a week. Mrs. Cook was alone in the vehicle and testified that she was traveling at approximately forty-five miles per hour which is the posted speed limit for this area. Mrs. Cook was approaching a curve to her left in the road, when suddenly the vehicle's right rear tire dropped off the edge of the road into a hole that was located on the outer edge of the blacktop. The edge of the road and a portion of the white edge line were broken off and jagged at this location. When the tire came into contact with the jagged blacktop, it burst, causing Mrs. Cook to lose control of the vehicle. She applied the brakes in an attempt to bring the vehicle under control but to no avail. The vehicle quickly went across both lanes of traffic and struck the guardrail on the left side of the road head-on. The impact was sufficiently serious that it caused the driver's side air-bag to deploy. Mrs. Cook was thrown forward and struck her forehead on the windshield. As a result, she suffered a large cut to her head which was bleeding significantly at the scene. According to Mrs. Cook, she also suffered injuries to her

shoulder and back. Fortunately, the occupants in the vehicle behind her at the time of this incident stopped and assisted Mrs. Cook. Mrs. Cook was taken by ambulance to the emergency room at Boone Memorial Hospital in Madison, where she was treated and released. However, she had to make three additional visits to the emergency room for x-rays and follow up treatment. Mrs. Cook testified that she now has severe headaches which she directly relates to the injuries she received in this incident. She also testified that approximately a year and a half after this incident she had a CT scan of her head which was negative. Claimants submitted into evidence medical expenses incurred as a result of this incident in the amount of $1,882.46. However, claimants' health insurance carrier paid for these expenses and as a result of the collateral source rule these expenses cannot be considered by the Court for reimbursement to the claimants. Claimants' only out-of-pocket expenses related to the medical bills incurred is $15.00. Their vehicle was a total loss as a result of this incident. However, claimants did not present any evidence as to the value of their vehicle. It had to be towed from the scene due to significant damage. Claimant Dennis Cook testified that he had the vehicle towed from the repair shop to their house where it remains. Claimants only had liability insurance coverage on their vehicle which did not cover any portion of the losses in this claim.

It is claimants' contention that respondent knew or should have known of the broken and jagged blacktop along the edge of the road and that it created a hazardous condition for the traveling public.

Respondent asserts that it had no notice of the broken blacktop at issue and that it did not present a hazardous condition to the traveling public. Respondent also asserts that it was not the proximate cause of claimants' damages.

Jeffrey Dingess, a Deputy Sheriff with the Boone County Sheriff's Department, testified that he is familiar with the portion of State Route 85 at the location of this incident. One of Deputy Dingess' duties involves the investigation of automobile accidents. He testified that in addition to the automobile accident investigation training he received at the State Police Academy, he also received "intermediate accident" investigation training which is a phase of training further advanced than that required of most police officers. Deputy Dingess was the investigating officer at the scene of this incident. He was notified of the incident at 10:38 a.m., and arrived at the scene on State Route 85 at 10:50 a.m. Deputy Dingess testified that he investigated a single-vehicle accident in which Wilma Cook was the driver, and he completed an official accident report. Deputy Dingess testified as to the findings he made in the accident report, which was introduced into evidence at the hearing. He testified that the edge of the road where Mrs. Cook's tire dropped off the road was chipped and broken off. At the edge of the road near the broken and jagged blacktop, Deputy Dingess noticed a yaw mark, which he described as a mark on the road resulting from a tire moving forward but sliding sideways. He stated that the yaw mark was indicative of the place where Mrs. Cook's tire went off the road on the right side of State Route 85. Respondent introduced photographs into evidence at the hearing of this matter depicting the broken and jagged edge of the blacktop, as well as the portion of guardrail that Mrs. Cook's vehicle struck. Deputy Dingess concluded that the cause of the accident was Mrs. Cook's tire going off the edge of the road, which caused her to "overcompensate" when she maneuvered the vehicle back onto the road, causing the vehicle to shift sideways and forcing it across the road into the guardrail. He determined that the distance between the location where claimant's tire went off the road and the point of impact on the guardrail was 201 feet. Deputy Dingess testified that he is certain that the yaw mark was caused by claimant's vehicle's tire and not some other vehicle. He testified that the yaw mark matched the

tires on claimant's vehicle exactly. Further, he was of the opinion that he arrived on the scene a short time after the accident and during daylight so he was able to determine the tire marks with certainty.

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 81 (W.Va.1947). To hold respondent liable, claimants 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, claimants failed to establish by a preponderance of the evidence that respondent was negligent in its maintenance of State Route 85 in Mingo County. Claimants presented no testimony as to why Mrs. Cook drove her vehicle onto the edge of the road. She testified that she did not recall any oncoming vehicles that forced her to maneuver the vehicle to the edge of the road. Further, Mrs. Cook is familiar with the road and yet failed to produce any evidence as to why her tire dropped off the road. Claimants assert respondent negligently maintained the road and that this negligence was the proximate cause of their damages. However, claimants did not introduce proof to support this allegation. To find respondent negligent in this claim would require the Court to speculate, which it will not do. *Mooney v. Dept. of Highways*, 16 Ct. Cl. 84 (1986) This Court has consistently held that it will not base an award upon mere speculation. *Phares v. Div. of Highways*, 21 Ct. Cl. 92 (1996). Thus, after a thorough review of the evidence, the Court finds that the claimants have not established that the respondent was negligent.

Furthermore, the Court wants to make it clear to the claimants that even if the Court had found the respondent liable, the Court would have only been able to make a small award to the claimants for Mrs. Cook's medical expenses since she had health insurance to cover all but approximately $15.00 of her costs. The health insurance is a collateral source and the Court is constrained by the law to refrain from making an award wherein a collateral source has already paid for the alleged loss. In addition, had claimants prevailed in establishing liability in this claim, they could have recovered the value of their vehicle, had they presented sufficient evidence of its value.

In view of the foregoing, the Court is of the opinion to and does hereby deny this claim.

Claim disallowed.

OPINION ISSUED JULY 17, 2003

RICHARD D. HITE
VS.
DIVISION OF HIGHWAYS
(CC-02-329)

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 son was driving the claimant's vehicle on Cedar Valley Road in Jackson County when the vehicle went off the edge of the road into a large drop off causing damage to the vehicle.

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

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $1,303.38. However, claimant is limited to the amount of his insurance deductible feature which is $100.00.

4. Respondent agrees that the amount of $100.00 for the damages 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 Cedar Valley Road in Jackson 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 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 $100.00.

Award of $100.00.

OPINION ISSUED JULY 17, 2003

JAMES MCNEELY
VS.
DIVISION OF HIGHWAYS
(CC-02-260)

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 brought this action for damage to his 2002 Dodge Stratus. The incident occurred on Route 85 near the town of Bigson, Boone County, when claimant's vehicle struck a large hole on the edge of the road. This portion of road is maintained by respondent in Boone 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 June 6, 2002, at approximately 10:00 a.m. Claimant's wife, Andrea McNeely, was proceeding north on Route 85 at a speed of about forty-five miles per hour. The speed limit at this location is fifty miles per hour. Mrs. McNeely testified that she was on her way to pick her husband up when the vehicle struck a large hole. Claimant's wife was familiar with the road and testified that she traveled it almost daily. She also stated that she did not see the hole before her

vehicle hit it due to the rain and it was dark. She testified that she could not have avoided this hole since it was in the travel portion of her lane and there was a large truck traveling in the opposite lane. This road is divided by double yellow lines with white lines on the edges. Claimant arrived at the scene after the incident happened, at which time he had his car towed due to two wheels being damaged. Claimant testified that he went back to the location of the hole the next day and took measurements. On June 11, 2002, claimant took photos of the hole. He stated that the width of the hole measured approximately fifteen and one half inches from the white edge line into the road and it measured about thirty-three inches in length. Claimant measured the depth of the hole at approximately six and a half inches. As a result of this incident, claimant's vehicle sustained damage to two wheels in the amount of $1,033.08. Claimant submitted repair bills for the damages; however, he had insurance coverage with a $500.00 deductible, which constitutes the limit of any recovery in this action. In accordance with the Court's decision in *Summerville et al. vs. Division of Highways*, any recovery would be limited to the amount of his deductible feature. See *Id*., 18 Ct. Cl. 110 (1991).

It is the claimant's position that the respondent knew or should have known of this hole on Route 85 and made the needed repairs.

Respondent did not offer any evidence to rebut claimant's allegations about the conditions existing on Route 85.

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, claimant must prove that respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986).

In this claim, the evidence established that respondent had at least constructive, if not actual, knowledge of the defective condition on Route 85 in Boone County. The Court is of the opinion that the location and size of the hole in Route 85 establishes that respondent should have known about the defect and should have repaired it or placed warning signs prior to claimant's incident. Consequently, there is sufficient evidence of negligence on the part of respondent by which claimant may recover his sustained loss.

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

Award of $500.00.

OPINION ISSUED JULY 17, 2003

JAMES H. CHAPMAN
VS.
DIVISION OF HIGHWAYS
(CC-02-227)

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

PER CURIAM:

Claimant brought this action for damage to his 1999 Ford Escort ZX2 which

occurred when his daughter Leah Chapman was operating the vehicle on U.S. Route 52 in Mingo County. Ms. Chapman came upon a large mudslide in the road, causing her vehicle to slide into the hillside. Respondent was responsible at all times herein for the maintenance of U.S. Route 52. 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 May 7, 2002, at approximately 10:00 p.m. Claimant's daughter, Leah Chapman, was driving claimant's vehicle northbound on U.S. Route 52 near Maher, in Mingo County. At the location of this incident, U.S. Route 52 is a two-lane, blacktop highway with a yellow center line and white lines on the edges. Ms. Chapman was on her way home approximately fourteen miles from the site of this incident. Ms. Chapman described the weather at the time of the incident as clear, but she stated that it had been storming and raining all week prior to the incident. According to Ms. Chapman, the road at this location is curvy and goes up and down numerous hills. She stated that she was traveling approximately forty-five miles per hour in a fifty-five mile per hour zone. Ms. Chapman was approaching a curve in the road when she suddenly saw the mudslide in her lane of travel. She was unable to maneuver into the southbound lane due to an oncoming coal truck and the vehicle was almost in the mudslide before she saw it. She drove the vehicle through the mud which caused her to lose control of the vehicle. The vehicle spun around at least twice before striking the hillside and coming to rest on the berm of the highway facing south. She described the impact as serious. The vehicle was significantly damaged but fortunately Ms. Chapman did not suffer any serious injuries. Ms. Chapman testified that she travels this road almost daily. She also testified that she traveled past the location of the mudslide in the southbound lane earlier in the day, but she did not observe a mudslide at that time. According to Ms. Chapman, the mudslide was approximately ten to twelve inches into the travel portion of the road and approximately eight feet in length.

Claimant James Chapman arrived on the scene approximately twenty minutes after the incident. He testified that the mud on U.S. Route 52 was approximately sixteen inches deep. Claimant also testified that the ditch line adjacent to the road was blocked off and water had backed up onto the road. He estimated that forty feet of the road was covered in a pool of water as a result of the ditch line being blocked. Claimant testified that he had driven past this location three days earlier and noticed that the ditch line was blocked and water was running across the road. However, he did not report the problem to respondent. Claimant submitted into evidence an estimate for the damage to the vehicle in the amount of $5,322.00. Claimant testified that the vehicle was "totaled", and that to have it repaired by any auto body shop would cost more than the value of the vehicle. Therefore, he decided to pay a friend to make the repairs. Claimant testified that he has paid $3,500.00 for the repairs made to the vehicle at this time. Claimant seeks $5,322.00 in damages.

Claimant asserts respondent knew or should have known that there was a potential for a mudslide at this location and taken the proper precautions to prevent it or to at least place the proper warning signs for the traveling public.

Respondent contends that it had no notice of a potential for a mudslide at this location and that it reacted diligently and reasonably upon receiving notice of the mudslide under the circumstances existing at that time.

Cecil Collins, a Transportation Worker II and Craft Worker for respondent in Mingo County, testified that one of his responsibilities includes answering emergency phone calls after normal routine working hours. He is familiar with the portion of U.S. Route 52 at issue in this claim. He stated that the width of the road at this location is

between eighteen to twenty-two feet. He described the road at this location as having a dip which then goes back uphill. Further, he believes that there is a small curve just after the location of the mudslide. According to Mr. Collins, the weather conditions the week leading up to this incident beginning on May 2, 2002, were very stormy and rainy. He stated that during the night of May 2, 2002, the local area received heavy rains and the Tug River came out of its banks causing respondent to go into "red alert" in the southern region of the State. Mr. Collins stated that the drainage areas and other tributaries of the Tug River close to U.S. Route 52 near this location were in a flood stage. He also testified that at approximately 10:30 p.m. he received a telephone call while he was on duty and a female informed him that her daughter had been involved in an accident near Old Field Branch and that a vehicle had struck a large mudslide. Mr. Collins and another employee proceeded to the scene with a truck full of large barrels and traffic cones which they set up at and around the mudslide. Mr. Collins also stated that he later had flashing lights placed on the barrels to warn the traveling public. Further, he stated that upon the arrival at the scene he observed Ms. Chapman sitting in the vehicle which was located on the southbound berm. Respondent submitted into evidence a DOH-12 which Mr. Collins filled out on the night of this incident that reflects the actions taken by respondent on that evening. This document indicates that respondent went to the scene and secured it with barrels and flashing lights. Mr. Collins testified that he did not have any prior notice or complaints regarding any mudslide at this location and that he responded to this incident as quickly as possible after receiving the call. He estimates that it took him twenty to twenty-five minutes to get to the scene. Further, he testified that beginning on May 2, 2002, respondent was responding to numerous mudslides all over Mingo County and that all of respondent's remaining personnel were committed to the day shift. Further, he stated that he and a few other employees were on night shift and if they noticed or were called about a hazardous location then they would mark the area with hazard signs until the hazard could be safely resolved the following day.

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 81 (W.Va.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).

In the present claim, the Court is of the opinion that claimant failed to establish by a preponderance of the evidence that respondent was negligent. The respondent was operating under a "red alert" or emergency circumstances due to the heavy rains and flooding at the time of this incident. Given this emergency and the fact that respondent did not have prior notice of the mudslide, the Court is of the opinion that respondent acted reasonably and diligently under the circumstances. While the Court is sympathetic to claimant's loss, it is constrained by the law to deny this claim.

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

Claim disallowed.

OPINION ISSUED JULY 17, 2003

TAMMY L. KING

VS.
DIVISION OF HIGHWAYS
(CC-02-183)

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

PER CURIAM:

Claimant brought this action for damage to her 1995 Chevrolet S10 pickup truck which occurred while she was traveling eastbound on Route 61 in East Bank, Kanawha County, and the vehicle slid on a patch of ice causing it to strike the mountainside. Respondent was responsible at all times herein for the maintenance of Route 61 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 March 22, 2002, at 7:30 a.m. Claimant was traveling on Route 61 through East Bank on her way to Chelyan at approximately thirty-five miles per hour. Route 61 is a blacktop, two-lane highway with a double yellow center line and white lines on the edges. Each lane is approximately ten feet in width. At this location, there is a mountain on the left side of the road and railroad tracks on the right. Claimant testified that she is familiar with this route as she travels this portion of Route 61 almost on a daily basis. She had last traveled in this same location on the day prior to the incident herein. She stated that she observed water on the road at this location prior to this incident but she had never had any problems with ice on the road. As claimant was driving around a curve, she saw what appeared to be water on the road and slowed down her vehicle. However, once she reached a specific area of the highway, she saw that it was ice. She stated that she had almost passed through the ice patch safely when suddenly she lost control of her vehicle and it slammed front first into the mountainside. The force of the impact caused the truck to turn around at which time the back end struck the mountainside and bounced off. The impact did substantial damage to her truck which had to be towed from the scene. Claimant testified that water flows freely from the hillside and across the road. She stated that there is no ditch-line, barrier, or drainage system present to prevent the water from crossing the road. Claimant submitted a repair estimate into evidence at the hearing of this matter in the amount of $1,830.36. However, she had insurance coverage to cover this loss at the time of the incident with a deductible of $500.00.

Claimant asserts that respondent was negligent in not having an adequate drainage system to prevent the water from flowing onto the road and that respondent failed to treat this portion of Route 61 to prevent the build up of ice in an adequate manner.

Respondent contends that it was on SRIC (snow removal and ice control) at the time of this incident and that it had inspected the area of the incident and saw no ice build up. Thus, respondent contends it had no notice of this particular hazard.

Frank McGuire, a foreman for respondent in Kanawha County, is responsible for maintaining this portion of Route 61. He testified that he is also a dispatcher for respondent. His duties as a dispatcher include receiving telephone calls, radio messages, and keeping track of the trucks on duty. He is familiar with the Route 61 at the location of this incident and was on duty at the time it occurred. He testified that he is aware of claimant's incident. According to Mr. McGuire, respondent was on SRIC at the time of the incident. He stated that while on SRIC, respondent's employees patrol the roads with

trucks containing various abrasives to be applied to any portion of the highway which the driver believes is slick, icy, or otherwise needs to be treated. Further, Mr. McGuire testified that he is required to keep a SRIC Log which documents all truck drivers on duty, the routes each driver patrols, the time of such patrol, and the condition of each route as determined by the driver. Respondent introduced the log maintained by Mr. McGuire on March 22, 2002, which indicates that one of respondent's drivers traveled through the location where claimant encountered ice on the road between approximately 5:30 a.m. and 6:00 a.m. The log also indicates that respondent's driver reported that portion of the road as clear. Further, Mr. McGuire testified that he had not received any prior complaints about this portion of the road being slick or icy nor had he received complaints about water flowing onto 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 81 (W.Va.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 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). Respondent cannot be expected or required to keep highways absolutely free of ice and snow at all times, and the presence of an isolated patch on a highway during the winter months is normally insufficient to charge the respondent with negligence. *Christo v. Dotson* 151 W.Va. 696, 155 S.E.2d 571 (1967); *McDonald v. Dept. of Highways*, 13 Ct. Cl. 13 (1979). However, 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).

In the instant claim, the Court is of the opinion that claimant failed to establish by a preponderance of the evidence that respondent was negligent in the maintenance of Route 61 at the time of her accident. The evidence establishes that respondent was operating under SRIC at the time of this incident; that a driver for respondent had just patrolled the location where the incident occurred approximately an hour and a half prior to the incident; and that the driver did not see any ice or water on the road. Therefore, the ice that claimant encountered formed quickly giving respondent very little time to recheck the same area. Further, respondent had not received any complaints prior to this incident regarding an on-going ice or water problem on the road at this location. Thus, the Court is of the opinion that respondent acted diligently in treating the roads on the date of this incident. While sympathetic to claimant's loss, the Court is constrained by the evidence to deny a recovery in the claim.

In view of the foregoing, the Court is of the opinion to and does hereby deny this claim.

Claim disallowed.

OPINION ISSUED JULY 17, 2003

WILLIAM F. HIGGINBOTHAM and ALICE HIGGINBOTHAM
VS.
DIVISION OF HIGHWAYS
(CC-02-261)

Claimant 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 Alice Higginbotham was traveling on Floradale Drive near Cross Lanes, in Kanawha County, and their vehicle struck a boulder on the edge of the road. Respondent was responsible at all times herein for the maintenance of Floradale Drive. The Court is of the opinion to make an award for the reasons set forth more fully below.

The incident giving rise to this claim occurred on October 2, 2001, at 8:45 a.m. Alice Higginbotham was driving her two children to school in claimants' 1991 Ford Econovan. The weather was clear and the road was dry. She is familiar with the road and travels it often. Mrs. Higginbotham was traveling at approximately ten miles per hour as she turned off of Koontz Drive onto Floradale Drive. She traveled down a hill and proceeded to maneuver around a right curve where there were four boulders on the edge of the road. She safely passed the first three boulders, but as she passed the fourth boulder, she was forced to maneuver the vehicle to the edge of the road due to an oncoming vehicle. At this time, the vehicle's passenger side door came into contact with one of the boulders. Mrs. Higginbotham testified that the impact with the boulder "pounded" the passenger door and then the boulder rolled back and got caught under the rear bumper of the vehicle. She attempted to maneuver the vehicle off of the boulder, and in doing so the vehicle dragged the boulder out into the middle of the road. Eventually, she was able to maneuver the vehicle and free it from the boulder. Mrs. Higginbotham described Floradale Drive as a narrow, two-lane residential road. She testified that there are locations on the road where it is difficult for vehicles to safely pass without the drivers maneuvering to the edge of the road. According to Mrs. Higginbotham, the road at the location of this incident proceeds downhill into a right curve. She testified that the four boulders are located on the respondent's right-of-way at the edge of the grass adjacent to the road. She also introduced into evidence a photograph of the location as well as the boulders, which depicts the first three boulders laying flat on the ground and the pointed edges of the boulders extending away from the road. However, the fourth boulder is situate with the base on the ground, but the pointed edge extends over the edge of the road. Further, she testified that the fourth boulder also is located in a blind spot in the curve and that she did not see the edge of the boulder until it was too late to react. Mrs. Higginbotham admits that she knew the boulders were there because she travels the road often. However, she testified that she was not aware of how far the one boulder extended into the road. Claimants submitted a repair estimate into evidence in the amount of $1,998.63.

Claimants assert that respondent was negligent in allowing boulders to be placed at the edge of the road creating a hazardous condition that was the proximate cause of claimants' damages.

It is respondent's position that it had no notice that the boulders presented a risk to the traveling public.

Garry Westfall, a foreman for respondent in Kanawha County at the time of this incident, is responsible for the routine maintenance of the road at the location of this incident. Mr. Westfall is familiar with Floradale Drive including the location of this incident. According to Mr. Westfall, Floradale Drive is a priority one road for snow and ice removal purposes since it is located near a public school. However, for surface repairs and other maintenance it is a priority two road. Mr. Westfall testified that

respondent first became aware of the rocks being a problem when the State School bus garage called and asked respondent on or about January 9, 2002, if respondent could remove the rocks. He and a crew of respondent's employees went to the location to move the rocks on January 11, 2002. However, the property owner whose land abuts respondent's right-of-way demanded that respondent not move the rocks. He testified that the property owner stated that the rocks belonged to them and that the rocks were on their property. Mr. Westfall stated that he then informed his supervisor, Chuck Smith, of the problem. Mr. Smith contacted respondent's right-of-way division which determined that the rocks were in fact on respondent's right-of-way. Upon obtaining this information, Mr. Westfall had the rocks removed despite threats from the property owners. According to Mr. Westfall, respondent was not aware that the rocks had been replaced in the same location. He testified that no one had made any calls or complaints regarding the rocks until the school bus garage called on or about January 9, 2002. However, Mr. Westfall admitted that he and other employees occasionally travel this road, and that even though the rocks are visible, respondent did not remedy the condition. He stated that the property owners "kept inching" the rocks closer to respondent's right-of-way.

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 81. (W.Va.1947). To hold respondent liable, the claimants 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 the present claim, the Court is of the opinion that respondent had at least constructive if not actual notice of the location of the rocks at the edge of the road. The evidence adduced at the hearing of this matter established that respondent's employees travel this road often enough to have noticed this hazardous condition. Further, respondent treats this road as a priority one road for snow and ice removal purposes and thus it should have been more diligent and remedied this hazardous condition. However, the Court is also of the opinion that claimant Alice Higginbotham is not without fault in this incident. She was familiar with the road, and she knew that the rocks were present. She should have exercised more care in operating the vehicle under the conditions then and there existing.

In a comparative negligence jurisdiction, such as West Virginia, the negligence of a claimant may reduce or bar recovery of a claim. In accordance with the finding of fact and conclusions of law stated herein above, the Court has determined that claimant Alice Higginbotham was 40% negligent for the incident that occurred. Since respondent's negligence was greater than the negligence of claimant Alice Higginbotham, claimants may recover sixty per cent (60%) of their loss.

In view of the foregoing, the Court is of the opinion to and does make an award to claimants in the amount of $1,199.18.

Award of $1,199.18.

OPINION ISSUED JULY 17, 2003

JESSE E. COOK and NORMA C. COOK
VS.
DIVISION OF HIGHWAYS
(CC-02-258)

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 Norma Cook was operating the vehicle on Dry Branch Drive in Kanawha County and the vehicle struck a sharp edge of a drainage culvert. Respondent was responsible at all times herein for the maintenance of Dry Branch Road in Kanawha County. 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 or about May 15, 2002, at approximately 4:30 p.m. near the intersection of Nunley Drive and Dry Branch Drive. Claimant, Norma Cook, was traveling from her home in Campell's Creek to her mother's home on Nunley Drive which is approximately six or seven miles from claimants' home. Mrs. Cook was driving a 2002 Buick LaSabre. She is familiar with the road having grown up and lived in the area most of her life. The weather on the date of this incident was clear, but there had been a heavy rainstorm a few days prior. Nunley Drive is a one-lane, blacktop road with no center or edge lines. As Mrs. Cook turned off of Dry Branch Drive onto Nunley Drive, she was approached by an oncoming truck that was exiting Nunley Drive. She had to back her vehicle out of Nunley Drive and onto Dry Branch Drive to allow the oncoming truck to pass safely. According to Mrs. Cook, there is a curve in the road on Dry Branch Drive where she backed the vehicle. Once she maneuvered the vehicle to this location, the front passenger side tire struck a sharp edge of a metal culvert bursting the tire. Mrs. Cook testified that the heavy rainstorm on May 5, 2002, caused a lot of water to wash leaves, tree limbs, and other debris into the ditch line along Nunley Drive and also into the culvert. She stated that due to this debris she could not see the culvert or the sharp metal edge. On May 7, 2002, Mrs. Cook called respondent at Chelyan to inform them that the ditch line on Nunley Drive had overflowed onto the road, her mother's driveway and nearly flooded her house. However, Mrs. Cook testified that respondent did not clean out the ditch line until after the incident at issue. In order to replace the tire, claimants went to two separate dealers. The dealers informed claimants that they did not have the same model tire in stock and that it would take four or five days before the same model tire could be delivered to the store. Mrs. Cook testified that the dealer informed the claimants that they could sell them two comparable tires. She testified that the dealer informed the claimants that they would not recommend just replacing one front tire, leaving two different brands of tires on the front of the vehicle. The claimants purchased two new front tires and had the tires balanced at a total cost of $279.80. However, Mr. Cook testified that he drove the vehicle on the interstate with the two new tires and noticed that the vehicle did not handle as well. He attributed this to the fact that the vehicle had two new tires on the front that were different from the two back tires. Further, Mr. Cook read a section of the vehicle's owner's manual into the record at the hearing which stated that if any tire is replaced it should be the same as the original or else it may affect the handling of the vehicle. Therefore, claimants decided to go back to the dealer and purchase two new rear tires as well. The cost of the two rear

tires was $264.11. Thus, claimants seek a total award of $531.40 in damages. Claimants testified that their insurer informed them that this loss was not covered under their insurance policy.

Claimants assert that respondent negligently maintained the culvert by not remedying its sharp edge or at least placing warning signs around the culvert to protect the traveling public.

Respondent did not introduce any evidence at the hearing of this matter to rebut claimants' allegations about the culvert on Dry Branch Drive.

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, claimants 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 the present claim, the Court is of the opinion that respondent was negligent in failing to correct a defective and hazardous condition. The evidence established that there was a very sharp edge at the end of the culvert on Dry Branch Drive. Further, the evidence established that there was debris covering the hazardous edge of the culvert which prevented Mrs. Cook from seeing it. Respondent had at least constructive notice of the debris in the area due to claimants' telephone call to the respondent about the local ditch line being clogged. Respondent should have remedied the clogged ditch-line sooner and it would have or at least should have remedied the defective culvert. However, the Court will make an award to claimants for the one tire that was damaged as a proximate result of respondent's negligence. It is not reasonable to require respondent to pay for four new tires when claimants could have waited a few days more for a replacement tire that matched the original tires. Furthermore, the Court will reduce the award for the one damaged tire since it was an original tire and had approximately 35,000 miles on it. This is at least one-half the life of a tire. The Court is of the opinion that the cost of a new General tire is approximately $170.00, and given the age of the damaged tire in this claim, claimants are entitled to receive one-half the cost of a new tire. Thus, the Court makes an award to claimants in the amount of $85.00.

Award of $85.00.

OPINION ISSUED JULY 17, 2003

WEST VIRGINIA ASSOCIATION
OF REHABILITATION FACILITIES
VS.
DIVISION OF REHABILITATION SERVICES
(CC-03-302)

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 $4,053.95 for providing maintenance services to 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 $4,053.95.

Award of $4,053.95.

OPINION ISSUED JULY 17, 2003

SCOTT ALAN RENNER
VS.
DIVISION OF MOTOR VEHICLES
(CC-03-090)

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 $100.00 for expenses incurred when respondent wrongfully suspended his motor vehicle driver’s license, causing his car to be impounded while he was traveling in New Matamoras, Ohio.

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 his sustained loss; therefore, the claim has been submitted to this Court for determination.

Accordingly, the Court makes an award to claimant in the amount of $100.00.

Award of $100.00.

OPINION ISSUED JULY 17, 2003

POMEROY IT SOLUTIONS, INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-03-162)

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 $18,724.00 plus interest for computer merchandise purchased by respondent in Kanawha County. The documentation for the merchandise 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 denies claimant's request for interest based upon the provisions in W.Va. Code §14-2-12 which states "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." There is no provision for interest in the claim herein.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $18,724.00.

Award of $18,724.00.

OPINION ISSUED JULY 17, 2003

MONTGOMERY GENERAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-03-243)

Claimant appears *pro se.*

Charles P. 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 $35,593.23 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 AUGUST 25,2003

PEARL WATTS
VS.
DIVISION OF HIGHWAYS
(CC-01-187)

Mark French, Attorney at Law, for claimant.
Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

WEBB, JUDGE:

Claimant brought this action for property damage to her home located in Dunbar, Kanawha County, which she alleges occurred during a construction project on I-64 in October 2000. Claimant alleges that her home sustained the most serious damage on one particular day in October 2000. Respondent is responsible for the maintenance of I-64 in Kanawha County. The Court is of the opinion to deny this claim for the reasons set forth more fully below.

Claimant, Pearl Watts, a 72-year-old widow resides at her home in Dunbar. Claimant's home fronts Route 25, also referred to as Fairlawn Avenue. It is a single story home made of masonry block. The left side of the house is an addition and is constructed over a crawl space while the right side is part of the original home and is constructed over a basement. There are three covered porches on the front, left, and rear sides. The house has three bedrooms. It is located approximately seventy-five to one hundred yards from I-64, which is located on the other side of Route 25 and above claimant's home. Claimant purchased her home in 1976 and has lived there ever since. At the time this incident occurred, the exterior of her home was made of stucco, but sometime in the summer of 2001, claimant had vinyl siding installed in place of the stucco. During this time period, she has made normal routine maintenance repairs to her home. Claimant installed a drainage system in the basement of her home and a sump pump approximately fifteen or sixteen years prior to 2002, when this claim was heard. Claimant had the sump pump installed due to concerns of potential water damage in the basement. She had some exterior patching done to her home approximately fifteen or sixteen years ago. Claimant also stated that she recalls having some minor cracking problems on the front portion of her home in the early to mid 1980's. However, she stated that she had it repaired and she has not had any trouble since then until this incident. She stated that she had her basement water proofed in 1990, and the gutters replaced in the mid 1980's. However, most work performed on her home was to ensure that it would remain in good condition. Beginning in 1999, respondent was in the process of an on-going construction project on I-64 to add a third lane in both directions of the interstate and to install a new permanent concrete barrier. Heavy equipment was being used on a daily basis, and Jersey barriers were placed to provide lane separation during various stages of the construction project. She testified that she had not experienced any problems regarding cracking of the walls or other foundational problems until the incident at issue in this claim. Although claimant could not see the construction work from her home, she saw it often while driving on the interstate. One night in late October 2000, claimant felt extremely strong vibrations and heard loud noises coming from the construction area on I-64. She testified that the doors and windows on her house shook and rattled. She could feel her home vibrating. The next morning she awoke and attempted to exit her home through the front door facing I-64 but was unable to do so because it was jammed. She was also unable to open the door at the east end of the house, which was also jammed. The only door in the house that she was able to open was the sliding glass door located at the back of the house. She

telephoned her brother-in-law, Freer Oxley, to come and assist her with opening the two doors which she was unable to open. In addition, outside of the house there are numerous cracks over the windows and around the doors including the living room window as well as a large crack in the wall of the back porch. Claimant also stated that the porch on the left side of the house was pulled loose from the house due to the vibrations. The outside wall above the door leading from this porch to the utility room also has a significant crack above it which extends from the corner of the door to the roof above the porch. The down spout gutter was broken loose from the right front corner of the northern end of the house and there is a large, deep crack in the external wall of the right rear corner of the house. Claimant testified that the down spout was significantly displaced from the gutter. She also testified that this occurred on the same night in October 2000 that she felt strong vibrations and heard loud noises. She stated that she had not had any problems with her gutter or down spouts coming loose or displaced prior to this event. Claimant introduced photographs into evidence demonstrating most of these damages including the door in the laundry room which has "dropped down" and cannot be opened without pulling the door facing loose. Claimant also submitted photographs into evidence showing cracked plaster above the windows in all three bedrooms of the house. Some areas were significantly cracked and damaged. She has attempted to repair these cracks but has been unsuccessful in doing so. Furthermore, claimant testified that there is significant cracking of the concrete or cinder blocks that make up the foundation of the front corner of her home. Additional photographs introduced by claimant show several large cracks extending horizontally through and along the mortar lines of these blocks. Claimant also testified that there is some cracking of the concrete or cement blocks in the crawl space under the front portion of her home.

Alexander Brast Thomas, a certified civil engineer with the Thomas Company, testified as claimant's expert in this claim. Mr. Thomas visited claimant's home and spoke to her regarding the incident and the subsequent damages. He reviewed the report prepared by Mr. Pennington of Civil Tech Engineering, an agent of claimant's homeowner's insurance carrier State Farm. He also reviewed Mr. Pennington's report and photographs regarding the damage to claimant's home and spoke to a geologist in his own firm regarding the issues in this claim. Upon examining this information, Mr. Thomas concluded to a reasonable degree of engineering certainty that the proximate cause of claimant's damages was due to shock induced vibrations. He testified that the shock induced vibrations probably started with the beginning of the construction work on I-64 near claimant's home. According to Mr. Thomas, the fact that claimant alleges to have suffered damage in such a short period of time corroborates his opinion that shock induced vibrations were the "contributing cause" of the damage to claimant's home. Mr. Thomas also disagrees with respondent's theory that claimant's damages were caused by water, given the short amount of time in which the damages allegedly occurred. Mr. Thomas stated that the testimony presented by claimant that her home was not damaged prior to the incident at issue, nor was it damaged once respondent's construction work on I-64 was complete, corroborates his theory that claimant's damages were caused by shock induced vibrations and not water damage or shrinkage. Thus, Mr. Thomas does not believe that water caused this damage given the short period of time that the damage occurred. However, he did testify that it was "conceivable" that the groundwater level, which was at ten feet, might affect the soil under and around claimant's home in such a way that it intensified the shock from the construction site to claimant's property. Mr. Thomas described this process as "saturation" or "liquefaction". Mr. Thomas also disagrees with respondent's theory that "soil shrinkage"caused or contributed to

claimant's damages. He ruled out soil shrinkage as a possible cause since claimant has lived in the house for 27 years and she has never observed any cracking or other problems with the walls or foundation of the house. Furthermore, upon observing the spread footing of the house, he saw no evidence of settlement damage. Further, Mr. Thomas also testified as to his reasons for disagreeing with Mr. Pennington's report which concluded that claimant's damages were not caused by the construction on I-64. He stated that Mr. Pennington neglects entirely the effect of traffic and events which occurred during the construction activity such as the dropping of concrete barriers. However, Mr. Thomas admits that he was not on site while the construction work was ongoing and that neither he nor claimant ever saw the concrete barriers being dropped. The only information he has regarding barriers being dropped during the construction project comes directly from information given to him by claimant. Based upon his expertise in civil engineering and his review of the evidence he received in this claim, Mr. Thomas is of the opinion that shock induced vibration was the primary cause of the damage to claimant's home.

John Wiseman, a project manager and estimator for Wiseman Construction Company, testified as claimant's expert witness as to the damage done to her home and the cost of repairs. Mr. Wiseman testified that he inspected claimant's home both inside and outside. Mr. Wiseman stated that he observed cracking in the masonry joints as well as through the block. He also observed photographs that depicted damage in the crawl space of the house which he described as the type of repair work that is labor intensive due to it being in such a confined space. The fact that it's a confined space brings about ventilation factors which increases labor costs. Based upon these observations and factors, he estimated the total cost of repairs to be $41,225.00. However, Mr. Wiseman estimated that to replace the stucco with the vinyl siding would cost an additional $5,200.00. Mr. Wiseman stated that materials and supplies would be needed such as mortar, a lot of grout to fill voids in the structure due to slippage, paint, and wallpaper. Further, he stated that carpet and baseboards for the interior are needed as well as smaller miscellaneous items. Claimant submitted an estimate for the repair work she asserts is needed to repair the damage to her home in the amount of $41,225.00.

It is claimant's contention that respondent knew or should have known that the strong vibrations and loud noises coming from its road construction work would cause damage to nearby houses, and that respondent's conduct was the proximate cause of the damage to her home.

Respondent asserts that it did not perform any work during the I-64 construction project that contributed to or caused claimant's damages. Instead, respondent asserts that claimant's damages were caused by water and soil shrinkage.

Dr. George A. Hall, the geotechnical research engineer with the Engineering Division for respondent, testified as respondent's expert witness. Dr. Hall first visited claimant's property in November 2000, at the request of Bruce Leedy, one of respondent's area engineers to whom claimant had made a complaint about the construction project on I-64 and the damages to her home. At that time, Dr. Hall viewed the inside and outside of claimant's home. Claimant spoke with Dr. Hall on that occasion to explain to him that she had had some problems with damage to her home in 1999, but in the fall 2000, the problems worsened. At that time, Dr. Hall assumed that claimant's property was situate on sandy soil and it was possible that vibration damage could have occurred. He thought that if there had been sufficient vibration to the sandy soil, then the kind of damages experienced by claimant to the porches and doors of her home were possible. After the instant claim was filed, however, Dr. Hall revisited the property in February 2002 to obtain soil samples. This effort took two visits as the hand auger he had

planned to use for obtaining the soil sample would not penetrate the soil sufficiently. On the second attempt to obtain a core boring a portable gasoline powered auger was used successfully to retrieve a core boring twelve (12) feet deep, well below the foundation level of claimant's home. Dr. Hall performed this investigation as he had read a report prepared by Mark Pennington for State Farm Insurance Company which indicated that there was clay soil in the crawl space beneath claimant's home. Mr. Pennington observed shrinkage cracks in the soil in the crawl space. Thus, Dr. Hall performed his own investigation of the soil and developed his expert opinions about the damages to claimant's home based upon this investigation. First, he stated that clay soil is not susceptible to settlement from vibration because the particles are "somewhat glued together" such that these do not move during vibration. Sandy soil, particularly loose sandy soils, are subject to vibrations. The upper three feet of soil in the boring was wet which he explained was normal for the wet season of winter. The next four feet of the sample was dry soil and the water table was apparent at ten feet. The core boring revealed to Dr. Hall that the soil beneath claimant's home is silty clay soil and the water table being at ten feet was a relatively high level. When silty clay soil dries out, Dr. Hall explained, the clay soils shrink due to loss of surface tension from the water and the particles of soil come closer together to fill the voids where water once filled the soil. When this occurs, he stated that anything resting on the soil, such as the foundation of a home, goes down with the shrinking soil. Since the drought of 1988 in West Virginia, our area experienced hotter, drier summers just prior to that drought and then again in 1999 there was another drought followed by a wet spring in 2000 with another drought. Dr. Hall mentioned these facts in explaining that was the reason that claimant started to notice significant foundation problems at that time, and it is his opinion that the shrinkage of the soil caused a portion of the damages to her home as it relates to the foundation. In fact, it is Dr. Hall's opinion that she noticed her problems with the porches and doors suddenly because the shrinkage became sufficiently severe that cracking began to occur quickly. The stresses reached such a level that the porches lost support at the corners so the corners began to settle first thereupon inducing stresses in the house and doorways actually pushing the doors so that the tops of the doors were rubbing against the door frames. Therefore, there were damages sustained to the door frames and cracks to the porch. In his opinion, ninety per cent (90%) of the damages to the porches is the result of soil shrinkage.

Dr. Hall also addressed the expert opinion of Mr. Thomas that vibration shock caused claimant's damages. He stated that he reviewed the construction project documents and determined that there was no blasting performed on the project. He scaled the distances from the highway to claimant's property at 200 or 300 feet from the highway closest to her property, 800 feet from the Roxalana Intersection, and 2000 feet from the Dunbar Bridges. Any vibrations from construction activities would have, in his opinion, been too distant and would not have been significant.

As to the cracks at the ceilings in claimant's home, Dr. Hall testified that in his opinion these were caused by water seeping into the stucco from the gutter and down spouts which were corroding and allowing water to leak out onto the stucco. The type of cracking occurring radiates outward and this fact in his opinion supports his position that the corrosion at the down spouts are the cause of these damages. This cracking is referred to as secondary cracking since the source of the water is from the gutters and/or the down spouts.

Thus, to summarize Dr. Hall's testimony, he opined that there are two causes for the damages to claimant's home: the first cause is the shrinkage of soil due to the drought

periods, and the second cause is water getting into the stucco from the down spouts causing water damage to the interior walls of claimant's home.

In all negligence claims, it is the burden of the claimant to establish by a preponderance of the evidence that respondent acted negligently and that the alleged negligence was the proximate cause of the claimant's damages. *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 instant claim, the claimant bears the burden of proving by a preponderance of the evidence that respondent negligently caused vibrations while performing construction work on I-64 and, further, that such vibrations were the proximate cause of the damage to claimant's home. Absent specific evidence that the proximate cause of the damage to claimant's property was vibrations induced by respondent, the Court is constrained to speculate as to the cause of claimant's damages. *Stephenson v. Division of Highways* 22 Ct. Cl. 98 (1998). 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. Division of Highways* 21 Ct. Cl. 92 (1996).

After a thorough review of the evidence, the Court is of the opinion that the claimant has not established that the damage to her home was caused by any specific acts or omissions on the part of the respondent. Claimant was only able to speculate that respondent may have dropped the concrete "Jersey Barriers" causing vibration induced damage to her home. However, she never saw the Jersey Barriers dropped or produced any evidence that they were dropped. Further, claimant's expert witness based his conclusions on the claimant's speculation that respondent may have dropped the barriers. In addition, claimant failed to produce any evidence that respondent did any blasting or otherwise committed any act or omission that proximately caused vibration damages to her home. It would be mere speculation for the Court to assume that respondent negligently induced vibrations that proximately caused the damage to claimant's property. While sympathetic to the claimant's position, the Court is unable to justify an award under these circumstances.

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

Claim disallowed.

OPINION ISSUED AUGUST 25, 2003
GONZALO ROBAYO

VS.
DIVISION OF HIGHWAYS
(CC-02-330)

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

PER CURIAM:

Claimant brought this action for damage to his 1989 BMW-329i which occurred when he was operating his vehicle on County Route 60/4 in Barboursville, Cabell County, and the vehicle struck a large hole on the edge of the road. Respondent was responsible at all times herein for the maintenance of County Route 60/4. 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 26, 2002, at 11:00 a.m. Claimant, Gonzalo Robayo, was traveling eastbound on County Route 60/4, also referred to as Spring Road, in Barboursville. County Route 60/4 is a narrow, two-lane blacktop road with double yellow center lines and no white edge lines. The road is a secondary highway approximately sixteen feet wide in most places. There is a steep hill on the right side of the road for eastbound traffic. On the date of the incident at issue, claimant was traveling to his girlfriend's house. He estimates that he was traveling between twenty-five and thirty miles per hour. He testified that he was approximately two hundred yards from his girlfriend's house when he observed a large oncoming truck. He stated that he was afraid that the truck was going to strike his vehicle so he maneuvered it to the right edge of the road. Suddenly, the two right side tires dropped off the paved portion of the road down into a large hole. He immediately heard the air leaking out of both right side tires. Claimant testified that a large portion of the road at this location was broken off or otherwise missing and that the edge of the road was very jagged. He estimates that there was a drop-off approximately three-quarters to a half foot deep between the paved portion of the road and the ground where the pavement was missing. Claimant was able to drive his vehicle to his girlfriend's driveway and park it. He discovered that both right side wheels were destroyed. Claimant introduced photographs into evidence at the hearing of this matter which depict a large hole along the edge of the road with jagged edges in the blacktop. The photographs also depict a significant drop off at the location where the road had broken off. Further, the photographs depict the fact that the portion of the berm where claimant's tires dropped off the blacktop was not covered with weeds as was the remaining berm near this location but was soil only. Claimant presented an estimate to the Court in the amount of $591.48 for the two wheels and an estimate in the amount of $112.19 for a four-wheel alignment. Claimant seeks a total award in the amount of $703.67 for the damages incurred. Claimant has automobile liability insurance to cover this damage with a deductible feature of $500.00; therefore, claimant is limited to a recovery of his deductible feature of $500.00.

Claimant asserts that respondent knew or should have known that this portion of the road was broken off and that it presented a hazardous condition to the traveling public.

Respondent contends that it did not have notice of this condition, and thus, it was not negligent in maintaining the road at the location of this incident.

Charles King, Maintenance Crew Supervisor for respondent in Cabell County, testified that his responsibilities include maintaining the roads and responding to complaints. He testified that he is responsible for County Route 60/4 and he is familiar with the area of this incident. Mr. King testified that County Route 60/4 is a secondary road with less traffic than the local primary routes. He stated that it is not a high priority route in terms of routine maintenance. He stated that respondent maintains secondary roads by responding to complaints from the traveling public and by relying upon respondent's employees who may happen to notice a problem while traveling these roads. Mr. King testified that he did not know about this incident nor was he aware of the hole. In addition, he stated that respondent had not received any complaints regarding the hole. According to Mr. King, the only complaints that respondent had received about County Route 60/4 were those regarding weeds and brush growing along the roadside. Further, Mr. King is of the opinion that the hole had not been present for very long due to the fact that the photographs introduced into evidence depict that the weeds on the side of the road did not grow to the edge of the blacktop. He testified that weeds which have grown to the edge of a blacktop road where there is a hole indicates a high probability that the

hole had been present for a significant amount of time. However, Mr. King testified that a crew leader/foreman lived in the area at the time of this incident and that he traveled this portion of road everyday. According to Mr. King, this crew leader/foreman must not have thought the hole claimant's vehicle struck was a "major hazard" or he would have responded to 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 81 (W.Va. 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).

In the present claim, the Court is of the opinion that respondent had at least constructive, if not actual, notice of the defect on County Route 60/4 and a reasonable amount of time to remedy the defect. The evidence established that there was a large hole on the edge of the road where the blacktop had broken off and that this hole created a hazardous condition for the traveling public. Respondent had an employee who passed this location daily who could have seen this condition and responded to it in a timely manner. Further, the Court is of the opinion that given the size and location of this hole it had been present for a significant period of time. Consequently, there is sufficient evidence that respondent was negligent in this claim and that this negligence 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 claimant in the amount of $500.00.

Award of $500.00.

OPINION ISSUED AUGUST 25, 2003

JAMES L. GROVES
VS.
DIVISION OF HIGHWAYS
(CC-02-391)

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. Claimant was traveling northbound on W. Va. Route 62 in the area known as the "Escue Curves" when the edge of the pavement gave way causing claimant to lose control of his motorcycle which then struck the guardrail along the northern roadway edge.

2. Respondent was responsible for the maintenance of the portion of W. Va. Route 62 known as the "Escue Curves" in Mason County, and respondent failed to maintain properly this portion of W. Va. Route 62 on the date of this incident.

3. As a result of the incident herein, claimant's motorcycle sustained damage

and claimant suffered personal injuries, including pain and suffering, for a total amount of damages of $7,000.00 as agreed to by the parties.

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 W. Va. Route 62 in Mason County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's motorcycle and the injuries which he suffered; 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 $7,000.00.

Award of $7,000.00.

OPINION ISSUED AUGUST 25, 2003

MONTGOMERY GENERAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-03-288)

Claimant appears *pro se.*
Charles P. 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 $4,071.25 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 AUGUST 25, 2003

AMANDA TRYGAR
VS.
HIGHER EDUCATION POLICY COMMISSION
(CC-03-332)

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, a student at West Virginia University, seeks $150.00 for personal property damage as a result of water leaking from a dormitory room located above claimants room in Arnold Hall. 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 $150.00.

Award of $150.00.

OPINION ISSUED AUGUST 25, 2003

WILLIAM A. MYERS, II, DMD
VS.
DIVISION OF CORRECTIONS
(CC-03-290)

Claimant appears *pro se.*

Charles P. 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 $2,398.45 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 6, 2003

SANFORD SHAFFER and GLORIA J. SHAFFER
VS.
DIVISION OF HIGHWAYS
(CC-03-021)

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 October 19, 2002, claimant Gloria J. Shaffer was traveling on US Route 622, Martins Branch Road, in Pocatalico, Kanawha County, when claimants' vehicle, a 1997 Ford Escort, struck a hole in the road damaging two wheels.

2. Respondent was responsible for the maintenance of US Route 622 in Kanawha County and respondent failed to maintain properly US Route 622 on the date of this incident.

3. As a result of this incident, claimants chose to purchase four wheels for their vehicle. However, claimants are limited to the amount of $159.40 for the cost of the two wheels which were actually damaged as a result of this incident.

4. Respondent agrees that the amount of $159.40 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 US Route 622 in Kanawha County on the date of this incident; that the negligence of respondent was the proximate cause of the damage 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 $159.40.

Award of $159.40.

OPINION ISSUED OCTOBER 6, 2003

GLENN O. FRAZIER, JR. and SONDRA FRAZIER
VS.
DIVISION OF HIGHWAYS
(CC-02-493)

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 November 22, 2002, claimant Glen O. Frazier, Jr. was traveling over an ice covered bridge on I-79 in Big Otter, Clay County, which caused claimants' 2000 Ford F150 pick-up truck and a camper being towed by the truck to "jackknife" and flip over.

2. Respondent was responsible for the maintenance of I-79 in Clay County and respondent failed to maintain properly I-79 on the date of this incident.

3. As a result of this incident, claimants' vehicle was a total loss. Claimants sustained damages in the amount of $1,248.75 for their insurance deductible and a tow bill.

4. Respondent agrees that the amount of $1,248.75 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 I-77 in Clay County on the date of this incident; that respondent's negligence proximately caused claimants to incur certain expenses; and that the expenses are 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 $1,248.75.

Award of $1,248.75.

OPINION ISSUED OCTOBER 6, 2003

SONYA DUNHAM
VS.
DIVISION OF HIGHWAYS
(CC-01-390)

Laura R. Rose, Attorney at Law, for claimant.
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 October 29, 1999, claimant was traveling northbound on State and Local Service Route 30 near Martinsburg in Berkeley County when her vehicle encountered some gravel on the roadway causing her to lose control of her vehicle which then struck a tree.

2. Respondent was responsible for the maintenance of State and Local Service Route 30 in Berkeley County and respondent failed to maintain properly Route 30 on the date of this incident.

3. Respondent had been working in the area of claimant's accident and it had placed gravel on the berm. Traffic on the road kicked some of the loose gravel onto the road surface. Respondent had constructive, if not actual, notice of this condition.

4. As a result of this incident, claimant was injured. Claimant agrees to accept $9,000.00 as full and complete satisfaction for her claim.

5. Respondent agrees that the amount of $9,000.00 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 30 in Berkeley County on the date of this incident; that the negligence 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 her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $9,000.00.

Award of $9,000.00.

OPINION ISSUED OCTOBER 6, 2003

CHARLESTON PSYCHIATRIC GROUP, INC.
VS.
DIVISION OF CORRECTIONS
(CC-03-406)

Claimant appears *pro se.*

Charles P. 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 $2,804.00 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 6, 2003

CITY OF ELKINS
VS.
DIVISION OF CORRECTIONS
(CC-03-396)

Claimant appeared *pro se*.

Charles P. 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 $225.00 for waste water testing performed at Huttonsville

Correctional Center, a facility of the respondent.

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 OCTOBER 6, 2003

POCAHONTAS MEMORIAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-02-486)

Claimant appeared *pro se*.
Charles P. 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 $1,674.14 for medical services rendered to 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 OCTOBER 6, 2003

THE HEART CENTER
VS.
DIVISION OF CORRECTIONS
(CC-03-349)

Claimant appears *pro se.*
Charles P. 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 $39.00 for medical services rendered to an inmate in the custody of respondent 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 OCTOBER 6, 2003

UNIVERSITY HEALTH ASSOCIATES
VS.
DIVISION OF CORRECTIONS
(CC-03-337)

Claimant appears *pro se.*
Charles P. 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 $6,858.00 for medical services rendered to inmates in the custody of respondent at Pruntytown Correctional Center and Huttonsville 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 OCTOBER 6, 2003

KANAWHA NEPHROLOGY, INC.
VS.
DIVISION OF CORRECTIONS
(CC-03-355)

Claimant appears *pro se.*
Charles P. 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 $1,520.00 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 6, 2003

MANPOWER
VS.
DEPARTMENT OF EDUCATION
(CC-03-351)

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 $1,855.48 for providing temporary services to respondent. The hourly amount exceeded the State Contract amount; 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.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $1,855.48.

Award of $1,855.48.

OPINION ISSUED OCTOBER 6, 2003

PRIMECARE MEDICAL, INC.
VS.
DIVISION OF JUVENILE SERVICES
(CC-03-357)

Michele Grinberg, Attorney at Law, for claimant.
Barbara F. Elkins, 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 provided medical laboratory tests to the employees of the WV Industrial Home for Youth, a facility of the respondent.

2. Respondent admits the validity of the claim, but states that the amount of $5,700.56, rather than the amount claimed of $11,401.12, is fair and reasonable.

3. Claimant agrees to accept $5,700.56 as full and complete compensation for the medical laboratory tests performed on respondent's employees.

4. Respondent agrees that the amount of damages as agreed to by claimant is fair and reasonable and states that there were sufficient funds expired in the appropriate fiscal year from which the invoices could have been paid.

The Court has reviewed the facts of the claim and finds that respondent is responsible for the medical laboratory tests performed on respondent's employees and that the amount of damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for its sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $5,700.56.

Award of $5,700.56.

OPINION ISSUED OCTOBER 9, 2003

JAMES BROWN, ANGELA BROWN, CHRISTINE BROWN,
and JAMES BROWN and ANGELA BROWN as parents and natural guardians
of TASHA BROWN, an infant,
VS.
DIVISION OF HIGHWAYS
(CC-01-213)

Samuel F. Hanna, Attorney at Law, for claimant.
Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

GRITT, JUDGE:

Claimants brought this action for personal injuries received by claimant James Brown, for loss of consortium suffered by claimant Angela Brown, his wife, and for loss of comfort suffered by his children, claimants Christine Brown and Tasha Brown, when claimant James Brown had an accident while operating a motorcycle on Tony's Branch Road, also designated as State Route 3/2, near the community of Bloomingrose in Boone County. The respondent was at all times herein responsible for the maintenance of Tony's Branch Road. The Court is of the opinion to make an award in this claim for the reasons stated herein below.

The facts of this claim establish that on June 5, 1999, claimant James Brown and his wife, claimant Angela Brown, were attending a graduation party being given by one of Mr. Brown's coworkers. The location of the party was on Tony's Branch Road, a two-lane asphalt road which is a dead-end road extending from W. Va. State Route 3. The claimant and his wife arrived at the party at approximately 7:00 p.m., having driven there

in their 1984 Chevrolet Blazer with two passengers, Mr. Brown's brother and his wife. Mr. Brown drove the Blazer to the party. At around 9:00 p.m., Paul Foster and his girlfriend arrived at the party riding on Mr. Foster's 1991 Heritage Soft Tail Harley Davidson motorcycle. After being at the party a few minutes, Mr. Brown asked permission to ride the motorcycle and Mr. Foster gave his permission. Thereupon, Mr. Brown rode the motorcycle to the dead-end of Tony's Branch Road, turned around and proceeded toward the intersection of Tony's Branch Road and W. Va. State Route 3. He turned around in an adjacent yard prior to the intersection to proceed back to the party. On this return trip, claimant James Brown encountered a cut made in the roadway during the installation of two culverts beneath Tony's Branch Road by employees of the respondent. At the location of the cut, a depressed area had developed and the motorcycle went into the depressed area. At that moment, claimant James Brown lost control of the motorcycle whereupon he proceeded down the road some distance and went into the ditch on the left side of the road, traveling some seventy (70) feet in the ditch and then he fell from the motorcycle which pinned him on the ground. The people in attendance at the party were informed of the accident and several of them went to the scene, including claimant Angela Brown. They found the claimant some ten (10) to twelve (12) feet from the motorcycle. An ambulance was summoned to take him to the hospital in Charleston and a law enforcement official came to the scene to perform an accident investigation. Claimant James Brown sustained severe injuries as a result of this accident.

Claimants allege that respondent was negligent in its maintenance of Tony's Branch Road based upon the condition of the cut made across Tony's Branch Road at the time of the incident described herein above. Claimants contend that respondent failed to remedy the depression of the cut even though respondent had adequate notice that it posed a danger to the traveling public on Tony's Branch Road; that respondent failed to warn motorists of the area of the cut; and that the work performed at the cut by respondent was not done in accordance with proper engineering methods.

Respondent asserts that although there was a cut in Tony's Branch Road, it did not pose any danger to the traveling public. It further asserts that the accident which occurred was the result of negligence on the part of the claimant Mr. Brown in his operation of a motorcycle with which he was not familiar.

During the hearing of this claim, several witnesses who lived on Tony's Branch Road testified as to the work done on the road at the location of the cut and the depth of the cut below existing pavement level on the date of claimant Mr. Brown's accident. Beverly Milam, a resident of Tony's Branch Road and a school bus driver, testified that she is very familiar with Tony's Branch Road since she drives over the road on a daily basis. She stated that she made a telephone call to personnel at respondent's office in Rock Creek because there were problems on a bridge in the area and with the cut on Tony's Branch Road. After her telephone call, employees placed gravel at the bridge and at the site of the cut. She made a second telephone call to complain about the cut specifically because in her opinion "it was a hazard." She explained to the Court that she had to stop her school bus to cross the cut in the road because it was too deep. She described the cut as having a depth of four (4) inches, a width of one and a half to two feet and that it crossed both lanes of the road. She remembered that there was gravel and pavement in the cut, but the depression at the cut continued to exist even at the time of claimant Mr. Brown's accident. She went to the scene of the accident on the night of June 5, 1999, and thought that the time was between 9:30 and 10:00 p.m. Another resident of Tony's Branch Road at the time of the incident, Angela Begler, testified that

at the time of Mr. Brown's accident she was familiar with the road and the cut on Tony's Branch Road. She stated that the cut was made by respondent about a month before claimant Mr. Brown's accident. She remembered that the "rut" across the road was about one and a half to two feet wide and four to five inches deep. She testified that she had called respondent's office in Madison to complain that vehicles were dragging and that somebody was going to get hurt. She also stated that from her observations a driver had to come to a complete stop to go across the "hole." Since she drove a truck, her vehicle did not drag in that area. She further testified that respondent placed more gravel in the cut, but it did not solve the problem.

Cecil Brown, claimant James Brown's brother and a resident of Tony's Branch Road at the time, testified that he made a video recording of the accident scene on June 6, 1999, the day after the accident. The video was admitted in evidence. He testified that the cut was made for the installation of a culvert pipe and that gravel was placed over the pipe. He described it as a "gravel tar" and it bounced out of the hole. He went to the accident scene shortly after the accident where he observed his brother and it was his opinion that he had been thrown off the motorcycle.

The owner of the motorcycle being ridden by claimant James Brown on June 5, 1999, was Paul Foster, a coworker. His motorcycle, a 1991 Harley Davidson, did not have a crash bar or a windshield. He arrived at the party that evening around dusk and he stated that claimant James Brown asked permission to ride his motorcycle so he let him take it for a ride. He stated that claimant James Brown did not appear to be impaired or inebriated. In fact he stated, "If I thought he was, you know, drunk I wouldn't have let him rode (sic) my bike." He observed him riding by the site of the party and he estimated his speed at 25 to 30 miles per hour. It was getting dark and soon thereafter an individual identified as Shane Harper came to the party to inform the participants that "Jamie Brown had wrecked down in the hollow." Mr. Foster testified that he went to the accident scene where he observed the claimant James Brown some ten to twelve feet from the motorcycle which was laying in the ditch. It was quite dark by that time so he could barely see the claimant James Brown who was lying on the ground. He also testified that he had encountered the cut in the road on his way to the party on his motorcycle. He was about twenty feet from the cut when he saw it; he was traveling at about fifty miles per hour, but he braked his motorcycle to about twenty-five to thirty miles per hour; he was able to maneuver the motorcycle across the cut, but he stated that he "had a pretty big jolt from it." There were no warning signs at the area of the cut. He estimated the depth of the cut at anywhere from two to six inches with the deeper area being in the lane over which the claimant James Brown was traveling on his return to the party. He also stated that the accident scene is about one mile from the location of the party.

George Milam, a former employee of the respondent and one of the employees who worked on the cut on Tony's Branch Road in April or May 1999, testified that in 1999 he was employed as a crew chief for respondent at the Seth office in Boone County. He stated that Tony's Branch Road is a paved, secondary road without markings. He testified as to the procedure used by respondent in the installation of the culvert on Tony's Branch Road since he supervised the employees during the time that two fifteen inch culverts were installed across Tony's Branch Road. The culverts were placed in a ditch that was forty feet in length across the road, twenty-eight inches wide, and twenty-eight to thirty inches deep. After the culverts were placed in the ditch, crusher run limestone was used to cover the culverts and it was tamped in place with the backhoe. He explained that asphalt would normally be laid over the gravel after four or five days,

but it was not laid over the area on Tony's Branch Road as the new supervisor in Boone County did not give direction for this to be done. He was aware of several complaints about the cut when the gravel settled into the ditch. He would tell the people to call the Boone County Headquarters about their complaints. He testified that the gravel in the cut area settled approximately four or five inches below the level of the pavement of Tony's Branch Road. There were no warning signs placed at the location of this cut. He stated that he was at the party on the evening that claimant James Brown had his accident and that he went to the accident scene.

Claimant James Brown testified about the circumstances of his motorcycle accident. He described driving to the party on Tony's Branch Road on the evening of June 5, 1999. He, his wife, his brother and his sister-in-law went to the party together in his Chevrolet Blazer and they arrived there at approximately 7:00 p.m. He did not eat anything since he had eaten dinner at his own home earlier. Although he drove over the cut on Tony's Branch Road on the way to the party in his Blazer, he did not notice it at that time. Although he had driven on Tony's Branch Road on previous occasions, he had not driven there during the time the cut existed on the road until this evening. He did not see any warning signs about the cut as he drove by the area on the way to the party. He stated that he had brought beer to the party and he drank two or three beers prior to riding the motorcycle which belonged to a coworker also attending the party. He was candid in stating that he had not ridden on a motorcycle in some years, that he did not have a helmet on at the time he had the accident, and that he requested Paul Foster to allow him to take a ride on the motorcycle. He described the route of his ride on the motorcycle as follows: he first rode to the dead-end of the hollow on Tony's Branch Road where he turned around; he then rode past the site of the party toward the Route 3 intersection; he rode over the cut area on his way toward Route 3, but he did not notice it as being a bad area; he then turned the motorcycle around in a yard to drive back to the party when the accident occurred. He described what occurred as follows: "...when I turned around and was coming back in the hollow it was aggressive (referring to the cut area when the motorcycle struck it). The bike bottomed out and I bobbled. I had my feet off the peg[s] 'cause I knowed (sic) I was going to dump this boy's bike. I just knowed (sic) it when I hit that. That's the reason I had my feet up to try to hold myself and that's the reason that I traveled instead of stopping. I didn't have my feet on the brakes because it hit me so hard." He traveled on the motorcycle about one hundred eighty-one(181) feet from the cut in the road to the ditch, then seventy (70) feet in the ditch to his left. He was lying ten (10) to twelve (12) feet from the ditch on a bank above the road. He remembers that the motorcycle was on him when he fell from the motorcycle and he knew that he was injured since he felt paralyzed. He stated that he remembered the people from the party arriving at the scene and talking to them. An ambulance arrived at the scene and he was taken to the trauma center at the General Division of Charleston Area Medical Center in Charleston, Kanawha County.

The investigating officer for claimant James Brown's accident was Danny McNeely, Deputy Sheriff for the Boone County Sheriff's Office. He received notice of the accident on Tony's Branch Road at approximately 9:50 p.m. and he immediately went to the scene. When he arrived, the emergency personnel were treating claimant James Brown so he was unable to talk to him about the circumstances of the accident. He took measurements of the area and noted the distance from the time Mr. Brown drove the motorcycle into the ditch to where the motorcycle stopped seventy (70) feet as well as the distance Mr. Brown himself evidently landed away from the motorcycle twelve (12) feet. He noted these distances on his office report in the drawing of the accident scene.

On his report, Deputy McNeely marked the section for "Contributing Circumstances" of the accident on the part of the driver, "Failure to Maintain Control." He based this conclusion upon statements he heard at the scene by by-standers who were making voluntary comments that Mr. Brown was unfamiliar with riding on a motorcycle and the fact that the motorcycle left the roadway on the opposite side of the road from the lane in which he was traveling. He stated, "It was just obvious that he lost control of the motorcycle or else he wouldn't have wrecked." The Deputy later interviewed claimant James Brown at the hospital where he took a statement and recorded that statement in his report as follows: "Driver states he went down the road and turned and started back up the hollow. He states that he was not going fast but was changing gears on the motorcycle and crossed a rough section of road and lost control and ran in the ditch." When Deputy McNeely was later contacted by an investigator for respondent and they returned to the accident scene, he measured the distance from a dark area of pavement which he assumed was the ditch referred to as the "rough section of road" mentioned by claimant James Brown in his statement to the area of the ditch where the motorcycle left the paved portion of the road. This measurement was one hundred eighty-one (181) feet.

The Court first will address the issue of liability in this claim. The claimant James Brown is an individual who was not familiar with the Harley Davidson motorcycle he was taking for a ride on Tony's Branch Road with which he was not very familiar. He had driven on this stretch of road on the way to a party with three passengers and he drove over the cut across Tony's Branch Road created by respondent at least a month prior to June 5, 1999. He was at the party a couple of hours during which time he consumed two to three beers. He then requested permission to ride on the Harley Davidson motorcycle and he drove off. It was dark by this time of the evening (9:00 to 9:30 p.m.) and he proceeded to the dead-end of Tony's Branch Road where he turned around and drove back passing the location of the party and toward the intersection of Tony's Branch Road and State Route 3. He crossed the cut in Tony's Branch Road with the motorcycle on the side of the cut that was not very deep. (The video in evidence reveals that the cut was deeper on one side of the road than the other and this fact was borne out by statements from the various witnesses.) He thereupon proceeded a short distance further (maybe a quarter of a mile or a little more according to his testimony) and turned around on the motorcycle to return to the party concluding his ride on the motorcycle. On this return trip he again came to the cut across the roadway only the motorcycle struck a deeper section of the cut (anywhere from four to six inches deep according to testimony from witnesses) and the motorcycle "bobbled" him. His feet were off the pegs and he tried to gain control of the motorcycle which was a natural reaction. He did not want the motorcycle to fall over with him and get damaged since it was not his motorcycle. Thus, a driver on a strange motorcycle was being propelled down the road while he tried to gain control. It is logical to believe that he twisted the throttle for gas control which would explain the distance he went of some one hundred eighty-one (181) feet before the motorcycle went into the ditch on his left across the road from his lane of travel. The motorcycle then traveled seventy (70) feet before turning over and the claimant James Brown either fell beneath it or was thrown from it. (The testimony differed among the witnesses.) The motorcycle was twelve (12) feet from him, perhaps because after the accident, the first people at the scene moved it off of him and parked it along the side of the road.

Taking into consideration all of the evidence in this claim, the Court concludes that the cut made by respondent across Tony's Branch Road was the proximate cause of

the accident which is the subject matter of this claim. The testimony from witnesses in this claim establishes that respondent created a hazard on Tony's Branch Road when it failed to pave the cut area in a timely manner or to place warning signs or to monitor the cut with the knowledge that the gravel placed in the cut would naturally settle. A settlement of anywhere from two to six inches is not unusual for a cut made across the entire width of a road. Traffic proceeding over the gravel will put ruts in the gravel. The expert witness for the claimants, Victor Dozzi, explained to the Court that limestone crusher run (the kind of gravel placed by respondent over the culverts installed in the cut area on Tony's Branch Road) is a mixture of one and a quarter (1 1/4) inch limestone with smaller particles so that the material actually binds together when it is tamped down. He was of the opinion that the material should have been placed in layers and tamped down layer by layer. The Court agrees that this is probably the preferred engineering technique, but the Court also recognizes that this is an impractical requirement for respondent's employees on small cuts such as the one herein. However, nothing in the record absolves respondent of its duty to maintain a cut such as this one by laying asphalt over the gravel in a timely manner, or in the alternative, monitoring the settlement of the gravel so that additional gravel is placed to prevent a hazardous condition for travelers using the road. At the least, respondent could have placed a warning sign to alert drivers not familiar with the area about the uneven surface or dip at the cut.

In previous claims considered by this Court, the Court found negligence on the part of the respondent in claims where a cut was made by respondent across the width of a roadway or part of the roadway and the evidence established that respondent failed to maintain the area such that it was maintained at the level of the existing pavement. (See *Hale v. Dept. of Highways* 11 Ct. Cl. 93 (1976), *Withrow v. Dept. of Highways* 17 Ct. Cl. 47 (1987), *Boyle v. Division of Highways* 19 Ct. Cl. 103 (1992).) Thus, the conclusion of the Court herein is that respondent was negligent in its maintenance of Tony's Branch Road and this decision is in accordance with previous decisions. The issue of liability having been established by claimants in this action, the Court must now consider the comparative negligence of claimant James Brown in his operation of the motorcycle, if any.

The Court has determined that claimant James Brown must bear some responsibility for the accident which occurred on Tony's Branch Road resulting in his injuries. He was riding an unfamiliar motorcycle and he should have been more aware of his surroundings as he rode on Tony's Branch Road. He did not wear a helmet as required by law in our State. W.Va. Code 17C-15-44(a) states as follows: "No person shall operate ... any motorcycle or motor-driven cycle unless the person is wearing securely fastened on his or her head by either a neck or chin strap a protective helmet designed to deflect blows, resist penetration and spread impact forces. ..." This violation of the law meant to protect operators of motorcycles must be taken into consideration by the Court when calculating any measure of comparative negligence. However, the Court also is of the opinion that his comparative negligence does not approach the "equal to or greater than" threshold which would result in a denial of an award. The Court is of the opinion that claimant James Brown bears thirty-three and one-third percent (33 ⅓%) of the responsibility for the accident herein and the injuries resulting therefrom; therefore, the award to him for his injuries will be reduced by this percentage.

Claimant James Brown, 33 years of age at the time of the accident and now 38 years of age, received serious personal injuries in this motorcycle accident. His current treating physician, Dr. Constantino Y. Amores, a neurosurgeon, testified that claimant James Brown sustained a cervical injury that resulted into a temporary paralysis. He was

in the hospital from June 6, 1999, to June 11, 1999, and then in rehabilitation from that date to June 18, 1999. He was discharged after receiving rehabilitation during his initial hospital treatment. He wore a Minerva collar which is stiffer in nature than the normal collar used in neck injury patients. He suffered a slight herniation of the disc between two vertebrae in his neck. He also had a maxillary fracture for which he was treated by a plastic surgeon. Dr. Amores testified that he last saw claimant James Brown in February and April 2002. Mr. Brown had complaints about the pain in his neck area which is subjective in nature, but according to Dr. Amores the complaints were credible. He stated that his prognosis for Mr. Brown's physical condition from a neurological point of view was good.

Claimant James Brown described his injuries during the hearing. He suffered a neck injury as mentioned herein above, injury to his front teeth and to his face, as well as a laceration to his chest which required stitches, and a four to six inch cut on the left side of his knee cap on his right leg. His medical bills totaled $38,733.12 of which amount he paid $280.16. He is a truck driver for a coal hauling company. He suffers with pain which is continuing in nature and which has affected his ability to perform the normal activities in which he engaged prior to the accident. His life style has changed as a result of his injuries. He is not able to enjoy the same sports activities such as hunting, fishing, volley ball games, badminton games, etc. He has been unable to play with his two children as he once did. He stated that the pain he experiences is "severe" at least once a week. He lost work from June 5, 1999, to December 28, 1999, when he returned to work for light work duty only. He incurred a loss of wages in the amount of $17,744.00 during 1999 as a result of the motorcycle accident.

Claimant Angela Brown testified about the differences in her husband's life style. She substantiated his testimony about his inability to enjoy sports activities or interact with his children as he had prior to the motorcycle accident. She also stated that she observes him when he experiences pain after driving a truck all day. She was candid in her testimony about her observations of her husband.

The Court is of the opinion that claimant James Brown may recover $280.16 in medical expenses, $17,744.00 in lost wages, and $98,000.00 for his pain and suffering in the past and the future for a total amount of damages of $116,024.16 which amount is reduced by thirty three and one-third percent (33 ⅓%) for his comparative negligence in accordance with the decision of the Court. The Court makes an award to claimant Angela Brown in the amount of $5,000.00. The Court declines to make awards to claimants Christine Brown and Tasha Brown since no damages are in evidence.

In accordance with the findings of fact and conclusions of law stated herein above, the Court makes an award to claimant James Brown in the amount of $77,353.31, and an award to Angela Brown in the amount of $5,000.00.

Award to James Brown: $77,353.31.

Award to Angela Brown: $5,000.00.

OPINION ISSUED OCTOBER 30, 2003

MELISSA SHAFFER
VS.
DIVISION OF HIGHWAYS
(CC-00-490)

Shannon M. Bland, Attorney at Law, for claimant.
Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

PER CURIAM:

Claimant brought this action for personal injuries and damage to her vehicle which occurred when she was operating her vehicle on the Route 60 bridge that crosses Coal River in St. Albans, Kanawha County, and a portion of the pavement gave way creating a large hole which the vehicle struck. Respondent stipulated to liability in this claim. Therefore, the only issue this Court shall address is the issue of damages.

The incident giving rise to this claim occurred on August 1, 2000, at approximately 1:00 p.m. Claimant, Melissa Shaffer, was traveling westbound on Route 60 with her mother and two children as passengers. She was traveling in the left lane as she crossed the bridge over Coal River. Suddenly, a large portion of the pavement gave way as her vehicle crossed it. A large hole was created where the pavement gave way causing the passenger side tires to fall into the hole. The impact jerked claimant to the right when the right front tire struck the hole. She was able to hold onto the steering wheel as the back right tire struck the hole. However, this impact caused her to be thrown to the back and to the right. Claimant was able to maneuver her vehicle out of the hole and off the bridge. She drove the vehicle to the Amandaville side of the bridge and parked it on the side of Route 60. Fortunately, claimant's two children and her mother were not injured in this incident. A friend of claimant's mother happened to be driving home from work when he observed claimant's vehicle on the side of the road. He took the children and claimant's mother home while claimant remained at the scene with the automobile. She called the police and Hensley's Towing Company, who arrived on the scene. In addition, claimant called Grover Call, a friend. According to the claimant, the police arrived at the scene and completed a report of the incident and observed the hole in the bridge. Claimant's vehicle had to be towed from the scene due to the damage to the two tires. Mr. Call drove claimant to respondent's local office in St. Albans, where he went inside to discuss what could be done to have claimant's vehicle repaired. As a result of the impact, both right side wheels and tires had to be replaced. In addition, claimant's vehicle had to have a four wheel alignment. Claimant submitted an estimate for the damage to her vehicle and the towing bill in the amount of $645.92. However, claimant had automobile insurance coverage at the time of this incident which covered all but the amount of the deductible in the amount of $250.00. Thus, claimant may only recover the amount of her deductible as an out-of-pocket expense for the damage to her vehicle.

Claimant arrived at her home between 6:00 p.m. and 7:00 p.m. later that same evening. She testified that once she got home she sat down to rest and she then felt tired and drained from the event. She stated that she took two Tylenols and went to bed. According to claimant, when she woke up the next morning she felt stiff and sore. Specifically, she stated that she had pain in her right arm and shoulder, as well as her neck and mid-back. Claimant testified that she had not had this type of pain prior to this incident. Seven days later on August 8, 2000, claimant went to her family physician, Dr. Molano in Hurricane, Putnam County. She was complaining of back and neck pain as well as headaches. Dr. Molano prescribed pain medication and a muscle relaxant which she took. However, according to the claimant these medications made her feel tired all the time. Claimant stated that she continued to have pain and went to see Dr. Molano again on August 24, 2000, for the same medical issues as before which were neck pain, back pain, shoulder pain and headaches. Claimant testified that on September 1, 2000,

she contacted Dr. Harold L. Casto regarding her condition.

Dr. Casto, a licensed chiropractor in the State of West Virginia, testified as an expert witness in the field of chiropractic medicine at the hearing of this matter. Dr. Casto testified that he treated claimant for injuries she sustained in the incident at issue in this claim. Her first visit was on September 1, 2000, when she initially complained of mid-back pain and stiffness along with intercostal pain, which is pain in the rib area located laterally from the spinal area. Claimant also complained of headaches, pain in the right side of her neck, and bilateral shoulder tightness and pressure. Dr. Casto performed a medical evaluation including radiographs of the cervical and dorsal spinal areas. These tests indicated that claimant suffered from cervical and thoracic sprain/strain type injuries. Dr. Casto described these sprain/strain injuries as the stretching or tearing of the soft tissue structures such as ligaments and tendons. In addition, Dr. Casto performed a comprehensive examination on claimant on September 7, 2000, which entailed the observation of claimant's posture, and various orthopedic tests. As a result of these examinations, Dr. Casto determined that claimant had traumatically induced scoliosis as well as muscle spasms, tenderness, and tightness in her mid-back area. She also exhibited muscle irritation, tightness, and splinting during the foraminal impression test which checked her range of motion. Claimant also had a decreased range of motion in the cervical and dorsal spinal areas as well as the thoracic region of her back. Dr. Casto's diagnosis as to claimant's condition on September 7, 2000, was cervical sprain/strain, thoracic sprain/strain, cervical brachial neuralgia, which is shoulder pain, and post traumatic headaches. Further, he testified that x-rays of the cervical area demonstrated that claimant had lost the normal forward curve of her neck, which will cause claimant's neck not to be as strong as it was prior to the injury. Dr. Casto testified to a reasonable degree of medical certainty that claimant's injuries were caused by the traumatic experience when she was whipped around in her vehicle during the vehicular accident on August 1, 2000.

After diagnosing claimant's injuries and condition, Dr. Casto established a treatment plan for claimant, which included multiple "physiotherapeutical modalities." Dr. Casto used moist heat packs and ultrasonation to provide deep heating therapy. He also used electrical muscle stimulation and performed manipulative therapy which involves the placing of his hands on the claimant's injured areas to move the bones closer to their normal position. According to Dr. Casto, claimant did not respond to the first series of treatments as well as he had expected. He attributes this in part to the fact that claimant was unable to come to her appointments on a daily basis due to her work schedule. Dr. Casto stated that he reexamined the claimant on October 24, 2000, at which time he noted that claimant's condition was responding in a positive manner to treatment. Specifically, he stated that the pain in her neck and mid-back had decreased and that her range of motion had improved. At this point in her treatment, Dr. Casto decided to not place claimant on a regular treatment program, but instead, he treated her on a basis that would not conflict with her work schedule. Claimant continued to receive treatment from Dr. Casto through 2001. Dr. Casto testified that claimant continued to complain of mid-back pain and intercostal pain. Claimant also informed Dr. Casto that this pain was interfering with her work duties. Therefore, he ordered that claimant have an MRI (Magnetic Resource Imaging) performed on February 5, 2001, to rule out various orthopedic and neurological problems. Claimant had an MRI performed at Putnam General Hospital. The MRI was negative for any disc herniation. Given that the MRI was negative, Dr. Casto testified that in his opinion there was no need at the time of his last examination for claimant to have surgery on her neck or back because there were no

problems that an orthopedic surgeon or neurosurgeon could operate on.

The last time Dr. Casto treated claimant was on November 19, 2002. Dr. Casto testified that according to his records claimant was still having pain in her right shoulder and pain and numbness throughout her right arm and hand. She complained of moderate to severe muscle spasms on the right side of her neck, as well as moderate to severe muscle spasms in her mid-back. As of November 19, 2002, Dr. Casto, noted that claimant's physical condition had not changed overall and he directed her to come in on an as needed basis. Dr. Casto and claimant agreed that claimant's work schedule made it difficult for her to come in on a regular basis. Dr. Casto testified that claimant's injuries are chronic in nature. Dr. Casto testified that a chronic injury is one where after a three month period a person is still having pain and all healing that is going to take place has already taken place. He stated that a chronic condition such as claimant's will not be resolved as easily as an acute injury. It is Dr. Casto's opinion, based upon a reasonable degree of medical certainty, that claimant's injuries are chronic and permanent in nature. His prognosis for claimant is that these problems are permanent in nature and will be with her for the rest of her life.

Claimant incurred medical expenses as a result of the injuries sustained in this incident. Claimant visited Dr. Molano on two different occasions as a result of this incident. She incurred medical bills from these visits to Dr. Molano's office in the amount of $130.00. However, claimant had medical payment insurance coverage through her automobile insurance policy with a policy limit of $5,000.00[1]. The automobile insurance policy paid a total of $130.00 to Dr. Molano. Claimant incurred a total of $10,335.00 in medical expenses as a result of treatment at Dr. Casto's office, beginning on September 1, 2000, and continuing on a fairly regular basis until October 11, 2001, as well as approximately seven visits in 2002. In addition, claimant incurred an expense at Putnam General Hospital for the MRI in the amount of $1,307.50 and an expense of $304.00 from Radiology, Inc., for reading the MRI. Therefore, claimant incurred a total of $12,076.50 in medical expenses. Claimant had $5,000.00 of medical payment insurance coverage available as a collateral source which will be deducted from the total award of medical expenses. Thus, claimant's total recovery for medical expenses is $7,076.50 and her total of special damages including the $250.00 insurance deductible for the property damage is $7,326.50.

Claimant testified that she continues to suffer from back pain, shoulder pain and numbness, and headaches. She testified that she did not have any of these problems prior to this incident. According to claimant, her daily activities have been affected as a result of this pain including her ability to perform her duties at work. She stated that the pain irritates her while performing certain daily activities and that she has to stop doing whatever that activity may be that causes her pain or discomfort. Claimant stated that, she was able to work the drive-thru at Wendy's, which was one of her duties as the Assistant Manager, but she is no longer able to do so. She is unable to play with her children as she did before. She stated that she used to hold her three year old daughter often but she does not do that because of the pain. In addition, she no longer plays ball

[1] Although claimant had $5,000.00 in health coverage through her automobile insurance policy, she chose not to take advantage of this resource. This Court has held that any insurance benefits available to a claimant constitutes a collateral source whether or not claimant accessed the insurance coverage available.

with her five year old as she used to before the incident. Based upon the testimony regarding claimant's injuries, the pain and suffering associated with them, and the effects these injuries have had on her daily life and recreational activities, the Court has determined that claimant should be granted an award in the amount of $75,000.00 for the effect upon her life now and in the future.

Therefore, in view of the foregoing, the Court is of the opinion to and does hereby make an award to claimant in the amount of $82,326.50.

Award of $82,326.50.

OPINION ISSUED OCTOBER 30, 2003

GARY L. WILSON AND DIANE L. WILSON
VS.
DIVISION OF HIGHWAYS
(CC-03-172)

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. On March 20, 2003, claimant, Gary L. Wilson, was traveling on Route 27 in Brooke County when his vehicle struck a large hole in the road damaging a tire.

2. Respondent was responsible for the maintenance of Route 27 in Brooke County and respondent failed to maintain properly Route 27 on the date of this incident.

3. As a result of this incident, claimants' vehicle sustained damages in the amount of $51.40.

4. Respondent agrees that the amount of $51.40 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 27 in Brooke 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 $51.40.

Award of $51.40.

OPINION ISSUED OCTOBER 30, 2003

AMANDA BELL
VS.

DIVISION OF HIGHWAYS
(CC-01-375)

Eric M. Gordon, Attorney at Law, for claimant.
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 October 12, 1999, claimant was crossing Alternate Route 2, also known as Main Street, near its intersection with 14th Street in Wheeling, Ohio County, when she stepped into a hole causing her to fall.

2. Respondent was responsible for the maintenance of Alternate Route 2, in Wheeling, Ohio County and respondent failed to maintain properly Alternate Route 2 on the date of this incident.

3. As a result of this incident, claimant was injured and incurred medical bills in the amount of $614.50.

4. Respondent agrees that the amount of $614.50 for medical bills as put forth by the claimant is fair and reasonable. In addition, respondent has stipulated that claimant be paid $885.50 for pain and suffering.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Alternate Route 2 in Ohio County on the date of this incident; that the negligence of respondent was the proximate cause of claimant's injuries; 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 $1,500.00.

Award of $1,500.00.

OPINION ISSUED OCTOBER 30, 2003

VERNON W. GRANT

VS.
DIVISION OF HIGHWAYS
(CC-03-099)

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

PER CURIAM:

Claimant brought this action for damage to his 1992 Chevrolet Geo Tracker which occurred when his vehicle struck a tree in the road while traveling east on Route 9/5, also known locally as Mission Road, approximately seven miles east of Charles

Town, Jefferson 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 1, 2002, at approximately 7:30 a.m. The weather was clear and the road surface was dry. Claimant Vernon Grant was traveling from his home at Harpers Ferry to Cumberland, Maryland. As he was traveling on Route 9/5 at approximately thirty-five to forty miles per hour, he approached a rise in the road and saw a tree suddenly fall onto the roadway in front of his vehicle. He stated that he immediately applied the brakes to avoid a serious collision with the tree. He also was concerned that his vehicle might knock the tree into oncoming vehicles. Claimant's vehicle struck the tree with enough force to knock the base of the tree off the highway leaving bark and debris all over the road. Fortunately, claimant was not injured, but his vehicle could not be driven from the scene and it had to be towed. Claimant estimates that there were seven or eight vehicles behind him at the time of this incident. Fortunately, none was involved in the collision. Claimant estimates that he was approximately fifteen to eighteen yards from the tree when he first saw it falling and that the root system of the tree was initially located approximately seven feet from the edge of the road. He estimated the tree was thirty-seven feet long and approximately twenty-two inches at the base. Claimant travels this portion of Route 9/5 at least five days a week and he had not noticed this tree in particular as presenting a potential hazard to the traveling public. However, after the incident he noted that the tree was dead. He also stated that the top portion of the tree had been cut by someone prior to the incident but he is not sure when. Further, claimant testified that there was a "gutter cut" into the bank where this tree fell from. He testified that this "gutter cut" was made by respondent to help the water drain away from the highway. He also testified that while the cut was not made into the deep root system, it was approximately two feet from the base of the tree. He testified that when this tree fell, it did not take the root system with it. According to claimant, the tree broke off from its root system. As a result of this incident, claimant incurred towing expenses in the amount of $95.00 and collision repairs in the amount of $944.35. Claimant did not have insurance coverage to cover any of this loss and seeks an award of $1,039.35.

Claimant contends that respondent knew or should have known that this tree was dead and taken the proper action to remedy this hazard to the traveling public.

Respondent's position is that it did not have notice that this tree was dead or that it presented a hazardous risk to the traveling public. Respondent also states that the tree was not on its right of way, and thus, it is not responsible for claimant's accident.

Craig R. Thompson, assistant supervisor for respondent in Jefferson County, testified that he is responsible for the day-to-day operations and routine maintenance. Mr. Thompson is responsible for maintaining Route 9/5 and is familiar with the location where this incident occurred. He described the portion of Route 9/5 as a winding, two-lane road approximately twenty-two to twenty- four feet wide. He testified that the respondent's right of way at this location is fifteen feet from the center line in each direction for a total of thirty feet. Mr. Thompson stated that he believes he observed the tree which claimant's vehicle struck laying in the ditch at the side of the road. He cannot be certain the tree he saw was the same tree; however, the location of the tree coincides with claimant's description of the accident scene. He stated that the tree was forty feet long and obviously dead. He also stated that the whole tree had fallen including the roots. According to Mr. Thompson's measurements, the distance between the center line of the

highway and the line of trees on the side of the road where this tree supposedly fell from is eighteen feet. However, he admits that he has no way of establishing exactly where the tree fell from nor can he testify that this was the actual tree at issue.

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 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). With regard to tree fall claims, the general rule this Court has adopted 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. Div. of Highways*, 22 Ct. Cl. 170 (1999); *Gerritsen v. Dept. of Highways*, 16 Ct. Cl. 85 (1986). The Court has also held that respondent may have a duty to remove dangerous trees and tree limbs that are not on the respondent's right of way especially where the tree or tree limb is dead. *Newkirk v. Div. of Highways* 20 Ct. Cl. 18 (1993).

In the present claim, the evidence is not clear as to whether the tree was on respondent's right of way before it fell. However, both parties agree that the tree claimant's vehicle struck was dead. The evidence also established that this was a very large tree and regardless of whether or not it was on respondent's right of way, it was very close to it, and clearly presented a risk to the traveling public given that it fell on the highway. The fact that this was a large tree, that it was close enough to the highway to present a risk to the traveling public, that it was dead, and that respondent's employees had performed a ditching operation in the vicinity of the tree, leads the Court to conclude that respondent had at least constructive notice of the tree and its potential to be a hazard to the traveling public. Respondent could have remedied this situation by cutting down the dead tree prior to this incident, but it failed to do so in a timely manner. While the Court is not saying that respondent is responsible for every tree that falls near a highway, the unique set of circumstances in this particular claim requires the Court to conclude that respondent is liable for the damages to claimant's vehicle.

Accordingly, the Court makes an award to claimant in the amount of $1,039.35.

Award of $1,039.35.

OPINION ISSUED OCTOBER 30, 2003

JAMES E. NELSON and CHARLEEN A. NELSON
VS.
DIVISION OF HIGHWAYS
(CC-03-015)

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 James Nelson was operating their vehicle on U.S. Route 19 near Summersville, in Nicholas County, and the vehicle struck an object in the road. Respondent was responsible at all times herein for the maintenance of U.S. Route 19. 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 2, 2003, at approximately 3:00 a.m. Claimants were traveling from their home in Erie, Pennsylvania, to Florida. James Nelson was driving the vehicle and Charleen Nelson was the front seat passenger. It was raining and foggy. At the location of this incident, U.S. Route 19 is a four-lane, divided highway with two lanes going in each direction. Claimant Mr. Nelson was traveling in the left lane approximately five miles north of Summersville when suddenly he saw what appeared to be a piece of metal in the road in front of the vehicle. He did not see the object until the vehicle was almost upon it. He was unable to maneuver the vehicle to avoid striking the object. After the tires struck the object, claimants thought that the tires were all right and, thus, continued to travel. However, approximately fifteen to twenty minutes later they noticed that the back left side tire was flat. Mr. Nelson drove the vehicle to the berm of the road to change the tire. While changing the tire, a courtesy patrol driver noticed claimants predicament and stopped to give assistance. At this time, the courtesy patrol driver noticed that claimants' front tire was also flat. The vehicle had to be towed to a local repair shop where the claimants waited until the repair shop opened later that morning. According to the claimants, the courtesy patrol driver informed them that someone knocked a sign down on U.S. Route 19. Mrs. Nelson testified that a courtesy patrol driver stated that the sign that was knocked down was metal. In addition, the claimants testified that the object which their vehicle struck was metal. However, Mr. Nelson could not testify as to whether or not the object their vehicle struck was a metal road sign. Claimants were unable to provide any independent information, other than the courtesy patrol driver's statement, about the nature of the object which their vehicle struck. Further, claimants did not know how long the object had been in the road. Claimants had to purchase two new left side tires as a result of this incident. Claimants submitted a repair bill for the two tires which were $170.55 plus the towing charge of $46.00. Thus, claimants seek a total award of $216.55 for the damage incurred.

Claimants contend that respondent knew or should have known that there was an object in the road and that it presented a hazardous condition to the traveling public.

Respondent did not present any witnesses or testimony 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 81 (W.Va.1947). To hold respondent liable, claimants 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 (1995).

In the present claim, the claimants failed to establish by a preponderance of the evidence that respondent had notice of the object in the road. Claimants did not produce any independent testimony or evidence that the object their vehicle struck was one of respondent's road signs. The only evidence claimants presented indicating that the object

was one of respondent's road signs was an out of court statement made by a courtesy patrol driver. This is inadmissible hearsay under the *W.V. Rules of Evidence, Rule 801(c)*, which states "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In this claim, claimants offered into evidence statements made by one or two courtesy patrol drivers that the respondent had a road sign knocked down on U.S. Route 19. These statements were made out of court, and were offered by the claimants to prove the "truth of the matter asserted", which is that the object their vehicle struck was one of respondent's road signs. The reason for this rule is that hearsay is generally considered to be untrustworthy because the person who made the statement is not available to be cross-examined by the respondent concerning the accuracy of the statement. *State v. Browning*, 199 W.Va. 417, 485 S.E.2d 1(1997). To allow such statements to be introduced into evidence would be unfair to the respondent. Even if the object was a road sign, claimants failed to establish that respondent had notice and a reasonable amount of time to remove the object in the road. Further, this Court has consistently held that an award cannot be based upon mere speculation. *Mooney v. Dept. of Highways*, 16 Ct. Cl. 84 (1986); *Phares v. Division of Highways*, 21 Ct. Cl. 92 (1996). While the Court is sympathetic to the claimants for the damage to their vehicle and inconvenience, it would be mere speculation for the Court to suggest what this object was or where it came from.

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

Claim disallowed.

OPINION ISSUED OCTOBER 30, 2003

SANDRA SUE BEARD
VS.
DIVISION OF HIGHWAYS
(CC-03-425)

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 $102.00 for damage to her vehicle that occurred on the exit ramp of Interstate Route 81 located at or near Inwood, 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 $102.00.

Award of $102.00.

OPINION ISSUED OCTOBER 30, 2003

GARY LEE HISAM and DEBORAH K. HISAM
VS.
DIVISION OF HIGHWAYS
(CC-02-392)

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 Deborah Hisam was operating their vehicle on State Route 2 near Sistersville in Tyler County and a large rock fell from a hillside and struck their vehicle. Respondent was responsible at all times herein for the maintenance of State Route 2 in Tyler 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 September 1, 2002, at approximately 2:20 p.m. Claimant Deborah Hisam was driving a 1998 Pontiac Trans Sport. Claimants' son was the front seat passenger and their daughter and her friend were seated in the back seat. Mrs. Hisam was traveling north on State Route 2 towards New Martinsville. State Route 2 at this location is a blacktop, two-lane road. According to Mrs. Hisam, there is a three to four foot berm between the edge of the road and the rocky hillside, which is on the right side of the northbound lane of travel. A river is on the left side of the northbound lane. Mrs. Hisam stated that the road surface was dry and the weather was clear. She was driving just north of Sistersville when suddenly and without warning she saw a large amount of dirt falling from the hillside onto the vehicle. This was immediately followed by a large rock which struck the vehicle. She stated that the rock was a "four wheeler" sized "boulder" and that it struck the front passenger side of the vehicle causing damage. In addition, the passenger side window was knocked out and the front of the vehicle suffered damage as well. Fortunately, there were no personal injuries to claimant or her passengers. Mrs. Hisam testified that she did not see the rock until it struck the vehicle, and that she had no time to react to avoid the rock. She also testified that the last time she traveled this portion of road was approximately one week prior to this incident. Further, she stated that "every time" she goes by this area she has observed rocks along the side of the road which she believes were pushed off the road at various times. According to Mrs. Hisam, there are frequent rock slides along State Route 2 for miles. Claimants have full insurance coverage on this vehicle which covered all this damage but for $250.00, the deductible portion of their insurance.

Claimants assert that respondent's knew or should have known that there was a rock fall hazard at this location and it should have taken adequate measures to prevent the rocks from reaching the road.

Respondent contends that it had no notice of this rock fall and that it had erected

"Falling Rock" warning signs near the location of this incident to warn the traveling public.

Bradley Crawford, the County Highway Administrator II for Tyler County at the time of this incident, is responsible for overseeing all road maintenance in Tyler County including the portion of State Route 2 at issue in this claim. Mr. Crawford is familiar with the location of this incident. He testified that State Route 2 at this location is a two-lane road with a berm that varies from three feet to eight feet at particular locations. He also described this area as a known rock fall location. According to Mr. Crawford, respondent has erected "Falling Rock" warning signs near this location to warn the traveling public. He testified that there is one warning sign just north of Sistersville for the northbound traffic and another warning sign is located approximately one mile north of it for southbound traffic. He also stated that the two signs have been present for several years. Further, he stated that the northbound warning sign is just south of the location of this incident, and that he is certain that Mrs. Hisam would have driven past it on the date of this incident. In addition, Mr. Crawford testified that respondent had no prior notice or warning about this rock fall and it responded to the scene as soon as it received notice and cleared the rocks and debris from the road.

It is a well established principle 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 81 (W.Va.1947). The Court has consistently held that the unexplained falling of a rock or rock debris on the road surface is insufficient to justify an award . *Mitchell v. Division of Highways*, 21 Ct. Cl. 91 (1996); *Hammond v. Dept. of Highways*, 11 Ct. Cl. 234 (1977). In order to establish liability on behalf of respondent, the evidence must establish that respondent had notice of the dangerous condition posing a threat of injury to property and a reasonable amount of time to take suitable action to protect motorists. *Alkire v. Division of Highways*, 21 Ct. Cl. 179 (1997).

In the present claim, claimants failed to establish that respondent did not take adequate measures to protect the safety of the traveling public at the location of this incident on State Route 2. Respondent had erected "Falling Rock" warning signs to warn the traveling public of the potential of rock falls at this location, and respondent responded to the scene in a timely fashion to clear the road. The evidence also established that Mrs. Hisam was aware of rock falls in the area and that she must have driven past the warning sign that was located prior to the accident site. While the Court is sympathetic to claimants' plight, there is no evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED OCTOBER 30, 2003

BETTY SHREVE
VS.
DIVISION OF HIGHWAYS
(CC-02-457)

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

PER CURIAM:

Claimant, Betty Shreve, brought this action for damage to her vehicle which occurred when she was traveling on County Route 9 in Wetzel County, and the vehicle struck a hole on the edge of the road. Respondent was responsible at all times herein for the maintenance of County Route 9 in Wetzel County. 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 October 11, 2002, some time in the afternoon. Claimant was traveling east on County Route 9, also referred to as Sugar Run Road, in her 1988 Chevrolet S10 pickup truck. Claimant's husband and grandson were passengers in the vehicle with her. She was on her way to New Martinsville for a doctor's appointment. Claimant was approximately four miles from Littleton in Wetzel County when she observed an oncoming vehicle traveling at a high rate of speed. She estimates that the oncoming vehicle was traveling approximately fifty miles per hour while claimant was traveling approximately thirty miles per hour. As the vehicle approached, claimant realized that the oncoming vehicle was drifting across the center of the road into her lane of travel and claimant was forced to maneuver her vehicle to the berm of the road. When she did so, the front passenger side tire struck a large hole. She described the impact as forceful. She also stated that she had a difficult time driving the vehicle out of the hole because the tire was stuck. The impact burst the tire and bent the wheel. Claimant described County Route 9 as a winding, unmarked one and one-half lane, blacktop road. According to claimant, the road is wide enough in some locations for two oncoming vehicles to pass safely as long as each vehicle stays within its lane. However, she stated that some locations on the road are more narrow and one oncoming vehicle may have to maneuver to the berm of the road to allow the other vehicle to pass safely. She stated that the berm varies at different locations from high to low. At the location of this incident, claimant stated that two oncoming vehicles could pass safely, but in this instance, the other vehicle was out of its lane of travel. In addition, claimant testified that at the location of the accident the berm was gravel and twelve to sixteen inch gravel berm. Claimant estimated that the hole was located a little less than twelve inches from the edge of the paved portion of the road. She estimated the hole to be eight to ten inches wide and very deep. Claimant introduced photographs into evidence at the hearing of this matter which depicted the erosion of the blacktop along the edge of the road as well as the hole in the berm just to the left of the eroded portion of the road. Claimant introduced a repair estimate into evidence for one wheel at $114.00, one tire at $32.99, and a center cap for $40.00. Thus, claimant seeks a total award of $198.21.

Claimant contends that respondent knew or should have known of this hole and yet failed to repair it in a timely manner.

Respondent asserts that it did not have notice of this hole and that it repaired it as soon as it received notice.

Mark Douglas Poe, the crew chief for respondent in Wetzel County at the time of this incident, is responsible for the maintenance of County Route 9. Mr. Poe is familiar with County Route 9 and the location of this incident. He stated that County Route 9 is an unmarked, secondary road. Further, he stated that respondent does not have a schedule for maintaining the road but that it is inspected and worked on if any problems are detected. Mr. Poe testified that he does not know the last time that the

berms were repaired along County Route 9. According to Mr. Poe, respondent had no prior complaints or notice about this hole.

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 81 (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). 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. 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 this claim, the evidence established that respondent had, at the least, constructive notice of the hole in the berm along County Route 9 at the location of this incident. Given the evidence that the pavement along the edge of the road where claimant drove onto the berm was deteriorated, the Court is of the opinion that this condition was present for a significant period of time as was the hole next to it. Thus, respondent should have made adequate and timely repairs.

Accordingly, the Court is of the opinion to and does make an award in this claim in the amount of $198.21.

Award of $198.21.

OPINION ISSUED OCTOBER 30, 2003

GEORGE C. STEPHENS and BETTY STEPHENS
VS.
DIVISION OF HIGHWAYS
(CC-03-174)

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

PER CURIAM:

Claimants brought this action for damage to their chain link fence which occurred when respondent plowed snow on State Route 10/1 in Martinsburg, Berkeley County, onto claimant's chain link fence knocking it to the ground. 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 sometime in late January 2003 at or near claimants' property located adjacent to State Route 10/1 also referred to as Tavern Road in Martinsburg, Berkeley County. State Route 10/1 is a winding, two-lane road which traverses in front of claimants' property and leads to the City Hospital in Martinsburg. The lanes on State Route 10/1 are each approximately twelve feet wide in most locations. The travel portion of the road from white line to white line is approximately twenty-four feet wide. Claimants had an eighty-five to one-hundred foot long chain link fence adjacent to the road. Mr. Stephens estimated that the fence was four

feet from the white edge line of the road. Further, he stated that respondent has taken more of his property during the past few years and that there used to be five feet between the fence and the white edge line of the road. In late January, 2003, a large portion of the State was covered by a significant snowstorm. According to Mr. Stephens, the area around claimants' property received approximately thirty-two to thirty-eight inches of snow within one and one-half to two days. As a result, State Route 10/1 was covered with snow. Respondent used a one-ton truck with a snowplow to clear the road. Mr. Stephens testified that most of the snow that was plowed off the road in front of his property was piled up next to and over his chain link fence completely knocking it to the ground. He estimates that respondent plowed fifty inches of snow onto his fence. As a result, claimants had to purchase and install five temporary fence posts to support the fence so that it could stand again. Mr. Stephens testified that it will cost them $478.00 to have a new fence installed. Thus, claimants seek an award of $478.00.

Claimants assert that respondent negligently plowed a large amount of snow onto their property which proximately caused the damage to their fence.

Respondent contends that it acted reasonably under the circumstances then and there existing and it is not liable for the damage to claimants' fence.

Mark Baker, assistant county supervisor for respondent in Berkeley County at the time of this incident, is responsible for daily operations of the field crews. He was responsible for the crew that plowed the snow on State Route 10/1 on the date at issue and he is familiar with this road. He testified that State Route 10/1 proceeds from the City Hospital past claimants' property and intersects with County Route 13 and County Route 45. Mr. Baker testified that the weather conditions on the dates at issue resulted in treacherous road conditions. He stated that the Martinsburg and surrounding area received thirty-six inches of snow within one and one-half to two days. According to Mr. Baker, the Governor declared a state of emergency throughout most of West Virginia including Berkeley County. In addition, respondent was on "Code Red", which provides that only respondent's vehicles and emergency vehicles may use the highways. This allows respondent to clear the roads more efficiently. Mr. Baker testified that a one ton truck with a snowplow was used to clear State Route 10/1. He estimated that in a twenty-four hour period respondent probably plowed the road in front of claimant's property once every two to two and one-half hours. Although State Route 10/1 is a low priority road in most locations, Mr. Baker stated that respondent keeps the portion near claimants' property cleared because it is the access route to the City Hospital. In addition, Mr. Baker rejected claimants' argument that respondent plowed the snow only to the side of the road where claimants' property was located. He testified that the plow truck operators are instructed to plow on the center line. He stated that "when we turn and come back we would plow the other side." He testified that respondent does not plow snow completely across the road to the other side because this can obstruct traffic. Further, Mr. Baker testified that respondent did not use a bucket to remove the snow at this location because it has only two such machines, one of which is needed at the headquarters to load salt trucks, while the other is used to haul snow in locations where the snowplow cannot reach such as large snow drifts.

W.Va. Code §15-5-11 grants immunity and exemption to a "duly qualified emergency service worker." W.Va. Code § 15-5-11(a) states in part that:

> ...Neither the State nor any political subdivision nor agency of the State or political subdivision nor, except in case of willful misconduct, any duly qualified emergency service worker complying with or reasonably attempting to comply with this article or any order, rule, regulation or

> ordinance promulgated pursuant to this article, shall be liable for the death of or injury to any person or for damage to any property as a result of such activity....

W.Va. Code §15-5-11(c)(1) defines a "duly qualified emergency service worker" in part as:

> Any duly qualified full or part-time paid, volunteer or auxiliary employee of this State... performing emergency services in this State subject to the order or control of or pursuant to the request of the State or any political subdivision thereof.

In this claim, the Court is of the opinion that W.Va. Code §15-5-11 bars claimants from any recovery due to the fact that employees of the respondent were operating as duly qualified emergency service workers under emergency circumstances. The Governor had declared a state of emergency and respondent was operating under "Code Red" to clear the roads and highways of snow and ice. Further, respondent was attempting to keep Route 10/1 clear of snow so as to allow the public access to the local hospital. Respondent did not willfully cause damage to claimants' chain link fence; therefore, under the statute, respondent is not liable for the damage to claimants' property. While sympathetic to claimants' loss, the Court is required to deny recovery in this claim.

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

Claim disallowed.

OPINION ISSUED OCTOBER 30, 2003

WALLACE REESE and KATHERINE R. REESE
VS.
DIVISION OF HIGHWAYS
(CC-03-116)

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

PER CURIAM:

Claimants brought this action for damage to their 2000 BMW 323 which occurred when claimant Wallace Reese was operating their vehicle on State Route 20 in Wetzel County, and the vehicle struck a hole in the road. Respondent was responsible at all times herein for the maintenance of State Route 20. 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 February 18, 2003, at approximately 4:45 p.m. Claimant Wallace Reese was traveling northbound on State Route 20 from Mannington to New Martinsville, which he travels frequently. At this location, State Route 20 is a two-lane, blacktop highway with a double yellow center line and white lines on both edges of the road. It was cloudy and the road was wet but there

was no precipitation at the time of this incident. The road surface was wet due to a large snowfall which occurred on February 17, 2003, the day prior to this incident. Mr. Reese testified that he was traveling between thirty-five and forty miles per hour. He stated that it was still daylight but that it was quickly turning to dusk. He was negotiating a right curve in the road near the south end of Reader in Wetzel County when he approached several holes in the road. He attempted to avoid the holes by maneuvering towards the center line but he was unable to do so because of oncoming traffic. The right front tire struck one of the holes. After the incident, claimant noticed that the vehicle was pulling to the right. On March 13, 2003, he drove the vehicle to Charleston to have it serviced. At that time, he discovered that the right front wheel was bent and the tire had a separated belt. Mr. Reese testified that he has observed numerous holes in the road at the location of this incident on prior occasions. He stated that he observed different holes appearing at different times. He stated that some holes would be repaired with cold mix but the repairs lasted only a short period of time because the cold mix would come out of the holes. According to Mr. Reese, it was possible to avoid some of the holes at this location by driving close to the center line. However, on the night of this incident there was oncoming traffic which prevented him from doing so. Claimants submitted a repair bill for a new tire, a wheel, and a four wheel alignment in the amount of $654.73.

Claimants contend that respondent knew or should have known of the holes in the road and that it should have made adequate and timely repairs to eliminate this hazard.

Respondent asserts that it did not have notice of the holes in the road and it was operating under emergency circumstances to remove the snow and ice from the roads as a result of a large snowstorm and that it acted diligently under the circumstances.

Joseph Mercer Jr., the Crew Leader for respondent in Wetzel County at the time of this incident, is responsible for overseeing the maintenance work on State Route 20 at the location of this incident. He is also familiar with the location where this incident occurred. Mr. Mercer testified that on February 17, 2003, Wetzel County received a heavy snowfall. He testified that some areas received twenty inches of snow and a few others received as much as thirty inches of snow. As a result of such a large snowfall in a short period of time, Mr. Mercer and the two crews he oversees were forced to operate on a twenty-four hour schedule. He stated that each crew is made up of six members and that they operated dump trucks and a grader to clear the snow off the roads. Mr. Mercer testified that during such a large storm the respondent's first priority is to clear the roads to keep them open for travel. Further, he stated that State Route 20 is a "trunk line" road and is a first priority road. Mr. Mercer testified that once State Route 20 is cleared then respondent clears the "feeder line" roads, which are blacktop roads that are not as heavily traveled as the first priority roads. He stated that the secondary roads are cleared and treated last. Respondent introduced into evidence the DOH-12 records which indicated that on February 17, 2003, the respondent placed thirty-four tons of salt and cinder on State Route 20 in response to the heavy snowfall. Further, on February 18, 2003, the date of this incident, respondent's records show that its two crews each worked a twelve hour shift. The respondent used snow plows and trucks to apply abrasives primarily on State Route 20. In addition, Mr. Mercer testified that respondent had a truck plowing snow and applying abrasives on State Route 20, a total of sixteen hours on February 18, 2003. According to Mr. Mercer, respondent had no prior notice or complaints about the hole which claimants' vehicle struck He testified that on February 6, 2003, respondent placed temporary cold mix patches over holes in the road on State Route 20. Respondent introduced into evidence a DOH-12 dated February 6, 2003, which indicated that

respondent patched the road in the area where Mr. Reese's incident occurred.

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 81. (W.Va. 1947). To hold respondent liable, claimants 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 was not negligent in its maintenance of State Route 20. The evidence adduced at the hearing established that respondent had all of its available employees on SRIC (snow removal and ice control) due to the significant snowstorm in Wetzel County. Respondent had to respond to this emergency situation and focus on removing the snow and keeping the roads clear. Respondent was operating on a twenty four hour basis to keep State Route 20 and other roads open beginning on February 17, 2003, and respondent did the same on February 18, 2003, which was the date of this incident. The evidence also indicated that respondent had just patched the portion of the road where this incident occurred on February 6, 2003, which was only twelve days prior to the incident. Respondent had no notice or complaints about holes in the road between February 6, 2003, and February 18, 2003. 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 was not negligent in its maintenance of State Route 20 at the time of claimant's incident herein.

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

Claim disallowed.

OPINION ISSUED OCTOBER 30, 2003

LAURENCE W. DOMENICO
VS.
DIVISION OF HIGHWAYS
(CC-03-201)

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 westbound over a bridge on Route 9 near Hedgesville, Berkeley County, and his vehicle struck a large hole in the road. Respondent was responsible at all times herein for the maintenance of Route 9 in Berkeley County.

The incident giving rise to this claim occurred on May 1, 2001, at approximately 2:00 p.m. The weather was clear and the road was dry. The bridge at issue on Route 9 has four lanes with two eastbound lanes and two westbound lanes divided by a concrete barrier At the time of this incident, respondent was overseeing a widening project on the bridge. Claimant, Laurence Domenico, testified that he knew he was traveling through a construction zone. He was traveling west in the right lane at approximately thirty miles

per hour when, suddenly and without warning, he saw a large hole in the road ahead of him. He looked to see if he could maneuver his vehicle into the left passing lane but he was unable to do so due to the volume of traffic both in front of and behind his vehicle. He described the impact as significant and loud. After his vehicle struck the hole, he attempted to slow it down, but the brakes did not work. Fortunately, claimant was in a five speed manual transmission automobile and he was able to slow the vehicle down and safely park it. The impact with the hole broke the vehicle's brake system causing all the brake fluid to leak out and the brakes to fail. In addition, it broke the cable to the emergency brake. Following this incident, claimant contacted respondent and he was directed to respondent's local field office at "Rock Cliff Drive" to report the incident, which he did. Claimant submitted a repair bill to the Court in the amount of $256.68 for damage to his brakes as well as his right wheel cylinder.

Claimant contends that respondent knew or should have known that this hole was present and taken the proper remedial actions.

It is respondent's position that it did not have notice of the hole and that the contractor performing the project was responsible for maintenance during the road widening project.

Mark Baker, assistant county supervisor for respondent in Berkeley County at the time of this incident, is responsible for the maintenance of the highways in Berkeley County including the bridge at issue in this claim. Mr. Baker testified that at the time of this incident the bridge was four lanes with an approximate five to six foot shoulder on each side. He also testified that the respondent had an agreement with a contractor, Upon the Rock, which was to remove the deck from the bridge, restore the bridge, put a new deck on, and a new parapet wall. In addition, the contractor was extending the bridge to create three lanes and a five-foot shoulder. Mr. Baker testified that respondent had no knowledge of the hole prior to this incident and had he known of it he would have had it repaired. He also testified that, once a contractor is given a project such as this one, it is the contractor's responsibility to properly maintain the structure while the job is being conducted. However, Mr. Baker also testified that the contractor has a duty to establish a field office for respondent's use or respondent's consultant's use during the project. He testified that respondent is ultimately the supervisor for such a project. He also stated that respondent or its consultant oversees the daily operations and is to be on site while all work is being performed. According to Mr. Baker, respondent did in fact have an inspector or consultant on this job site.

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 81 (W.Va.1947). However, the Court has also held that respondent owes a duty to motorists to exercise reasonable care and diligence in maintaining roads under all circumstances. *Hobbs v. Dept. of Highways*, 13 Ct. Cl. 27 (1979); *Lewis v. Dept. of Highways*, 16 Ct. Cl. 136 (1985); *Adkins v. Div. of Highways*, 21 Ct. Cl. 13 (1995). 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. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the present case, the evidence established that respondent had at least constructive notice of the hole on the bridge. The Court rejects respondent's argument that it should not be held liable for this damage because there was a private contractor who was responsible for the project. The evidence established that respondent had a local field office at the site of this incident. Respondent's witness admitted that it had

someone on or near the site to oversee the daily operations of the contractor and to inspect the job. Thus, respondent should have been aware that this hole was present and taken the proper remedial actions to correct it. Its failure to do so was the proximate cause of claimant's damages.

Accordingly, in view of the foregoing, the Court is of the opinion to and does make an award to the claimant in the amount of $256.68.

Award of $256.68.

OPINION ISSUED OCTOBER 30, 2003

JOE ZIRK
VS.
STATE RAIL AUTHORITY
(CC-03-419)

Claimant appeared *pro se*.
John S. Dalporto, 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 $1,765.00 for personal property damage caused when respondent was using a tamper on a railroad near claimant's home and a hydraulic hose burst on the machine and sprayed hydraulic fluid on claimant's property located in Moorefield, Hardy 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 $1,765.00.

Award of $1,765.00.

OPINION ISSUED OCTOBER 30, 2003

CARL SANDERS
VS.
PUBLIC SERVICE COMMISSION
(CC-03-426)

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 $771.40 for travel expenses. 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 $771.40.

Award of $771.40.

OPINION ISSUED OCTOBER 30, 2003

ALLTEL
VS.
STATE FIRE MARSHAL
(CC-03-427)

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 $507.12 for providing cellular telephone services for 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.

Accordingly, the Court makes an award to claimant in the amount of $507.12.

Award of $507.12.

OPINION ISSUED OCTOBER 30, 2003

FEDERAL BUREAU OF PRISONS
VS.
DIVISION OF CORRECTIONS
(CC-03-484)

Claimant appears *pro se.*

Charles P. 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 $9,583.77 for the housing of inmates 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 DECEMBER 2, 2003

VERIZON WEST VIRGINIA, INC.
VS.
DEPARTMENT OF ADMINISTRATION
(CC-03-503)

Joseph J. Starsick, Jr., Attorney at Law, for claimant.
Heather A. Connolly, 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 $933,785.85 for unpaid telephone charges for fiscal years 1998, 1999, and 2000. 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 $933,785.85.

Award of $933,785.85.

OPINION ISSUED DECEMBER 2, 2003

CHARLESTON AREA MEDICAL CENTER, INC.
VS.
DIVISION OF CORRECTIONS
(CC-03-439)

Claimant appears *pro se.*
Charles P. 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 $41,926.91 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 thHP Photosmart D7355 Printerat 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 2, 2003

CHARLESTON AREA MEDICAL CENTER, INC.
VS.
DIVISION OF CORRECTIONS
(CC-03-449)

Claimant appears *pro se.*

Charles P. 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 $6,473.83 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 2, 2003

ALI R. DABIRI
VS.
DIVISION OF HIGHWAYS
(CC-03-094)

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

PER CURIAM:

Claimant brought this action for damage to his water line which he alleges was caused by respondent's negligent failure to secure properly a portion of the hillside adjacent to Route 11/1 also referred to as Bill's Fork Road near Servia in Braxton County. Respondent is at all times herein responsible for the maintenance of Route 11/1 in Braxton County. The Court is of the opinion to deny this claim for the reasons set forth more fully below.

Claimant's residence and property is located adjacent to County Route 11/1. County Route 11/1, also referred to as Bill's Fork Road, is a "semi-improved" tar and shale road with a "sealed top." The road is approximately ten feet wide and is unmarked. There is a small berm on the right side of the road for northbound traffic and a steep hillside on the opposite side of the road with a small ditch-line located between the edge of the road and the hillside. According to respondent, its right-of-way at the location of this incident is between fifteen to twenty feet from the center of the road in both directions. Claimant owns property on both sides of County Route 11/1 at the location of this incident. According to claimant, there is a distance of approximately seventy to eighty feet from the edge of the highway on the left side of the road to the toe of the slope on claimant's property at the bottom of the hill. There is a creek located at the bottom of the hill between the hillside and claimant's meadow. His residence is located on the end of the meadow opposite the road. Claimant estimates that there is a distance of 800 feet from his home to County Route 11/1. Claimant stated that the hillside is located at an approximate seventy degree slope. He stated that the hillside has a steep slope at the top, but at approximately twenty to thirty feet down the slope of the hill it becomes somewhat less steep. The slope of the hillside above the road on the opposite side of the road is less steep. Claimant estimates that it has a fifty-five to sixty degree slope. Claimant's water line begins at the well which is located on the west side of County Route 11/1 approximately ten to fifteen feet from the road. The well is on a portion of claimant's property where it was located when he purchased the property in 1997. He estimates that it has been in the same location at least thirty years and it is the only source of water for claimant's residence. The water flows through a pipe from the well, then through respondent's sixteen to eighteen inch culvert under County Route 11/1, and continues on the other side of the road where it flows through the waterline across claimant's meadow to his home. Claimant testified that there is approximately one-thousand feet of waterline extending from the well to his home.

In May 2002, the waterline to claimant's home failed. At first, claimant believed that the line might be plugged so he decided to place a second waterline of 1000 feet on top of the ground from the same well across the meadow to his home. This waterline was in place from May 2002 until November 2002, when he hired a company to excavate the underground pipe to determine what was causing the problem. It was at this time that claimant found that there was a "kink" in the water line on the side of the road closest to claimant's residence. According to claimant, the "kink" is approximately two to three feet from the edge of the road on the grassy berm. Further, claimant testified that he also observed a portion of County Route 11/1 "sliding" and "settling" parallel to the location where the kink was found in his water line. He stated that there is a crack in the surface of the road at this location and that as a result of the crack there is a large gap between two portions of the road. He estimated that this gap is between eight to ten

inches in width and height. This is the same location where claimant's water line runs under the road. Claimant is of the opinion that the road is settling because there is nothing to maintain the weight of the road sufficiently. In addition, he stated that the weight of the traffic and the heavy rainfalls the prior year combined to cause this condition in the road. He is of the opinion that the condition of the road caused the damage to his water and the subsequent loss of his water supply. Claimant stated that if respondent had placed some type of retainer such as pylons along the hillside it would have prevented the road from sliding and causing the damage to his water line. Claimant also stated that since this was a mountainous area respondent should have been more diligent in providing support for the hillside and the road especially since the hillside was at such a steep angle. Claimant testified that he incurred expenses as a result of respondent's negligence. He submitted invoices for installing a new water line. One invoice was in the amount of $291.40 and a second invoice in the amount of $219.47. Claimant also submitted an invoice into evidence in the amount of $856.00 for an air compressor and the excavation of the pipe. Claimant seeks a total award of $1,366.87.

Claimant asserts that respondent failed to provide proper support for the hillside causing the road to settle and crack which was the proximate cause of the damage to claimant's water line.

Respondent's position is that it acted reasonably and diligently in maintaining the road and hillside. Further, it did not have notice of the slip of the hillside until after the damage to claimant's water line.

Jack D. Belknap, Equipment Operator Two for respondent, in Braxton County, testified that he is familiar with County Route 11/1 at the location of claimant's property. Mr. Belknap stated that County Route 11/1 is a third priority road, but that it is not the lowest priority in terms of road maintenance. He stated that he believes that respondent's right-of-way is fifteen to twenty feet from the center of the road in each direction. He first became aware of claimant's loss of water flow in the Summer of 2002 when claimant called and informed respondent that he had lost the water flow to his home due to a problem with respondent's road. Mr. Belknap and an assistant visited the scene to determine what the problem may be. He testified that he saw clear water leaking from claimant's water line on the side of the road where the ditch line and the well are located. He also testified that while he was there he did not observe any cracks in the road. The only noticeable action that he felt respondent could do at that location was to clear the ditch line. Mr. Belknap also stated that he informed claimant of the water leak and that there was nothing respondent could do to help because it was not responsible for repairing the water line. Further, Mr. Belknap testified that respondent had no prior notice of the road surface settling until the spring of 2003. Mr. Belknap is of the opinion that any slippage at or near the location of claimant's water line has been caused by excessive surface water that developed over the past few years as a result of heavy rainfalls. In addition, he testified that Braxton County has suffered from water damage this past year from the excessive rainfall.

Mark Nettleton, a Geotechnical engineer for respondent, is responsible for addressing landslides on behalf of respondent. Mr. Nettleton testified that he first went to the site of this incident on September 3, 2003, with two other employees of respondent to investigate the cause of claimant's problem. Mr. Nettleton testified that he observed a slip of the hillside below the road on the side of the road where claimant's water line was damaged. He stated that this area looked like the "typical toe of a landslide". However, he did not notice any slippage or problems with the hillside on the other side of the road. In Mr. Nettleton's opinion, the last two years of heavy rainfall has caused

the water table to rise which in turn caused high pool pressures in the ground and embankment. This caused the soil below the road to weaken and the embankment to slide and give way. Further, he testified that this condition began on claimant's property and progressed to the road. Mr. Nettleton testified that he did not observe anything on the hillside below the road that would indicate that anyone had done anything to cause this problem. According to Mr. Nettleton, in order to correct this problem a retaining wall, piling, or a buttress at the bottom of the hill is needed. However, he stated that the road was designed properly, and respondent was not negligent for failing to install a retaining wall at the time the road was designed. In addition, he did not believe that there was anything that anyone could have done along the edge of the road that would have prevented the lower side of the hill from sliding. In addition, he testified that the drainage system established by respondent was in good working condition. He stated that the water from the hillside above the highway on the left side of the road flows into the ditch line next to the highway at the bottom of the hill. This water flows through the culvert under the road which is the same one through which claimant's waterline runs. The water then drops seventy to eighty feet over the edge of the hillside to the creek below which is located on claimant's property. Mr. Nettleton testified that the ditch line and culvert are open and in good condition. In his opinion, this drainage system has not had any effect on softening the soil on the hillside or under the road.

The Court has held that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *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. *Rogers v. Div. of Highways*, 21 Ct. Cl. 97 (1996).

In the present claim, claimant failed to establish by a preponderance of the evidence that respondent maintained County Route 11/1 or the supporting hillside in a negligent manner. While the Court is sympathetic to claimant's situation, it is of the opinion that the cause of the slippage of the hillside is not a result of respondent's negligence. The evidence adduced at the hearing established that the excessive surface water that has developed over the past two years as a result of heavy rainfalls is the cause of the slippage and claimant's damages. Further, the evidence established that respondent had installed an adequate drainage system and maintained it adequately. While respondent's witness testified that a retaining wall or buttress at the bottom of the hill would remedy the slip in the road, he did not state that the road was improperly designed or that respondent was negligent for not installing these devices. The evidence established that respondent did not have prior notice of a slip at this location. Thus, the Court is of the opinion that respondent was not negligent in failing to protect claimant's property because it was not foreseeable that a slip would occur at this location.

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

Claim disallowed.

OPINION ISSUED DECEMBER 2, 2003

BRIDGETTE D. GREAVER
VS.
DIVISION OF HIGHWAYS

(CC-02-417)

Claimant appeared *pro se.*

Xueyan Zhang, 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 Old Route 50 near West Union, in Doddridge County, and the vehicle struck a large rock in the road. Respondent was responsible at all times herein for the maintenance of Old Route 50 in Doddridge 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 October 11, 2002, sometime in the afternoon. Claimant was traveling westbound on Old Route 50 to her home in West Union, Doddridge County. She was driving her 1983 Ford Escort Stationwagon. It had been raining earlier in the day but according to claimant there was no precipitation at the time this incident occurred. Claimant was traveling through an area known locally as the "cut" because the road goes through a cut made in the mountain. She estimates that she was traveling forty-five to fifty miles per hour in a fifty-five mile per hour zone. There was a truck in front of her and a car behind her, which car was driven by Sandra Holcombe, a friend of claimant's and a witness to the incident. Suddenly, claimant saw a large rock in the middle of her lane of travel. She stated that she was unable to maneuver the vehicle to the right onto the berm because the vehicle would strike the ditch, and there was an oncoming vehicle in the other lane. Thus, she stated that she had no choice but to drive over the rock which caused significant damage to her vehicle including damage to the converter, muffler, and tailpipe. Sandra Holcombe testified that after claimant's vehicle struck the rock, it broke into numerous smaller pieces. Fortunately, claimant was not injured and she was able to drive her vehicle to respondent's local station approximately one-half mile away to report the incident. Claimant testified that the rock her vehicle struck was approximately eighteen inches high and eighteen inches wide. According to claimant, she could not see the rock in the road due to the large truck in front of her blocking her view. She estimated that she was a car length away from the rock when she saw it. Claimant stated that the truck in front of her was high enough off the ground to avoid striking the rock. Old Route 50 at this location is a two-lane, blacktop road with a double yellow center line and white lines on both edges. There are berms on both sides of the road. In addition, there are hills on both sides of the road. Claimant testified that the rock came from the hillside on her right where the hill is steeper. Claimant also testified that she travels this road two or three times per day and that she is aware that this is a rock fall area. However, she stated that she has only seen smaller rocks fall on the side of the road. She has never seen a large rock in the road prior to this incident.

Claimant contends that respondent failed to take adequate measures to protect the traveling public from a known rock fall hazard.

Respondent asserts that it acted reasonably and diligently in protecting the traveling public from falling rocks at this location and that it did not have notice of this particular hazard.

Larry Williams, assistant supervisor for respondent in Doddridge County, is responsible for maintaining the roads in Doddridge County, which includes the portion of Old Route 50 at issue and he is familiar with this location. According to Mr. Williams, this location is a known rock fall area and respondent occasionally receives complaints of rocks in the road. In addition, there are no rock fall warning signs at this location. Mr.

Williams testified that when this portion of road was built, benches were built into the rock wall on the right side of the road. The benches are located high above the road and are approximately twenty feet wide. The benches were created to catch the rocks that fall and prevent them from continuing to roll down the hill and onto the road. According to Mr. Williams, this is the first large rock that he is aware of that has fallen onto the road. He stated that it is very rare for rocks to fall onto the road at this location and that when they do they are small. Further, he stated that the benches are preventing the large rocks from falling onto the road. Mr. Williams also testified that neither he nor respondent had notice of this particular rock in the road, until claimant reported the 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 81 (W.Va.1947). This Court has consistently held that the unexplained falling of a rock or rock debris on the road surface is insufficient to justify an award. *Mitchell v. Division of Highways,* 21 Ct. Cl. 91 (1996); *Hammond v. Dept. of Highways*, 11 Ct. Cl. 234 (1977). In order to establish liability on behalf of respondent, claimant must establish by a preponderance of the evidence that respondent had notice of the dangerous condition 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 claimant failed to establish that respondent had not taken adequate measures to protect the safety of the traveling public from rock falls at the location of this incident. Respondent built adequate benches along the side of the hill which the evidence established caught the large rocks. In addition, the evidence established that respondent did not have notice of any large rocks falling onto the road at this location until after claimant's incident. While the Court is sympathetic to claimant's plight, the fact remains that there is no evidence of negligence on the part of respondent upon which to base 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 2, 2003

AMANDA ADAMS
VS.
DIVISION OF HIGHWAYS
(CC-03-100)

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

PER CURIAM:

Claimant brought this action for damage to her 2003 Dodge Neon which occurred when she was traveling on County Route 39 near Swiss in Nicholas County, and the vehicle struck a large hole in the road. Respondent was responsible at all times herein for the maintenance of County Route 39. 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 February 21, 2003, at

approximately 10:30 p.m. Claimant, her fiancee, and brother had traveled from Summersville to Charleston to do some shopping. Claimant was driving back to Summersville from Charleston. Her fiancee was seated in the front seat and her brother was seated in the back seat. It was dark outside and it had been raining. Although it had stopped raining, the road surface was saturated and there was standing water at some locations on the road. County Route 39 at the location of this incident is a two-lane asphalt highway with a double yellow line and white lines on both edges. Claimant slowed the vehicle as she drove around a left curve in the road just above Swiss Road towards Summersville. As she drove out of the curve, she saw a large hole in the travel portion of the road just as both right side tires went through the hole. Claimant stated that the hole was just left of the white edge line and that both right side tires struck the center of the hole. She maneuvered the vehicle to the berm of the road where she discovered that both tires were flat. The vehicle had to be towed to the garage to be repaired. At the garage, claimant was informed that one of her wheels was also bent. Claimant testified that she did not know the hole was there. She testified that the last time she had traveled County Route 39 in the same direction was approximately three months prior. Christopher Pittsenbarger, claimant's fiancee, testified that he did not see the hole before claimant's vehicle struck it. He also testified that the hole was approximately five inches in diameter and four to five inches deep. Claimant's brother, Carl Adams, testified that the hole was approximately six to seven inches in diameter and four to five inches deep. He also testified that he travels this portion of highway often and that he did not recall this particular hole in the road. Claimant submitted a repair bill into evidence for the cost of the two tires in the amount of $132.39, and she submitted a repair estimate into evidence for the cost of a new wheel in the amount of $349.80. Thus, claimant seeks a total award of $482.19.

Claimant contends that respondent knew or should have known of this hole and that it presented a hazardous condition to the traveling public.

It is respondent's position that it did not have notice of the hole or a reasonable amount of time to make repairs, and that it was acting reasonably and diligently under the circumstances.

Edward Brown, assistant county supervisor for respondent in Nicholas County, is responsible for responding to complaints regarding the roads and for maintaining the roads in Nicholas County. Mr. Brown is familiar with this portion of County Route 39. He testified that County Route 39 is a first priority road and that it is a heavily traveled road. He stated that he or one of his two other assistants drive this road looking for holes and other hazards, especially during the winter months. He testified that there was a lot of bad weather during the winter of 2003, including heavy snow, freezing rain, and freeze thaw cycles. According to Mr. Brown, the weather conditions last winter caused the road foundations to deteriorate at a fast rate. Mr. Brown also stated that respondent had not received any prior complaints regarding holes in this portion of County Route 39. However, at some point in the middle of February 2003, one of his assistant's did report to him that there were a few areas that needed repairs, but the location at issue was not mentioned as one of the areas in need of repairs. Regardless, Mr. Brown testified that weather conditions throughout February 2003 prevented respondent from applying cold mix patches to the surface of the highways.

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 81 (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 Court is of the opinion that respondent acted reasonably and diligently in maintaining County Route 39 especially during inclement weather. Claimant failed to establish that respondent had notice of the hole which her vehicle struck and a reasonable amount of time to take corrective action. While the Court is sympathetic to the claimant for her loss, there is insufficient evidence to establish that respondent was negligent.

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

Claim disallowed.

OPINION ISSUED DECEMBER 2, 2003

DAVID C. FRIEND
VS.
DIVISION OF HIGHWAYS
(CC-02-425)

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 White Oak Road to Terra Alta in Preston County when his vehicle struck a piece of metal causing damage to his left rear tire.

2. Respondent was responsible for the maintenance of this portion of White Oak Road in Preston County, and respondent failed properly to maintain White Oak Road at this location in Preston County on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $112.65.

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 White Oak Road in Preston 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 $112.65.

Award of $112.65.

OPINION ISSUED DECEMBER 9, 2003

BRITTAIN MCJUNKIN, MD, and JUDITH MCJUNKIN
VS.
DIVISION OF HIGHWAYS
(CC-02-424)

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 vehicle which occurred when claimant Brittain McJunkin, M.D., was operating their 1999 Audi station wagon on I-77 near Charleston, Kanawha County, and the vehicle struck a metal expansion joint protruding between the road and the bridge. 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 October 15, 2002, at approximately 6:00 a.m. while dark. Claimant Dr. McJunkin was traveling southeast on I-77 on his way to work in Greenbrier County. He was traveling in the left lane at approximately sixty to sixty-five miles per hour. He was approaching a small bridge between mile marker ninety-five and ninety-six when suddenly his vehicle struck something in the area of the metal expansion joint span between the bridge and the highway. The impact punctured both left side tires forcing Dr. McJunkin to maneuver the vehicle to the side of the road. He testified that he did not see any part of the joint protruding from the roadway prior to striking it with the vehicle because it was dark. He assumes that the expansion joint was in a state of disrepair thus causing the damages to the tires of his vehicle. As a result of the impact, claimants purchased two new tires and had the tires balanced. Claimants submitted a repair bill in the amount of $226.84.

Claimants assert that respondent failed to maintain properly the interstate by failing to remedy the defective expansion joint between the bridge and pavement.

Respondent did not present any evidence or witnesses in this claim.

It is a well established principle of law that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 46 S.E.2d 81 (W.Va.1947). In order to hold respondent liable for road defects of this type, claimant must establish by a preponderance of the evidence that respondent had 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); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). However, 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).

In the present claim, the Court is of the opinion that claimants have failed to establish by a preponderance of the evidence that respondent knew or should have known that the expansion joint on I-77 which is assumed to have damaged claimants' vehicle was in a state of disrepair at the time of the accident described herein. The Court would have to resort to speculation to find that, in fact, the expansion joint was in disrepair, and further, that there is liability on the part of the respondent which this Court will not do. Consequently, there is no evidence of negligence established upon which to base an award.

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

Claim disallowed.

OPINION ISSUED DECEMBER 9, 2003

THOMAS H. WALKER and HEATHER WALKER
VS.
DIVISION OF HIGHWAYS
(CC-03-254)

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

PER CURIAM:

Claimants brought this action for damage to their 1999 Mitsubishi Eclipse which occurred when claimant, Thomas Walker, was operating the vehicle on Cabin Creek Road near Chelyan, in Kanawha County, and the vehicle struck a large hole in the road. Respondent was responsible at all times herein for the maintenance of Cabin Creek Road. The Court is of the opinion to deny this claim for the reasons set forth below.

According to claimant Thomas Walker, the incident giving rise to this claim occurred either on March 7, 2003, or March 10, 2003, between 6:30 p.m. and 7:00 p.m. Mr. Walker was driving their vehicle on Cabin Creek Road on his way home from work. He had a coworker in the vehicle with him on the evening at issue. It was a dark, rainy and somewhat foggy evening. Mr. Walker testified that the road surface was wet and that it was a little difficult to see given these conditions. Cabin Creek Road at this location is a two-lane, asphalt highway with a yellow center line and white lines on the edges. Mr. Walker testified that he was traveling Cabin Creek Road, as he does on a daily basis, when suddenly his front and rear right side tires struck a large hole in the road. Claimant drove the vehicle for approximately one mile further when he noticed that the right front tire was going flat. He turned off the road and changed the front tire with the help of his friend. Mr. Walker noticed that both passenger side tires and wheels were damaged. According to Mr. Walker, the hole was located within the travel portion of the road and within the area where the passenger side tires touch the pavement. He stated that he did not see the hole prior to striking it with the vehicle. Mr. Walker also stated that he drove past this location the day prior to the incident, and if the hole was present at that time, he did not see it. Further, Mr. Walker admitted that this hole may be the type that literally occurs overnight. Mr. Walker submitted an estimate into evidence in the amount of $1,865.60 for the cost of two new wheels and an estimate for two new tires in the amount of $194.82. Thus, claimants seek a total award of $2,060.42 in damages. Claimants have comprehensive insurance coverage which covered at least a portion of this loss. Mr. Walker could not recall the amount of claimants' deductible feature and he did not have a certificate of insurance coverage, also referred to as a declaration of insurance or an abstract of coverage, available at the hearing of this matter. Thus, the Court instructed claimants to send a copy of their certificate of insurance coverage to the Court within thirty days which claimants have not done. Therefore, if there was a finding of liability on the part of respondent, the Court would be unable to make an award without knowing the amount of insurance coverage available. *See Sommerville v. Division of Highways*, 18 Ct. Cl. 110 (1991).

Claimants contend that respondent knew or should have known of this hole in the road and that it should have taken more timely and adequate action to remedy this hazardous condition.

Respondent did not present any witnesses or direct testimony 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 81 (W.Va.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). In the present claim, claimants failed to establish by a preponderance of the evidence that respondent had notice of the defective condition on Cabin Creek Road which caused the damage to claimant's vehicle. The evidence also established that this road is known for the propensity of holes to develop quickly and without warning due to the number of coal trucks using the road on a daily basis.

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

Claim disallowed.

OPINION ISSUED DECEMBER 9, 2003

DAVID R. MARTIN
VS.
DIVISION OF HIGHWAYS
(CC-02-266)

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

PER CURIAM:

Claimant brought this action for damage to his 1993 Buick Regal four door sedan which occurred when he was operating his vehicle northbound on State Route 20 in Upshur County and the vehicle struck a hole on the edge of the road. Respondent was responsible at all times herein for the maintenance of State Route 20 in Upshur County. 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 June 27, 2002, between 11:45 a.m. and 12:00 noon. It was a clear and sunny day with no precipitation. Claimant was on his way to the Veterans' Administration Center. He was traveling northbound on State Route 20 at approximately fifty miles per hour in a fifty-five mile per hour zone. He testified that he travels this portion of road approximately once every two weeks and he could not recall the last time he had traveled it. At this location, State Route 20 is a two-lane, asphalt road with a yellow center line and white lines on both edges. There is a gravel berm that varies in width along the right side of the road for northbound traffic. Claimant was approximately two miles north of Buckhannon next to Pringle Tree Road when his vehicle veered to the right and slightly off the edge of the road. He stated that he slowed the vehicle and drove a short distance on the berm. He attempted to maneuver

the vehicle back onto the road when suddenly it struck a large hole on the edge of the road. According to claimant, the right front tire absorbed the direct impact which was significant. He stated that there is extra space along the berm at this location which enabled him to maneuver the vehicle safely onto the road. The force of the impact caused the right front tire to explode and the right front wheel to sustain damage. According to claimant's measurements, the hole was approximately seven inches deep, two feet long and one foot wide. Claimant submitted photographs of the hole into evidence at the hearing of this matter which demonstrated that the hole was large and extended into the white edge line of the paved portion of the highway. According to claimant, the hole extended between five and six inches from the berm into the paved portion of the road. As a result of the impact, claimant testified that he purchased a new tire in the amount of $50.21, and a used aluminum wheel in the amount of $63.60. However, at the hearing of this matter, the Court requested that claimant provide the Court the original invoice for the used aluminum wheel and his certificate of insurance coverage within thirty days. While claimant provided the Court his certificate of insurance coverage, he did not send the original invoice which the Court needs to verify the date this cost was incurred. Thus, claimants are limited to a recovery of the cost for the new tire in the amount of $50.21.

Claimant contends that respondent knew or should have known of this hole on the edge of the road and that it should have made adequate repairs in a more timely fashion.

Respondent's position is that it did not have notice of this hole and that it has acted reasonably and diligently under the circumstances.

Gregory Phillips, Highway Administrator for Upshur County, is responsible for all highway maintenance in Upshur County including the portion of State Route 20 at issue. He testified that he is familiar with the location at issue and that it is located approximately two miles north of Buckhannon city limits. Mr. Phillips testified that State Route 20 is a heavily traveled highway. The width of the road is eighteen feet and the berms vary from three to six feet. Mr. Phillips testified that respondent did not have prior notice of the hole at issue. He testified that either he or his assistant drive the roads daily and make visual inspections of all heavily traveled roads in Upshur County including State Route 20. He stated that no more than three or four days would pass before he or his assistant would travel State Route 20 and pass this particular location and neither Mr. Phillips nor his assistant noticed the hole at issue. According to Mr. Phillips, the hole claimant's vehicle struck is "off the edge of the road" and that a portion of the berm at this location has been washed away by "torrential downpours." He testified that Upshur County has had approximately seventeen torrential downpours this past year, but he cannot testify as to whether or not it rained the night prior to this incident. Further, Mr. Phillips testified that the berm at issue is located on a downhill slope. There is a steep hill above State Route 20 on the side of the road opposite the location of this incident. There is a ditch-line at the bottom of this hill that extends along the road. According to Mr. Phillips, a large amount of water flows off the hillside and down onto the road; and due to this past year's "torrential rainfalls," the ditch-line has been unable to hold this water. Thus, the water flows onto the berm and washes it out. Mr. Phillips testified that the water is creating a "cutter" along the edge of the road where the stone on the berm of the road is washed away from the edge of the asphalt creating a cut and a drop between the road and berm. He testified that this type of condition has to be maintained constantly and that there is no way to prevent it from occurring. He stated that if respondent repaired the hole at issue, another one would occur as soon as it rains again. Mr. Phillips also testified that the broken pavement and hole which claimant's vehicle struck could

have been created overnight by the combination of a "torrential downpour" and a coal or log truck driving on the edge of the road. However, Mr. Phillips also testified that he could not determine approximately how long the hole had been present because the area in the photographs introduced by the claimant was wet. The fact that there is water in the hole leads him to believe that there could have been a washout perhaps the night before.

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 highways. *Adkins v. Sims,* 46 S.E.2d 81 (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 the hole and the broken edge of the pavement at the location of this incident. The evidence established that there was a hole on the berm that had eroded the pavement and extended well into and beyond the white edge line. Based upon the size of this hole, its location, and the fact that this is a heavily traveled highway, the Court concludes that respondent should have known of this condition. The Court recognizes the validity of respondent's argument that heavy rainfalls, along with the location of the berm on a down hill slope combine to create a potential condition that can occur over night, thus arguably denying respondent timely notice. While the Court appreciates respondent's position, it is of the opinion that given such a hazardous condition as the one at issue, respondent could have at least placed a warning sign prior to this location to provide notice of the condition at the edge of the pavement to the traveling public.

In accordance with the finding of facts 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 of $50.21.

Award of $50.21.

OPINION ISSUED DECEMBER 9, 2003

JANET M. PECK
VS.
DIVISION OF HIGHWAYS
(CC-03-168)

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

PER CURIAM:

Claimant brought this action for personal injuries and property damage which occurred when she was traveling north on State 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 State Route 2. 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 March 15, 2003, between 5:00 p.m. and 6:00 p.m. Claimant was traveling northbound on State Route 2 through a stretch

of highway referred to locally as the "Glendale Narrows." She was proceeding to her home in Benwood, Marshall County. She stated that the weather conditions were clear and the road surface was in good condition. At this location, State Route 2 is an undivided, four-lane asphalt highway. There are two southbound lanes and two northbound lanes. Each lane is twelve and one-half feet wide. There are center markings and white edge lines on each side of the road. Along the northbound side of the road there is a sheer rock cliff and along the southbound side of the road there is a stone wall between the road and a steep slope to the river. On the evening at issue, claimant stated that there were vehicles traveling in front of her and behind her in the left lane of travel but there were no oncoming vehicles. Claimant was traveling in the left lane between forty-five and fifty miles per hour. She had just driven up a small grade in the road and she was starting to proceed down a small hill when she attempted to maneuver into the right lane of travel. She looked in her rearview mirror, her side mirror, and then turned to look back once more to make sure the lane was clear. She had just maneuvered into the right lane when she suddenly observed a large rock in the road in front of her. According to claimant, she attempted to avoid the rock by quickly maneuvering the vehicle. However, she was unable to avoid striking it with the vehicle. Claimant stated that the vehicle struck the rock and "ran up over it" causing the vehicle to go up in the air and come back down on two wheels. Claimant testified that the vehicle went up in the air and landed on two wheels twice. Then, the vehicle headed toward the stone wall between the road and the river. She attempted to maneuver it back onto the road, but she was unable to regain control of the vehicle which struck the stone wall and bounced back twice before coming to rest after striking the stone wall a third time. Claimant described the rock which her vehicle struck as being approximately thirty to thirty-six inches wide and at least thirty-six inches high. She stated that the rock was already in the road when the impact occurred. Further, claimant stated that the incident occurred in the portion of "the narrows" closer to McMechen than to Glendale. Claimant introduced photographs into evidence which depict numerous rocks located between the edge of the road and the bottom of the hillside at the location of this incident. As a result of the impact with the rock, claimant's vehicle was damaged and it had to be towed from the scene. Claimant had an estimate of the damages to the vehicle which was determined to be a total loss. In addition, claimant suffered personal injuries as a result of this incident. She testified that she did not believe that she was injured at the time of the incident and therefore did not go to the hospital that day. However, she woke up the next morning in pain. She stated that she had a bruise on her arm and some swelling in her leg. Claimant went to the Wheeling Hospital Emergency Department where she was examined and x-rayed. Claimant suffered no broken bones, and she was treated and released with a recommendation to follow up with her family physician. She stated that she did follow up with Dr. Kelly at the New Benwood Medical Clinic for one visit. Claimant testified that she does not suffer from any long term physical injuries or chronic pain as a result of this incident. Claimant also testified that she missed approximately nine days of work as a result of not having a vehicle to travel to and from her places of employment. However, claimant stated that she did not miss work as a result of the physical injuries she suffered in this incident. She submitted property damage estimates and a towing bill into evidence at the hearing. Subsequent to the hearing, claimant submitted her medical bills and lost wages to the Court at the Court's request. Claimant incurred an expense at Wheeling Hospital in the total amount of $298.75. Her health insurance carrier paid all of this amount except $21.14, claimant's co-pay. Claimant submitted a bill from New Benwood Medical Clinic in the amount of $203.87 of which claimant paid a co-pay in

the amount of $10.00, and she submitted a receipt from Ohio Valley Chiropractic, LLC in the amount of $105.24 which claimant paid in full. However, it is unclear whether or not claimant's health insurance covered or could have covered any portion of this medical expense. Claimant also testified that she purchased her vehicle on July 11, 2002, for $1,200.00, and she submitted estimates from three different automobile dealers who valued the vehicle at $1,200.00 at the time of this incident. In addition, claimant seeks to recover the fifty dollar towing bill. Thus, claimant seeks recovery in the amount of $1,386.38 in this claim.

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, Highway Administrator Two for respondent in Marshall County at the time of this incident, is responsible for all routine maintenance in Marshall County. Mr. Minor is familiar with the location of this incident referred to as "the narrows." This portion of Route 2 is approximately one mile and a half in length. Mr. Minor testified that both the north and south bound lanes are illuminated with high-intensity lights to help protect the traveling public. He also stated that each lane is signed as a rock fall area. One sign is located on the northern entrance which is on the Glendale end of the "narrows" and the other is located at the southbound entrance of the "narrows" on the McMechen side. He stated that the rock fall signs are approximately five feet wide and five feet long and have flashing amber lights. According to Mr. Minor, these were present at the time of claimant's incident and she would have driven past one of the signs. Mr. Minor testified that respondent has also taken additional measures to protect the traveling public including patrolmen operating on a full twenty-four hour cycle when there is a freeze/thaw cycle or during a period of heavy rock falls. In addition, respondent relies on the state, county, and local police to detect and report problems. Mr. Minor testified respondent did not have notice of this particular rock fall until 8:00 p.m., after the incident occurred.

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 81 (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); *Coburn v. Division of Highways*; *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). Knowledge of other rock falls in the area near an incident can be sufficient to give respondent notice of a hazard to the traveling public. *Cole v. Division of Highways*, 21 Ct. Cl.15 (1995); *Foster v. Division of Highways*, 23 Ct. Cl. 248 (2000).

In the present claim, the Court is of the opinion that respondent had actual knowledge of a hazardous condition at the location of this incident on State Route 2 in Marshall County. This area on State Route 2 between Glendale and McMechen referred to as "the narrows" is a section of highway known for dangerous rock falls which are a hazard to the traveling public. *Foster v. Division of Highways*, 23 Ct. Cl. 248 (2000). Respondent's remedial actions have proven to be insufficient to protect the traveling public at this location. Respondent has placed falling rock warning signs with flashing lights and it has installed numerous lights to illuminate the road to assist drivers in seeing rock falls. In addition, respondent also has regular patrols to locate rocks on the road.

However, these measures have proven insufficient to protect the traveling public in this particular section of State Route 2. 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 at this specific location of State Route 2 in Marshall County. Thus, the Court is of the opinion to make an award to the claimant for the value of her vehicle in the amount of $1,200.00, $50.00 for the towing bill, $31.14 for the medical insurance co-payments, and $105.24 for the costs incurred in receiving chiropractic care for a total award of $1,386.38. The Court has determined that claimant failed to establish by a preponderance of the evidence that she suffered lost wages; therefore, claimant may not make a recovery for lost wages.

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 the amount of $1,386.38.

Award of $1,386.38.

OPINION ISSUED DECEMBER 9, 2003

MARK O. DILLS
VS.
DIVISION OF HIGHWAYS
(CC-03-023)

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 operating his vehicle on State Route 2 between New Martinsville and Moundsville in Marshall County and a large rock fell from a hillside striking his car. Respondent was responsible at all times herein for the maintenance of State Route 2 in Marshall County. 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 December 12, 2002, at approximately 7:45 p.m. Claimant was driving his 1992 Dodge Shadow ES Hatchback with his girlfriend who was sitting in the front passenger seat. They were proceeding northbound on State Route 2 from claimant's home in New Martinsville to McMechen in Marshall County. It was a dark, damp, cool evening. Claimant testified that there had been a lot of "freeze/thaw" activity during this period. Claimant travels this portion of road frequently and he had last done so the prior day. State Route 2 at this location is a two-lane, asphalt highway with a yellow center line and white edge lines on each side of the road. Each lane is twelve and one-half feet wide and the total width of the road is twenty-five feet. The shoulder of the road is approximately two and one half feet wide on each side of the road. Claimant estimates that there is an approximate twenty foot berm on the right side of the northbound lane where the mountainside at issue is located. He believes that the berm on the opposite side of the road is a little wider. Claimant stated that he was traveling approximately fifty-five miles per hour just north of the Consolidated Coal Company offices when suddenly a large rock fell from the hillside, bounced out of the ditch on the side of the road, and struck the right front of the vehicle.

Claimant estimated that the rock was eighteen inches in diameter. He stated that he did not see the rock until the impact. According to claimant, there were two vehicles approximately one hundred-fifty to two hundred feet in front of his vehicle and there were two vehicles behind him. He was unable to swerve into the southbound lane because there was oncoming traffic. The impact totaled claimant's vehicle and caused claimant's girlfriend to suffer a broken ankle. However, claimant suffered no personal injuries. Claimant testified that the area of this incident is a known rock fall area and he is aware that rock slides have occurred often. He stated that there are piles of rocks on the road side where the respondent has had to push them out of the travel portion of the road. Further, claimant testified that respondent has attempted to prevent rock slides from reaching the road at this location. He stated that respondent has placed a permanent rock fence, and some barriers at this location. Claimant submitted a tow bill into evidence in the amount of $180.00 and an estimate from "Kelly Bluebook" which valued a 1992 Dodge Shadow ES Hatchback at $1,885.00. Thus, claimant seeks a total award in the amount of $2,065.00. Claimant testified that he purchased his vehicle approximately five months prior to this incident and that it had between sixty and seventy thousand miles on it. He also testified that the vehicle was in excellent condition other than a problem with the paint not adhering well to the body of the car.

Claimant contends that respondent knew or should have known that there was a high risk of rock falls at this location, and yet failed to take adequate action to remedy this hazardous condition.

It is respondent's position that it has taken adequate measures to remedy rock falls in this location and that it did not have notice of this particular rock fall hazard.

Christopher Minor, Highway Administrator Two for respondent in Marshall County, is responsible for all routine maintenance of highways in Marshall County including the portion of State Route 2 at issue in this claim. Mr. Minor is familiar with the location of this incident and refers to it as the "Southern Narrows." He testified that the "Southern Narrows" begin at the Consolidated Coal Company offices where State Route 2 is a two-lane road, and extends north for three-quarters of a mile to Washington Lands where State Route 2 becomes a four- lane highway. He stated that this location is considered a rock fall area and that it is signed as such. According to Mr. Minor, there is a rock fall warning sign for northbound traffic approximately one hundred feet from the intersection of "Consol Coal Offices." He estimated that the portion of road within this rock fall area is approximately three-quarters of a mile. Further, he testified that rock fall warning signs have been present at this location for at least twenty-six years. Mr. Minor testified that there are other areas along State Route 2 that have more rock falls than the location at issue, but he admitted that there are rock falls at the location of this incident especially when there is a "freeze/thaw"cycle. Mr. Minor distinguished the "Southern Narrows" from what is referred to as "The Narrows". He stated that "The Narrows" is that portion of State Route 2 located between Glendale and McMechen approximately fourteen miles north of the location of the incident herein. According to Mr. Minor, rock falls are less prevalent in the "Southern Narrows." He estimated that the "Southern Narrows" do not have a tenth of the "situation" as does "The Narrows." In addition, he stated that the "Southern Narrows" area is not lighted.

Mr. Minor testified that respondent did not have notice of this rock fall until after claimant's incident. Respondent was called out at 8:00 p.m. by a deputy sheriff who informed respondent that a vehicle had struck a rock in the road while traveling through the "Southern Narrows." Respondent introduced a DOH-12 into evidence which indicated that it responded to an emergency regarding a rock fall. Mr. Minor testified

that respondent did not have any information about this particular rock falling onto the road until after the incident occurred. Further, he stated that during freeze and thaw cycles respondent has a patrolman on duty twenty-four hours per day. However, at the time of this incident, respondent had only one shift and it had to "call out" an employee on duty to respond to the scene to remove this rock. Mr. Minor testified that since respondent was not operating on a twenty-four hour patrol cycle it was probably not the standard freeze/thaw winter cycle.

It is a well established principle that the State is neither and 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 the rock fall hazards in the area at issue. While the "Southern Narrows" portion of highway at issue does not present as great a risk for rock falls as "The Narrows," it is nonetheless a known rock fall area. The evidence adduced at the hearing indicates that there is a significant number of falling rock incidents at this location. Further, the road is not lighted which makes it more difficult for the traveling public to avoid rocks that may be in the road. In addition, the evidence established that this incident occurred during a freeze/thaw cycle which increases the risk of falling rocks. However, respondent failed to have a patrolman on duty at the time of this incident. Instead, respondent had to call an employee at home to respond after the incident occurred. The actions taken by respondent in this claim are not adequate to protect the traveling public from a known hazard. 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 at this specific location of State Route 2 in Marshall County, and further, that respondent is liable for the damages to claimant's vehicle.

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 the amount of $2,065.00.

Award of $2,065.00.

OPINION ISSUED DECEMBER 9, 2003

KEVIN O. WEST and KATRINA L. WEST
VS.
DIVISION OF HIGHWAYS
(CC-02-303)

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

PER CURIAM:

Claimants brought this action for damage done to their vehicle which occurred when their son, Klint West, was driving their vehicle southbound on I-79 near Bridgeport, Harrison County, and the vehicle struck numerous large holes on the berm of the

highway. Respondent was responsible at all times herein for the maintenance of I-79 in Harrison County. 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 June 21, 2002, at approximately 6:45 a.m. Claimants' son, Klint West, was driving their 2001 Mitsubishi Eclipse southbound on I-79 on his way to attend a class. I-79 at this location is a four-lane, divided interstate highway with two southbound lanes and two northbound lanes. There is a white center line and yellow lines on both edges of the road. There is an asphalt berm on both sides of the southbound lanes and a grass median between the northbound and southbound lanes. Klint West had just traveled through a construction zone near the Meadowbrook Road Exit in Bridgeport. He stated that he was traveling between forty-five and fifty miles per hour as he traveled out of the construction zone which had a posted speed limit of fifty miles per hour. Klint West testified that he remained in the left lane of travel as he drove out of the construction zone. He also stated that there was a lane shift near the end of the construction zone. At this location, he approached an eighteen wheel truck in the right lane of travel. Mr. West testified that the truck was traveling adjacent to claimants' vehicle for approximately three hundred to four hundred yards when he noticed that it began to cross over the center line. He was afraid that the truck was going to strike his vehicle so he maneuvered it to the left onto the edge of the berm. According to Mr. West, he drove on the berm approximately ten yards when, suddenly, the vehicle struck numerous large holes in the berm. Mr. West stated that there were approximately ten holes each of which was approximately six to eight inches deep and significantly long. The impact caused both left side tires to go flat immediately. Further, he stated that he could not maneuver the vehicle back onto the road because of the tire and wheel damage as well as a large "lip" between the edge of the road and the berm. Mr. West testified that if he had maneuvered the vehicle back onto the road the vehicle would probably have struck the eighteen wheel truck. Fortunately, he was able to maintain control of the vehicle so he drove onto the median and parked.

Claimant Kevin West testified at the hearing of this matter regarding the scene of this incident and the damage caused to claimants' vehicle. He stated that he arrived at the scene of the incident fifteen minutes after his son made a telephone call. He stated that there was a State Trooper already at the scene, but he did not fill out an accident report. Kevin West also testified that he observed two or three hubcaps around the location of this incident. According to Kevin West, both left side tires and wheels were destroyed. In addition, he stated that there was damage underneath the front of the vehicle as well as a bent cross-member and body damage. The vehicle had to be towed to claimants' home and later to a repair shop. Claimant Kevin West submitted a repair bill into evidence in the amount of $3,070.42. Claimants did not present a receipt for the tow bills with the name of the company or the date and thus the Court will not consider those bills. However, claimants had comprehensive insurance coverage to cover this loss, with a deductible feature of $500.00. Thus, claimants are limited to the amount of their insurance deductible of $500.00. See *Sommerville/State Farm Fire and Casualty* v. *Division of Highways*, 18 Ct. Cl. 110 (1991).

Claimants assert that respondent failed adequately to maintain the berm of the road at the location of this incident and that its failure to do so was the proximate cause of their damages.

Respondent contends that it did not have notice of the condition of the berm or a reasonable amount of time to take corrective action.

Gary Dyer, Supervisor for respondent at Lost Creek in Harrison County, is responsible for the maintenance of I-79 in Harrison County from the 99 mile post to the 132 mile post which includes the location at issue. Mr. Dyer testified that either he or one of his crew members patrols this location daily. He stated that the total width of the two southbound lanes is twenty-four feet, making each lane twelve feet wide. He also stated that the berms are made of asphalt and are approximately four feet wide. According to Mr. Dyer, he was notified of this incident on June 21, 2002, and he personally went to the location and observed numerous holes in the berm of the left lane. He stated that respondent made temporary cold patch repairs that same day and on June 26, 2002, permanent repairs were made using asphalt. Mr. Dyer testified that respondent did not have any prior reports of holes in the berm at this location. Further, it is his opinion that this condition did not necessarily occur over a significant period of time, but, instead it could have occurred quickly, if a lot of traffic had been forced to drive onto this portion of the berm. He stated that the berm could have deteriorated within fifteen to twenty minutes with heavy traffic.

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 81 (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). 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).

In this claim, the Court is of the opinion that the evidence established that I-79 at the location of this incident presented a hazardous condition to the traveling public. Further, the evidence established that the driver of the vehicle, Klint West, used the berm in an emergency or, at the least, under necessary circumstances. The photographs introduced by the claimants established that there were numerous holes in the berm and that the berm was not level with the paved portion of the road. If respondent did not have actual notice of the condition of this berm, the evidence established that it at least had constructive notice. Respondent should have known that the construction work being performed near the location of this incident would force traffic onto the berm and cause damage. Respondent could have placed warning signs or barrels at the location where the berm was damaged to give notice to the traveling public. Thus, the Court concludes that negligence on the part of the respondent resulted in the damages to claimants' vehicle.

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 claimants in the amount of $500.00.

Award of $500.00.

OPINION ISSUED DECEMBER 9, 2003

MARTHA R. PERRINE

VS.
DIVISION OF HIGHWAYS
(CC-03-255)

Claimant appeared *pro se.*
Xueyan Zhang, 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 State Route 41 in Persinger, Nicholas County, and the vehicle struck a large hole in the road. Respondent was responsible at all times herein for the maintenance of State Route 41. 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 April 22, 2003, at approximately 1:00 p.m. Claimant was driving her 1997 Dodge vehicle eastbound on State Route 41 from Craigsville to Summersville. The weather was sunny and the roads were dry. State Route 41 at this location is a two-lane, asphalt highway with double yellow center lines and white lines on the edges. Claimant travels this portion of State Route 41 to Summersville approximately once a week. The last time she had traveled it prior to this incident was approximately one week earlier. Claimant testified that she was traveling between 45 to 50 miles per hour in a 55 mile per hour zone. As she approached a large oncoming log truck that crossed the centerline, she believed that she had to maneuver her vehicle to the edge of the road and onto the berm. When she did so, the right front tire struck a large hole on the berm of the road resulting in a serious impact. Claimant stated that the hole her vehicle struck resulted from broken pavement. She stated that the hole extended from the berm, through the white edge line and approximately ten to twelve inches into the travel portion of the road. According to claimant, the hole was fourteen to sixteen inches wide and approximately three to four feet long. In addition, claimant testified that the hole was significantly deep. Claimant testified that the hole was deep enough to make it difficult for her to remove the vehicle from it. As a result, claimant's right front tire and wheel were destroyed. She also asserts that her right rear tire was damaged as a result of this incident. Although she does not recall her head striking anything in the vehicle, she does recall that there was a severe impact when the vehicle struck the hole. She stated that the impact caused a feeling of pressure in her head and that "it just felt like my head exploded." Claimant also stated that later that night she could not see for a while. Claimant went to the emergency room at Summersville Memorial Hospital the next morning complaining of severe headaches which she attributed to this incident. She was x-rayed, treated, and released from the emergency room the same day with instructions to follow up with her family physician. According to claimant, her family physician directed her to have an MRI of her head and MRA of the neck to determine whether she had suffered a stroke. Claimant testified that she never had these type of headaches until this incident. Further, she stated that she continues to have severe headaches and she is not sure at this time whether the headaches will continue in the future. In addition, claimant visited an ophthalmologist to have her eyes examined due to the headaches and temporary loss of vision on the night of this incident. Claimant submitted a repair bill to the Court in the amount of $193.98 for the cost of two tires. Claimant's nephew bought her a new wheel and loaned her the money for the tires. However, claimant did not know the cost of the wheel, nor did she have any method to establish its value. Claimant also seeks an award for medical expenses she

incurred as a result of injuries she sustained in this incident. The total amount of medical expenses claimant alleges she incurred as a result of this incident are $3,487.70. A portion of claimant's medical expenses were covered by Medicare health insurance coverage, a collateral source. Thus, claimant may only recover her out-of-pocket medical expenses in the amount of $297.94. Claimant seeks a total award of $491.92.

Edward Brown, assistant supervisor for respondent in Nicholas County is responsible for monitoring and maintaining the highways in Nicholas County. He is responsible for the portion of highway at issue and is familiar with the location of this incident. He stated that State Route 41 is approximately twenty-two feet wide, each lane being eleven feet wide from the center line. Mr. Brown described the road at the location of this incident as an elevated downhill curve. He testified that the berm is difficult to maintain because of the high volume of traffic, and the large log trucks which use the road. He also stated that this portion of the road is in a turn and the berm is difficult to hold because the traffic including heavy log trucks drive on the berm at this location. According to Mr. Brown, respondent maintains the berm at this location by cleaning the berm at least three times a year except during the winter when it cannot be done. He stated that if he or one of his crew members notices a hole in the berm during the winter months, they will fill it with gravel until warmer weather arrives. According to Mr. Brown, the last time the berm at issue was maintained was either October or November 2002. He stated that either he or his foreman travels this portion of road almost daily. He also testified that while there were some portions of the road that were deteriorating including the curve at issue, he did not have notice of this specific hole prior to this incident. Mr. Brown testified that if he or his crew locates a hazard, it will be marked with barrels or hazard boards until they can repair 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 81 (W.Va.1947). To hold respondent liable for a road defect of this type, 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 the present claim, the Court is of the opinion that the evidence established that this portion of State Route 41 presented a hazard to the traveling public. The size of the hole and its location in the berm leads the Court to conclude that the respondent had constructive notice of this hole. The incident occurred during springtime when respondent should have been able to repair this defect. Further, the hole was located in a curve in the road that respondent knew had a tendency to deteriorate quickly because of the large number of log trucks that travel on the edge of the berm at this location. This created an even greater hazard for the traveling public. Respondent should have at least placed warning signs or hazard paddles near this location. Thus, the Court finds respondent is liable for the damages which proximately flow from its negligence in this claim which include the damage to claimant's vehicle, minus the amount of the wheel, and the medical expenses claimant incurred.

Accordingly, the Court makes an award to the claimant in the amount of $491.92.

Award of $491.92.

OPINION ISSUED DECEMBER 9, 2003

ALAN M. HICKS
VS.
DIVISION OF HIGHWAYS
(CC-03-137)

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

PER CURIAM:

Claimant brought this action for damage to his 2000 Chrysler Sebring which occurred when he was traveling on the U.S. Route 50 exit ramp, at the West Virginia Avenue Exit in Clarksburg, Harrison County, and his vehicle struck a large hole in the road. 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 set forth more fully below.

The incident giving rise to this claim occurred on February 24, 2003, at approximately 8:00 a.m. Claimant was driving his daughter to school in Clarksburg. The weather was clear but there was still some snow on the roads remaining from a week long snow storm that had just ended. Claimant stated that some of respondent's employees were continuing to clear the roads on the morning of this incident. Claimant testified that he was traveling at approximately thirty-five miles per hour as he turned onto the U.S. Route 50 exit ramp at West Virginia Avenue. He estimated that he was approximately two car lengths onto the ramp, when suddenly he saw a large hole in the road in front of him which he was unable to avoid. His vehicle's right front tire struck the hole. Claimant described the impact as serious, but he did not realize that his vehicle suffered any damage until a few days later when he noticed that the outside portion of the right front wheel was bent. According to claimant, this portion of U.S. Route 50 is a one lane exit ramp. He stated that there is a median on both sides of the travel portion of the road. He testified that the hole was located on the right side of the road approximately one to two feet from the white edge line. He also testified that the hole was approximately eighteen to twenty-four inches in diameter and was "fairly deep". According to claimant, the last time he traveled this portion of highway was approximately one week prior to this incident. Further, he estimated that he travels this road twelve times per week when he takes his daughter to school. However, he had not traveled through this location for one week because his daughter's school was canceled as a result of the large snow storm. Claimant testified that he had never noticed the hole prior to this incident. Claimant submitted a repair bill into evidence at the hearing in the amount of $436.72 for the cost of replacing the wheel.

Claimant asserts that respondent knew or should have known that this hole was present and taken timely and adequate measures to remedy the hazard.

It is respondent's position that it was on snow removal and ice control at the time of this incident and that it did not have notice of this hole until after the incident.

David Adams, the Transportation Crew Chief for respondent at Tunnel Hill, U.S. Route 50 in Harrison County, is responsible for maintaining U.S. Route 50. Mr. Adams testified that he is familiar with the portion of road at issue. He stated that this incident occurred on a short exit ramp on U.S. Route 50 that is approximately twenty-four feet wide at the beginning of the ramp. The ramp narrows to approximately twelve feet and

it eventually becomes a two-lane divided highway. Mr. Adams testified that respondent was involved in snow removal and ice control (also referred to as "SRIC") on the date of this incident and during the most of February 2003. According to Mr. Adams, when respondent is operating in SRIC mode, it is considered to be an emergency condition during which time all employees work to remove snow and ice from the roads with all other activities suspended. Further, Mr. Adams testified that February 2003 was an unusually harsh month with a lot of snow and ice. He also testified that neither he nor his crew received any prior complaints about the hole claimant's vehicle struck.

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 81 (W.Va.1947). To hold respondent liable for defects of this type, 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, claimant did not establish that respondent had notice of the hole on the U.S. Route 50 exit ramp. There was no evidence presented by claimant that respondent did not take reasonable steps to ensure the safety of the traveling public at this location on U.S. Route 50. Respondent was also operating in SRIC mode which is an emergency condition. It was required to concentrate its activities on snow removal and ice control for most of February 2003. While the Court is sympathetic with the claimant's loss, there is insufficient evidence of negligence upon which to base 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 9, 2003

ROBERT G. SNODERLY
VS.
DIVISION OF HIGHWAYS
(CC-03-065)

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

PER CURIAM:

Claimant brought this action for damage to his vehicle which occurred when he was traveling south on U.S. Route 250 near Fairmont, Marion County, and the vehicle was struck by a large rock. Respondent was responsible at all times herein for the maintenance of U.S. Route 250 in Marion 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 February 1, 2003, at approximately 5:00 p.m. Claimant was traveling southbound on U.S. Route 250 from Fairmont to South Fairmont in his 1998 C24 Chevrolet Cavalier. There was a light misty rain. It was still daylight and claimant could see the road without the use of his

headlights. U.S. Route 250 at this location is a two-lane, asphalt highway with double yellow center lines and white lines on the edges. For southbound traffic there is guard rail and a narrow berm on the left side of the road and the Tygart River is below. On the northbound side of the road there is a rock wall approximately one hundred feet high and a berm approximately ten to twelve feet wide. Claimant was traveling with his wife and children as passengers in the car. He estimates that he was traveling forty to forty-five miles per hour as he proceeded toward South Fairmont. Claimant was approximately one-quarter of a mile past Mary Lou Retton Drive when suddenly he saw numerous rocks falling off the rock cliff to his right. He slowed down and glanced in his rear view mirror to make sure the long line of traffic behind him was not going to strike his vehicle. He looked to the front again and saw a large rock fall over the hood of the vehicle and lodge underneath his vehicle which prevented it from moving. Claimant testified that he had to use a car jack to raise his vehicle and remove the rock. He described the rock as ten to twelve inches thick and sixteen inches long. Claimant removed the rock from the road and estimated that it weighed forty-five to fifty pounds. According to claimant, he traveled this road between ten to twenty times per year and that he had last traveled through this location approximately one or two months prior to this incident. Claimant submitted repair bills and an estimate into evidence at the hearing in the amount of $1,227.73 for the damage to his vehicle. The rock destroyed the oil pan, gasket, and the filter. He also received an estimate for the damage to the inner fender and the front end section of the vehicle.

Claimant contends that respondent knew or should have known that this location presented a rock fall hazard and failed to take proper precautions to remedy the hazardous condition.

It is respondent's position that it acted reasonably and diligently in maintaining the rock cliff at this location and that it did not have notice of this rock fall until after it occurred.

George Steorts, is the County Administrator for respondent in Marion County and is responsible for the maintenance of the roads and highways in Marion County. He testified that he is responsible for maintaining U.S. Route 250 and that he is familiar with the location of this incident. Mr. Steorts stated that U.S. Route 250 is a primary route with a high volume of traffic. He testified that this location has been a known rock fall area. However, he stated that respondent does not have warning signs in place, but it does have hazard barrels sitting on the berm approximately two or three feet off of the road to warn the traveling public that the area is prone to having some small debris fall onto the road. According to Mr. Steorts, respondent undertook a project at this location in 2002, to scale down the "high wall"or rock cliff in order to prevent rock falls. Prior to the project in 2002, there had been a major rock fall at this location that shut down the road. Respondent removed approximately ten to fifteen feet from the top of the rock cliff and created a "rock bench" approximately ten feet up the wall. The "rock bench" is six feet wide and is designed to stop rocks and debris from falling onto the highway below. In addition, respondent widened the berm to reduce the chance of rocks falling onto the travel portion of the road. According to Mr. Steorts, respondent has not had any large rock falls at this location since the project was completed. He stated that his crews have occasionally reported clearing some smaller rocks off the road, but not large rocks such as the one in this claim. Further, he testified that respondent did not have notice of this particular rock fall until after the 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 highways. *Adkins v. Sims*, 46 S.E.2d 81

(W.Va.1947). The Court has consistently held that the unexplained falling of rock or rock debris on the road surface is insufficient to justify an award. *Copen v. Division of Highways*, 23 Ct. Cl. 272 (2001); *Mitchell v. Division of Highways*, 21 Ct. Cl. 91 (1996). In order to hold respondent liable for defects of this type, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Hammond v. Division of Highways*, 11 Ct. Cl. 234 (1977). Claimant must also establish that respondent had a reasonable amount of time to take corrective action. *Alkire v. Division of Highways*, 21 Ct. Cl. 179 (1997); *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 that respondent had notice of a potential hazardous condition at this location. The evidence adduced at the hearing established that respondent had worked on the rock cliff in 2002 in an attempt to prevent more rock falls at this location. Considering the mountainous terrain on U.S. Route 250 at the scene of the accident herein, the measures taken by respondent were reasonable and diligent. Further, respondent did not have notice of this particular rock fall until after it had occurred. Thus, respondent did not have a reasonable amount of time to take corrective actions. While the Court is sympathetic to claimant's plight, 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 as stated herein above, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 9, 2003

WAYNE COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-03-428)

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, Wayne County Commission, is responsible for the incarceration of prisoners who have committed crimes in Wayne County, but have been sentenced to facilities owned and maintained by respondent, Division of Corrections. Claimant brought this action to recover $5,565.00 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, but stated that the correct amount owed to claimant is $5,525.00. The claimant has reviewed the claim and agrees that the amount of $5,525.00 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 $5,525.00.

Award of $5,525.00.

OPINION ISSUED JANUARY 8, 2004

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 of way 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 JANUARY 8, 2004

JOHN DEPTO and MARY ANN DEPTO

VS.
DIVISION OF HIGHWAYS
(CC-02-056)
(Damages)

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

PER CURIAM:

The Court issued an Opinion in this matter on March 14, 2003, on the issue of liability only wherein the Court determined that respondent was liable for negligently maintaining the drainage structure along County Route 86 in Marshall County which is adjacent to claimants' property. The issue of damages in the claim was heard by the Court on September 10, 2003, at which time testimony was presented and evidence adduced on this issue. The Court is of the opinion to make an award in this claim in the amount of $8,337.30 for the reasons set forth more fully below.

Claimants brought this action for water damage to their property located on County Route 86 in Glendale, Marshall County. Originally, claimants sought $7,000.00 for this damage, but after having prevailed on the liability portion of their claim, they sought an award of $52,600.00.

The damages asserted by the claimants include the cost of having a new culvert and catch basin installed at their driveway based upon an estimate from a construction company in the amount of $3,500.00; however, subsequent to the hearing of this matter, the Court received information from the parties that respondent had replaced the culvert at claimants' driveway to the satisfaction of the claimants. Thus, claimants waive this portion of their claim. Claimants' damages being considered by the Court at this time include an estimate from Miller Construction Company for the cost of replacing a retaining wall at the bottom of their driveway in the amount of $5,653.00 and an invoice in the amount of $184.30 for limestone purchased to repair their driveway. The Court has determined that these repairs were necessary and reasonable and that claimants be awarded $5,837.30 for these actual damages. Further, claimants seek an award for neglect, mental anguish, and lost wages in the amount of $43,500.00. The Court, having considered all the evidence, is aware that claimants suffered from the annoyance and inconvenience of having to contend with such inconveniences as an ice covered driveway during winter seasons and debris in their yard for many years. The Court declines to make an award for the lost wages. Thus, the Court makes an award to the claimants for this nuisance and inconvenience in the amount of $2,500.00.

In view of the foregoing, the Court is of the opinion to and does make an award to claimants in the amount of $8,337.30.

Award of $8,337.30.

OPINION ISSUED JANUARY 14, 2004

MARVIN CHAPEL CHURCH
VS.
DIVISION OF HIGHWAYS

(CC-02-507)

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

PER CURIAM:

Claimant brought this action to recover costs associated with water damage to its property which it alleges is due to respondent's negligent maintenance of the drainage system along U.S Route 220 in Hampshire County. Respondent is at all times herein responsible for the maintenance of U.S. Route 220 in Hampshire County. The Court is of the opinion that respondent is liable in this claim for the reasons stated more fully below. Further, the Court held the record open in this claim to allow claimant ninety days from the date of the hearing to submit a written estimate of what it would cost to repair all damages in the basement of the church and to submit a written estimate of the costs associated with whatever corrective measures are needed to prevent additional flooding.

Marvin Chapel Church is located adjacent to U.S. Route 220 in Purgitsville, Hampshire County. It is a small, locally controlled congregational church. The church owns less than one-fourth an acre of frontage real estate along U.S. Route 220, which is titled in the name of the trustees.

U.S. Route 220 is a two-lane, asphalt road with a yellow center line and white lines on the edges. It is a north and south route. Marvin Chapel Church is located on the east side of the road. There is a stream which flows just south of the church and a parking lot on the north side of the church. Glen Hamric, the pastor of Marvin Chapel Church, and Sudie Rinker, the Chairman of the Trustees were present and testified on behalf of Marvin Chapel Church. Pastor Hamric testified that he has been the pastor at the church for eight years. According to Pastor Hamric, the church has been located on Route 220 at least sixty to seventy years. He stated that the church building is very close to the road and that respondent probably owns the property almost to the front door of the church. He estimated that the paved portion of the road is approximately fifteen to twenty-five feet from the front of the church. Pastor Hamric testified that respondent performed some significant construction work on the road in front of the church when it straightened out some curves in the road near the church. Respondent also installed drainage ditches near the church and performed extensive work on the front and both sides of the church. The only location that was not worked on was behind the church. According to Pastor Hamric, after respondent performed this work, the church was in such a position in relation to the road that any water draining from U.S. Route 220 would flow onto the parking lot and into the basement of the church. He stated that the road was raised higher as a result of this work. He also estimated that the highway was moved between eight to ten feet away from the front of the church. In July 2002, the church began to have flooding problems in the basement. Respondent was notified about the flooding shortly after it occurred. In response, respondent sent a private contractor to install a new drainage system in hopes of resolving the flooding problem. The contractor began working on the project sometime in late September and continued until April 2003. Pastor Hamric testified that the contractor dug down to the footers in front of the church and installed a drainage line which ran from the front of the church and crossed over to the stream where the excess water was emptied. However, he stated that this new drainage line did not work properly and that claimant was still getting flooded every time there was a "heavy rain." He stated that he has seen water flowing from the surface of the elevated road in front of the church across the berm onto the church parking lot and

into the basement. Further, he testified that there is nothing to stop the water from flowing towards the church and into the basement. He stated that the ground is contoured at this location to allow the water to drain to the stream which is just fifteen feet south of the church, but as it flows this direction, it also flows into the church basement. Pastor Hamric testified that there was no flooding at the church until after respondent's work on U.S. Route 220.

Sudie Rinker also testified on behalf of claimant. Ms. Rinker is the Chairman of the Trustees at Marvin Chapel Church. She has held this position for three to four years and also during the time of the flooding. She testified that she has attended Marvin Chapel Church since 1974, and that she has never seen the church flood until after respondent's construction work in July 2002. According to Ms. Rinker, the first flood occurred on a Saturday in the Summer of 2002. She and two other church members noticed the basement was flooded when they arrived at church the following day. She testified that there was approximately one and one-half inches of water in the kitchen and an inch of water in the classroom. However, she also testified that the water was probably higher the previous day because there was a ring around the wall approximately eight to ten inches high. It is Ms. Rinker's opinion that the flooding has been caused by respondent's failure properly to install the drain pipe and because of dirt, leaves, and debris clogging the drain and preventing the water from flowing through it. Further, Ms. Rinker stated that she has seen the church flooded between six to eight times from July 2002, to the present. In addition, she testified that she contacted respondent within a reasonable amount of time once she discovered that the new drainage ditch was not working, but no one responded to her complaint.

The flooding in the church caused significant damage to the basement including the wall paneling, carpet and sheet rock. Claimant submitted a repair estimate to the Court at the hearing of this matter for the damage to the carpet in the amount of $1,160.60. Further, claimant submitted a written estimate to the Court and counsel for respondent within ninety days of this hearing for the cost associated with adequately preventing further seepage of water into the church basement. The contractor hired by claimant proposed to place approximately fifty tons of asphalt with a "swell" with negative drainage from the church with one-hundred feet of four inch drain pipe. In addition, the contractor proposes to do all excavation, grading and cleanup, for a total cost of $11,535.00. Thus, claimant seeks a total award of $12,695.60

Claimant contends that respondent failed to provide a proper drainage system for excess water along the portion of U.S. Route 220, and further that respondent changed the nature of the road and adjacent property causing a large volume of water to flow onto claimant.

Respondent chose not to present any witnesses or evidence in this claim.

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 the inadequate drainage system and a reasonable amount of time to take corrective action. *Orsburn v. Division of Highways*, 18 Ct. Cl. 123 (1991); *Ashworth v. Division of Highways*, 19 Ct. Cl. 189 (1993).

In the present claim, the Court is of the opinion that claimant established that respondent knew or should have known that its construction work on and around U.S. Route 220 created an inadequate drainage system for water flowing from U.S. Route 220, and as a result this was the proximate cause of the damage to claimant's property. The evidence also established that respondent had performed extensive construction work around the church and in the process U.S. Route 220 was raised significantly higher than

the church adjacent to it. This increased the amount of water drainage from the road onto the claimant's property. In addition, the manner in which respondent left the berm and parking lot also contributed to an increase in the flow of water drainage from the road and into the church. The land was contoured such that water flowing to the stream just south of the church also flowed into the church. Further, claimant notified respondent that it was having flooding problems in a timely fashion. However, while respondent attempted to remedy the problem, it failed to take timely and adequate corrective measures to resolve the water drainage problem. Thus, the Court has determined that claimant herein may make a recovery for the damages proximately caused to its property in the amount of $1,160.60 for the carpet, and a recovery of $11,535.00 for the cost of hiring a contractor to repair the underlying drainage problem causing the flooding. Thus, claimant may make a total recovery of $12,695.60.

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 $12,695.60.

Award of $12,695.60.

OPINION ISSUED JANUARY 14, 2004

BOBBY WAYNE HUDNALL and MAUREEN HUDNALL
VS.
DIVISION OF HIGHWAYS
(CC-02-350)

Tom White, Attorney at Law, for claimants.
Andrew F. Tarr, Attorney at Law, for respondent.

BAKER, JUDGE:

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 26 in Oakvale, Mercer County. At the hearing of this claim, the Court amended the style of the claim to include both property owners, Bobby Wayne Hudnall and Maureen Hudnall, as the claimants. Respondent is at all times herein responsible for the maintenance of County Route 26 in Mercer County. The Court is of the opinion that the claimants may make a recovery in this claim for the reasons stated more fully below.

Claimants' property is located on Hatcher Road, designated as County Route 26, in Oakvale, Mercer County. County Route 26 is a one-lane, paved road for approximately the first two or three miles, but it is a gravel road near claimants' home and remains gravel for approximately the next two miles. Claimants' property consists of approximately sixty acres which fronts along County Route 26. They purchased this property in 1998 with three houses and four buildings located on it. They have resided in the wood and cinder-block house, referred to as the "main house," since1998. It is approximately twelve years old. There is an old log house located just north of the main house and a mobile home located at the far north end of the property. All three dwellings front County Route 26. The main home in which claimants reside is located approximately twenty-five to thirty feet from County Route 26. There is a graded

embankment between the road and their home of about fifteen feet. There are also the "pool house", a log smoke house, a chicken house, and a turkey house located on claimants' property. All of these structures are located below County Route 26. Hatcher Creek is below and at a distance of approximately eighty feet from claimants' home and this creek flows the entire length of claimants' property. The creek flows behind all three of claimants' dwellings. Prior to the flooding, claimants had a small bridge that crossed Hatcher's Creek behind the log cabin that led to the well house on the opposite side of the creek. Claimants' driveway intersects with County Route 26 in front of the main house and it turns into a one-lane road which extends north of the main house to the log house and ends at their mobile home. There is a ditch line on the opposite side of County Route 26 away from claimants' property. There are also five different culverts on the opposite side of the road near the ditch line both north and south of claimants' property. However, two culverts are at issue in this claim. Culvert number one is located almost directly opposite claimants' driveway and is approximately forty or fifty feet from claimants' main home. Culvert number two is a few yards directly south of culvert number one.

Mr. Hudnall testified that he maintains his own drainage structure on his property. He testified that there is a ditch line that begins at the driveway and extends adjacent to the main home and empties into an eighteen inch culvert beneath the portion of the driveway that extends from the main home towards their mobile home. This culvert extends from beneath the driveway and empties into Hatcher Creek. Mr. Hudnall stated that this drainage system is intended to capture excess water flowing from the road down hill onto his property. He stated that claimants' real and personal property have been damaged by three different floods which he alleges were caused by respondent's failure properly to maintain its drainage system along County Route 26. According to Mr. Hudnall, the first flood occurred on May 15, 2001. The second flood occurred on July 8, 2001, and the third flood occurred on or about May 3, 2002. Each of the three floods caused substantial damage to claimants' three homes. Claimants submitted numerous photographs into evidence at the hearing which depicted a substantial amount of flood water and debris flowing from County Route 26 down their driveway and front yard. The photographs also demonstrate the amount of water which flowed into the basement of their log home causing significant damage to the structure, plumbing system, various personal property items, and the hot water tank. In addition, Mr. Hudnall stated that during the flood on July 8, 2001, the water pooled near culvert number one on the opposite side of the road from claimants' driveway. He estimated that the water was three to four inches deep. Mr. Hudnall testified that claimants sustained damage to all seven structures on their property. Claimants' bridge which crossed Hatcher Creek was destroyed and their well system and septic system were damaged. As a result of the floods, claimants' property sustained damages.

Claimants presented an estimate to the Court from a construction company for the damages sustained which included repairs to the floors, walls, kitchen, and foundation of the log home. The same estimate covered repairs to a deck and the swimming pool, and the replacement of the bridge for a total amount of $18,000.00. Claimants also submitted an estimate from the same construction company for the removal of debris, waste and destroyed furnishings as necessary, as well as the pouring of concrete in the amount of $1,950.00. According to Mr. Hudnall, FEMA compensated claimants for the damages to their well and septic systems after the first flood in the amount of $7,000.00. This is the only compensation which claimants' have received from FEMA. However, he testified that the septic system was destroyed in another flood and it needs to be

repaired again, and FEMA has not reimbursed claimants for this work. Claimants submitted a repair estimate for the septic system in the amount of $896.50, and a repair estimate in the amount of $2,026.00 for repairs to the drain pipes and the driveway. Thus, claimants submitted a total estimate of damages sustained in the amount of $22,872.50. However, claimants agreed at the beginning of the hearing to have their claim heard by one Judge which limits any recovery which the Court may award to the maximum of $19,999.99.

Claimants assert that respondent negligently maintained the drainage system along County Route 26, and that this negligence was the proximate cause of the flood damages which claimants incurred.

Respondent did not present any witnesses or evidence in this claim. However, respondent attempted to establish its position through the cross-examination of claimants' witnesses that its actions or failure to act were not the proximate cause of claimants' damages, but rather, claimants' damages were caused by three unusually heavy rainstorms that occurred throughout most of the State. Thus, according to respondent, there was nothing it could have done to prevent what were alleged to be "Acts of God."

Mr. Hudnall testified that he had contacted respondent numerous times, beginning in October 1998, about the poor condition of the culverts and the drainage system along County Route 26 and the flooding that was occurring to his property. Claimants introduced telephone records into evidence at the hearing which corroborated testimony that there were telephone calls made from claimants' home to respondent's office in Charleston. Mr. Hudnall also testified that one of respondent's engineers came to claimants' property and observed the damaged culverts. According to Mr. Hudnall, respondent informed him that the culverts would be repaired, but this was not done. Mr. Hudnall testified that the two culverts at issue were not properly maintained. Photographs in evidence depict that culvert number one was "smashed". Mr. Hudnall testified that the culvert was smashed by one of respondent's grader operators while grading the road. Further, Mr. Hudnall stated that he opened the culvert up just enough to allow some water to flow through, but that respondent's grader operator drove through and flattened the culvert again preventing the water from flowing through it. In addition, numerous witnesses who live along or otherwise travel County Route 26, testified that the drainage system was in poor condition. John Atkins, an employee of "Long Term Recovery," a group which assists flood victims, went to claimants' residence during the May 2002 flood. He testified that there was a large amount of water and debris near culvert number one located across the road from claimants' driveway. He also testified that the culvert was mashed down and that claimants and other individuals were trying to open the culvert to allow the water to flow out. It was Mr. Atkins' opinion that had the culverts been operating properly there would have been a lot of water eliminated from the road and claimants' property. James Bryant Jr., a school bus driver for Mercer County, testified that he traveled County Route 26 as part of his assigned route for at least six years, including the time period at issue. He stated that the ditch line on the right side of the road opposite claimants' property was often saturated. He stated that there were numerous areas along the ditch line of the road near claimants' property where water would not drain properly, but instead pooled up. Mr. Bryant testified that he was afraid to maneuver the school bus over to the edge of the road due to the ditch line being soggy. He estimated that the ditch line was in a poor condition beginning just south of claimants' property and continuing approximately two miles north. In addition, there was testimony from local residents who live along County Route 26 that the ditch line and culverts have

been in poor condition for a substantial amount of time. James Ruble, a local resident who lives approximately 1500 feet south of claimants' property, testified that the ditch line along County Route 26 just below his property cannot be seen because it is filled up with mud and debris.

Respondent attempted to establish that the flooding which occurred at claimants' property on all three occasions was the result of unusually heavy rainfalls that occurred not only at the location of claimants' property, but throughout the State. Respondent's position is that this constituted an "Act of God" and that respondent was therefore not responsible. One of the witnesses, James Bryant, testified that he was not aware that there was a major flooding event throughout the State on July 8, 2001. He only recalls that there was flooding in general in May 2001. John Atkins also testified that he was aware that there was major flooding in May 2001 in other areas of the State and he was also aware of major flooding on July 8, 2001, in other areas including the Matoaka area in Mercer County. Mr. Atkins also testified that there was a minor flood in May 2002. In addition to observing flooding at claimants' property, he also observed flooding in Princeton and the surrounding area. Mr. Ruble also stated that he was aware that there was major flooding in May 2001, and on July 8, 2001. He also recalls that there was some flooding in the Princeton area as well as the claimants' property in May 2002. Brian Jones, who lives approximately one and one-half miles south of the claimants, also testified that he is generally familiar with the flooding in May 2001, and he recalls the flooding in Mercer County in general on July 8, 2002. However, he was unsure as to whether or not there was flooding in the Princeton area in May 2002. Further, Mr. Hudnall testified that he is aware that all three floods at issue occurred at the same time many other parts of the State were being flooded. However, he was of the opinion that this was not the situation at the location of his property, rather, he categorized the rain as being heavy rain.

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 take corrective action. *Ashworth v. Division of Highways*, 19 Ct. Cl. 189 (1993); *Orsburn v. Division of Highways*, 18 Ct. Cl. 125 (1991). Further, in order for respondent successfully to assert the "Act of God" defense, it must establish by sufficient evidence that the unusually severe flooding that was allegedly occurring in other areas of the State was in fact occurring in like manner and circumstances at the location of the incident at issue.

In the present claim, the Court is of the opinion that the proximate cause of the damage to claimants' property was respondent's failure to maintain an adequate drainage system for surface water flowing from County Route 26. The evidence established that respondent knew of the drainage problem at this location since at least October 1998. However, respondent failed to provide an adequate drainage system despite numerous requests for help from the claimants and other neighbors who live along County Route 26. Claimants established that an excessive amount of water flowed from County Route 26 onto their property causing damage to the land, three homes, and personal property. Further, the Court is of the opinion that respondent failed to establish that the flooding which occurred at claimants' property was the result of an "Act of God." The fact that other areas of the State or the surrounding counties were having unusually heavy rainfalls and flooding does not establish that the same or similar amount of rainfall and flooding also occurred at claimants' property. Respondent failed to establish that there were any unusually heavy rainfalls at the location of claimants' property. There was no evidence

as to how much rainfall was recorded in and around claimants' property during any of the three floods. Thus, respondent cannot rely on the "Act of God" as a defense in this claim. The Court has determined that the claimants herein may make a recovery for the damages proximately caused to their property in the amount of $19,999.99.

In accordance with the finding of facts and conclusions of law as stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $19,999.99.

Award of $19,999.99.

OPINION ISSUED JANUARY 14, 2004

CHRISTOPHER PITTS
VS.
DIVISION OF HIGHWAYS
(CC-00-413)

Mark F. Underwood, 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 March 28, 2000, claimant was injured when a piece of concrete fell from the interstate bridge over Norwood Road and struck him on the head as he was walking underneath the bridge.

2. Respondent was responsible for the maintenance of the highway bridge on Interstate 64 that passes over Norwood Road, which is located in or near Huntington, Cabell County, and respondent failed properly to maintain the highway bridge on Interstate 64 on the date of this incident.

3. Respondent acknowledged that it had at least constructive notice that pieces of concrete had fallen from the interstate bridge over Norwood Road prior to the claimant's incident.

4. As a result of this incident, claimant suffered injuries to his head. His out-of-pocket expenses were approximately $1,664.90. Claimant had no medical or other insurance coverage for his medical expenses as a result of his injuries.

5. Respondent and claimant have agreed to settle this claim for the total sum of $9,000.00 for claimant's out-of-pocket medical expenses and for claimant's past and future pain and suffering resulting from his injuries.

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 highway bridge on Interstate 64 that passes over Norwood Road in Huntington, Cabell County, on the date of this incident; that the negligence of respondent was the proximate cause of the personal injuries 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 his sustained loss.

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

amount of $9,000.00.

Award of $9,000.00.

OPINION ISSUED JANUARY 14, 2004

DOUGLAS RUNYON
VS.
DIVISION OF HIGHWAYS
(CC-02-450)

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 operating his vehicle on County Route 10 in Wyoming County, and he was forced to drive onto the berm of the road to avoid an oncoming truck. When he drove onto the berm, his vehicle struck a large hole. Respondent was responsible at all times for the maintenance of County Route 10. 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 September 18, 2002, at approximately 11:00 a.m. Claimant was driving his 2000 Mitsubishi Eclipse southbound on County Route 10, also referred to as Jesse Mountain, near Oceana in Wyoming County. County Route 10 at this location is a two-lane, asphalt road with a double yellow center line and white lines on both edges. The berm along the southbound lane consists of gravel and it extends six feet ten inches to a guardrail. The guardrail is located in a position to prevent vehicles from traveling over the edge of the hill. The weather on the morning at issue was uneventful and the road was dry and in otherwise good condition. Claimant was traveling between forty and forty-five miles per hour in a fifty-five mile per hour zone. As he proceeded uphill on Jesse Mountain, he observed a large truck in the northbound lane quickly approaching his vehicle. According to claimant, the truck was close to the yellow center line. In order to avoid a potential head-on collision, claimant maneuvered his vehicle to the edge of the road. He stated that once he maneuvered near the edge of the road it felt as though the tires were pulled towards the berm and his vehicle went off the road. Claimant's vehicle struck a hole or a large drop-off area located just to the right of the white edge line. The impact was significant. It destroyed his front wheel and tire. Claimant testified that the drop-off between the white edge line of the road and the berm was approximately one foot. Claimant stated that the drop-off was so deep that the understructure of his vehicle was resting on the gravel berm and the entire front end of the vehicle was resting on the road. Claimant testified that he lives approximately two miles from the location of this incident and he travels this portion of road approximately once every two or three days. According to claimant, the berm along this portion of County Route 10 has been in a poor condition for over a year. Further, he stated that he has reported the problem to respondent on at least two occasions prior to this incident. He admits that when he called and reported the problem he stated that the berm along the entire portion of County Route 10 on Jesse Mountain was in poor condition. Claimant submitted two estimates for the damage to his vehicle. The first

estimate was for $446.18, and the second estimate was for $342.88, for a total of $789.06. However, claimant had comprehensive liability insurance coverage at the time of this incident which covered this loss with a deductible feature of $500.00. The claimant is limited to a recovery of his insurance deductible. *See: Sommerville / State Farm Fire and Casualty v. Division of Highways,* 18 Ct. Cl. 110 (1991).

Claimant contends that respondent was negligent in its maintenance of the berm at the location of this incident, and that this negligence created a hazardous condition that was the proximate cause of the damages to claimant's vehicle.

It is respondent's position that it did not have notice of the condition at issue. Respondent also asserts that claimant did not reasonably need to use the berm at this location.

Larry Michael Vasarhelyi, Investigator Two for respondent, is responsible for investigating claims made against the respondent. Mr. Vasarhelyi investigated this claim and visited the location at issue to take measurements. He determined the total width of the road to be twenty-one feet, six inches. The southbound lane in which claimant was traveling was eleven feet, three inches from the edge of the white line to the center line. The northbound lane was ten feet, three inches wide from the center line to the white line at the edge of the pavement. The berm along the southbound lane was six feet, ten inches from the edge of the pavement to the guardrail.

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 81 (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). The respondent owes 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 a highway and it fails. *Sweda v. Dept. of Highways,* 13 Ct. Cl. 249 (1980).

In the present claim, the evidence established that County Route 10 at the location of this incident presented a hazardous condition to the traveling public. Testimony established that respondent had prior notice that the berm along the entire portion of County Route 10 on Jesse Mountain was in poor condition. The evidence also established that there was a large drop-off of at least one foot between the paved portion of the road and the gravel berm. Given the size of this drop-off, and claimant's testimony that he had notified respondent of the condition approximately one year prior to this incident, the Court is of the opinion that respondent had constructive, if not actual, notice of the poor condition of this berm. Further, it was reasonable for claimant to steer to the right of his lane to avoid a collision, even if the oncoming truck did not actually cross the center line. Under these circumstances, claimant should have been able to rely upon the berm to have been in a safe condition.

In accordance with the finding of facts and conclusions of law as stated herein above, 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 JANUARY 14, 2004

WILLIAM J. TONCRAY
VS.
DIVISION OF CORRECTIONS
(CC-03-044)

Claimant appeared *pro se.*
Charles P. Houdyschell, Jr., 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, an inmate at Northern Regional Jail, brought this claim to recover the value of his Aiwa Walkman that was damaged during a shake down while he was being held at Denmar Correctional Center, a facility of the respondent.

2. Respondent admits the validity of the claim, but states that the amount of $40.00, rather than the amount claimed of $55.00, is fair and reasonable.

3. Claimant agrees to accept $40.00 as full and complete compensation for the Aiwa Walkman.

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

The Court has reviewed the facts of the claim and finds that respondent is responsible for the damage to claimant's Aiwa Walkman and that the amount of 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 $40.00.

Award of $40.00.

OPINION ISSUED JANUARY 14, 2004

JAN-CARE AMBULANCE
VS.
DIVISION OF CORRECTIONS
(CC-03-529)

Claimant appeared *pro se.*
Charles P. 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 $709.50 for transportation 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 JANUARY 14, 2004

WENDELL SWEETSER
VS.
PUBLIC SERVICE COMMISSION
(CC-03-543)

Claimant appeared *pro se*.

Ronald L. Reece, 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 $4,950.00 for providing expert testimony for a case on behalf 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 $4,950.00.

Award of $4,950.00.

OPINION ISSUED JANUARY 20, 2004

STACY J. BERRY
VS.
DIVISION OF HIGHWAYS
(CC-03-299)

Claimant appeared *pro se.*

Xueyan Zhang, Attorney At Law, for respondent.

PER CURIAM:

Claimant brought this action for damages to her 2002 Volkswagen Passat which occurred on two separate occasions in February and March 2003 when her vehicle struck

the same hole in U.S. Route 19 in Clarksburg, Harrison County. Respondent is responsible for the maintenance of U.S. Route 19, locally referred to as Milford Street, at the location of claimant's two incidents. The Court is of the opinion to make an award to claimant for each incident for the reasons set forth herein below.

Claimant's first incident occurred on February 24, 2003, at about 10:00 to 10:30 p.m. when she was returning to her home south of Clarksburg from Morgantown where she had been attending classes. She was traveling south on U.S. Route 19, a highway she traverses infrequently, when her vehicle struck a large hole filled with water which was in the travel portion of her lane. U.S. Route 19 is a two-lane, asphalt road with a yellow center line and curbs on each side. She was traveling at twenty to twenty-five miles per hour, as this roadway is in a residential area. She proceeded to her home although she was aware that her vehicle had something wrong. She returned to this area the next day to view the hole in the road which she estimated to be eighteen inches long, twenty-four inches wide and at least eight to ten inches deep. It was located six to eight inches into her lane of travel from the curb. Also the next day, she took her vehicle to a tire shop where she was advised that there was damage to the interior of two rims. Claimant ordered two new rims at a cost of $230.00. In the meantime, she had the tires mounted on aluminum rims that were the original rims for her vehicle.

The second incident involving this same hole in the pavement on U.S. Route 19 occurred on March 24, 2003, when claimant was again returning to her home from Morgantown. Her vehicle struck the exact same defect in the road when she was traveling southbound on U.S. Route 19 at about twenty-five miles per hour. She had called representatives of the city of Clarksburg after the first incident and the area had been repaired. On this second occasion, the hole had reappeared and claimant's vehicle went into it causing damage to one of the aluminum rims. Replacing that rim cost $400.52 because it was a more expensive rim.

Thus, claimant replaced a total of three rims as a result of both incidents with the same hole on U.S. Route 19 for a total amount of damages of $630.52. Claimant has a $250.00 deductible with her insurance carrier per incident so she is limited to a recovery of $500.00.

John Michael Barberio, Highway Administrator for respondent in Harrison County, testified that he was aware of the hole on U.S. Route 19 that caused the damages to claimant's vehicle. He explained to the Court that respondent filled this hole, as well as others on U.S. Route 19, which is a high priority highway. The highway extends approximately one-half mile to three fourths mile through the city of Clarksburg and this section is maintained by respondent. He testified that respondent's crews filled holes in that specific area on numerous occasions including February 24, 2003, the date of claimant's first incident. It was quite possible, in his opinion, that the hole could be patched with cold mix in the morning and that enough material could come out of the hole during the day such that the hole would be a hole again by late evening.

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, respondent has established that it had continuously treated the hole in Route 19 which caused the damages to claimant's vehicle. The DOH-12' s submitted into evidence establish that respondent treated this area frequently in an

attempt to protect the traveling public but the patching material (cold patch) available to respondent during the winter months comes out of defective areas very quickly in snowy or rainy weather. Respondent was not able to effect a permanent remedy until warmer weather. However, respondent never took any steps to place a warning sign for the traveling public even though this particular hole was on a high priority road in a residential area. The Court is of the opinion that respondent had actual knowledge of the defect on U.S. Route 19 on the dates of both of claimant's incidents and it failed to protect the traveling public; therefore, the Court finds that respondent was negligent and that claimant may make a recovery for the damages to her vehicle which were proximately caused by respondent's negligence.

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 in the amount of $500.00 for the damages to her vehicle.

Award of $500.00.

OPINION ISSUED JANUARY 20, 2004

BRANDON CRITCHFIELD
VS.
DIVISION OF HIGHWAYS
(CC-02-397)

Claimant appeared *pro se.*

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to his 1997 Kawasaki Ninja ZX6R motorcycle which occurred when he was driving his motorcycle from a parking lot onto County Route 19/71 in Shinnston, Harrison County. The motorcycle went into a drop inlet at the edge of the road causing claimant to lose control of the motorcycle and resulting in an accident. Respondent was responsible at all times herein for the maintenance of County Route 19/71. 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 21, 2002, at around midnight. The weather was uneventful and it was dark outside. There had been no recent precipitation and the road surface was dry. Claimant was driving his 1997 Kawasaki Ninja ZX6R motorcycle, which he had purchased from a friend approximately one year prior to this incident. He had traveled on County Route 19/71 also known as East Avenue to go to a friend's house on East Avenue when he decided to stop at Fox's Pizza to speak with a girl who worked there. Claimant spoke to his friend on the parking lot as Fox's Pizza was closing for the night. After they finished talking, she left the parking lot in her vehicle as claimant was placing his helmet on. Claimant proceeded to drive from the parking lot and turned left onto County Route 19/71 when suddenly the front tire of the motorcycle struck the corner of a drop inlet. Claimant testified that the frame of the motorcycle struck the asphalt due to the inlet being so deep. The impact threw him violently backwards while he attempted to hold onto the motorcycle. At this time, he

believes that he accidentally hit the throttle causing the motorcycle to careen quickly out of control throwing claimant onto the asphalt. As he was getting up, the motorcycle was still spinning across the road out of control. According to claimant, it eventually came to rest on the opposite side of the road after skidding approximately fifteen feet. Claimant suffered minor scrapes and burns. He was able to pick up the motorcycle and drive it to his friend's house. However, the body of the motorcycle was damaged.

The inlet drain at issue is located just a few feet from Fox's Pizza's parking lot but within the travel portion of County Route 19/71. County Route 19/71 is a two-lane, unmarked asphalt road. At this location, County Route 19/71 proceeds downhill and levels out at the bottom of the hill and extends into a sharp right turn. The drop inlet at issue is located near the edge of the road in the right lane at the bottom of the hill just prior to the right turn. Claimant testified that the drop inlet was approximately eleven inches deep and twenty-four inches by twelve inches in width and length. He estimated that he was only traveling between five to seven miles per hour when he drove from the parking lot onto the road. He also stated that he did not see the drop inlet prior to striking it. Further, claimant stated that he has not been to this location for approximately eight months and when he drove to Fox's Pizza that night, he came in the opposite direction and thus was unaware of the drop inlet. The following day claimant reported the incident to the Shinnston Police Department.

Claimant submitted a repair estimate into evidence in the amount of $2,898.03. He had liability insurance only. According to claimant, the damage to the motorcycle was mostly cosmetic in nature which included numerous scratches and paint chips on the body of the motorcycle especially the left side which struck the asphalt. In addition, the fairing was cracked, and claimant had to purchase new tires, repair the clutch cable and brake cable at a cost of $30.00. These repairs cost claimant $30.00. The measure of damages in this claim was established through an estimate from Trick Motorsports submitted in evidence by claimant. Claimant's total loss in this claim is $2,928.03.

Claimant asserts that respondent knew or should have known that this significant depth of the drop around the inlet drain on County Route 19/71 at the location of this incident presented a hazardous condition to the traveling public and yet failed to make adequate repairs.

It is respondent's position that the drop inlet at issue in this claim does not constitute a hazardous condition to the traveling public. Respondent maintained the drop inlet as required and it was it good condition.

John Barberio, the Highway Administrator for respondent in Harrison County, is responsible for the overall maintenance of all highways in Harrison County including County Route 19/71. Mr. Barberio testified that County Route 19/71 is a low priority road. While respondent is responsible for maintaining it from curb to curb, the City of Shinnston plows it during the winter. He stated that at the location of this incident the roadway is a two-lane road approximately thirty feet wide. Mr. Barberio also stated that the drop inlet at issue has been at that location ever since the road was built. According to Mr. Barberio, he has not received any prior complaints about this condition of the drop inlet and he was unaware that it posed any problems to travelers of the road. He stated that it is a normal situation to have a drop inlet ten or eleven inches below the paved surface of the road where it is near the side of the road or curb, and not in the main driving portion of the road. In addition, he testified that a vehicle proceeding down the hill at this location would not use the portion of the road where this inlet drain is located, because the road is thirty feet wide and provides sufficient space to maneuver around the turn at this location. Mr. Barberio acknowledged that the drop inlet is in the travel

portion of the roadway and, in his opinion, it probably would not be appropriate for drivers using County Route 19/71 to drive in the area where the drop inlet is located.

Paul Lister, an investigator for the respondent's Legal Division went to the scene of this incident and took photographs and measurements of the scene. Mr. Lister testified that this particular drop inlet has a twenty-four inch by twenty-four inch metal cap on it. According to his measurements, the drop inlet tapers from the edge one and a half feet in three directions away from the curb side. It is tapered so as to drain water that flows down the hill. According to Mr. Lister, he measured the depth as being six inches at the deepest portion of the inlet. In addition, Mr. Lister testified that there is no ditch line on either side of the road, thus water drainage could be a significant problem without this drop inlet. Finally, Mr. Lister testified that given the relationship between the drain and the entry to the parking lot, it was his opinion that claimant had to have "cut" very close to the curb in order to strike this drop inlet.

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 81 (W.Va.1947). In order to hold respondent liable for road defects of this type, 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 established that respondent had actual or constructive notice of a hazardous condition at the location of the drop inlet at issue in this claim. The evidence established that there is a significant difference in the elevation of the bottom of the drop inlet and the asphalt pavement of the road surface. Further, the evidence also established that the drop inlet was within the travel portion of the lane, and thus, the traveling public certainly should be able to use that portion of the road without encountering a hazardous situation. The Court has determined that claimant, who was unfamiliar with this area, was attempting to exit from a parking lot during in the dark and he could not have anticipated that his motorcycle would drop six inches as he exited that parking lot onto a State maintained road. Therefore, Court holds that respondent was negligent in its maintenance of the drop inlet at issue in this claim and, further, that respondent is liable for the damage to claimant's motorcycle.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $2,928.03.

Award of $2,928.03.

OPINION ISSUED JANUARY 20, 2004

JERRY LOUISE KINTY
VS.
DIVISION OF HIGHWAYS
(CC-03-056)

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

PER CURIAM:

Claimant brought this action for personal injuries which she suffered in an incident that occurred at the entry to the parking building at BB&T Bank which is immediately adjacent to Fairmont Avenue in Fairmont, Marion County. The incident occurred on December 2, 2002, when claimant was exiting her van as her husband, Jerold Kinty, Sr., let her out to attend a parade. Respondent maintains Fairmont Avenue as part of the State road system. The Court is of the opinion to deny this claim for the reasons stated herein below.

Claimant alleges that she broke her foot on Fairmont Avenue on December 2, 2002, at about 5:30 to 5:45 p.m. when she stepped onto the juncture of the entry to the parking building of BB&T Bank and the edge of the pavement of Fairmont Avenue. It was dark at the time and she did not observe the area where she stepped that caused her to foot to "snap". It is her position that there was a difference in elevation of the State maintained road and the apron to the parking building. The difference in the elevation of the two surfaces caused her to break her foot just as she exited the van. She did not realize the serious nature of the incident until later that evening when her foot began to swell. During the parade she was riding on a float and she noticed that her foot was hurting so she was helped off the float and into a car until her husband came to assist her. After returning home, she noticed her foot being discolored so her husband took her to the hospital where it was determined that her foot was broken. She incurred out-of-pocket medical expenses in the amount of $30.00 and she lost wages since she was unable to return to her place of employment until February 3, 2002.

Claimant and her husband returned to the scene of this incident several days later and he took photographs of the concrete apron to the parking building and Fairmont Avenue. Mr Kinty testified that he watched as his wife exited the van and he stated that "she stepped down kind of sideways backwards with the left foot out first rather than the right foot, then brought her right foot out and when she did she kind of flipped. I saw her grab the door." He also testified that it was very dark. At the time, he did not realize that she had injured her foot.

Respondent asserts that the area where claimant broke her foot is not a part of Fairmont Avenue that is the responsibility of respondent to maintain. George Steorts, respondent's Highway Administer in Marion County, testified that respondent has the duty to repave Fairmont Avenue and this has been done as needed. The street was not milled during each repaving operation so there may have been a difference in the elevation at the juncture of the parking apron and the street. If there was such a difference in the elevation at the edge of the parking lot apron for BB&T Bank, it is the responsibility of the property owner to maintain its entry at its juncture with the State maintained road. Mr Steorts explained that respondent maintains certain State roads in the municipalities throughout West Virginia; however, the maintenance on these roads is from curb to curb only. That was the extent of the duty and responsibility for respondent in the instant claim.

The Court, having reviewed the testimony and the photographs entered into evidence in this claim, has determined that the area where claimant broke her foot is the responsibility of the property owner rather than the responsibility of the respondent. The difference in elevation between the parking building entrance is created by its concrete apron at the juncture with Fairmont Avenue. Although the Court is sympathetic for the injuries she received in this incident, the Court concludes that claimant has not established any negligence on the part of the respondent for her personal injuries and she 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 JANUARY 20, 2004

LIANG WEI
VS.
HIGHER EDUCATION POLICY COMMISSION
(CC-03-401)

Claimant appeared *pro se.*
Kristi A. McWhirter, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant Liang Wei, a graduate student attending West Virginia University in Morgantown, brought this action to recover damages to his personal property which occurred on July 8, 2003, while he was residing in an apartment complex provided for faculty and owned by the University, a facility of the respondent. The Court is of the opinion to deny this claim for the reasons put forth herein below.

According to the testimony of the claimant, he first moved into his apartment in 2001. He rented this apartment, located on Medical Center Drive in Morgantown, West Virginia, from West Virginia University. In 2002 he experienced flooding in the basement of his apartment at which time some of his property was damaged. He continued living in the same apartment, and on July 8, 2003, the basement again flooded, causing damage to some of his personal property for which he now makes this claim. The second flood was more significant since four feet of water came into the basement and damaged his property such that it was destroyed. He did not have renter's insurance so he had no coverage for his loss. He itemized the personal property lost and the estimated values of these items as follows: several boxes of books - $300.00, a computer - $200.00, three mattresses - $150.00, and four new suitcases - $360.00 for a total of $1,110.00.

Claimant's position is that respondent should be held liable for his loss since he rented the apartment from West Virginia University. The water came from the storm sewer and a drain line and flowed into his apartment basement through the back door of the basement.

Respondent asserts that claimant was advised that West Virginia University would not be responsible for claimant's personal property at the time that he rented the apartment and that he should obtain his own insurance coverage. The handbook provided to all tenants including the claimant contains a non-liability clause and this handbook is made a part of the rental contract by reference. Therefore, claimant was informed that he was responsible for his own personal property in the apartment and not the respondent. Respondent further asserts that the flood is the result of inadequate drainage on the street adjacent to the apartment complex which is the responsibility of the Morgantown Utility Board. In fact, personnel from the University informed this Board in writing on two occasions to correct the problems caused by inadequate drainage provided by the storm sewers in the area. Flooding had occurred in 2002 as the result of a heavy rain as well as the flood in 2003, which caused claimant's property damage.

The Court, having reviewed the testimony in this claim and the documentation in evidence, has determined that claimant was advised at the time he entered into the contract to rent his apartment from West Virginia University that he would be responsible for his own personal property kept in the apartment. At that time he had a obligation to acquire renter's insurance if he wanted monetary coverage for any loss of his personal property. He chose to accept any loss of his personal property and to be responsible for the same when he did not acquire this insurance. The non-liability clause in the rental agreement protects the respondent from the loss alleged by the claimant herein.

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

Claim disallowed.

OPINION ISSUED JANUARY 20, 2004

ESTHER M. BOOTH and STEPHEN P. RICH
VS.
DIVISION OF HIGHWAYS
(CC-03-047)

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 Stephen Rich was operating their vehicle on County Route 34, also referred to as Middle Grave Creek Road, in Marshall County, and the top portion of a large tree next to the road fell onto claimants' vehicle. Respondent was responsible at all times herein for the maintenance of County Route 34 in Marshall 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 2, 2003, at 11:00 a.m. Claimant Esther M. Booth is the mother of Stephen Rich and the titled owner of the vehicle at issue. Stephen Rich was operating his mother's1994 Chevrolet 1500 Pickup Truck. He was traveling east on County Route 34 just outside Moundsville. At this location, County Route 34 is a two-lane, asphalt highway with a yellow centerline and white lines on both edges. Each lane is approximately twelve and one-half feet wide. Mr. Rich described the weather as clear and cold. There was no precipitation at the time of this incident, but there had been a recent snowfall. The road was clear but there was snow remaining on the side of the road. Mr. Rich was traveling east on County Route 34 near Mile Post 4.82, when suddenly the top of a large tree fell onto the vehicle. The passenger side door and the passenger side of the windshield were struck first, receiving a direct impact. As a result of the impact, the windshield was cracked, the passenger side door and window were damaged, and the cab was depressed approximately six inches. Mr. Rich stated that he did not see the treetop falling until immediately before the impact with his vehicle. He testified that the treetop was up too high to have been within his range of vision while looking at the road ahead of him. He stated that in order to have seen the top of the tree at the time it fell, he would have had to have been looking straight up in the air while he was driving. The tree at issue was located on the right side of the road in the direction Mr. Rich was traveling. There is a small but steep embankment

followed by a drop-off to a creek on the opposite side of the tree away from the road. The tree was located on the edge of this bank. According to Mr. Rich, the trunk of the tree was located approximately six to eight feet away from the edge of the pavement. He stated that the tree was dead and that is why the top of the tree fell and struck his vehicle. He is not sure who owns the property where the tree was located or if it was on respondent's right-of-way. Mr. Rich testified that he travels this portion of road almost daily, and that he had traveled the road in the opposite direction earlier in the day on the date of this incident. Claimants submitted an estimate for the damage to the vehicle in the amount of $7,094.22, which indicates that the repairs are more than the value of the vehicle at the time of the incident. Thus, the vehicle was determined to be a total loss. Mr. Rich testified that the market value of the vehicle was approximately $6,000.00 at the time of this incident, but he did not present additional evidence to support this amount. In addition, he testified that he still has the vehicle, and has made repairs to it himself. He stated that he has repaired the cab, replaced the windshield and the rear window, and incurred expenses for paint and various miscellaneous supplies. He was unable to produce the receipts for these expenses, but he estimates that he spent a total of $500.00 in repairing the vehicle to make it safe and legal to drive on the highway. Claimants seek an award of $6,000.00 which they assert is the fair market value of the vehicle.

Claimants assert that respondent knew or should have known that the tree was dead and that by allowing it to stand over or near the highway presented a hazardous condition for the traveling public.

Respondent contends that this tree was not on its right-of-way and thus it was not its responsibility. Regardless, respondent also contends that it did not have notice that this tree was dead or presented a hazard to the traveling public.

Christopher Minor, Highway Administrator Two for respondent in Marshall County at the time of this incident, is responsible for the maintenance of all highways in Marshall County. He is familiar with this portion of County Route 34 and he is aware of the incident at issue in this claim. He testified that the incident occurred at or near Mile Post 4.82 on County Route 34. Mr. Minor also testified that he spoke to an employee in the respondent's Right-of-Way Division and, based upon this conversation, he determined that the respondent's right-of-way at this location is fifteen feet from the center of the road on each side of the road. According to Mr. Minor, each lane is twelve and one-half feet wide, and respondent's right-of-way extends another two and one-half feet from the edge of the road to the shoulder. Mr. Minor also testified that respondent does not own any property in this area. In addition, Mr. Minor testified that respondent did not have notice of this tree or one similar to it presenting a hazard to the traveling public. However, Mr. Minor testified that he visited the location of this incident to determine whether or not the tree was on the respondent's right-of-way. He testified that he measured the distance between the center of the road and the tree closest to the edge of the road at the location of this incident and determined that the distance was nineteen feet. Thus, according to Mr. Minor's measurements, all of the trees at this location would be at least four feet from respondent's right-of way. Further, Mr. Minor testified that respondent has not received any recent complaints regarding the trees along this portion of road. He stated that the last complaint was made in either late 1999 or early 2000 by Tyler Truck Caps, a company that hauls truck caps through this location. The complaint was the overhanging tree limbs were damaging its property. As a result of this complaint, respondent's employees used a "bucket truck" to clear all tree limbs located sixteen feet high above the respondent's right-of-way beginning at the Moundsville city limits and

proceeding approximately fourteen miles east. It has one mile of road yet to finish.

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 81 (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 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. *Wiles v. Division of Highways*, 22 Ct. Cl.170 (1999). The general rule is that if a tree is dead and poses an apparent risk then the respondent may be held liable. However, where a healthy tree or tree limb falls as a result of a storm and causes damage, the Court has held that there is insufficient evidence upon which to justify an award. *Gerritsen v. Dept. of Highways*, 16 Ct. Cl. 85 (1986). Further, the Court has held that in some cases the respondent may have a duty to remove dangerous trees or tree limbs that are not on the respondent's property or right-of-ways, especially where the tree or tree limb is dead. *Newkirk v. Division of Highways*, 20 Ct. Cl. 18 (1993). The Court has held respondent liable where a tree limb hangs over respondent's property and presents a hazard. See *Morris v. Division of Highways*, (CC-00-242, unpublished opinion issued August 16, 2001).

In the present claim, the testimony is unclear as to whether or not the tree from which the top fell was on respondent's right-of-way. However, the issue is whether this particular tree presented a hazard to the traveling public and whether respondent had notice of this hazard. The Court is of the opinion that respondent did not have notice of this hazardous condition. While the evidence presented by the claimant established that the tree at issue was dead, respondent did not have notice of this particular hazard. Respondent's last complaint some three years prior was regarding tree limbs overhanging on this road and the area addressed was a mile from the location of claimant's accident. Respondent, at that time, remedied the problem by using a "bucket truck" to clear all the tree limbs that were hanging over the road. However, in the instant claim, claimants' truck was struck not by an overhanging limb, but the top of the tree actually fell. This is an entirely different situation, especially since the tree causing the problem may not have been with the respondent's right-of-way. The evidence also indicated that this tree would not have been seen unless specifically brought to the attention of respondent. According to the claimant, it was not within the normal sight range for a driver to have seen it unless the driver was looking straight up in the air. Thus, one of respondent's drivers would not have noticed this particular tree while driving through this location on a routine inspection. The photographs in evidence depict a heavily wooded area and the Court will not place a burden on respondent with respect to trees along side the State's highways unless the tree is near the road and is an obvious hazard. While the Court is sympathetic to claimants' loss, the Court has determined that there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 20, 2004

ORDER ISSUED JANUARY 28, 2004

EDWARD C. JONES II
VS.
DIVISION OF HIGHWAYS
(CC-02-378)

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

PER CURIAM:

Claimant brought this action for damage to his vehicle which occurred when he was operating his 1999 GMC Jimmy northbound on Interstate 79 near Fairmont in Marion County, and it struck a hole located on a bridge. Respondent was responsible at all times herein for the maintenance of Interstate 79 in Marion 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 August 21, 2002, at approximately 5:00 p.m. Claimant was traveling northbound on I-79 proceeding to Fairmont. Interstate 79 is a four-lane, divided highway with two southbound lanes and two northbound lanes. There was some confusion at the hearing of this matter as to which of two bridges on I-79 that this incident occurred. The evidence established that the first bridge is located on I-79 northbound at the Harrison/Marion County line, and the second bridge is located approximately seven tenths of a mile north of the county line and closer to Fairmont. Both bridges at issue have two northbound lanes of travel. In addition, each bridge has an asphalt surface, a white center line, a yellow edge line for the left lane, and a white edge line for the right lane. On the date at issue, the weather was clear with no precipitation and the road was dry. Claimant was proceeding northbound on I-79 at approximately seventy miles per hour in "very heavy traffic." As he traveled across one of the two bridges, his vehicle struck a hole in the road. Claimant stated that the impact felt as though the front end "almost dropped out of the vehicle." However, claimant is not sure whether the hole was located on the first bridge at the Marion/Harrison County line or at the second bridge near Fairmont. He stated that the hole was located where the bridge and the pavement of the highway meet. He was not sure whether the hole was at the entrance to the bridge or at the exit of the bridge. After the incident, claimant was able to drive to Fairmont and return back home to Clarksburg that evening without any noticeable problems with the vehicle; however, he testified that two days later when he drove the vehicle from Clarksburg to Morgantown, he noticed the vehicle was out of alignment. He stated that the vehicle's steering was not correct and that it "darted back and forth" on the road. Claimant testified that he had to take his vehicle to at least two different repair shops to have the front end realigned correctly. In addition, an idler arm had to be replaced and the rotor assembly in the front left wheel had to be repaired. While claimant stated that he was seeking an award of $421.83 in his notice of claim, he submitted repair bills at the hearing of this matter in the total amount of $581.80. However, claimant had insurance coverage that would have covered this particular loss. At the hearing, claimant testified that he believed the deductible feature was $500.00. However, the Court requested that claimant provide a copy of his abstract of automobile

insurance coverage to the Court and respondent. The abstract of insurance coverage indicates that his deductible feature at the time of this incident was $250.00. Thus, claimant is limited to a recovery of $250.00 in the event of an award. See; *Sommerville/State Farm Fire and Casualty v. Division of Highways*, 18 Ct. Cl. 110 (1991).

Claimant contends that respondent knew or should have known that this hole was present and that it presented a hazardous condition to the traveling public.

Respondent asserts that it did not have notice of any holes on either of the two bridges at issue, and that it has reasonably and diligently maintained both bridges.

Gary Dyer, the Maintenance Supervisor for respondent at its Lost Creek Maintenance Garage at the time of this incident, is responsible for overseeing all maintenance on I-79 north from the ninety-nine mile post marker at Weston to the one-hundred thirty two mile post marker at South Fairmont. Thus, he is responsible for overseeing the maintenance of both bridges at issue in this claim. Mr. Dyer testified that on June 28, 2002, he was on duty and traveling northbound on I-79 when he noticed a hole in the pavement on the "130 bridge" northbound, which is the second bridge referred to by claimant in his testimony. This bridge is approximately seven tenths of a mile north of the county line. He stated that he applied a temporary patch on the hole at that time, and then on July 2, 2002, he and his crew returned to apply a permanent patch on the hole. Respondent introduced two DOT-12 daily work reports which corroborate Mr. Dyer's testimony that this hole on the "130 bridge" was patched. Further, Mr. Dyer stated that he did not have any information regarding holes on either bridge at issue once these repairs were made.

Robert Suan, Crew Leader for respondent at the same Lost Creek Maintenance Garage oversees the maintenance for I-79 north including the "130 bridge" northbound. Mr. Suan testified that he and Paul Lister, an investigator for respondent's Legal Division, met with claimant on May 8, 2003, at the "130 bridge" northbound. He stated that at that time claimant informed him that it was on the "130 bridge" northbound that his vehicle had struck the hole. In addition, Mr. Suan testified that claimant indicated to him and Paul Lister that the incident at issue occurred at the same location of the patched hole that Mr. Dyer and his crew had repaired on July 2, 2002. Mr. Lister also testified that claimant was very clear in indicating to him that this incident occurred on the "second bridge", also referred to as the "130 bridge", and that it occurred at the location of the patch applied by Mr. Dyer and his crew. Finally, Mr. Lister testified that respondent did not have any other complaints regarding this patched hole either before or after claimant's 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 81 (W.Va.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 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 claimant failed to establish any negligence on behalf of respondent. The evidence adduced at the hearing established that respondent had made repairs to the hole which claimant allegedly struck just a little over a month prior to the alleged incident. Further, respondent did not have any other complaints or notice regarding this hole prior to the alleged incident. The Court is of the opinion that respondent was acting diligently in maintaining the bridge at issue on I-79 and there is insufficient evidence of negligence on the part of respondent.

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

Claim disallowed.

ORDER ISSUED JANUARY 28, 2004

ALAN BEDDOW and STEPHANIE BEDDOW
VS.
DIVISION OF HIGHWAYS
(CC-03-403)

Claimants appeared *pro se.*

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

PER CURIAM:

Claimants are the owners of two rental units which make up a duplex apartment building on Riddle Avenue in Morgantown, Monongalia County, which sustained damages on July 8, 2003, when water flowed from the ditch line across Riddle Avenue and flooded the two units. Claimants allege that respondent failed to maintain the ditch line in a proper manner. Respondent was responsible for maintaining Riddle Avenue at all times herein. The Court is of the opinion to make an award to claimants for the reasons set forth below.

Claimant Alan Beddow testified that claimants purchased two rental units on Riddle Avenue in 1995. There were no problems with flooding until the summer of 2002 when a storm occurred and water came into the units causing damages. He contacted respondent's employees at the Sabraton Garage to come to Riddle Avenue. A crew cleaned the ditch on the opposite side of Riddle Avenue that had overflowed with water flowing across the road into claimants' apartments. The next spring in 2003 he noticed that the ditch line had not been cleaned so he contacted respondent again requesting that the ditch line be cleaned again before causing any flooding problems at his apartments. On July 8, 2003, a storm occurred in Morgantown bringing about three inches of rain in two to three hours. Claimants' apartments flooded causing damage to the carpeting on the first level of each unit. Claimants again contacted respondent and a crew came to the scene that evening to clean out the ditch line. Claimants' damages included the destroyed carpet and claimants later employed a landscaper to contour the yard creating a slope to prevent water from flooding their units again. They took these steps in an attempt to mitigate any further water problems. These efforts caused claimants to incur the cost of $1,473.38 for carpet and $5,900.00 for the landscaper for a total loss of $7,373.38.

Claimant Stephanie Beddow testified that she and her husband had lived in one of the apartments from 1995 until 2001 and that there had not been any problems with water in the unit. She came to the apartments on the day of the flood described on July 8, 2003, so she could assist with the clean up. She observed the wet carpet that was ruined, and she was present when one of the tenants took photographs of the scene during the flooding. She testified that the photographs accurately depicted the situation on that day.

Claimants allege that the damages to their duplex apartment building were caused by respondent's failure to maintain the ditch line in a proper manner and keep it

free from silt and debris adjacent to Riddle Avenue across from their property, and that this failure caused them to incur a loss.

Respondent contends that it maintained the ditch line on Riddle Avenue in an adequate manner and that the damages to claimants' apartment building were the result of an unusual storm in the Morgantown area on the morning of July 8, 2003, which caused flooding problems throughout Monongalia County.

Kathy Westbrook, respondent's Highway Administer for Monongalia County, testified that she is familiar with Riddle Avenue which is designated as County Route 61/4. She is responsible for the maintenance of this street which is a two-lane, asphalt road approximately twenty feet wide. It is a second priority road approximately .91 miles long and runs in a north-south direction with claimants' property on the east side of the street. This road was taken into the State highway system on February 10, 1982, and has been maintained by respondent since that date. She stated that on July 8, 2003, the National Weather Service issued a flash flood warning at about 6:30 a.m. for the Monongalia County area. She stated that in three hours there were four inches of rainfall which caused flooding problems throughout that day. She talked to claimant Alan Beddow about the flooding at his apartment units in the afternoon on July 8, 2003, and responded by filling out a Citizen's Request for Assistance form. She testified that she visited Riddle Avenue that afternoon and sent a crew to the area that evening to clean out the ditch line, which was done. Ms. Westbrook described that drainage system on Riddle Avenue as follows: there is an underground drainage system at the beginning of Riddle Avenue for the first tenth of a mile and then there is an open drainage ditch adjacent to Riddle Avenue across from claimants' property; there are also two driveways and one of them has a twelve-inch culvert beneath it which is not the regulation size required by respondent of fifteen inches; and there is a construction project to the north of claimants' property on the west side of Riddle Avenue and the entrances to this site had only one with a fifteen-inch culvert beneath it while the other entrances had permit requests pending but did not have proper drainage structures beneath them. She stated that the owners of properties on Riddle Avenue to the south of claimants' property have been notified that their driveway culverts "are possibly not sufficient to carry the water." It is her opinion that the flooding on claimants' property occurred due to the severity of the storm that day and not from any problem with the ditches although she acknowledged that the ditch line was filled with sediment and silt. She also stated that the records maintained by respondent establish that one of the claimants contacted respondent's office July 26, 2002, and the ditch line on Riddle Avenue was cleaned in response to the contact. Respondent's records also established that it cleaned the ditch line on Riddle Avenue on April 22, 2003, which is in accordance with respondent's maintenance schedule to clean the ditches along secondary roads at least once a year.

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).

The Court has taken into consideration all of the evidence in this claim, including the photographs. The claimants' property was flooded on July 8, 2003, during a storm, but the Court has determined that the cause of the flow of water across Riddle Avenue was proximately caused by the condition of the ditch line across from the property. The ditch line had been allowed to fill with sediment and silt probably from the construction project north of claimants' property which also resulted in more water

than usual to flow into the ditch line and then across the road. Once respondent cleaned the ditch line to a depth of one foot or more there were no more problems; however, on the date of the flood that occurred herein, the ditch line was only a few inches in depth, which would not have been sufficient. Therefore, the Court concludes that claimants have established that respondent was negligent in its maintenance of the ditch line on Riddle Avenue and this negligence was the proximate cause of the damages to claimants' property on July 8, 2003.

In accordance with the findings of fact stated herein above, the Court is of the opinion to and does make an award to claimants in the amount of $7,373.38.

Award of $7,373.38.

OPINION ISSUED JANUARY 29, 2004

CORRECTIONAL MEDICAL SERVICES
VS.
DIVISION OF CORRECTIONS
(CC-03-553)

Claimant appeared *pro se.*

Charles P. 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 $810,063.25 for medical services rendered to inmates in the custody of 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 FEBRUARY 2, 2004

FRIENDS OF BARBARA FLEISCHAUR and
COMMITTEE TO ELECT BASTRESS FOR JUSTICE
VS.
DIVISION OF HIGHWAYS
(CC-02-515)

Barbara Evans Fleischauer and Robert M. Bastress, Jr., Attorneys at Law, for claimants.
Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

PER CURIAM:

This action was brought by claimants, political committees for the elections of Barbara Evans Fleischauer and Robert M. Bastress, Jr., during the 2000 election campaigns. Claimants allege that certain political signs and wire frames were destroyed by respondent without the knowledge or consent of the claimants. The signs and wire frames were being stored in a building on Monongahela Boulevard in Morgantown, Monongalia County. The building was condemned by respondent and respondent took actual possession of the building on or about April 11, 2001. Respondent admits that it was in possession of the particular building through an Order entered by the Monongalia County Circuit Court and it admits that its employees destroyed the political signs and wire frames which are the subject matter of the claim. The Court is of the opinion to make an award in this claim for the reasons set forth herein below.

The testimony in the hearing of this claim established the following facts:

1. The political action committee for Barbara Evans Fleischaur purchased certain political signs for both the primary and general election campaigns for Ms. Fleischaur. After the campaign ended in November 2000, these signs which were reused in various campaigns were stored at Ms. Fleischaur's law office located at 3248 Monongahela Boulevard in Morgantown, Monongalia County. The value of the 600 stored signs and wire frames is $2,120.00.

2. Ms. Fleischaur was notified by the respondent that it intended to condemn the building where the signs were being stored and in which she maintained her law office so she moved her law office in November 2000. At the time of her move, she discussed the political signs with one of the owners of the premises, Francis Oates, who agreed that she could continue to store the signs at the premises until respondent took possession of the building.

3. Ms. Fleischaur was reimbursed for her moving expenses by respondent in the amount of $3,799.00 and $840.00 for other various costs related to moving her law office. These expenses were paid to her as relocation expenses since respondent was taking private property for pubic purposes.

4. Robert M. Bastress, Jr., the husband of Ms. Fleischaur, was a candidate for the West Virginia Supreme Court of Appeals in the primary election in May 2000. At that time he had a political committee which purchased 5,000 political signs and wire frames for the campaign. After his unsuccessful campaign, he estimated that there were about 1,800 signs and wire frames left from the campaign which he stored at his wife's law office. He placed the value for these signs and wire frames at $3,587.04.

5. When Ms. Fleischaur was driving past the condemned building, which she remembers as being a Friday in the month of January 2001, she noticed a light on in the building so she asked her husband to go to building to check on the signs and wire frames. He went to the building sometime in the next couple of weeks (he could not remember if it was in January or February 2001) at which time he was advised by an employee of the respondent that the signs and wire frames had been "thrown out." That was the first notification to claimants that the signs and wire frames had been destroyed.

Claimants assert that the signs and wire frames were wrongfully destroyed by respondent when it occupied the condemned building. Claimants contend that if Ms. Fleischaur or Mr. Bastress had been notified that respondent wanted the signs and wire

frames removed from the premises, the signs and metal frames would have been removed immediately; however, they were not notified that respondent was taking possession of the premises. Therefore, claimants allege a wrongful taking of property for which the claimant Committees should be compensated.

Respondent's position is that the signs and wire frames did not belong at the premises which was condemned and occupied by it pursuant to an Order of the Monongalia Circuit Court entered on April 11, 2001. Respondent contends that it did not enter the premises until after the date of the Order. Further, respondent contends that the number of signs and wire frames alleged by claimants to have been destroyed is inaccurate. Respondent established the following facts:

1. Respondent entered into a contract for the construction of two bridges across the Monongahela River in Star City, Monongalia County. It was necessary to acquire additional parcels of real estate to accomplish this construction project; therefore, respondent acted under the 1970 Uniform Relocation and Acquisition Act to acquire the parcel on which there was a two-story building in which the law office being rented by Ms. Fleischaur was located. Ms. Fleischaur received relocation benefits as a tenant of the building.

2. Respondent entered into negotiations with the owners of the buildings on the parcel involved in this claim with condemnation resulting. Respondent was granted a right of entry and defeasible title in April 2001. It did not enter the building until after the Order was entered by the Court on April 11, 2001.

3. In accordance with respondent's procedures, Ms. Fleischaur received a total of $4,608.54 for relocation expenses to move her law office to another location. As part of its procedure, an inventory and photographs of the items located at the law office were made at the time. The inventory list indicates that there were 200 signs at the law office. This was an estimate reached by the employee of respondent who viewed the premises for the inventory. This would have been performed in the month of September 2000.

4. The monies received by Ms. Fleischaur were for relocation expenses and did not cover the cost of any of the political signs and wire frames that were destroyed; however, the relocation monies did include the cost to move 200 signs which were in the estimate for the moving company. Thus, respondent paid the moving costs for the signs listed on the inventory.

5. Respondent's employee Jim Phillips, the Project Manager for the construction project, and other employees first entered the building where the signs and wire frames were located on April 12, 2001, the day after the entry of the Circuit Court Order. That was the first opportunity they had access to the premises which were to be used by respondent as a field office for the construction project.

6. When Mr. Phillips entered the building, he noticed the political signs and wire frames and had the same disposed of so that the office could be occupied by staff. The signs were thrown out a window and dumped in a dumpster. No effort was made to contact the named individuals on the signs.

7. Brian Davis, a Project Engineer for respondent, stated that about a month after respondent occupied the building and disposed of the signs, a gentleman came to the office, inquired about the signs, was advised they had been destroyed and then he left.

Thus, the Court has to determine if the political signs and wire frames were wrongfully destroyed by respondent and, if so, what is a fair and reasonable amount of compensation due the claimants for the signs and wire frames. Respondent took possession of the building where the signs and wire frames were being stored in April 2001. Respondent's employees destroyed property belonging to the claimants without

first making inquiry of the former owner of the building or the tenant. The identity of both of these individuals was known to respondent since the building had just been purchased and the tenant, Ms. Fleischaur, had just moved from the premises the previous November. The Court notes that Ms. Fleischaur signed a West Virginia Department of Transportation, Division of Highways Relocation Claim on December 6, 2000, which provided in part "I, the undersigned claimant certify that I was in occupancy at the time of initiation of negotiations to acquire the real property as designated above and that all my personal property has been or will be moved from the captioned parcel to 235 High Street, Morgantown." This same document was signed by a representative of the respondent, Harry Bergstrom, on January 2, 2001, when paperwork was being prepared to pay her for relocation expenses. The documents also establish the moving date as November 17, 2000. Thus, Ms. Fleischaur was under an obligation to remove all of her possessions in accordance with the documentation she signed in order to receive compensation for relocating her law office. The Court, based upon the foregoing, has determined that the claimants may recover a portion of their losses based upon the fact that respondent's employees have some duty of care when they dispose of personal property for which ownership can easily be determined and respondent does not exercise the due care owed the public when it carelessly destroys personal property. For this reason, the Court finds respondent liable in this claim.

The time frames in the record of this claim are confusing to the Court, but it will take official notice that the 2000 Legislative Session began on January 10, 2001, for the first day of the Session and the second day of the Session was February 15, 2001. The session was not during January through March due to the election in 2000, but rather the session took place during February through April 2001. The Court is of the opinion that this change in session dates accounts for Ms. Fleischaur's memory of the date she first saw lights in her former law office being different from respondent's date of entry to the building.

The inventory prepared by respondent as its basis for reimbursement of claimants' relocation expenses was done in September 2000. The Court is aware that the election occurred in November 2000, so it is logical to assume that the political signs and wire frames had been distributed as a part of the campaign efforts by the claimant Committees. Therefore, the estimate of 200 signs on the inventory may not be an accurate estimate for the number of signs at Ms. Fleischaur's law office on the date when the same were destroyed. The estimate of the number of signs and wire frames as documented by Ms. Fleischaur and Mr. Bastress does not seem to be unreasonable to the Court. Therefore, the Court will adopt those numbers for determining the damages sustained by the claimants. However, the Court is also aware that not all of the signs were new as many of the signs were collected and stored after being used in the previous election campaigns. Also, respondent reimbursed Ms. Fleischaur for moving a certain portion of the signs according to the inventory so any award will be reduced to reflect this payment.

This is a claim wherein the principles of equity and good conscience apply. Although this Court looks to legal principles, it is also a Court which considers moral obligations of the State. Were it not for the fact that respondent had the benefit of the actual knowledge of the owners of the personal property left at the condemned premises, there may be no basis for an award; however, respondent's employees could have made one telephone call which would have solved the issue before this Court. The Court, therefore, finds that respondent was negligent when it destroyed personal property without having attempted to contact even one of the claimants to ascertain the

appropriateness of destroying that property. Further, the Court has determined that a fair and reasonable calculation of the value of the signs and wire frames is $1,500.00 and $2,500.00, for the claimants respectively.

Accordingly, the Court is of the opinion to and does make an award to claimants as stated herein above.

Award to Friends of Barbara Fleischaur: $1,500.00.

Award to Bastress for Justice: $2,500.00.

OPINION ISSUED FEBRUARY 2, 2004

ELLEN F. ANDREWS
VS.
DIVISION OF HIGHWAYS
(CC-03-153)

Claimant appeared *pro se.*

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

PER CURIAM:

Claimant brought this action to recover costs associated with water damage to her home and personal property allegedly due to the negligent maintenance of the drainage system along Hamilton Addition Road and Manor Drive in White Sulphur Springs, Greenbrier County. Respondent is at all times herein responsible for the maintenance of Hamilton Addition Road and Manor Drive. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

Claimant's property and home are situate at the corner of Manor Drive and Hamilton Addition Road in White Sulphur Springs, Greenbrier County. Claimant purchased the property and the home in December 1977. Her home is adjacent to Manor Drive, an unmarked asphalt road which runs north to south in front of claimant's home. Hamilton Addition Road is also an unmarked asphalt road which is located adjacent to the right side of claimant's house. Hamilton Addition Road runs east to west. There is a culvert located at the corner of the northern end of Manor Drive and the eastern end of Hamilton Addition Road. The water flows into the culvert at this location and channels it to a ditch line along the side of Manor Drive opposite claimant's property. The ditch line extends south to the end of Manor Drive where it empties into a sixteen to twenty inch culvert. This culvert extends under the road and underground through an empty lot for some distance where it empties into a small creek. Claimant's home is level with both roads adjacent to her property. She has an asphalt driveway in front of her home that is slightly slanted toward the road to allow water to drain into a culvert which she had installed at the end of her driveway. In addition, claimant has gutters and down spouts on her home. Claimant testified that the water from the gutters and down spouts flows into her culvert.

The incident giving rise to this claim occurred on February 27, 2003, at approximately 9:00 a.m. According to claimant, there was a heavy snowfall of approximately six to seven inches in the White Sulphur Springs area approximately two or three days before this incident. The snow was followed by a day of heavy rain that quickly turned to sleet and ice. At approximately 9:00 a.m. on the morning at issue,

claimant and her friend, B.J. Camden, returned to her home after having breakfast at a local restaurant. They discovered approximately five to six inches of water in the basement. Claimant opened the sliding door to the basement to allow the water to escape. Claimant also testified that she, Mr. Camden, and Harold Weikel, a neighbor, dug ditches and trenches to divert the water that was flooding her property onto her surrounding neighbors' properties. Claimant presented numerous photographs into evidence which demonstrated that a significant amount of water had flowed through her property. Claimant testified that, in her opinion, respondent caused excessive water to flow onto her property because it had plowed the snow from the roads and piled the snow on both sides of the road at the corner of Manor Drive and Hamilton Addition Road. Claimant stated that the pile of snow was four feet high and it blocked the entrance to the culvert located at the corner of Manor Drive and Hamilton Addition Road. The snow prevented the water from entering the culvert at this location which then allowed the water to accumulate. It was not able to flow through the ditch along Manor Drive as it would under normal circumstances. Thus, drainage water flowed from the east over top of the culvert, across her neighbor's yard, onto her property and into her basement. Claimant presented numerous photographs which corroborated her testimony regarding the path of the water. Claimant also testified that her neighbor directly across from her on Manor Drive also had her culvert blocked as a result of respondent leaving large piles of snow in front of the entrance. Claimant testified that this also caused more water to flow onto her property and contributed to the flooding of her basement. In addition, claimant stated that her home was flooded in a similar manner in 1995, for the same reasons as the present flood. At that time, respondent suggested that claimant install a culvert at the end of her driveway, which she did. However, according to claimant, respondent never created the ditch line along the left side of Manor Drive where her home is located. Thus, she states that she has a culvert under the driveway but respondent did not connect a ditch line on either side of the culvert. Claimant stated that the culvert near the south end of Manor Drive was also blocked. However, claimant testified that this culvert was blocked with rocks and gravel. Claimant stated that as a result of this blocked culvert, additional excess water was spilling over onto the road and flowing onto her property contributing to the flood damages she incurred.

As a result of the flooding to claimant's home, the utility room in the basement of her home received approximately six inches of water. Her mother's antique sewing machine was damaged as well as a new computer desk, a television cabinet, a couch, and her sewing machine. Claimant also stated that the fabrics she uses in sewing projects were saturated and the carpet was destroyed. In addition, claimant testified that the bedroom in the basement was flooded causing damage to a bed, a chest of drawers, a dresser, an antique cabinet and a cedar wardrobe. Finally, claimant testified that the utility room and bathroom which extends the full length of the house were also flooded causing damage to her washer and dryer, a bookcase, various clothing and toys that belong to her granddaughter, and her Rainbow sweeper. While claimant did not present an itemized list of damages, she testified that her Rainbow sweeper was $1,000.00 when she purchased it in 1989 and her Christmas tree cost $189.00. Claimant seeks a total award of $2,330.84 in damages as stated in her complaint.

B.J. Camden testified that respondent deposited the snow at the stop sign. He also testified that respondent could have put the snow on a vacant lot next to the creek where it simply would have melted and drained into the creek.

Claimant contends that respondent negligently maintained the drainage system along Hamilton Addition Road and Manor Drive which was the proximate cause of her

flood damage.

Respondent did not present any witnesses or evidence in this claim.

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. Division of Highways*, 19 Ct. Cl. 189 (1993); *Orsburn v. Division 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 claimant's property was respondent's failure to maintain an adequate drainage system for the water flowing from Hamilton Addition Road and Manor Drive. Respondent had at least constructive, if not actual, notice of the potential for flooding at this location. Claimant notified respondent of this problem after a similar incident in 1995, but respondent did not remedy the problems. Further, claimant established that respondent should have used more care and diligence in determining where to place the excess snow it cleared from the roads. The testimony established that there was an empty lot near the location of the culvert where respondent could have deposited the snow. Thus, respondent knew or should have known that it negligently covered the inlet end of the culvert at this location. The Court has determined that the claimant herein may make a recovery for the damages proximately caused to her property.

The Court has reviewed claimant's damages which are subjective in nature rather than specific in amount. The Court has determined that a fair and reasonable amount of damages is $1,500.00. This amount reflects depreciated values for the Rainbow sweeper and claimant's Christmas tree as well as an estimate for the furniture and sundry items she listed.

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 $1,500.00.

Award of $1,500.00.

OPINION ISSUED FEBRUARY 4, 2004

ELMER R. GOINS
VS.
DIVISION OF HIGHWAYS
(CC-02-164)

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 County Route 41 near Quinnimont in Fayette County and the vehicle struck numerous large rocks in the travel portion of the road. Respondent was responsible at all times herein for the maintenance of County Route 41 in Fayette 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 March 26, 2002, at

approximately 10:30 p.m. Claimant was driving his 1991 Toyota truck on County Route 41 towards Quinnimont. He was traveling with a passenger. It was dark and raining outside. The road was wet which concerned the claimant. He travels this portion of County Route 41 regularly and he is familiar with it. According to claimant, the posted speed limit varies from forty to forty-five miles per hour along this portion of road. He stated that the last time he traveled this portion of road was approximately two weeks prior to this incident. He stated that there are frequent rock falls along the portion of County Route 41 at issue. County Route 41 at this location is a two-lane, asphalt road with a double yellow center line and white lines along the edges. Adjacent to the lane of travel on which claimant was traveling, there is a steep, rocky mountainside. There is a small berm from two feet to six feet in width between the road and the mountain and this berm varies in width depending upon the location. As claimant was approaching a sharp curve in the road, he saw a man walking along the side of the road trying to warn claimant as to an emergency around the curve. Unknown to claimant at the time, there was a large rock fall in the road. Claimant testified that he was able to slow his vehicle to approximately thirty miles per hour to prepare for an emergency when suddenly he observed numerous rocks in both lanes of the road. He stated that he was unable to stop his vehicle in time and it slid into the rocks causing significant damage to the front of the vehicle. He stated that the rocks had fallen off the mountainside and were blocking both lanes of travel. He also stated that a few of the rocks were three to four feet in diameter, but most were smaller. Claimant testified that there is a "falling rock" warning sign approximately one mile prior to the location of this incident. Claimant submitted an estimate for the damage to the front of his truck in the amount of $793.59. The front fender, grill, bumper, and frame were damaged. However, claimant has comprehensive insurance coverage to cover this loss with a deductible feature of $250.00. Thus, claimant is limited to recover $250.00. *See; Sommerville v. State Farm Fire and Casualty v. Division of Highways,* 18 Ct. Cl. 110 (1991).

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 situation.

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 at this location.

Delbert Hypes, Equipment Operator Three for respondent in Fayette County at the time of this incident, is responsible for operating heavy equipment such as graders, bulldozers, and end loaders. He is familiar with County Route 41 and with the location at issue. Mr. Hypes testified that this is a known rock fall location and that there are approximately two rock falls at this location every month. According to Mr. Hypes, respondent has "falling rock" warning signs at Mile Post 4 for southbound traffic and Mile Post 1.9 for northbound traffic thereby providing traffic from both directions falling rock warning signs prior to reaching the location at issue. He testified that he and his crew were notified at approximately 11:00 p.m. on the night of this incident that there was a rock fall. In response to the call, respondent sent a crew to remove the rocks and debris from the road as soon as possible that night. Further, he testified that prior to this call at 11:00 p.m, his office did not have any notice or complaints about a rock fall at this location. In addition, Mr. Hypes stated that it would not be feasible for respondent to erect a screen or a wall to prevent the rocks from reaching the highway. According to Mr. Hypes, there is too much area to cover because there is no method to determine where rock slides will occur. Further, he stated that it may be feasible for respondent to treat the area to keep the rocks from falling, but he stated that it would cost "a lot of

money". Finally, Mr. Hypes testified that respondent has not had anyone available to remove the rocks or take any steps to prevent any future 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 highways. *Adkins v. Sims*, 46 S.E.2d 81 (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). 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 upon which to justify an award. *Coburn v. Dept. of Highways*, 16 Ct. Cl. 68 (1985). In the rare decisions where the Court has found the respondent liable for rock fall damages, the Court found that the remedial steps taken by respondent were either inadequate or nonexistent in response to known rock fall hazards. *Fiete v. Division of Highways*, 22 Ct. Cl. 139 (1999).

In the present claim, the evidence established that respondent had placed warning signs to warn motorists of the potential rock fall hazard. The evidence further established that respondent was not notified about this particular rock fall until after the incident, and that it sent its employees to remove the rocks within a reasonable amount of time. The Court is of the opinion that claimant failed to establish sufficient evidence that respondent was negligent in maintaining the road at this location.

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

Claim disallowed.

OPINION ISSUED FEBRUARY 4, 2004

DELORSE J. BOBO
VS.
DIVISION OF HIGHWAYS
(CC-02-351)

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

PER CURIAM:

Claimant brought this action to recover for damages to her 1993 Dodge Colt which occurred when she was traveling between Moorefield and Petersburg in Grant County on U.S. Route 220 and her vehicle struck a rock in the road. U.S. Route 220 in Grant County is a highway maintained by respondent. The Court is of the opinion to deny this claim for the reasons set forth herein below.

Claimant was traveling on U.S. Route 220 at around 9:30 p.m. on August 27, 2002, to her home in Petersburg when her vehicle struck a rock in her lane of travel in the area of Welton Orchard Park. She was driving at fifty to fifty-five miles per hour. It was dark and raining at the time. She testified that she saw a rock in the road, but there were two or three cars behind her vehicle so she did not believe she could come to a sudden stop. There were also vehicles in the opposite lane coming toward her. Her vehicle went

over the rock which she estimated to be eight to ten inches in diameter. She explained that the rock broke into smaller pieces after her vehicle struck it. U.S. Route 220 is a two-lane, concrete highway with a hillside to claimant's right side as she was traveling south. She stated that she had not observed any rocks in the road at that location before this incident. She also stated there was a "Falling Rock" sign about a mile to a mile and a half from this location. After her vehicle struck the rock, the motor locked up because the oil pan had a hole allowing all oil to drain out immediately. The total amount of the cost to repair her vehicle was $768.91.

Gary Kitzmiller, respondent's Supervisor in Grant County, testified that he is familiar with U.S. Route 220 in the area of Welton Orchard Park. He stated that his office did not receive any notice of the rock in the road on the date of claimant's incident; however, he did state that there is a rock cliff in that area which is marked with a "Falling Rock" sign.

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, claimant failed to establish that respondent failed to take adequate measures to protect the safety of the traveling public on U.S. Route 220 in Grant County. Respondent has "Falling Rock" warning signs in place to warn the traveling public of the potential for rock falls at this location. While the Court is sympathetic to claimant's 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 FEBRUARY 4, 2004

RICHARD H. GLASS
VS.

DIVISION OF HIGHWAYS
(CC-02-310)

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

PER CURIAM:

Claimant brought this action for damages to his 1997 Ford Escort which

occurred when he was driving his vehicle on Route 55 from Moorefield to Baker in Hardy County and his vehicle struck a rock in the road. Respondent was at all times herein responsible for the maintenance of Route 55. The Court is of the opinion to deny this claim for the reasons set forth herein below.

On July 21, 2002, claimant and his wife were on their way to church at about 8:30 a.m. with claimant driving his vehicle at approximately thirty-five to forty miles an hour when he observed a rock in his lane of travel. He was proceeding around a curve when this incident occurred. He estimated that he was fifteen feet from the rock when he first saw it; that the rock was ten to twelve inches in diameter; and that "it was jagged." Since he is the pastor at the church not far from the scene of the accident, he drives this stretch of highway frequently. He had noticed rocks at the side of the road in the area where his accident occurred on prior occasions, but there were not any rocks in the travel portion of the Route 55. As a result of this incident, claimant's vehicle sustained damage to the converter which was repaired at a cost of $534.92.

Larry O. Funk, respondent's Supervisor for Hardy County, testified that he is familiar with Route 55 which he described as a two-lane asphalt road with shoulders three to five feet wide in most places. At the area of claimant's accident, there is a shale bank twenty to thirty feet high, but the area is not considered an area prone to having rock falls. There are no warning signs in the area. The hillside is sloped and it is covered with trees and brush. There are curves that have rocky areas adjacent to the road and rocks can fall into the road especially after rain.

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, claimant failed to establish that respondent failed to take adequate measures to protect the safety of the traveling public on Route 55 in Hardy County. Claimant had not seen rocks in the road at the location of his accident on other occasions and he is a frequent traveler on Route 55. While the Court is sympathetic to claimant's 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 FEBRUARY 4, 2004

ELVIN E. THOMPSON
VS.
DIVISION OF CORRECTIONS

(CC-01-340)

Claimant appeared *pro se.*
Charles P. Houdyschell, Jr., Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, Elvin E. Thompson, a former inmate at Mt. Olive Correctional Complex, brought this action against respondent to recover $1,222.00 which he alleges was deducted from his Veterans' benefits as a result of respondent's negligence in failing to notify timely the Veterans Administration of his incarceration.

A hearing was conducted by the Court in this claim on September 10, 2003, at which time claimant testified as to the facts and circumstances giving rise to this claim. Claimant was incarcerated at Mt. Olive Correctional Complex on February 3, 1997. Claimant was receiving Veterans' benefits prior to his incarceration in the amount of $94.00 per month. He continued to receive $94.00 per month while incarcerated at Mt. Olive from February 3, 1997, through April 22, 1999, for a total amount of $1,222.00. The Department of Veterans Affairs' rules provide that a veteran's benefits are to be restricted if a veteran is convicted of a felony and imprisoned for more than sixty days. Once incarcerated, the veteran's benefits are reduced to ten percent of the actual monthly benefit of which the veteran then receives five percent. The Department of Veterans Affairs' rules provide that the overpayment of benefits to an incarcerated veteran based upon his failure to notify the Department of Veterans Affairs of his incarceration results in the loss of all financial benefits until the overpayment is recovered. In this particular instance, the Department of Veterans Affairs was not notified of claimant's incarceration until April 22, 1999, when Kenneth Watson, Veterans Affairs liaison for respondent, contacted the Department of Veterans Affairs informing it that claimant was incarcerated. As a result, the Department of Veterans Affairs took the position that, since it received late notice of claimant's incarceration, claimant was overpaid in the amount of $94.00 per month for the period of time between February 3,1997 to April 22,1999, in the amount of $1,222.00. As a result of the overpayment, the Department of Veterans Affairs stopped paying claimant any benefits until the overpayment was recovered. If the Department of Veterans Affairs had been notified timely of claimant's incarceration, he would have received a reduced benefit of $47.00 per month, instead of the $94.00 per month, and he would not have been charged with the overpayment. Claimant testified that he was unaware that he was required to notify the Department of Veterans Affairs of his incarceration. He testified that he informed employees of Mount Olive Correctional Complex, when he was first processed, that he was a disabled veteran and he thought "it would be handled from there." Claimant stated that the Department of Veterans Affairs was not corresponding with him at the prison even though the Department knew he was there. He stated that the Department continued sending mail to his home address and that he had no way of getting notification from his home while in prison. However, claimant testified that his sister was designated by him to receive his mail including the mail from the Department of Veterans Affairs, but he is unclear whether she was the payee on his benefit check. He testified that she had access to his bank account and that his benefit check was to be deposited directly to his bank account. Further, he testified that he did not know that Mount Olive had a Veterans Affairs liaison that he could communicate with until it was too late. According to claimant, if

respondent had notified the Department of Veterans Affairs in a timely manner that he was incarcerated, he would have been receiving $47.00 per month, for twenty-six months for a total amount of $1,222.00, which is the amount he was entitled to recover. However, claimant states that since respondent failed to notify the Department of Veterans Affairs, in a timely manner he continued to receive $94.00 per month for twenty-six months for a total amount of $2,444.00. Thus, claimant was overpaid in the amount of $1,222.00, which is the difference between $94.00 for twenty-six months, and $47.00 for twenty-six months. Further, when the Department of Veteran Affairs sought to recover the $1,222.00 from claimant, it did so by eliminating claimant's monthly benefits and recovered the overpayment in thirteen months. According to claimant, this presented an economic hardship for him by forcing the total repayment in such a short period of time. He testified that the benefits were recovered much quicker than it was paid out.

Respondent contends that it was not responsible for notifying the Department of Veterans Affairs that claimant was incarcerated and that claimant's overpayment and subsequent loss of benefits, if any, was not the, fault of the respondent. Further, respondent contends that claimant did not suffer damages and may not recover any award.

Kenneth Watson, an employee of respondent's at Mount Olive Correctional Center, serves as the liaison between respondent and the Department of Veterans Affairs. He testified that as the liaison, he corresponds with inmates and the Department of Veterans Affairs, and that he is familiar with the rules and regulations regarding the benefits of incarcerated veterans. Mr. Watson testified that it is the inmate's responsibility to notify the Department of Veterans Affairs of his incarceration, and not the respondent's responsibility. According to Mr. Watson, he does not notify the Department of Veterans Affairs of an inmate's incarcerated status unless contacted by the Department regarding the inmate. Mr. Watson stated that the Department of Veterans Affairs made an inquiry about the claimant which is what prompted him to send a notice of claimant's incarceration on April 22, 1999. Mr. Watson also testified that, while respondent does not have a written policy regarding whose responsibility it is to contact the Department of Veterans Affairs, respondent does provide a form to inmates during "intake" that the inmate can state whether or not he has served in the military. Respondent produced a copy of claimant's intake form from Mt. Olive Correctional Complex and claimant did not indicate that he was a veteran. Further, respondent submitted the Department of Veterans Affairs' rules into evidence which deals with incarcerated veterans. Rule 14.2.1 states in part, if the veteran continues to receive benefits after sixty days of incarceration, it will result in an "overpayment". "The VA considers it the recipient's fault if this occurs because the recipient failed to notify the VA of his/her incarceration." Further, respondent asserts that claimant did not incur any out-of-pocket damages as a result of the overpayment. Claimant admitted that he was unjustly enriched by receiving the $1,222.00, and that the Department of Veterans Affairs stopped paying claimant's benefits only long enough to collect the overpayment of $1,222.00.

The Court is of the opinion that respondent was not negligent in failing to notify the Department of Veterans Affairs that claimant was incarcerated. Claimant failed to produce evidence that respondent had a duty to notify the Department of Veterans Affairs of his incarceration. Given the evidence presented, the Court is of the opinion that claimant had the duty to notify the Department of Veterans Affairs that he was incarcerated in a timely manner. Claimant seems to have been confused as to whether or

not his sister was designated as his "payee" while he was incarcerated and the testimony is unclear on this issue. However, claimant testified that she was designated to receive his mail, and, therefore, it would be unreasonable to hold respondent liable for not sending relevant information to the Department regarding the claimant's incarceration. Claimant was in the best position to notify the Department of Veterans Affairs of his status. Regardless, even if the respondent did have a duty to notify the Department of Veterans Affairs, the claimant did not suffer any damages. He was overpaid by the Department of Veterans Affairs while incarcerated and the Department simply recovered the amount of the overpayment and nothing more.

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

Claim disallowed.

OPINION ISSUED MARCH 2, 2004

PATRICIA SUE BELLAMY
VS.
DIVISION OF HIGHWAYS
(CC-02-506)

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 her husband James Bellamy was operating the vehicle on MacCorkle Avenue in Charleston, Kanawha County, and the vehicle struck a hole in the road. Respondent was responsible at all times herein for the maintenance of MacCorkle Avenue. The Court is of the opinion to deny this claim for the reasons set forth more fully below.

There is an issue as to the date on which this incident occurred. The claim form that claimant completed for this claim indicates that the incident occurred on December 12, 2002, which is the date that the respondent relied upon in preparing for the hearing. However, at the hearing, Mr. Bellamy testified that he was not sure of the date and he stated that it probably occurred in September 2002, but upon further review, he agreed that it may have occurred on December 12, 2002. That issue having been resolved, Mr. Bellamy testified that he drove from his home in Beckley, Raleigh County, to the hospital at Charleston Area Medical Center's Memorial Division to visit his wife who was in the hospital on at least three different occasions for a total of twenty-five days. Regardless of the actual date of this incident, Mr. Bellamy testified that he was traveling eastbound on MacCorkle Avenue as he left the hospital. It was approximately 6:30 p.m. and it was dark and raining. He stated that he was approximately halfway between the hospital and the entrance to I- 77 when the vehicle struck either a manhole or a hole in the pavement of the road. He did not see the hole prior to striking it. He described the impact as significant, but he was able to drive claimant's vehicle home to Beckley. The next morning he noticed that the tire pressure was low and decided to take his vehicle to a local repair shop to have the tire checked. According to Mr. Bellamy, a mechanic at the repair shop informed him that the wheel was damaged and that this damage was probably caused by the tire having struck a hole in the road. Claimant submitted an invoice into

evidence for the cost of replacing the wheel in the amount of $240.89.

Claimant asserts that respondent knew or should have known that this hole was in the road and that it presented a hazardous condition to the traveling public.

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 on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 81 (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 present any evidence that respondent was negligent. Claimant failed to establish that respondent had constructive or actual notice of the hole which caused the damage to claimant's vehicle. Claimant was unable to establish the approximate date on which this incident occurred and she was unable to establish the approximate location of the hole. Further, Mr. Bellamy admits that the vehicle may have struck a manhole and not a hole in the pavement. 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. Division 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 her vehicle was caused by any negligence on the part of respondent.

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

Claim disallowed.

OPINION ISSUED MARCH 2, 2004

KEITH BURDETTE
VS.
DIVISION OF CORRECTIONS
(CC-02-484)

Claimant appeared *pro se*.

Charles P. Houdyschell, Jr., Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover the value of certain items of personal property that he alleges were negligently seized and destroyed by the respondent while he was an inmate at Mt. Olive Correctional Center. Claimant placed a value of $217.25 upon the property.

A hearing was conducted by the Court in this claim on October 30, 2003, at which time the claimant testified as to the facts and circumstances giving rise to this claim. On or about October 5, 2001, claimant Keith Burdette was moved from his single cell unit to lock-up. While he was in lock-up, respondent removed certain personal property items from his cell, because this property was over the "in cell limit" and was

considered "altered." According to claimant, these property items were "grandfathered"[2] under a former policy and should not have been seized. Claimant testified that while he was in lock-up, he wrote a letter to Lori Grant, a counselor at Mount Olive Correctional Complex at that time, informing her that he did not understand why he had to dispose of the items and that it was his understanding that he was under the former policy and that the disputed items of personal property were grandfathered even though they were prohibited under the new policy. Claimant contends that he also informed Ms. Grant in this letter that if he could not keep the property items at issue that he wanted them mailed out of the facility to his home address.

Claimant testified that when he was released from lock-up on or about August 31, 2002, he discovered that numerous items of his personal property were missing. Claimant stated that he first contacted Mr. Kincaid, the unit manager, about the missing property. Mr. Kincaid informed claimant that the property had been destroyed. Claimant testified that he thought that respondent was either going to store his personal property in the state shop until he got out of lock-up or that the property would be mailed to his home address. Claimant testified that he was missing two pairs of thermal pants, five sweatshirts, two pairs of fleece sweat-pants, a hooded sweatshirt, three pairs of sweat-shorts, and one thermal lined hooded sweatshirt. Claimant presented evidence at the hearing of this matter indicating that he exhausted all the proper administrative remedies and procedures in seeking to recover his property. Claimant presented the respondent's "evidence/property seizure receipt" into evidence at the hearing of this matter, which indicated the property items that were seized and the reason for the seizure. The evidence/property seizure receipt indicates that the claimant was to determine the disposition of this property by indicating on the form whether the property was to be either mailed out of the prison or destroyed. In addition, there was a second page attached to the form from Ms. Grant, dated December 3, 2001, which stated that if claimant wanted the property to be mailed that he needed to provide a voucher, and a name and address where the property was to be shipped. Claimant admits that he did not indicate on the form whether he wanted the property mailed and he did not provide a voucher or name and address. He stated that Ms. Grant verbally informed him that she would take care of the problem. However, the property was destroyed. Claimant was unable to produce the letter he alleges he wrote to Ms. Grant on December 4, 2002, and he was unable to produce any written response from Ms. Grant stating that she would take care of claimant's property. Claimant exhausted his administrative grievance process and his claim was denied by the Warden on September 17, 2002.

Claimant contends that respondent negligently destroyed his personal property without his permission and in violation of respondent's procedures.

It is respondent's position that claimant failed to timely notify it as to whether or not he wanted his personal property items mailed from the facility or to have the items destroyed.

Peggy J. Giacomo, Storekeeper Two for respondent, testified that she is familiar with the practices and procedures regarding the storage of inmates' property at respondent's state shop at the Mount Olive Correctional Complex. Ms. Giacomo testified that one of the state shop's duties is to store an inmate's property when he is placed in

[2] A grandfather clause is a regulatory clause that creates an exemption because of circumstances existing before a new regulation takes effect.

lock-up and return the property to the inmate when he is returned to a regular cell. Ms. Giacomo testified that inmates are limited to the number of clothing items they are allowed to have in their cells. She testified that while Operational Procedure 4.03 is the current governing policy, Operational Procedure 3.10 was in effect at the time of this incident and is substantially similar to Operational Procedure 4.03. According to Ms. Giacomo, inmates are limited to the number of property items in their possession. Once an inmate is found to have too many items of personal property, the respondent offers the inmate a choice as to whether to mail the items to a designated recipient or to have the items destroyed. Ms. Giacomo testified that the property items are listed on a "S-1" seizure form and shown to the inmate. In addition, she stated that the inmate has thirty days to make a decision as to what is to be done with the property. If the property is the subject of the grievance process, it is held until the grievance is resolved. If an inmate does not respond within the thirty days, then the respondent destroys the property. Ms. Giacomo testified that the claimant's property was seized because it was altered or over the "in-cell" limit. She also testified that claimant was given an option on his S-1 seizure form to mail the property or to have it destroyed, and that it appears that he did not respond in a timely manner. Thus, his property was destroyed. Ms. Giacomo also testified that she is aware that some items were "grandfathered" at the Mount Olive Correctional Complex when inmates were moved from the Moundsville facility. However, she was not aware of any property that is currently grandfathered by the policy.

This Court has held that a bailment exists when respondent takes the personal property of an inmate, and keeps it for storage or other purposes, and then has no satisfactory explanation for not returning it. *Heard v. Division of Corrections*, 21 Ct. Cl. 151 (1997); *Edens v. Division of Corrections*, 23 Ct. Cl. 221 (2000). In the present claim, the Court is of the opinion that no bailment relationship existed. Respondent timely notified claimant that it had seized his personal property. Respondent also offered claimant the choice of mailing the property out of the facility or having it destroyed. The evidence also established that respondent gave claimant timely notice that it would store the property for thirty days, and that claimant failed to notify respondent to mail the property out of the facility. Once the time period for respondent's storage of the claimant's seized property expired, it had no duty to continue storing the property. Claimant did not indicate what he desired to be done with the property within the prescribed time period of thirty days. Thus, respondent destroyed the property in accordance with Operational Procedure 3.10. Claimant failed to establish that respondent negligently destroyed his property. Claimant did not establish that his property was "grandfathered" under any policy which would have prohibited respondent from destroying the seized property. Regardless, claimant could have avoided this situation if he had simply indicated that the property should be mailed from the facility to a named addressee and address.

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 2, 2004

ANNA BELL CARNELL
VS.

DIVISION OF HIGHWAYS
(CC-03-333)

Claimant's husband appeared on her behalf *pro se*.
Andrew F. Tarr, Attorney At Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to her 2002 Oldsmobile Intrigue which occurred when her daughter, Barbara Darlene Harris, was operating the vehicle on County Route 2 between Quinwood and Marfrance in Greenbrier County and a tree limb fell onto the vehicle causing damage thereto. Although this claim was originally filed in the name of claimant's husband, Charles Carnell, the Court on its own motion amended the style of the claim to reflect the titled owner of the vehicle as the claimant. Respondent is responsible for the maintenance of County Route 2 in Greenbrier at all times herein. The Court is of the opinion to deny this claim for the reasons set forth herein below.

Barbara Darlene Harris, claimant's daughter, testified that on June 17, 2003, at about 10:10 a.m., she was traveling on County Route 2 to go to the doctor. Her daughter was a passenger in the vehicle. She described County Route 2 as a narrow road. It had been raining earlier that week. As she was driving at approximately fifteen to twenty miles per hour on this road, a tree limb, suddenly and without warning, fell onto the hood of her mother's vehicle. She drove to the side of the roadway and her brother-in-law, who had been driving his vehicle behind them, stopped to see if they were all right. She observed that the limb was three to four inches in diameter. It had broken apart upon impact with the vehicle. It appeared to be a dead limb which had fallen from a tree four to five feet from the edge of the road. She stated that she had not observed this particular tree prior to the date herein. The respondent later cut the tree down so she stopped to look at it.

Claimant's husband, Charles Carnell, testified that he obtained an estimate for the damages to claimant's vehicle and had it repaired for $789.21. Claimant has a deductible feature of $100.00 from her insurance so she is limited to a recovery in that amount.

William Hoover, respondent's Transportation Crew Supervisor for Crawley in Greenbrier County, testified that he is familiar with County Route 2 which is in the western portion of Greenbrier County. He testified that he went to the scene of the accident involving claimant's vehicle. He saw dead limbs and a partially dead tree so he had the tree removed. He estimated that it was approximately eighteen inches "at the butt" and that it was within the State's right of way.

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 81 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the hazard 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). This 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. Division of Highways*, 22 Ct. Cl. 170 (1999).

In the present claim, the Court is of the opinion that claimant failed to establish

that respondent had actual or constructive notice that this particular tree or tree stump presented a risk to the traveling public. There was no evidence that respondent had any prior complaints regarding this tree.

Thus, there being no basis for a finding of negligence on the part of respondent, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED MARCH 2, 2004

MICKEY LEE VANCE
VS.
DIVISION OF HIGHWAYS
(CC-03-321)

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

PER CURIAM:

Claimant brought this action for damage to his 1994 Ford Ranger pickup truck which occurred when he was traveling on County Route 97 near Pineville in Wyoming County, and his vehicle struck a large tree or tree stump which had fallen onto the road. Respondent was responsible at all times herein for the maintenance of County Route 97. The Court is of the opinion to deny this claim for the reasons set forth more fully below.

There is some doubt as to the exact date on which the incident giving rise to this claim occurred. However, claimant stated on his claim form that the date was May 7, 2003, and at the hearing of this matter he testified that it was either on May 7, 2003, or "close to it." On the day at issue, claimant was traveling from his home in Glover to Pineville, Wyoming County. It was between 10:00 p.m. and 10:30 p.m. Claimant is familiar with the road and travels it often. Claimant testified that he was traveling between forty-five and fifty miles per hour and he was approximately one hundred yards from his home, when suddenly and without warning, a large tree or tree stump fell from the bank adjacent to his travel lane. His vehicle was approximately three or four feet from the tree when he first observed it. He applied the brakes whereupon his vehicle slid and struck the tree with enough force to knock the tree or tree stump to the opposite side of the road. The impact caused significant damage to his vehicle. Fortunately, claimant was not injured and he was able to drive home. He called the police and respondent who arrived at the scene of the incident approximately twenty or thirty minutes later. Claimant described the object his vehicle struck as a tree or a large tree stump. He stated that it was approximately four feet in diameter and that it was originally located just a few feet up the hillside on the side of the road. Further, he stated that the tree was "about half alive and half dead". In addition, he stated that he had never noticed this particular tree prior to this incident. He stated that the tree was not hanging over the road or was anything that would have gained his attention. Claimant introduced an estimate into evidence at the hearing in the amount of $1,789.97. However, he also testified that he had comprehensive insurance coverage that would have covered this loss at the time of the incident with a deductible feature of $1,000.00. Thus, claimant is limited to a

recovery in the amount of his insurance deductible feature. *See Sommerville/State Farm Fire and Casualty v. Division of Highways*, 18 Ct. Cl. 110 (1991).

Claimant contends that respondent knew or should have known that this tree presented a hazard to the traveling public and that it failed to take the proper remedial action which was the proximate cause of the damage to his vehicle

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 on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 81 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the hazard 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). This 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. Division of Highways*, 22 Ct. Cl. 170 (1999).

In the present claim, the Court is of the opinion that claimant failed to establish that respondent had actual or constructive notice that this particular tree or tree stump presented a risk to the traveling public. Claimant admitted that he had not noticed the tree before this incident. Further, he was not sure as to whether this was a tree or a tree stump, and he stated that it appeared to be partially dead and partially alive. Claimant presented no evidence that respondent had any prior complaints regarding this tree.

Thus, there being no basis for a finding negligence on the part of respondent, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED MARCH 2, 2004

BOBBY J. EWING
VS.
DIVISION OF HIGHWAYS
(CC-00-437)

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

PER CURIAM:

Claimant brought this action for damage to a tire on his 1983 Chevrolet Caprice which occurred when he was traveling on I-64 westbound at the Eisenhower Drive exit and his vehicle went over a piece of metal laying on the highway. I-64 in Beckley, Raleigh County, is maintained by respondent. The Court is of the opinion to deny this claim for the reasons set forth herein below.

Claimant testified that he was driving westbound off of the I-64 ramp at the Eisenhower Drive exit when he realized that his vehicle had run over a piece of metal approximately a foot in length and two inches thick. He could not describe it in detail because he only viewed as it flew from beneath his vehicle. He had to drive off the exit

ramp before he was able to stop to check any damage to his vehicle. The piece of metal had damaged the right front tire which had to be replaced at a cost to claimant of $119.50.

Respondent did not offer any witnesses or evidence in this claim.

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, 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, claimant has not provided the Court with any basis to find negligence upon the respondent. There was no activity on going in the area such as construction to explain the presence of a piece of metal on the roadway.

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

Claim disallowed.

OPINION ISSUED MARCH 2, 2004

HAZEL MCBRIDE
VS.
DIVISION OF HIGHWAYS
(CC-02-216)

Claimant appeared *pro se.*

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

PER CURIAM:

Claimant brought this action for damage to her 1997 Dodge Avenger which occurred when her son, Mark McBride, was driving the vehicle on Route 20 in Summers County near the Bluestone Dam when rocks fell from the hillside adjacent to the road and struck the vehicle causing damages to the vehicle. Respondent was at all times herein responsible for the maintenance of Route 20. The Court is of the opinion to deny this claim for the reasons set forth herein below.

Claimant's son, Mark McBride, was operating claimant's vehicle on December 1, 2001, on Route 20 in Summers County. He had one passenger sitting in the right, front seat. It was a cold, foggy evening. The accident occurred at approximately 2:00 a.m. Route 20 is a two-lane, asphalt road marked with a yellow center line and white edge lines. Mr. McBride testified that he was proceeding southbound from Hinton to Pipestem and that he was driving at fifty-five miles per hour in a straight stretch of the highway when a rock, suddenly and without warning, struck the right, rear of the vehicle. More rocks fell onto the right side of the roof of the vehicle, and one fell directly in front of the vehicle which was struck with the right front tire. The vehicle went into the air, moved on two tires and then came back down into an upright position. After the vehicle struck the rock, Mr. McBride testified that he was able to allow the vehicle to coast to a wide spot adjacent to the road and it was later towed from the scene. He described the rock as being two or three feet high and as big as the hood of the vehicle. A Traffic Crash Report prepared by the Summers County Sheriff's Office indicated that the vehicle traveled

some 286 feet where it went off the right side of the road, then it traveled some 62 feet off the edge of the road, reentered the roadway and traveled some 59 feet crossing the center line and traveling another 16 feet before it stopped. Mr. McBride stated that he had driven through this same area of Route 20 earlier that day and he had not observed any rocks on the road at that time. He is familiar with Route 20 and he stated that he had observed rocks in the road in this area on other occasions. There are "Falling Rock" signs for both the northbound and southbound traffic for this particular section of Route 20. Further, he explained to the Court that this area of highway is a known rock fall area.

Although claimant's husband, Gary McBride testified about the damages to the vehicle and established damages to her vehicle in the amount of $8,758.46 which represents the value of her vehicle as a total loss, he explained that claimant had insurance coverage with a deductible of $100.00. The Court limits recovery, if any, in this claim to the amount of the deductible even though the insurance did not pay any part of claimant's loss because the driver of the vehicle, Mark McBride, was an excluded driver under the terms of the insurance policy. The claimant is not entitled to recover more than the amount of the deductible provision in her policy.

Respondent did not offer 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 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, claimant failed to establish that respondent did not take adequate measures to protect the safety of the traveling public on Route 20 in Summers 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 of this incident and remove the rocks from the road. The driver of claimant's vehicle was familiar with Route 20 and the propensity of rocks to fall onto the roadway. The Court recognizes that driving in an area with rock hillsides where rocks fall suddenly onto the vehicle and in front of the vehicle giving the driver little time to react does not mean the driver is at fault. However, the respondent likewise does not have time to react and cannot be held to be negligent for the accident which occurs. 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 2, 2004

KAREN S. HUNLEY
VS.

DIVISION OF HIGHWAYS
(CC-03-274)

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

PER CURIAM:

Claimant brought this action for damage to her 1993 Pontiac Grand Prix which occurred when she was operating her vehicle on U.S. Route 52 on Coaldale Mountain in Mercer County and a large rock fell from the hillside striking the windshield. Respondent was at all times herein responsible for the maintenance of U.S. Route 52. 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 8, 2003, at approximately 9:30 a.m. Claimant was driving her grandmother, who was the front seat passenger, to a doctor's appointment. She was traveling southbound on U.S. Route 52 at approximately forty miles per hour. It was raining and claimant had her headlights on at the time of this incident. Claimant stated that there are a number of rocks on the hillside adjacent to her lane of travel. As claimant was proceeding into a right curve in the road, she heard a loud noise and observed a rock about the size of a basketball strike her windshield. The impact shattered the windshield and threw glass onto the claimant and her grandmother. Fortunately, there were no serious injuries, but claimant did have to visit the emergency room twice for serious headaches. The windshield was destroyed requiring claimant to purchase a new one at a cost of $145.00. Claimant also testified that she had to purchase a new inspection sticker at a cost of $14.00. She stated that she had just had a new one placed on the vehicle a month prior to this incident. Thus, claimant seeks a total award of $159.00.

Claimant testified that she travels this portion of road approximately twice a week. The last time she traveled the road was approximately one week prior to this incident. She stated that she has never seen a rock fall at this location. She also stated that she did not see any rock fall warning signs for southbound traffic on the date of this incident. However, she did state that there was a rock fall warning sign near this location on the opposite side of the road for northbound traffic on the date of this incident. She testified that she did observe a warning sign for southbound traffic a few months later and assumed that respondent must have put it up after this incident, unless it was covered by brush or trees on the date of this incident.

Claimant asserts that respondent knew or should have known that this location presented a rock fall hazard and it should have taken the proper remedial measures to remedy this hazard.

Respondent did not present any witnesses or evidence in this claim.

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 81 (W.Va.1947). To hold respondent liable for road defects of this type, 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. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl.8 (1985). The general rule this Court has adopted is that the unexplained falling of a rock onto a highway, without an affirmative showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient evidence upon which to justify an award. *Coburn v. Dept. of*

Highways, 16 Ct. Cl. 68 (1985); *Hammond v. Dept. of Highways*, 11 Ct. Cl. 234 (1977).

The Court is of the opinion that the respondent took reasonable steps to insure the safety of the traveling public in this claim. Further, there was no evidence that respondent had notice of a dangerous condition.

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

Claim disallowed.

OPINION ISSUED MARCH 2, 2004

LENORA J. BUNTING
VS.
DIVISION OF HIGHWAYS
(CC-03-055)

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

PER CURIAM:

Claimant brought this action for damage to her vehicle which occurred when she was traveling on County Route 50/9 in Smithburg, Doddridge County, and the vehicle struck a large hole in the road. Respondent was responsible at all times herein for the maintenance of County Route 50/9 in Doddridge 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 May 21, 2002, at approximately 4:30 p.m. Claimant was traveling in her 2002 Buick Park Avenue on County Route 50/9, also referred to as Herbert Avenue, to her home in Smithburg, Doddridge County. County Route 50/9 is a one and one-half lane, dead-end, asphalt road. It is an unmarked low priority road and is approximately twelve-feet wide. Claimant's home is located adjacent to County Route 50/9 and it is approximately three-fourths of a mile from the junction of County Route 50/9 with the main highway. According to claimant, there are ten homes located on this road and many residents park their vehicles in the lane of travel adjacent to their homes. Thus, the traveling public has use of only one lane. On the evening of this incident, claimant was proceeding on County Route 50/9 at approximately twenty miles per hour when suddenly the vehicle struck a large hole in the road. Claimant described hearing a loud "crunching noise". She stopped the vehicle and noticed that one of her tires was flat. Claimant discovered that the vehicle also had a cracked wheel as a result of the impact. Claimant testified that she travels this road approximately five days per week and at least twice a day. She stated that she is very familiar with the location of the hole which her vehicle struck since she passes it every time she travels the road. According to claimant, she usually avoids the hole by straddling it with the vehicle or by driving around it. However, she did not do so on this occasion despite the fact that there was no oncoming traffic at the time this incident occurred. Claimant also stated that she reported this same hole to respondent a number of months prior to this incident, and respondent filled the hole with rocks which was only a temporary repair. Claimant testified that the hole reappeared and was present

for a significant period of time between the time respondent repaired it and the date of this incident. However, she is not sure if she reported it to respondent during this time period. Claimant submitted a repair bill into evidence in the amount of $520.57 for the cost of a new wheel. However, claimant has insurance coverage which covers this loss with a deductible feature in the amount of $500.00. Thus, claimant is limited to a recovery, in any, in the amount of her insurance deductible. *See Sommerville/State Farm Fire and Casualty*, 18 Ct. Cl. 110 (1991).

Claimant asserts that respondent had notice of the hole on County Route 50/9 and that it presented a hazardous condition to the traveling public.

It is respondent's position that this road was a low priority dead-end road and that it maintained it as best it could under the circumstances. Further, respondent contends that claimant was aware of the hole and failed to use reasonable care to avoid it.

Larry Williams, Assistant Supervisor for respondent in Doddridge County, is responsible for the maintenance of the roads in Doddridge County including County Route 50/9. Mr. Williams testified that County Route 50/9 is a low priority route with a low volume of traffic and it is a dead-end road. He testified that it is maintained with tar and chip and is patched occasionally. He stated that respondent tries to patch low priority roads two or three times a year, but he is not certain that this road was patched that often. Further, he testified that the problem with this particular hole is that most vehicles are forced to drive along the edge of the road where this hole is located in order to maneuver around the vehicles parked in the road adjacent to the local residences, and this has contributed to the deterioration 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 v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, claimant must establish by a preponderance of the evidence that respondent had 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); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the present claim, the Court is of the opinion that the hole in the road on County Route 50/9 at the location of this incident constituted a hazardous condition to the traveling public. The evidence also established that the respondent had at least constructive, if not actual, notice of this condition and a reasonable amount of time to take corrective action. However, the Court is also of the opinion that claimant knew about the hole on County Route 50/9 and she could have avoided the defect. She traveled the road twice a day at least five days a week, and at all other times she was able to avoid striking the hole with her vehicle. However, on this particular occasion claimant failed to avoid striking the hole with her vehicle despite the fact there was no oncoming traffic or an emergency. Thus, the Court is of the opinion that claimant failed to act as a reasonably prudent driver would act under the circumstances, and further, that claimant's negligence in this claim is equal to or greater than the respondent's. Therefore, based upon the principle of comparative negligence no award is granted to the claimant in this claim. *See Bradley v. Appalachian Power Company*, 163 W.Va. 332, 256 S.E.2d 879 (1979).

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

Claim disallowed.

OPINION ISSUED MARCH 2, 2004

RANDALL W. TOLER and DONNA M. TOLER

VS.
DIVISION OF HIGHWAYS
(CC-03-017)

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

PER CURIAM:

Claimants brought this action for damage to their 1999 Lincoln Continental which occurred when claimant Donna Toler was driving west on Route 99 in Raleigh County, and the vehicle struck rocks in the roadway. Respondent is responsible for the maintenance of Route 99 in Raleigh County. The Court is of the opinion to deny this claim for the reasons set forth herein below.

On January 3, 2003, claimants were proceeding from a hospital in Beckley to their home in Cyclone, Wyoming County. It was just after midnight and it was foggy. It had been raining with mixed snow. They were traveling on Route 99 in the area of Bolt Mountain with claimant Donna Toler driving the vehicle and claimant Randall Toler in the right front passenger seat. As claimant Donna Toler proceeded at twenty to twenty-five miles per hour, she drove into a curve from a straight stretch of the road. She testified that she suddenly felt the vehicle scraping and being lifted up, and she realized that the vehicle had passed over rocks in the roadway. She had not seen the rocks prior to driving over them. Claimants had to stop to add fluids to their vehicle and they then drove to their destination in Wyoming County. Claimant Donna Toler testified that she had seen rocks both in the road and on the berm at this area of Route 99 on previous occasions but she had been able to avoid driving over the rocks. Claimants' vehicle sustained damage to the fuel pump, fuel hose, and connections which cost $980.23 to repair. Claimants carry insurance coverage with a deductible of $250.00 and claimants are limited to a recovery of the amount of the deductible. Claimants also incurred an expense of $157.66 for renting another vehicle for four days while their vehicle was repaired.

Johnny Bass, a foreman for respondent in Raleigh County, explained that Route 99 is a two- lane road which proceeds over Bolt Mountain. Respondent has "Falling Rock" signs at various locations on this road because it is known for having rocks fall from the hillsides. Some sections of the road have hillsides along both sides of the road and other areas have a hillside on one side only. The berm varies from five feet to twelve feet in width on Route 99 in Raleigh County. Respondent has not taken any precautions to prevent rock falls other than cleaning the rocks from the roadway after rock falls occur.

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 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. *Coburg v. Dept. of Highways*, 16 Ct. Cl. 68 (1985); *Hammond v. Dept. of Highways*, 11 Ct 24

In the present claim, claimants have not established by a preponderance of the evidence that respondent failed to take adequate measures to protect the safety of the traveling public on Route 99 in Raleigh County. Respondent has placed "Falling Rock" warning signs to warn the traveling public of the potential for rock falls at this location and respondent reacts as soon as it receives notice that rocks have fallen into the road.

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 APRIL 14, 2004

HOWARD COPLEY, as Administrator of the Estate
of Teresa Copley, Deceased, HOWARD COPLEY,
individually, CURTIS H. COPLEY
VS.
DIVISION OF HIGHWAYS
(CC-01-189)

David Lycan and D. Jeffrey Ezra, Attorneys at Law, for claimant.
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 18, 1999, Curtis H. Copley, who is the son of Howard Copley and Teresa Copley, was traveling northbound on U.S. Route 52 near the town of Glen Hayes, Wayne County. Teresa Copley was a passenger in the vehicle being driven by Curtis H. Copley.

2. At or near Glen Hayes, Wayne County, the vehicle driven by Curtis H. Copley hydroplaned on U.S. Route 52 as a result of rainwater pooling in substantial ruts or channels in the road and collided with a Head Start bus being driven in the opposite direction.

3. The collision resulted in the death of Teresa Copley and minor injuries to Curtis H. Copley.

4. Respondent was responsible for the maintenance of U.S. Route 52 in Wayne County on the date of this incident, and, further, respondent admits that it failed to maintain Route 52 in proper condition on this date.

5. Respondent and claimants have agreed to settle this claim for the total sum of Sixty-Seven Thousand Five Hundred Dollars ($67,500.00).

6. Claimants have requested and respondent agrees that Howard Copley in his individual capacity is to receive the total sum of Sixty Thousand Seven Hundred Fifty Dollars ($60,750.00).

7. Claimants have requested and respondent agrees that Curtis H. Copley, who

is now an adult and no longer under the guardianship of Howard Copley, is to receive the total sum of Six Thousand Seven Hundred Fifty Dollars ($6,750.00).

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 U.S. Route 52 in Wayne County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to the claimants; 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 $60,750.00 to Howard Copley and $6,750.00 to Curtis H. Copley for a total award of $67,500.00.

Award to Howard Copley: $60,750.00.
Award to Curtis H. Copley: $6,750.00.

OPINION ISSUED APRIL 14, 2004

WENDELL K. ASH
VS.
DIVISION OF CORRECTIONS
(CC-03-416)

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 action to recover the cost of a Christmas Food Package alleged to have been sent to him from a company known as Securepac during December, January or February 2003. At that time, he was placed in the segregation unit of Mt. Olive where he was not permitted to receive such an item. Claimant alleges that something happened to the package and that policies of Mount Olive Correctional Complex were not followed. He now makes a claim in the amount of $74.20 for the package.

This claim was submitted to the Court upon claimant's Motion for Summary Judgment, respondent's Response to Motion for Summary Judgment of the Claimant and Respondent's Motion for Summary Judgment, and claimant's Clarification as agreed to by the parties on October 30, 2003, at a video teleconference.

Claimant contends that he was sent a Christmas Food Package from the company Securepac sometime in December, January or February 2003. Claimant at that time was being held in a segregation unit at Mount Olive Correctional Complex. While in segregation, inmates may not receive such packages pursuant to the policies of Mt. Olive Correctional Complex. Claimant alleges that he was not provided the proper form (a package refusal form) to complete to return the package to the address of his choice.

Respondent contends that the package was either not received by Mount Olive Correctional Complex or that it was returned to Securepac, and further, that a refund was received by the person sending the package to claimant. This assertion is supported by respondent's Exhibit B attached to its Answer which is a letter from Securepak stating that it was making a full refund to the sender of the food package, Luella Glover.

According to the letter, it was assumed that the package had been lost in transit to Mt. Olive Correctional Complex. Claimant was unable to deny or confirm that a refund had been received by the person who sent him the package.

In this claim, the Court is of the opinion that claimant has not established that respondent acted in a wrongful manner. The company Securepac was not sure if the package which is the subject matter in this claim was mailed or lost, but it was making a refund to the sender of the package. Therefore, there has been no loss on the part of the claimant in this claim. The policies in place at Mt. Olive Correctional Complex were followed by the facility and claimant was well aware of the policies. The Court is of the opinion that respondent's Motion for Summary Judgment is well taken.

Accordingly, the Court is of the opinion to and does grant respondent's Motion for Summary Judgment and this claim is hereby dismissed and stricken from the docket of the Court.

Claim dismissed.

OPINION ISSUED APRIL 14, 2004

CHARLES R. KILMER
VS.
DIVISION OF CORRECTIONS
(CC-03-285)

Claimant appeared *pro se*.
Charles P. Houdyschell, Jr., Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover the value of certain personal property items that he alleges were negligently destroyed by respondent while he was an inmate at Mt. Olive Correctional Complex. Claimant was serving a term of confinement in segregation. When he was released to return to the main population, he noticed several food items had been destroyed. Claimant placed a value of $32.30 upon the items. The Court is of the opinion to deny this claim based upon the findings set forth herein below.

A hearing by video teleconference was conducted by the Court in this claim on October 30, 2003, at which time the claimant testified as to the facts and circumstances giving rise to this claim. Claimant, Charles Kilmer, was in a regular cell at Mount Olive Correctional Complex until he was placed in punitive segregation on October 17, 2002. Claimant was released from segregation on January 15, 2003, to return to the main population at which time he was given an "inmate property seizure form". The form was dated October 18, 2002, and listed the food items that respondent had seized. It also indicated that the property was to be either mailed out of the facility or it would be destroyed. Claimant subsequently discovered that the food items were destroyed. According to claimant, the day he was released from segregation was the first time that he was given notice that his food items had been seized and destroyed. Claimant exhausted all administrative remedies in seeking to be reimbursed for those food items he considers to have been negligently destroyed. He stated that the food items were still in their regular packages and that only a few items had been opened. While claimant admits that a loaf of bread and a cherry pie might have spoiled, he stated that all other

items would not have spoiled within the ninety days he spent in segregation. Claimant testified that he was never given the opportunity to mail the food items out of the facility which he would have chosen to do. Further, he testified that respondent knew or should have known that these food items would not spoil within the ninety day time period he was in segregation, and should not have destroyed them. Claimant's food consisted of various canned, packaged and boxed items for which he seeks $32.30.

Claimant contends that respondent negligently destroyed his food items while he was in segregation without giving him notice or an opportunity to mail the items out of the facility.

Respondent did not present any witnesses in this claim.

Fred Kerby was called by claimant as a witness in this claim. Mr. Kerby is an Inspector Two for respondent at Mount Olive Correctional Complex. Mr. Kerby completed the "Food Code Course" training in 1999 through the West Virginia Department of Health and Human Resources which certified him to inspect food at respondent's facilities. He testified that this training was for health and food standards and compliance with the "Food Code". Mr. Kirby testified that he wrote the "Fire Safety and Sanitation Inspection Report" pertaining to claimant's food items remaining in his cell while claimant was in segregation. The report was introduced into evidence at the hearing of this matter by the claimant and states in part that claimant had excessive amounts of food stuff in his cell, and that since he was sent to segregation for an extended period of time, the food would either be mailed out or destroyed because it presented a health hazard. However, Mr. Kerby stated that at the time he wrote the inspection report he made a mistake when he indicated that the food items could be mailed out. He testified that regardless of whether or not the food is sealed it cannot be mailed from the facility. According to Mr. Kirby, respondent's policy and operational procedures require it to dispose of any food that reaches the state shop and to allow inmates to mail food items out presents a health risk to the recipient. In addition, he testified that the health code will not permit storage of food at the state shop because its not adequately equipped to do so which presents a serious health hazard.

In the present claim, the Court is of the opinion that respondent was not negligent in destroying claimant's food items. The testimony presented at the hearing established that respondent's policy is to destroy food items that are left in an inmates cell when the inmate is sent to the segregation unit, referred to as lock-up. Respondent does not store food items for an extended period of time because it presents a health hazard to the inmates. Thus, claimant's food items had to be destroyed when he was sent to lock-up. The mere fact that respondent made a mistake and indicated on a property seizure form that the items could be destroyed or mailed out does not create a duty upon respondent to then store the food items. The testimony established that this was harmless error on the part of an employee who testified as to such at the hearing. The Court is convinced that respondent acted reasonably and diligently in carrying out its policy and procedures.

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

Claim disallowed.

OPINION ISSUED APRIL 14, 2004

KEVIN BOXLEY
VS.
DIVISION OF CORRECTIONS
(CC-02-514)

Claimant appeared *pro se*.
Charles P. Houdyschell, Jr., 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 or destroyed by the respondent after he was transferred from Northern Correctional Facility to Mount Olive Correctional Complex.

A hearing was conducted by the Court in this claim on October 23, 2003, at which time the claimant testified as to the facts and circumstances giving rise to this claim. Claimant testified that he was transferred from Northern Correctional Facility to Mount Olive Correctional Complex on May 21, 2002. When he arrived at Mount Olive Correctional Complex only some of his personal property items were brought with him. He alleges that his watch, assorted hygiene items and certain arts and crafts items were missing. Claimant followed the appropriate grievance procedure while he was at Mt. Olive Correctional Complex in an attempt to obtain various property items remaining at Northern Correctional Facility. Claimant also testified that he filed a Counselor Request Form while he was in punitive segregation at Mount Olive Correctional Complex in an attempt to determine what had happened to his missing personal property. He received a written reply that a telephone call was made by Ms. Susie Pierson, Correctional Counselor at Mount Olive, to Northern Correctional Facility to find out the amount of postage claimant needed to have his property mailed to him. Claimant received a memorandum (hereinafter referred to as a memo) from the Mount Olive Correctional Complex regarding an unapproved package that was sent from Northern Correctional Facility to him dated June 26, 2002. The memo informed claimant that the package was not listed on the approved order form and there was no special package approval on file in the post office. In addition, the memo informed claimant that the package did not conform to Operational Procedure 3.10. Claimant introduced the memo into evidence at the hearing of this matter. At the bottom of the memo, there is a handwritten note by one of respondent's employees dated July 2, 2002, which states that the post office needs a memo to accept the package. In addition, Susie Pierson, Counselor I at Mount Olive Correctional Complex, testified that because the post office was not aware the package was coming, it was returned to Northern Correctional Facility. Claimant testified that there apparently was no approved package form on file within claimant's working area to receive this package which is why the post office needed a memo to accept the package. Claimant also stated that he believed that the package had been sent to Mount Olive on more than one occasion and returned to Northern Correctional Facility without him ever seeing it. Susie Pierson, Counselor I at Mount Olive Correctional Complex, testified that she did contact someone at the state shop at Northern Correctional Facility to have claimant's property weighed to determine the amount of postage which was $4.33. Claimant submitted a voucher for the payment of the postage costs.

At the hearing, counsel for respondent showed claimant a green Aqualite wrist watch with a velcro band to identify whether or not it was his missing watch. However, claimant stated that it was not his watch. Claimant did not present any evidence to indicate the brand name of his watch or where it was purchased. Respondent introduced

what was purported to be claimant's G-1 grievance form with his signature into evidence at the hearing. The form was dated June 5, 2002, and listed numerous items that were not transferred with claimant to Mount Olive Correctional Complex including a green Aqualite watch with a nylon and velcro band, one set of coloring pencils, one set of line markers, and several other food stuff items. However, claimant could not verify that the signature on this document was his. Claimant seeks an award for the value of his lost watch in the amount of $30.99, assorted hygiene and cosmetic items in the amount of $30.00, arts and crafts materials in the amount of $34.00, and postage costs in the amount of $4.35. Thus, claimant seeks a total award of $100.00.

Claimant asserts that respondent negligently lost or destroyed his personal property items while they were being mailed from Northern Correctional Facility to Mount Olive Correctional Complex.

Respondent contends that it did not negligently lose claimant's personal property items and that it attempted to return his watch to him at the hearing of this matter but he refused to accept it.

Kathy Dillon, the Institutional Paralegal at Mount Olive Correctional Complex, testified that as part of her duties she has access to inmate files and records including those of the claimant. She had an inmate property form in claimant's file that lists where the property came from and the contents of the property. On this particular form a green Aqualite watch is listed. Further, this document bears the signature of an inmate in three different places. Asked if this was his signature claimant stated, "I would say yes, it is my signature in those three boxes." However, claimant testified that he did not prepare the contents of the list on this property form.

Karen Pszczookowski, Associate Warden of Operations at Mount Olive Correctional Complex since 1998, testified that she became involved in locating and addressing some alleged missing property from claimant. She testified that she first got involved in locating Mr. Boxley's property around June 5, 2002, when he filed a grievance. She stated that claimant informed her that he was missing a green Aqualite watch with a nylon velcro band, a set of pencils, one set of fine line markers and various food items. According to Ms. Pszczookowski, respondent did locate claimant's property and sent it to Mount Olive Correctional Complex where it was received at the post office. However, she stated that since two items were not accepted by Mount Olive Correctional Complex, the property was returned to Northern Correctional Facility. She also testified that claimant was sent a notice advising him that the package was returned to Northern Correctional Facility on July 18, 2002. In addition, the supervisor of the post office wrote to him informing him that he had fifteen days to send an address for the property to be forwarded, and if no response, then the package would be destroyed. She stated that all of the property was eventually destroyed except for the watch. While she admits that the proper procedures pertaining to the personal property were not followed when claimant was moved from Northern Correctional Facility to Mount Olive Correctional Complex, she testified that it was turned over to her and secured in her office on August 15, 2002. She testified that she gave the watch to personnel at Mount Olive Correctional Complex on October 29, 2003, which was the day prior to the hearing of this claim.

After due consideration of the testimony and evidence in this claim, the Court has determined that respondent was not negligent in its actions with respect to care and treatment of claimant's items of personal property. The procedures followed were taken to protect his property and claimant was offered an opportunity to forward the items to an address provided by him. This Court has held in previous claims that respondent is the bailee for personal property acquired from inmates and it is responsible for its safety

and return to inmates; however, in the instant claim the Court is of the opinion that respondent acted in a reasonable manner with respect to the treatment of claimant's item of personal property during the scenario as described by the claimant and by respondent's employees.

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

Claim disallowed.

OPINION ISSUED APRIL 14, 2004

MICHAEL CORRIVEAU
VS.
DIVISION OF CORRECTIONS
(CC-02-006)

Claimant appeared *pro se*.

John Boothroyd, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action for breach of an employment contract by respondent while he was an inmate at St. Mary's Correctional Center. Claimant seeks an award for lost wages, back pay, interest and postage costs incurred in pursuing this claim in the amount of $1,545.80.

A hearing in this claim was conducted by the Court on November 14, 2003, at which time the claimant testified as to the facts and circumstances giving rise to this claim. Claimant Michael Corriveau was transferred from Huttonsville Correctional Center to St. Mary's Correctional Center on or about May 12, 2000. On June 14, 2000, claimant signed a "job contract" to work as an inmate law library clerk. According to the contract, claimant was to be paid $40.00 per month. His duties included assisting other inmates with legal research and assisting them with claims in magistrate court. Claimant served in this position under the initial contract for approximately two and one-half months until August 28, 2000, at which time respondent renewed the contract with claimant under the same terms. Claimant testified that he showed up for work every day and performed his duties during the six month period he worked at the law library. In late November or early December 2000, claimant decided that he wanted to pursue additional education in the field of paralegal studies so he ordered various books and materials outside of correctional facilities through Blackstone School of Law. Claimant testified that he verbally requested permission from his unit manager, Patrick Mirandi, to order and pay for the books and materials himself and to have these sent to him at St. Mary's Correctional Center. According to claimant, Mr. Mirandi verbally informed him that he could probably do it if he had his family purchase the books and materials and then send the same to him at the correctional facility. Claimant preferred to perform this task himself but it was denied.

After claimant's verbal request was denied, claimant filed a "G-1" grievance form requesting in writing that he be allowed to order the first part of the paralegal course material by sending partial payment of $25.00. The total cost for the first part of the course was $50.00. In addition, claimant asserted in the G-1 grievance that he was also being denied his constitutional right to an education and that he was being discriminated

against. Claimant's unit manager replied to the G-1 grievance in writing on December 5, 2000, which stated that claimant was given an alternative plan of action by either having a family member purchase the books and materials or by paying for the full amount of the order which was $50.00. In addition, the unit manager informed claimant in writing that respondent's Policy Directives 325.00 and 2.21 both require claimant to obtain administrative authorization for such a purchase. According to claimant, the response from his unit manager was confusing and unclear as to the direction given to claimant explaining his course of approved action. Claimant stated that he was especially confused by the portion of the response that stated claimant had an alternative course of action by having a family member purchase the books and materials or by claimant paying the cost in full. Thus, claimant testified that he interpreted the response from the unit manager as an approval to go forward with the alternative plan of having his wife purchase the materials. Claimant testified that he wanted clarification regarding his grievance response so he wrote to the warden at St. Mary's Correctional Center, William Fox, for permission. The warden denied claimant permission to order the books and materials. However, claimant testified that prior to corresponding with the warden he had already asked his wife to order the books and materials and to pay the full amount of $50.00. A few days later the books and materials were mailed to him at St. Mary's Correctional Center on or about December 12, 2000.

On January 9, 2001, claimant testified that he was abruptly terminated from his job as the law library clerk for ordering the books and materials. As a result, he was cited for three different violations. He introduced the "violation reports" into evidence at the hearing of this matter. The first violation report dated January 16, 2001, stated that claimant violated respondent's Disciplinary Rule No. 2.01 for refusing an order of the Warden denying claimant's request to enter into a contract with Blackstone Law School. The second violation report dated January 16, 2001, charged claimant with the violation of Disciplinary Rule No. 2.21 which was the "misuse of correspondence regulations." Claimant violated this rule by writing a letter to Blackstone Law School acknowledging his receipt of a reduced payment plan card and advising he would send $50.00 to start the paralegal course. The third violation report, also dated January 16, 2001, charged claimant with violation of disciplinary rule No. 2.29 which is "the unauthorized entry into a contract" with Blackstone Law School. At this time, claimant also received a "job termination slip" from his job supervisor which stated that due to his violations, claimant could not effectively represent other inmates when he had just exhibited the same or similar conduct as inmates he represents. Claimant was found guilty on all three charges in Magistrate Court at St. Mary's Correctional Center. As a result of this determination, claimant was transferred to Huttonsville Correctional Center.

Once claimant was returned to Huttonsville Correctional Center he filed four grievances and followed the administrative grievance procedures seeking a remedy for the alleged breach of contract by St. Mary's Correctional Center. Eventually, claimant received permission to apply for a paralegal course which he completed in June 2003.

Claimant now seeks $1,360.00 in lost wages, back pay, and projected raises beginning from the date he was terminated on January 9, 2001, up to the present date. Claimant also seeks $76.80 in interest which he calculated based upon an 8% interest rate per annum since January 9, 2001. In addition, claimant seeks $25.00 for postage expenses incurred in filing this claim. Finally, claimant seeks an award of $84.00 in lost wages as a result of allegedly missing fourteen hours of work at his current place of employment due to respondent's counsel having to reschedule the original hearing of this claim.

Claimant contends that he was wrongfully terminated from his job while an inmate at respondent's facility and seeks damages for lost wages, back pay, interest, and postage expenses.

It is respondent's position that claimant violated numerous operational procedures at St. Mary's Correctional Center, and as a proximate result of these violations, he was terminated from his job in accordance with respondent's policies and procedures. Regardless, respondent asserts that claimant was an "at will" employee subject to termination at anytime.

George Warren Janice served as the magistrate for St. Mary's Correctional Center at the time of this incident and he heard claimant's disciplinary case and ruled upon it. Mr. Janice testified that he found claimant guilty on all three charges brought against him by respondent. He made a recommendation that claimant be transferred to Huttonsville, and that he be assessed thirty days loss of privileges on each charge, and that all charges were to run concurrently. Mr. Janice testified that the reason he ordered this punishment was claimant's total disregard for the rules at respondent's facility. He testified that claimant had been advised that he did not have administration authorization to contract with a company outside the facility which violated Policy Directives 325 and 2.21. According to Mr. Janice, respondent has a clearly defined policy that requires the warden or deputy warden to inform the inmate in writing whether or not they may purchase material from a source outside of the correctional facility. Mr. Janice stated that the first response from Warden Fox to claimant dated December 7, 2000, clearly denied claimant the authorization to enter into the contract with Blackstone Law School. Further, he stated that the response recommends that he pursue his education through respondent's education department. Mr. Janice also testified that the reason for respondent's policy of not allowing inmates to contract with outside organizations is that over the years many inmates have bought items and then not paid for the items which creates legal problems for the respondent. Mr. Janice also stated that the reason he decided to order claimant back to Huttonsville was that claimant showed a total disregard and lack of respect for the system at St. Mary's Correctional Center, and that St. Mary's was a new facility at the time. He also stated that St. Mary's did not have any area designated for the purpose of segregating inmates to punish an inmate. Thus, his only recourse was to send an inmate to another facility as punishment.

Respondent's Operational Procedure #3.10-1, which was submitted into evidence at the hearing of this matter, states that "it is the policy of St. Mary's Correctional Center to provide for a mechanism which ensures that all eligible offenders have a meaningful job and/or program opportunities. It is the policy of St. Mary's Correctional Center that except for serious job related disciplinary infractions, rule violations will not interrupt program or work participation." Further, Operational Procedure #3.10-1 also states, in part, that work and program assignments will not be affected by disciplinary infractions unless "(T)he infraction arose of or is directly related to the work or program assignment" and "the severity of the infraction warrants segregation." Further, Operational Procedure #3.10-1 also states that "any offender found guilty of a disciplinary violation and confined to segregation as a result thereof will automatically have his or her job terminated." If the supervisor terminates an inmates contract, the reasons for the termination must be given to the offender in writing, subject to the review of the Work Assignment Committee. Further, any contract termination may be appealed by the inmate through the Offender Grievance Procedure.

The issue in this claim is whether or not the respondent breached the job contract it made with claimant. The Court is of the opinion that based upon the evidence

respondent did not breach the job contract it had with claimant. The contract at issue is clearly a terminable "at will" contract, which means that respondent could terminate claimant's employment at anytime without giving any reason. Regardless, even if the employment contract was not an "at will" contract, the Court is of the opinion that respondent followed its Operational Procedure #3.10-1 pertaining to the inmate work program in terminating claimant from his job contract. The evidence established that claimant failed to obtain proper authorization from the warden or deputy warden to purchase materials from a source outside of the facility, and yet, he deliberately set about making the purchase. Claimant was subsequently found guilty of three violations relating to this purchase in magistrate court. Further, the evidence established that this infraction arose from and was related to the claimant's work program assignment. Claimant's "offender job termination slip" stated in part that he could not effectively represent other inmates who had disciplinary issues similar to his own. In accordance with Operational Procedure #3.10-1, respondent may take proper disciplinary actions even though it affected claimant's work assignment. Respondent followed all the proper procedures in terminating claimant including providing him with a termination slip with the reasons for the termination which was reviewed by the work assignment committee, and it timely responded to claimant's grievances. Finally, respondent is under no constitutional obligation to provide inmates with employment whatsoever nor is respondent obligated to pay inmates a salary for work performed in a prison facility. Further, claimant is not entitled to a recovery for lost wages, back pay, interest, postage, and costs associated with having the initial hearing rescheduled.

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

Claim disallowed.

OPINION ISSUED JUNE 10, 2004

KIMBERLY L. ERSKINE
VS.
DIVISION OF HIGHWAYS
(CC-03-057)

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 February 17, 2003, claimant was traveling across the Amandaville Bridge on Route 60 in St. Albans, Kanawha County, when her vehicle struck a hole in the road damaging a tire.

2. Respondent was responsible for the maintenance of the Amandaville bridge on Route 60 in Kanawha County and respondent failed to maintain properly Route 60 on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $79.45.

4. Respondent agrees that the amount of $79.45 for the 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 Amandaville Bridge on 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 $79.45.

Award of $79.45.

OPINION ISSUED JUNE 10, 2004

KIM HAYNES
VS.
DIVISION OF HIGHWAYS
(CC-03-049)

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 February 17, 2003, claimant was traveling across the Amandaville Bridge on Route 60 in St. Albans, Kanawha County, when her vehicle struck a hole in the road damaging two rims and a tire.

2. Respondent was responsible for the maintenance of the Amandaville Bridge on Route 60 in Kanawha County and respondent failed to maintain properly Route 60 on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $1,052.09. However, claimant is limited to the amount of her insurance deductible feature which is $250.00.

4. Respondent agrees that the amount of $250.00 for the 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 Amandaville Bridge on 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 $250.00.

Award of $250.00.

OPINION ISSUED JUNE 10, 2004

JEFFREY A. NICHOLS
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-04-026)

Claimant appeared *pro se*.
Ronald L. Reece, 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 $307.40 for items of personal property that were entrusted to respondent's employees when he was taken to South Central Regional Jail, a facility of the respondent. At the time of claimant's release, he discovered his Seiko watch and cigarette lighter were 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 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.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $307.40.

Award of $307.40.

OPINION ISSUED JUNE 10, 2004

KIRBY DRUSCHEL
VS.
HIGHER EDUCATION POLICY COMMISSION
(CC-04-130)

Claimant appeared *pro se*.
Jendonnae L. Houdyschell, 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, a student at West Virginia University, seeks $255.00 for personal items damaged by a water leak in his dormitory room in Boreman North.

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 $255.00.

Award of $255.00.

OPINION ISSUED AUGUST 18, 2004

TOMMY C. MOWERY
VS.
DIVISION OF HIGHWAYS
(CC-98-208)

George I. Sponaugle, II, 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 and vehicle damage sustained when he was traveling south on U.S. Route 220 in Grant County. U.S. Route 220 in Grant County is maintained by respondent. The Court is of the opinion to disallow this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on June 16, 1996, at approximately 5:00 p.m. On the day in question, the claimant was driving a 1984 Pontiac Fiero as he was traveling south on U.S. Route 220 at a speed of about forty to forty-five miles per hour. The posted speed limit is fifty-five miles per hour in this area. Claimant stated that he is very familiar with U.S. Route 220 and he has driven on this stretch of U.S. Route 220 for approximately twenty-three years. On the day of this incident, claimant had been to a friend's house in Petersburg where the two of them worked on claimant's automobile. Claimant arrived at his friend's house between 12:30 - 1:00 p.m. Claimant described this day as very hot and around 4:00 p.m. a thunderstorm passed through the area. He described rainfall as being more than an average amount and heavy. Claimant left his friend's house to return to his home in Upper Tract, Pendleton County. At the time of the accident he recalls the roads being damp but he believes that it had stopped raining. He does not recall noticing water at this same area before the accident. Claimant testified that he was driving about forty-five miles per hour when he drove over a knoll on U.S. Route 220 and as he proceeded in the section of highway just beyond the knoll, his vehicle went into an area covered with water which caused him to lose control of his vehicle. He estimates that he traveled about thirty (30) to forty (40) feet prior to driving through the area of U.S. Route 220 covered with water. When his vehicle came onto the water, it began sliding in the road. He was able to maneuver his vehicle to the right side of the road to avoid oncoming traffic. He recalls that the front end of his vehicle dropped off onto the shoulder and "when the front end hit the shoulder it got traction and whipped the back end of the car around into the bank. When the car hit the bank, I felt the impact and my head hit the glass. At that point I don't have any recollection of any more of the accident other than whenever I woke up... ." The impact

of the vehicle with the bank adjacent to the road caused claimant to hit his head and he lost consciousness. Claimant stated that he remembers first being aware of the accident when he realized his head was outside of the vehicle driver's side window and he was laying on the pavement although he was still in his seat belt. When he fully regained consciousness, he got out of his vehicle. Approximately ten minutes later a friend and his girlfriend arrived at the scene and rendered assistance to him. Claimant realized that he had a severe cut to his head and he described his back pain as feeling like a "stoved finger." He was transported to Grant Memorial Hospital where he was stabilized and then transported by helicopter to University of Virginia Hospital where he received stitches to close his head injury and was released from the hospital the next day.

Approximately two days after the incident described above, claimant returned to the scene of the accident where he observed water running down into the travel lane where his accident had occurred. The water appeared to cover the southbound lane which was the lane of travel in which the accident had occurred. He described the road as having a "sway" in it and he was driving in an upgrade portion on the road at the accident scene. Claimant described the water as being approximately one inch deep at this location at the time he observed the water some two days after the accident. Claimant proceeded to take a series of photographs which depict various points at the scene including a photograph of the culvert adjacent to this area which appears to be filled with debris. Water flows through this culvert beneath the road in the approximate area where claimant's accident occurred. Claimant described the culvert as being approximately twelve inches in diameter. Another photograph depicts the ditch line adjacent to the road. One photograph depicts erosion apparently from the water flowing across U.S. Route 220 over top of the culvert rather than flowing through the culvert. Claimant opined that the culvert could not handle the amount of over flow and the water ran across the road and washed the grass and vegetation off this area. Claimant also testified that in his opinion there are two culverts that he believes caused water to flow onto the highway, the culvert described herein above and another culvert which is located beneath a driveway adjacent to the southbound lane of U.S. Route 220. Claimant testified that there is a blind spot where he could not see the water crossing the road and it appeared to him as though the road was clear. He described the water on the road surface on the date of the incident as three or four times as much water as on the date of his return visit to the scene. He stated that he was not aware of any water problems in this area of U.S. Route 220 prior to the date of his accident and there were no signs warning the public of water problems at this location.

Claimant suffered a back injury causing a compression to an area of the vertebrae in his back. His disability was calculated to be at forty percent. He has received physical therapy and rehabilitation therapy, but he still suffers from pain in that area of his back. He had twenty-two stitches to close his head wound. He stated that his insurance company declared his vehicle a total loss for which he did not have insurance coverage; however, he received $700.00 from the insurance company for the vehicle windows which were damaged in the accident. Claimant testified that his medical bills were paid by his automobile insurance. Although his vehicle is a 1984 Pontiac Fiero, he placed its value at $8,000.00 since he had just finished work to recondition it in 1995. The work to recondition his vehicle took him approximately three years.

A neighbor in the area of the accident scene, Joshua Paul Thorne, testified that he lives on U.S. Route 220 which is commonly referred to as the Franklin Pike. He testified that he has been driving for three to four years; that he is familiar with the area where the claimant herein had his accident; and that he has observed water running down

the road occasionally. He explained that when there is a heavy downpour water will run off a driveway adjacent to U.S. Route 220 and rather than flowing through the culvert, the water will flow over the top of the road and across the roadway along with dirt and debris. Mr. Thorne also explained that one cannot see the water until coming right upon it because the driver is proceeding up a hill to a flat area and then the road surface dips right in front of his driveway. He stated that this water flows about 50 to75 feet. There are no warning signs posted for excess water and this condition has existed for the past three to four years. Mr. Thorne stated that he only noticed this condition after the year 1996.

Claimant contends respondent knew or should have known that there was a drainage problem on U.S. Route 220 which created a hazardous condition to the traveling public and that respondent failed to provide proper warning to the traveling public of a known hazardous condition. It is claimant's position that respondent's failure to respond properly to this hazard constitutes negligence and that this negligence was the proximate cause of the claimant's accident which resulted in physical injuries to him.

Respondent asserts that it did not have adequate notice that there was a drainage problem on U.S. Route 220 from its culvert or ditch line. Further, respondent asserts that it did not have knowledge that the driveway at issue in this claim posed any water problems on U.S. Route 220.

Edward Lee Rohrbaugh, a crew leader for respondent in Grant County, testified on behalf of respondent. Mr. Rohrbaugh stated that he has been responsible for maintaining this section of U.S. Route 220 since the early seventies. He described U.S. Route 220, Franklin Pike, as being a high priority road with double yellow lines in the middle and/or passing zones and white lines on the edges. Mr. Rohrbaugh testified that his crew used a backhoe to remove the rocks and dirt from U.S. Route 220 on the day of the accident. He testified that on the day of the accident water was coming off a driveway; however, prior to claimant's accident his office had not received any notice or complaints about a problem on that portion of road and the date of the accident is the only time he recalls ever having a problem at this location. He was not sure how long the house and driveway have been at this location or if a permit was issued for the construction of this driveway. According to Mr. Rohrbaugh, his office is responsible for maintaining the ditches along this route and his office had received no complaints regarding the ditch line needing to be cleaned. He explained that heavy rains could clog culverts.

Robert Allen Amtower, respondent's Assistant District Engineer for Maintenance for District Five in the Eastern Panhandle, testified that he manages and oversees all of the maintenance activities within the district. Mr. Amtower is familiar with U.S. Route 220 in Grant County and described the road as being a two-lane bituminous paved highway. He stated that the average lane width is about eleven feet. The shoulder widths vary anywhere from two feet to ten feet depending on the section of roadway at issue. U.S. Route 220 in this particular area had been resurfaced in 1992. He stated that the culvert which runs underneath U.S. Route 220 is a fifteen-inch diameter corrugated metal pipe and he is unsure of when the culvert was last replaced although he could discern that it has been quite some time ago.

In his testimony Mr. Amtower stated that respondent's policy for driveway entrance permits is consistent with W.Va. Code §17-16-6, which states that no one will have access to any highway right of way without a permit. He explained that if people have "unpermitted driveways," respondent will eventually contact them and inform them that a permit is needed. With respect to maintenance, it is respondent's policy that an

applicant or individual who has an entrance upon the highway is responsible for the construction and maintenance of that particular driveway. Mr. Amtower stated that the records in his district maintenance office were searched and there were no complaints found regarding this particular driveway or area on U.S. Route 220. He testified that although he has not spoken with the property owner he is aware that the entrance now has a swale across it such that it should be properly draining. In addition, he explained that his office maintains a listing of all complaints, particularly with driveways, and respondent notifies owners of any problems. There was no such record of any notification of the property owner found in regard to the driveway at issue in this claim. Mr. Amtower's office was not able to determine whether this driveway was permitted; however, he explained that it may have been done under another name.

Mr. Amtower reviewed claimant's photograph of what appears to depict the outlet end of the culvert on U.S. Route 220 and it did not appear to be obstructed. He also noticed that there was evidence of some overtopping or water overflow in this particular area. He explained that sometimes during heavy rainfall there are problems with debris getting into the culverts; however, if the culvert is not obstructed there should be full flow of the pipe. There are times when heavy rain produces more water than any culvert can carry.

Mr. Amtower testified that when problems are brought to respondent's attention the procedure is to notify the proper people so that the problem can be resolved. Mr. Amtower stated that although they do not wait for the public to complain about a problem, they generally rely on the public to report problems so that corrective action can be taken because they cannot physically be on every road in every case. He testified that he did not know of this incident until sometime in the past year. In addition, he explained that if a particular problem is believed to involve private properties or issues beyond the scope of what the individual county can do then the district seeks engineering and technical assistance which will be provided to correct matters and make the necessary repairs.

Mr. Amtower examined the photograph which depicts the driveway and concluded that this design entrance does not look like one which would have been approved by respondent. However, the driveway may have been properly installed but may not have been maintained properly. County employees patrol the roads looking for potential problems; however, respondent does not have the staff to have employees driving on every highway every day to look for problems. If something is discovered by one of the employees, such employee is trained to report it to his or her county supervisor so that it can be corrected. After examining claimant's photograph of the ditch line, Mr. Amtower concluded that the ditch line is adequate at that point in the road. He stated that there appears to be no water coming onto the roadway from the ditch line. Mr. Amtower used one of the photographs of the ditch line to demonstrate that the ditch line is higher in this area and that the water may not get to the ditch line. He also testified that it would take periods of moderate to heavy rainfall to cause any water problems on the roadway since the driveway culvert located there apparently was functioning with water flowing through it. The culvert located beneath the U.S. Route 220 is a fifteen-inch corrugated metal pipe which would carry the water as long as it was not obstructed. There has been a culvert at this location since the 1920's according to his research. He stated that if respondent's crews came to the location of the accident on prior occasions to remove rocks and debris from the roadway and there was water running across the road then it should have been obvious to them that there was a problem. However, if there was no water in the area at the time that the crews were present, then there would not have been

any indication to them that there was a problem with the culvert system.

Deputy Lawrence Cornell, the investigating officer for claimant's accident, worked for the Grant County Sheriff's Department in 1996 as a Senior Deputy. His duties included patrolling, investigation of accidents, and completing reports on accidents within the county. He investigated the accident which occurred on June 16, 1996, involving the claimant. When he arrived at the scene, he observed the vehicle on its top in the middle of the highway. He believes that it was still sprinkling rain at the time of this single car accident. He explained that when he arrived there was some gravel on the road and water coming across that was a "little milky." Claimant was in the ambulance when the Deputy arrived at the scene. Deputy Cornell measured the width of the highway at twenty-two feet five inches. The eastern berm was measured at two feet five inches. The western berm measured at four feet six inches. The distance from the rear wheel of the vehicle to the edge of the roadway was four feet three inches and the distance from the wheel to the western side of the highway was eleven feet six inches.

The Deputy stated that there had been a heavy rain on the day of claimant's accident and that it was cloudy. U.S. Route 220 at the scene was marked with double yellow lines and is on a grade. He described a dirt driveway adjacent to U.S. Route 220 from the side of the hill on the west side of the roadway and he stated that in a heavy rain muddy water and gravel comes down from the driveway and flows across the road. This is not a hidden driveway. He stated that there are drainage ditches on both sides of the road. He explained that the water came off of the side of the hill in the west and was traveling at an angle across the road and the angle would be more to the north than the south. There are no warning signs to alert the public about water on the road surface. He estimated that he found claimant's vehicle to be approximately fifty to sixty yards at the most from the driveway.

Deputy Cornell concluded that when claimant was traveling south on U.S. Route 220, it was raining and water was running across the road. When claimant's car went through the water, it started to hydroplane whereupon claimant lost control of his vehicle which then struck the embankment on the west side of U.S. Route 220 and overturned on roadway. Contributing circumstances in the police report was marked as failure to maintain control because in the Deputy's opinion with the amount of rain coming down claimant was going too fast for these conditions. Although there was no proof of excessive speed, the Deputy stated that he should have slowed down for the rain. He did not cite the claimant for any driving offenses. Deputy Cornell also testified that while he has been with the Grant County Sheriff's Office, he has not investigated any other accidents before or after this one at this particular location on U.S. Route 220. He did not know of any complaints or calls from the public concerning this particular location on U.S. Route 220.

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 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 evidence adduced at the hearing indicates that respondent had no notice of the condition on U.S. Route 220 in Grant County. Respondent sent employees to the scene as soon as it received notice of the situation. The Court, while being sympathetic with the claimant and understanding the distress

caused to claimant in this situation, is of the opinion that respondent acted reasonably in response to notice of the debris on the roadway and that respondent was not negligent in its maintenance of the highway.

As to the driveway adjacent to U.S. Route 220 which claimant asserts caused the excessive water on the roadway surface, there was nothing to establish that respondent had actual or constructive notice that the driveway caused water problems on U.S. Route 220. Thus, the Court is of the opinion that respondent was not negligent in its maintenance of U.S. Route 220 based upon this element of claimant's allegations.

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 Benjamin Hays Webb, II, took part in the hearing of this claim, but he did not participate in the decision or opinion due to his untimely death.

OPINION ISSUED AUGUST 18, 2004

CHARLES DERRINGER
VS.
DIVISION OF HIGHWAYS
(CC-02-387)

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

PER CURIAM:

Claimant brought this action for damage sustained to his vehicle when he drove over a bump in a stretch of road that was in the process of being re-paved along U.S. Route 19 between Oak Hill, Fayette County, and Beckley, Raleigh County. At this location, U.S. Route 19 is a road maintained by respondent. The Court is of the opinion to make an award for the reasons more fully stated below.

There is an issue as to the date on which this incident occurred. The claim form that the claimant completed for this claim indicates no date on which this incident occurred. However, at the hearing, Mr. Derringer testified that he was unsure of the exact date of the incident, but further stated that the incident giving rise to this claim occurred on a Saturday in August 2002 between 9:30 p.m. and 10:00 p.m. Claimant was traveling on U.S. Route 19 from Oak Hill toward Beckley in his 1993 Pontiac Grand Am. U.S. Route 19 is a four-lane highway, but due to repaving it was reduced to having one lane in each direction. Claimant testified that he was driving around forty-two miles per hour when he came upon a stretch of road where there were two different levels of pavement due to one having been ground down to be re-paved. Claimant's vehicle struck a bump in the road where the two pavement levels met. He estimated that there was a three to four inch difference in the pavement levels. The impact damaged both front tires and rims of his vehicle along with the struts. The sustained damage was estimated at $491.57.

The respondent did not put forth any witnesses to testify in this matter.

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). However, in the instant claim there was on-going construction on U.S. Route 19 and the difference in elevation of the pavement created a hazard to the public in the area where the incident herein occurred. The Court is aware that respondent has inspectors at project sites to oversee the conditions of the roads. There were no signs to warn the traveling public of the difference in elevation of the roadway and this failure to warn constitutes negligence on the part of the respondent. Therefore, the Court concludes that this negligence was the proximate cause of the damages to claimant's vehicle.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $491.57.

Award of $491.57.

OPINION ISSUED AUGUST 18, 2004

JESSICA S. GRANEY
VS.
DIVISION OF HIGHWAYS
(CC-03-033)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of her vehicle striking a piece of concrete while she was traveling northbound on U.S. Route 119 between Davis Creek and Ashton Place in Kanawha County. U.S. Route 119 is a road maintained by respondent in Kanawha County. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on January 25, 2003, at about 12:45 p.m. The claimant, Jessica S. Graney, was traveling northbound on U.S. Route 119 between Davis Creek and Ashton Place in her 1998 Volvo S70. U.S. Route 119 is a four lane highway in the area of the incident involved with this claim. Claimant testified that she was driving between forty and fifty miles per hour in the left lane, with traffic in front, to the right, and behind her. Claimant saw something in the middle of the road ahead of her, but due to the traffic around her had no choice but to proceed. She ran over the object which she later determined as being a piece of concrete that she estimated to be about twelve inches long by twelve inches wide by twelve inches high. Claimant's vehicle sustained damage to both left side tires and a rim. The damage sustained totaled $655.02.

The position of the respondent is that it did not have actual or constructive notice of the condition on U.S. Route 119 at the site of the claimant's accident for the date in question.

Franklin D. Ball, a maintenance supervisor for the respondent, testified that he first became aware of the situation when he received a phone call from respondent's Boone County office at 1:45 p.m. on the afternoon of January 25, 2003. He then

proceeded to the site of the incident on U.S. Route 119, where a Courtesy Patrol truck had already removed the piece of concrete from the highway that claimant's vehicle had struck. At this point, Mr. Ball put the piece of concrete into his truck and returned to his department headquarters to get cold-mix to patch the hole where the piece of concrete had been dislodged. Prior to the phone call that Mr. Ball received from the Boone County office, there had been no notice of the condition in the road at the location in question.

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 the respondent did not have actual or constructive notice of any road hazard on U.S. Route 119. Respondent did not have ample opportunity to make repairs. Thus, the claimant is not entitled to an award for her losses.

In the instant case, the evidence established that the respondent did not have actual or constructive notice of a piece of concrete on U.S. Route 119 prior to the incident in question. Further, the evidence established that when respondent was notified of the situation, respondent's employees took reasonable steps to ensure the safety of U.S. Route 119 in Kanawha County. Consequently, there is insufficient evidence of negligence upon which to justify an award.

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

Claim disallowed.

OPINION ISSUED AUGUST 18, 2004

KATHY MULLINS and FRANK MULLINS
VS.
DIVISION OF HIGHWAYS
(CC-03-066)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred as a result of Kathy Mullins' vehicle striking a rock while traveling northbound on State Route 10 in Logan County. State Route 10 is a road maintained by respondent in Logan County. 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 February 15, 2003, at approximately 5:30 a.m. to 6:00 a.m. On the rainy and foggy morning in question, claimant Kathy Mullins was traveling northbound on State Route 10 on Lyburn Mountain in her 1994 Pontiac Grand Am SE.. State Route 10 is a two-lane road that is marked as a "falling rock" area with a speed limit of fifty-five miles per hour. Mrs. Mullins was on her way to work the morning of the incident, and she was driving around twenty-five to thirty miles per hour due to the conditions. Claimant was proceeding around a curve when a truck coming at her in the opposite lane caused her to drive over a rock that had

fallen into her lane of the road. The rock had fallen from a mountainside adjacent to the northbound lane in which claimant was driving. Mrs. Mullins stated that the rock was about ten inches high, forty-eight inches long, and thirty-six inches wide. After driving onto the rock, claimant was unable to get her car off of the rock, as it would not go into any gear. Eventually she was able to put the car into neutral and coast down the road to a gas station. Claimants' vehicle sustained damage to the transmission and the oil pan totaling $1,321.00. Claimants' insurance deductible was $1,000.00.

The position of the respondent was that it did not have notice of the rocks on State Route 10. Respondent admitted that the area in question is a rock fall area and stated that there are "rock fall" signs located on each side of State Route 10 to warn a driver proceeding up the mountain. On the morning of the incident herein, Terry Ellis, Transportation Crew chief for respondent in Logan County, testified that there were many telephone calls to the office as soon as it opened around 7:30 a.m. due to the heavy rainfall that had taken place the previous night. Respondent sent crews out to alleviate the problems on their routes. Mr. Ellis testified that the only call and the only work done on State Route 10 that morning was for a drainage problem. There was one call about a rock fall, but it was not for State Route 10. Respondent maintains that there was no prior notice to respondent of any rocks on State Route 10.

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,* 130 W.Va. 645, 46 S.E.2d 81 (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 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).

In the present claim, claimants have not established sufficient evidence that respondent failed to take adequate measures to protect the safety of the traveling public on State Route 10 in Logan County. Respondent has placed "falling rock" warning signs to warn the traveling public of the potential for rock falls at this location. 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 AUGUST 18, 2004

KATHY L. GUNNO
VS.
DIVISION OF HIGHWAYS
(CC-03-077)

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 February 17, 2003, claimant was traveling across the Coal River Bridge on Route 60 in Kanawha County when her vehicle struck a hole in the road.

2. Respondent was responsible for the maintenance of the Coal River Bridge on Route 60 in Kanawha County and respondent failed to maintain properly Route 60 on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $225.33.

4. Respondent requested at the hearing that claimant submit a copy of her insurance declaration of coverage in order to determine the deductible provided for collision coverage. This information has not been provided to the Court.

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 has not been determined since claimant has failed to provide the requested information.

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

Claim disallowed.

OPINION ISSUED AUGUST 18, 2004

BECKY L. PIERSON
VS.
DIVISION OF HIGHWAYS
(CC-03-105)

Claimant appeared *pro se*.

Andrew F. Tarr, Attorney at Law, for respondent

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of her vehicle striking a hole while she was traveling south on W. Va. Route 114, Kanawha County. W. Va. Route 114 is a road maintained by respondent in Kanawha County. The Court is of the opinion to award the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on February 27, 2003, around 8:00 p.m. Claimant was traveling on W. Va. Route 114 in her 2002 Lexus IS300. W. Va. Route 114 is a two lane highway. Claimant testified that she was driving around forty miles per hour. On the dark and wet night in question, Ms. Pierson was driving along W. Va. Route 114 when her vehicle struck a large hole in the road that she had not seen. Claimant's vehicle sustained damage to the front passenger side wheel. The damage sustained totaled $532.46. Claimant's insurance deductible was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 114 at the site of the claimant's accident for the date in question.

David Fisher, Highway Administrator 2 for the respondent in Kanawha County, testified that he had no knowledge of any potholes on W. Va. Route 114 near the site of the incident in question here. Mr. Fisher stated that on the date of this incident there were no records of any phone calls regarding holes along this stretch of road nor any records of maintenance crews repairing holes on this stretch of W. Va. Route 114. However, Mr. Fisher stated that this was an section of road was an area where water accumulates. In such an area, the integrity of the asphalt could be affected and during periods of freezing and thawing the roadway could be more apt to being damaged. Mr. Fisher also stated that based on evidence presented by claimant, it looked as though the hole had previously been patched with cold mix, which has a tendency to break up in wet conditions.

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 the respondent did have actual or constructive notice of any road hazard on W. Va. Route 114. Respondent had ample opportunity to make repairs. Thus, the claimant is entitled to an award for her losses.

In the instant claim, the evidence established that the respondent did have at least constructive notice of the hole on W. Va. Route 114 prior to the incident in question, based upon the evidence of an earlier patch that had been attempted and the knowledge that this was an area prone to accumulating water. Therefore, the Court is of the opinion that respondent was negligent in its maintenance of this road as of the date of claimant's accident.

Accordingly, the Court makes an award to the claimant for the damages to her vehicle in the sum of $500.00, which is her insurance deductible.

Award of $500.00.

OPINION ISSUED AUGUST 18, 2004

CHARLESTON AREA MEDICAL CENTER
VS.
DIVISION OF CORRECTIONS
(CC-03-463)

F. Christian Gall, Jr., Attorney at Law, for claimant.
Charles P. Houdyschell, Jr., Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action for reimbursement for the cost of medical treatment provided to an inmate in the custody of Mt. Olive Correctional Complex, a facility of the respondent. The invoice for the services provided to respondent was not processed for payment in the appropriate fiscal year; therefore, the claimant has not been paid. This claim came on for hearing before the Court on January 29, 2004, at which time the parties agreed that the transcript in the claim of *West Virginia University Hospitals, Inc., v. Division of Corrections*, Claim No. CC-03-190, would be considered by the Court in the instant claim for the purpose of addressing an issue before this Court of first impression. Counsel for claimant in the transcribed claim is Dan Greer. He produced his witnesses,

the respondent produced its witnesses, and the parties agreed that a complete record had been made such that the Court could consider the instant claim in the place and stead of the aforementioned claim by West Virginia University Hospitals, Inc.

The respondent State agency denies liability in this claim because it asserts that Correctional Medical Services (hereinafter referred to as CMS), a medical management firm under contract with respondent, had paid claimant for the medical services which are the subject matter of this claim based upon the national average of the usual and customary charges. Respondent's position is that any amount paid for medical services above and beyond the usual and customary charges should not be an obligation of respondent and should not be considered a moral obligation of the State. In addition to this position, respondent asserts that it would have denied this claim as an over expenditure claim even if the assertion of the usual and customary charges was not at issue.

Claimant asserts that it provided medical services to an inmate during the 2001 fiscal year for which it was not paid in full. Partial payment was made by CMS; however, CMS had not negotiated any rates for reimbursement by contract with the claimant or other similarly situated medical providers. Thus, claimant alleges that the usual and customary charges standard should not have been an issue when it provided the medical services which are the subject matter in this claim, because it did not know that CMS was going to apply the usual and customary charges principle as a basis for reducing its charges. Since claimant did not include this aspect of its medical charges in the rate setting procedure before the West Virginia Health Care Authority[3], it contends that it is being required to subsidize the cost of medical care for inmates.

Felice Anthony Ruggiero, regional manager for the State of West Virginia for CMS, testified that CMS is a private provider of medical care for inmates and its contract with respondent is for the management of the operations of medical units in the seven correctional facilities under the auspices of respondent. In fact, CMS is a private provider of medical care for inmates for corrections departments in many states throughout the United States. As such, it manages and provides medical care to inmates for the states, and more particularly in the instant claim, for the respondent herein. He explained that CMS provides managed medical care, pharmacy services, hiring of medical personnel, and record keeping. It also provides outside medical care by contracting with hospital and individual medical providers which agree to treat inmates in the custody of the respondent. Providers are paid up to a maximum of $5,000.00 per inmate per illness per year. Payments are made based upon the usual and customary charges calculated by using fees charged throughout the United States. The medical provider then submits a bill for the amount over $5,000.00 to respondent for it to reimburse the provider for the amount in excess of $5,000.00. However, CMS reviews the charges on behalf of the respondent which are in excess of $5,000.00 to ascertain whether the treatment and the charges are appropriate for the particular medical treatment provided the patient inmate. In practice, CMS pays the amount over $5,000.00 that it determines is within the usual and customary charges and it is reimbursed by respondent. When a medical provider is not paid the full amount of its charges by CMS, general procedure has been that

[3] The West Virginia Health Care Authority has the responsibility for reviewing proposed per visit rates depending upon inpatient or out patient services for medical facilities throughout West Virginia.

respondent will pay the provider the full amount requested for its services through an invoice submitted to respondent. In the instant claim, the respondent has taken a different position with respect to the charges by denying the invoice on the basis that the amount requested is above and beyond the usual and customary charges.

Respondent's Director of Administration, Nancy Leonoro Swecker, testified that the claimant herein has charged above the usual and customary charges for the medical services provided and the State of West Virginia should not have to pay and satisfy such charges as a moral obligation of the State. She acknowledged that the claimant medical provider was not aware that it would be held to a different standard since respondent has never taken this position with respect to claims filed in the Court of Claims. This would not affect respondent's budget in any way but would save the taxpayers in the State since the claims are paid through the Legislative process by this Court. However, she also stated that the medical provider herein was not aware prior to the time that it provided medical services to the inmate that respondent was going to take the position that the payment would be based upon the usual and customary charges after the invoice for services was tendered for payment

This Court now has this claim before it as a legal issue which is one of first impression, i.e., should the respondent be required to pay and satisfy medical charges alleged to be more than the usual and customary charges for the medical services rendered? There is the additional issue to be considered in that the medical provider was not informed that it would be held to the usual and customary charges prior to rendering the medical services which are the subject matter of this claim.

The Court, having reviewed the record in this claim, finds that the usual and customary charges standard is an appropriate standard for determining the medical costs incurred by respondent for the medical treatment and care of inmates incarcerated in its facilities. However, the Court finds further that respondent or any State agency in like position is under a duty to so advise medical providers in a timely manner prior to the medical services being rendered by the medical provider for inmate(s) if respondent intends to apply the usual and customary charges standard.. The Court is of the opinion that this is an equitable resolution of the present claim. It affords the medical providers notice of a different standard, i.e., the usual and customary chargers standard, for determining the appropriate cost for medical treatment to be charged to respondent and calculated by CMS, and it affords medical providers the opportunity to include this standard in its rate setting proposal before the West Virginia Health Care Authority. In the instant claim, the medical provider did not have the knowledge that a different standard for medical charges would be applied and any other finding would be inconsistent with prevailing contract law. The contract for medical services begins with the acceptance of the inmate as a patient, and it appears to the Court that the rates at the time are the agreed rates for the cost of medical treatment of the inmate rather than some arbitrary standard being applied after the fact. Therefore, the Court has determined that claimant may make a recovery 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 $89.87.

Award of $89.87.

The Honorable Benjamin Hays Webb, II, took part in the hearing of this claim but not in the decision of the claim. The Honorable Robert B. Sayre, Interim Judge, and the Honorable George F. Fordham, Jr., Interim Judge, reviewed the transcript and took part in the decision of the claim with the Honorable Franklin L. Gritt, Jr., Presiding

Judge.

OPINION ISSUED AUGUST 18, 2004

SARAH WEBMEYER

VS.
HIGHER EDUCATION POLICY COMMISSION
(CC-04-213)

Claimant appeared *pro se*.
Jendonnae L. Houdyschell, 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 $13.98 for a poster that she had hanging in her dormitory room at West Virginia University. On her return from Christmas break, claimant entered her room to find some furniture rearranged and her poster, which had been hanging on a wall, folded over and in a ball on the floor. Claimant purchased the poster for $13.98; therefore, claimant seeks $13.98 in damages.

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 $13.98.

Award of $13.98.

OPINION ISSUED AUGUST 18, 2004

STEPHANIE P. SPROUSE
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-04-229)

Claimant appeared *pro se*.
Ronald L. Reece, 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 $9.40 for stamped envelopes that had been taken from her by a correctional officer to be placed in claimant’s personal property bag. Envelopes were placed in a package and then placed on the desk of the Property Officer. Said envelopes have not been found; therefore claimant seeks $9.40 for her loss.

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 $9.40.

Award of $9.40.

OPINION ISSUED SEPTEMBER 8, 2004

PAUL V. WILSON and KIM LAREW
VS.
DIVISION OF HIGHWAYS
(CC-00-432)

Mark L. French, Attorney at Law, for claimants.
Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

BAKER, JUDGE:

The claimants brought this claim to recover for damages to their property as the alleged result of respondent's negligent design and maintenance of the drainage system on U.S. Route 119, near Morgantown, Monongalia County. U.S. Route 119 is a road maintained by respondent in Monongalia County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

Claimants are the owners of real property adjacent to U.S. Route 119 near Morgantown. At this location, U.S. Route 119 is a two-lane road that traverses in a north-south direction. Claimants' property is located on the west side of U.S. Route 119 at the bottom edge of a slope from the roadway. Claimants have owned the property since 1957. In 1997 claimants had a building constructed on this property to use as rental property. The building was built in front of a culvert pipe that was beneath U.S. Route 119 which had been there for an extended period of time. Claimant Kim Larew testified that the culvert pipe had been in place at the time the property was purchased. She stated that starting in 2000 there was flooding in the building, apparently from the run-off from the road which flowed through the culverts under U.S. Route 119. The flooding caused substantial damage to the building and to the personal property of its occupant. Ms. Larew testified that the culvert behind the building was old and deteriorated. In September 2002, respondent replaced the culverts allegedly responsible for the flooding. The new culvert pipes, while the same size in diameter as the former culverts, allegedly caused there to be more flooding to the property. Ms. Larew stated that the new pipe was not deteriorated, and it was her opinion that more water flowed through the new culvert pipe much easier and it was dispersed differently. She felt that this caused further problems. She testified that on several occasions she had different construction projects performed on the property attempting to alleviate the flooding problem. The flooding no longer is a problem since one of the construction projects provided an extension from respondent's culvert into a catch basin. The water in the culvert now flows into a pipe beneath the ground thus alleviating the flooding. Claimants assert that as a result of the flooding which occurred on multiple occasions, claimants suffered $64,607.03 in damages.

Luther Dempsey, a licensed professional engineer, testified as an expert witness

for the claimants. Mr. Dempsey testified that culvert pipes were placed under U.S. Route 119 in order to convey water from the upper side of the roadway to the lower side of the highway with the claimants' property located on the lower side. Mr. Dempsey stated that the culverts were placed on either side of the natural water course, the natural water course being the natural drainage area where the topography of the land is such that the water collects and drains naturally. He stated that due to the placement of the culverts, the water collected and discharged into places where it was not naturally collected and drained. This discharging of water into areas where it does not naturally discharge made the flooding possible and made it difficult for claimants to use the property to its fullest extent. Further, Mr. Dempsey testified that the respondent's action of replacing the old culverts with new ones further exacerbated the problem. The new culverts transported water under the roadway more efficiently than the old, deteriorated ones. These new culverts, because they were not deteriorated or obstructed, deposited much more water than previously had been deposited on the claimants' property. Mr. Dempsey stated that this would cause more flooding problems for the claimants. He also made recommendations to claimants as to how to alleviate the flooding problem. One of his suggestions was to collect water from the culvert pipes and route it by means of underground piping away from the improvements on the property. This suggestion was implemented by claimants, the cost of which is included in the damages claimed herein.

The position of the respondent is that the claimants failed to provide adequate drainage when they built their building directly in front of the culvert pipe, that claimants therefore assumed the risk of water flooding their building, and that it was not negligent in the design or maintenance of the drainage system near the claimants' property adjacent to U.S. Route 119.

Kathy Westbrook, County Highway Administrator for respondent in Monongalia County, testified that she had spoken to Ms. Larew regarding flood damage to a building on Ms. Larew's property. Ms. Westbrook stated that Ms. Larew described a culvert pipe under U.S. Route 119 that was deteriorated and damaged, which was causing flooding in a building that she owned. After this telephone conversation, respondent sent employees to the area to inspect the culvert pipe. Ms. Westbrook stated that she was informed that there was water running through the pipe, but there was some deterioration on the upper end of the pipe along the shoulder of the road. It was at this time that the decision was made to replace the pipe. Ms. Westbrook stated that the pipe was replaced on September 26, 2001. She further stated that at no point after this maintenance was completed did she receive a complaint from Ms. Larew regarding further flooding problems.

George Hall, a retired research and geotechnical engineer for the technical section of the Design Division for respondent, testified as an expert witness for respondent. Mr. Hall testified that he researched the claimants' property in the USGS Topographic map to determine the drainage areas and find the natural drainage situation. He stated that the building that claimants built on their property was placed directly in front of a culvert pipe such that it blocks the flow of water from the culvert that would normally flow through the natural drainage area. He stated that the construction of the building in its location blocked the water flowing from the culvert which had flowed into the natural drainage area prior to the time that the building was constructed. Mr. Hall testified that the location of the building allowed only a restricted area for any water flow that came from the culvert, further causing potential flooding problems. He stated that it is not respondent's responsibility to create a sufficient catch basin on private property

when the owner of that property constructs a new building directly in front of a culvert pipe. Mr. Hall testified that by constructing the building directly below a culvert and failing to provide an adequate means for the water flowing from the culvert to be dispersed, the claimants in effect created the flooding problems which they experienced.

The Court has held that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught vs. Dept. of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether respondent negligently failed to protect a claimants' property from foreseeable damage. *Rogers vs. Div. of Highways*, 21 Ct. Cl. 97 (1996)

In the instant claim, claimants have failed to establish that respondent maintained its drainage structures on the west side of U.S. Route 119 in Monongalia County in a negligent manner. The Court is of the opinion that respondent took reasonable actions when it replaced the culvert pipe after receiving notice that the culvert pipe was in a deteriorated condition. The terrain in this area of U.S. Route 119 places claimants' property in a low area which is the natural drainage area. In addition, the Court concludes that there are many factors, other than the actions taken by respondent, which have brought about the flooding that caused the damages to claimants' property. Claimants knowingly built a building directly in front of the culvert pipe and failed to provide an adequate catch basin that could have been connected to the culvert pipe at the time of construction of the building. Consequently, there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

The Honorable Benjamin Hays Webb, II, took part in the hearing of this claim, but he did not participate in the decision or opinion due to his untimely death.

OPINION ISSUED OCTOBER 1, 2004

TAMMY LYNN MERCER
VS.
DIVISION OF HIGHWAYS
(CC-04-298)

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 her vehicle striking a culvert while she was traveling on W. Va. Route 5/4 near Mannington, Marion County. W. Va. Route 5/4 is a road maintained by respondent in Marion County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on May 9, 2004, between 10:30 a.m. and 11:30 a.m. On the clear and sunny morning in question, claimant was traveling on W. Va. Route 5/4 in her 1994 Jeep Grand Cherokee. W. Va. Route 5/4 is a two-lane, dirt and gravel road that is just wide enough for two vehicles in opposite lanes to travel on at the same time. Ms. Mercer was traveling on W. Va. Route 5/4 to go to her sister's

house on the morning of the incident. She saw her brother-in-law in his vehicle approaching her in the opposite lane so she drove to her right. She then heard a noise but was unsure what it was. Her brother-in-law drove alongside her vehicle to tell her that her tire had burst. Claimant drove her vehicle a little farther up the road, got out of her vehicle and discovered that she had damaged both of her vehicle's tires on the passenger side. The tires were sliced by a culvert adjacent to the side of the road since the culvert had a piece of metal sticking up out of it. Claimant's vehicle sustained damage to both passenger side tires totaling $160.55.

The position of the respondent was that it did not have notice of the damaged culvert on W. Va. Route 5/4. George Steorts, Highway Administrator for respondent in Marion County, testified that W. Va. Route 5/4 is a low priority road. The road receives maintenance when an employee of respondent notes a problem or when a citizen reports a problem. Mr. Steorts stated that respondent had no knowledge of a problem with this culvert before receiving a telephone call from claimant after her accident, though there were other telephone calls in regard to this road. He also stated that the problem with the culvert was fixed within the next day or so. Mr. Steorts stated that he believed that a snow plow had plowed into the culvert and tore the metal piece up. Respondent maintains that there was no prior notice to respondent of problems with the culvert on W. Va. Route 5/4.

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*, 130 W.Va. 645, 46 S.E.2d 81 (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, claimant established that respondent failed to take adequate measures to protect the safety of the traveling public on W. Va. Route 5/4 near Mannington in Marion County. While W. Va. Route 5/4 is a low priority, dirt and gravel road, respondent is aware that this is a road used by residents and others proceeding to and from the homes in the area. Respondent is also aware that this road is narrower than the average road, which requires drivers to drive onto the edges of the road when there is oncoming traffic. Due to the type of road that this was and the time of year in which the accident occurred, the Court is of the opinion that respondent was negligent in maintaining the culvert at the time of the incident and is thus liable for the damages which proximately flow from its inadequate protection of the traveling public in this specific location of W. Va. Route 5/4 near Mannington, Marion 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 stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $160.55.

Award of $160.55.

OPINION ISSUED OCTOBER 1, 2004

LINNIE M. ANTILL
VS.
DIVISION OF HIGHWAYS

(CC-03-156)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her vehicle struck a patch of ice while she was traveling on County Route 62 in Alkol, Lincoln County. County Route 62 is a road maintained by respondent in Lincoln County. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred around 8:10 a.m. on February 25, 2003, a cold and snowy morning. Claimant was traveling on County Route 62 in her 1991 GMC Jimmy. County Route 62 is a narrow, two-lane road where a driver must drive to the far side of the road in order to let an oncoming vehicle pass at the same time in the particular area of the incident involved in this claim. Ms. Antill testified that she knew the roads were going to be icy and snowy and that crews for respondent had not been out to this road yet when she left her home that morning. Claimant testified that she was driving down a hill at around five miles per hour when her vehicle struck an icy patch on the road. Ms. Antill applied the brakes, but she was unable stop the vehicle as it began to slide down the hill. Claimant's vehicle struck another vehicle that was stopped on the hill. Her vehicle sustained damage totaling $1,663.56. Claimant also was not able to go to work during the next four days as she did not have a vehicle so she lost $208.00 in wages.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 62 at the site of the claimant's accident for the date in question.

Tim Pullen, an assistant maintenance engineer for the respondent in District Two for Cabell, Lincoln, Logan, Mingo and Wanye Counties, testified that he had no knowledge of any ice on County Route 62 on the date of claimant's accident. Mr. Pullen stated that this is a second priority road which only receives treatment after all first priority roads have had snow removal and ice control activities performed on them. He stated that trucks started treating first priority roads around 6:10 a.m. and finished treating these roads around 9:30 a.m. on the day of this accident.

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.

In the instant case, the evidence established that the respondent did not have actual or constructive notice of ice on County Route 62 prior to the incident in question. Further, claimant testified that she knew respondent had not treated County Route 62 on the morning of the incident and that she went ahead and assumed the risk by driving on County Route 62. Consequently, there is no evidence of negligence upon which to justify an award. The Court is well aware that during periods of snow and ice respondent directs its attention to the primary routes. It is not able to address all county routes but attempts to maintain all road hazards when it receives notice from the public. Thus, the Court will not impose an impossible duty upon respondent during periods when its attention must be the control of ice and snow on the State's highways. Therefore, the Court has

determined that claimant may not make a recovery for her loss in this claim.

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

Claim disallowed.

OPINION ISSUED OCTOBER 1, 2004

JACQUES L. SALLADE
VS.
DIVISION OF HIGHWAYS
(CC-03-109)

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 his vehicle striking a hole while he was traveling east on W. Va. Route 33, Putnam County. W. Va. Route 33 is a road maintained by respondent in Putnam County. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on February 23, 2003, at around 9:00 p.m. Claimant was traveling home from church on W. Va. Route 33 in his 1995 Honda Accord. W. Va. Route 33 is a two lane highway in the area of the incident involved with this claim. Claimant testified that he was driving around forty miles per hour with minimal traffic around him. He was driving up a slight incline in the road and around a curve when his vehicle struck a large hole in the road that he had not seen. Claimant's vehicle sustained damage to both passenger side tires. The damage sustained totaled $337.76.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 33 at the site of the claimant's accident for the date in question.

Danny Tucker, a transportation crew leader for the respondent in Putnam County, testified that he had no knowledge of any potholes on W. Va. Route 33 near the site of the incident in question here. Mr. Tucker stated that on the date of this incident there were no records of any telephone calls regarding holes along this stretch of road nor any records of maintenance crews repairing holes on this stretch of W. Va. Route 33. He also testified that on the date of this incident there had been a crew out working on snow and ice removal.

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 the respondent did not have actual or constructive notice of any road hazard on W. Va. Route 33. Respondent did not have ample opportunity to make repairs. Thus, the claimant is not entitled to an award for his losses.

In the instant case, the evidence established that the respondent did not have actual or constructive notice of a hole on W. Va. Route 33 prior to the incident in

question. Consequently, there is no evidence of negligence upon which to justify an award. The Court is well aware that during periods of snow and ice removal it is not able to direct its attention to maintain all road hazards, though it does so when it receives notice from the public. Thus, the Court will not impose an impossible duty upon respondent during periods when its attention must be the control of ice and snow on the State's highways. Therefore, the Court has determined that claimant may not make a recovery for this claim.

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

Claim disallowed.

OPINION ISSUED OCTOBER 1, 2004

LORI M. COLLINS
VS.
DIVISION OF HIGHWAYS
(CC-03-102)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2000 Grand Am GT struck a hole as she was traveling east on I-64, Kanawha County. I-64 is a road maintained by respondent. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on February 23, 2003, between 5:00 p.m and 6:00 p.m. Claimant was traveling eastbound on I-64 to the South Charleston/MacCorkle Avenue exit. I-64 is a four-lane highway with a one lane exit ramp at the area of the incident involved in this claim. Claimant testified that she was driving between thirty-five and forty miles per hour with traffic in front of and behind her. Ms. Collins was exiting the highway when her vehicle struck a hole in the road that she did not see. Claimant's vehicle sustained damage to the front left tire and rim. The damage sustained totaled $799.24. Claimant's insurance deductible was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on I-64 at the site of the claimant's accident for the date in question.

Stephen Knight, Transportation Crew Supervisor for the respondent in Kanawha County, testified that he had no knowledge of any potholes on I-64 on or near the exit ramp for South Charleston/MacCorkle Avenue. Mr. Knight stated that on the date of this incident, respondent's maintenance crews were working at the site of a mudslide that had occurred on another stretch of I-64 for which they were responsible. Respondent had received no notice of holes in the road along this portion of I-64 on the day of the incident in question or in the previous five days.

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 case, the evidence established that the respondent did not have actual or constructive notice of a hole on I-64 on the South Charleston/MacCorkle Avenue exit ramp prior to the incident in question. Consequently, there is insufficient evidence of negligence upon which to justify an award. Thus, the claimant may not make a recovery for her loss in this claim.

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

Claim disallowed.

OPINION ISSUED OCTOBER 1, 2004

WANITA L. SOMMERVILLE
VS.
DIVISION OF HIGHWAYS
(CC-04-140)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for property damage which occurred as a result of her fence being struck by a boulder adjacent to U.S. Route 19 in Clarksburg, Harrison County. U.S. Route 19 is a road maintained by respondent. 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 at approximately 3:00 p.m to 5:00 p.m. on February 6, 2004, a rainy day. U.S. Route 19 is a two-lane road at the area of claimant's property. Ms. Sommerville returned home to find a large boulder lying against the fence in front of her residence. Claimant was not sure from where the boulder came. Across the street from her house is a grassy area that slopes up to a wooded area. Claimant's fence sustained damage totaling $956.62.

The position of the respondent was that it did not have notice of any rocks or rock falls on U.S. Route 19. Mr. John Barberio, Highway Administrator for respondent in Harrison County, testified that he had never received any complaints of rock falls in this area of U. S. Route 19. He also stated that to his knowledge there had never been any problems with rock slides in this area. Mr. Barberio also stated that in a municipality respondent only maintains state highways from curb to curb. Respondent maintains that there was no prior notice of any rocks or rock falls near claimant's residence on U.S. Route 119 immediately prior to the incident in question.

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,* 130 W.Va. 645, 46 S.E.2d 81 (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 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).

In the present claim, claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on U.S. Route 19 in Harrison County. The evidence failed to establish that respondent had actual or constructive knowledge of the potential for rock falls in this area. There was no evidence presented to establish where this boulder came from and the Court will not speculate as to where the boulder came from. 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 OCTOBER 1, 2004

DEBRA SUE DAY
VS.
DIVISION OF HIGHWAYS
(CC-03-209)

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 her vehicle striking a hole while traveling eastbound on W. Va. Route 34 in Putnam County. W. Va. Route 34 is a road maintained by respondent in Putnam County. The Court is of the opinion to award this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on March 15, 2003, at approximately 9:00 p.m. On the clear evening in question, claimant was traveling eastbound on W. Va. Route 34 in her 1998 Volvo S90. W. Va. Route 34 is a two-lane road that is under construction to widen the roadway. Ms. Day was on her way home the evening of the incident, and she was driving around twenty-five to thirty miles per hour. Claimant was proceeding down the road when her vehicle struck a hole that she did not see. Claimant's vehicle sustained damage to both right side rims and one tire totaling $1,123.56.

The position of the respondent was that it did not have notice of the hole on W. Va. Route 34. Respondent admitted that the area in question had been prone to having holes along it due to on-going construction. Gordon Bowles, Transportation Crew Chief Supervisor 1 for Respondent in Putnam County, testified that the construction being done on W. Va. Route 34 was not being done by respondent, but was being performed by a contractor. Respondent attempted to patch any holes that its employees saw while traveling in the construction zones, traffic permitting. Mr. Bowles testified that there were no telephone calls regarding the hole in question in this claim. Mr. Bowles also testified that it is normal for a road under construction to be patched often because a road such as this one, that had been ground down and milled was more susceptible to holes. Respondent also sent inspectors out to the construction sites to ensure that the roads were passable for the traveling public. Respondent maintains that there was no prior notice to respondent of this hole on W. Va. Route 34.

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,* 130 W.Va. 645, 46 S.E.2d 81 (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 failed to protect the traveling public. Respondent maintains inspectors that travel to construction sites to oversee a contractor's maintenance of the roadways. In the instant claim, respondent was aware of the ongoing construction in the area, and was also aware that the roadway was more apt to have holes due to the construction and the condition of the road. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage 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 award this claim in the amount of $1,123.56.

Award of $1,123.56.

OPINION ISSUED OCTOBER 1, 2004

THOMAS A. ADKINS and THOMAS A. ADKINS, II.
VS.
DIVISION OF HIGHWAYS
(CC-03-265)

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

1. On May 3, 2003, claimant Thomas A. Adkins, II, was traveling westbound on I-64, Kanawha County, from Charleston to Cross Lanes, when he came upon a section of highway that was under construction. At this location, respondent had milled the asphalt in order to re-pave. The difference in the height of the roadway caused claimants' vehicle to sustain damage to all four rims. Claimants' vehicle then went over a metal spike sticking out of the road, puncturing a tire.

2. Respondent was responsible for the maintenance of I-64 in Kanawha County and respondent failed to maintain properly I-64 on the date of this incident.

3. As a result of this incident, claimants' vehicle sustained damage in the amount of $725.00. Claimants' vehicle had comprehensive insurance covering the vehicle at the time of the incident, with a deductible of $250.00.

4. Respondent agrees that the amount of damages as put forth by the claimant in the amount of their deductible 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 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 OCTOBER 1, 2004

CHERYL WHITT
VS.
DIVISION OF HIGHWAYS
(CC-03-315)

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 June 4, 2003, claimant was traveling on Route 2 in Flat Rock, Mason County, when her vehicle struck a large hole in the road causing damage to a rim and tire.

2. Respondent was responsible for the maintenance of Route 2 in Flat Rock, Mason County, and respondent failed to maintain properly Route 2 on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $220.00.

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 2 in Flat Rock, Mason 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 $220.00.

Award of $220.00.

OPINION ISSUED OCTOBER 1, 2004

RONALD S. MCCOY
VS.
DIVISION OF HIGHWAYS
(CC-03-239)

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 his vehicle striking a drainage grate while he was pulling onto W. Va. Route 10, Logan County. W. Va. Route 10 is a road maintained by respondent in Logan County. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on March 10, 2003, between 10:30 p.m. and 11:00 p.m. Claimant was exiting a Seven/Eleven convenience store parking lot, driving onto W. Va. Route 10 in his 1999 Pontiac Grand Prix. W. Va. Route 10 is a two lane roadway. Claimant testified that as he was driving out of the parking lot, his vehicle ran over a drain grate. The grate flipped up and struck his vehicle on the side and top of the driver side door. Claimant's vehicle sustained damage to the bottom, side and top of the driver's side door. Mr. McCoy estimated that the grate was about five feet from the main travel portion of the highway. The damage sustained totaled $1,041.81. Claimant's insurance deductible was $500.00.

The position of the respondent is that it was not responsible for the drain just off of W. Va. Route 10 at the site of the claimant's accident.

Mike Vasarhelyi, Investigator 2 for the respondent in the Claims Section, Legal Division, testified that inside any city limits, respondent is only responsible and only maintains the roadway from curb to curb. Mr. Vasarhelyi stated that he went to the site of claimant's incident, and that this was not a State maintained drain and further, it is not within respondent's area of responsibility. He stated that the State does not maintain any drains similar to the one that the claimant's vehicle struck.

Terry Ellis, Transportation Crew Chief for respondent in Logan County, stated that this drain and the grate covering it were not respondent's responsibility to maintain. He testified that in a city, respondent is only responsible for the travel portion of the road, and that this particular drain grate was not within the travel portion of the roadway. Mr. Ellis further stated that respondent does not use the type of grate that was responsible for the damages to claimant's 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). The Court is of the opinion that the respondent was not responsible for maintaining the grating that struck claimant's vehicle near W. Va. Route 10. Thus, the claimant is not entitled to an award for his losses.

In the instant case, the evidence established that the respondent was not responsible for a drain grating that was located just off of W. Va. Route 10. The claimant has failed to establish that respondent is responsible for the drain. Consequently, there is insufficient evidence of negligence upon which to justify an award.

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

Claim disallowed.

OPINION ISSUED OCTOBER 1, 2004

KATHLEEN HOLLETT
VS.
DIVISION OF HIGHWAYS
(CC-03-303)

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 her vehicle encountering a patch of ice while she was traveling on County Route 35, Cabell County. County Route 35 is a road maintained by respondent in Cabell County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on February 5, 2003, around 8:00 a.m. Claimant was traveling to work on County Route 35 in her 2000 Hyundai Sonata. County Route 35 is a two lane road. Claimant testified that she was driving between twenty-five and thirty miles per hour with no traffic around her. She was cresting a knoll proceeding through a curve when her vehicle struck a large patch of ice covering her travel lane. She had not observed the ice. Upon encountering the ice, Mrs. Hollett lost control of her vehicle which slid into a yard. She was finally able to apply her brakes but the application of the brakes caused her vehicle to fish tail, and her vehicle struck another vehicle parked in the driveway. It then to ran over a birdbath and came to a stop. Claimant's vehicle sustained damages totaling over $8,000.00. Claimant's insurance deductible was $500.00. Her insurance also covered up to $20.00 per day for vehicle rental. Due to the damages to her car, Mrs. Hollett was required to rent a vehicle for some six weeks while her vehicle was repaired. She had to pay $224.00 for the rental vehicle that her insurance did not cover. Mrs. Hollett is requesting an award for her insurance deductible and the out-of-pocket expenses for the rental vehicle for a total of $724.00 in damages.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 35 at the site of the claimant's accident for the date in question.

Mike King, Highway Administrator 2 for the respondent in Cabell County, testified that he had no knowledge of any ice problems on County Route 35 on the date of or prior to the date of the incident herein. Mr. King stated that his office did not receive any telephone calls about the icy condition along this stretch of road prior to claimant's accident. He stated that if there was any notice of an icy condition on the road, crews for the respondent would be working overnight to remove the ice from the road way. Mr. King opined that with the amount of ice that was apparent in claimant's photograph exhibits, there may have been a water leak at one of the residences in the area that caused an extensive area of ice to form on the road. He stated that it appeared from the photographs that claimant presented that there were no other wet areas aside from that particular icy patch on the road, and that this further suggests that a water pipe break, as

opposed to rainfall or melting snow, caused the ice to form. Mr. King also testified that it appeared from claimant's photographs that the driveways in the area were not properly connected to the State right-of-way, as there appeared to be no drains or pipes beneath the driveway, and that this too could have contributed to the icy condition on the date of the 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). The State can neither be required or 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). The Court is of the opinion that the respondent did not have actual or constructive notice of the potential for ice to create a hazardous condition on County Route 35 at the time of claimant's accident. Respondent did not have a reasonable opportunity to make repairs. Thus, the claimant is not entitled to an award for her losses.

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

Claim disallowed.

OPINION ISSUED OCTOBER 1, 2004

NANCY BLAIR
VS.
DIVISION OF HIGHWAYS
(CC-03-286)

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 her vehicle striking a hole while she was traveling on W. Va. Route 34 in Putnam County. W. Va. Route 34 is a road maintained by respondent in Putnam County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on April 9, 2003, around 6:50 a.m. Claimant was traveling on W. Va. Route 34 in her 1998 Toyota Corolla. W. Va. Route 34 is a two lane road that has been under construction for some time prior to claimant's incident herein. Claimant testified that she was driving around thirty-five miles per hour. On the dark and wet morning in question, Ms. Blair was driving on W. Va. Route 34 on her way to work when her vehicle struck a large hole in the road that she

did not see. Claimant's vehicle sustained damage to the front passenger side tire. The damage sustained totaled $75.21.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 34 at the site of the claimant's accident for the date in question.

Danny Tucker, foreman for the respondent in Putnam County, testified that he had no knowledge of any holes on W. Va. Route 34 near the site of the incident in question here. Mr. Tucker stated that on the date of this incident there were no records of any telephone calls regarding holes along this stretch of road or any records of maintenance crews repairing holes on this stretch of W. Va. Route 114. However, Mr. Tucker stated that this was a section of road that had been under construction for some time. He said that respondent does maintain holes in construction areas given the opportunity. Mr. Tucker also stated that there had been crew out the day before the incident involved herein patching holes in the area of the accident. He stated that the crew had been using a cold mix to make temporary patches to any holes that they found along W. Va. Route 34. Mr. Tucker further stated that a hole could develop overnight if it had been filled with cold mix previously, as wet weather will wash out the cold mix.

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 the respondent did have actual or constructive notice of a road hazard on W. Va. Route 34. Thus, the claimant is entitled to an award for her losses.

In the instant claim, the evidence established that the respondent did have at least constructive notice of the hole on W. Va. Route 34 prior to the incident in question, based upon the evidence of an earlier patch that had been attempted and the knowledge that this was a known construction area. The respondent has the duty to make sure that the contractor is protecting the traveling public, and if it does not, it is negligent. Therefore, based upon the evidence established in this case, the Court is of the opinion that respondent was negligent in its maintenance of this road on the date of claimant's accident.

Accordingly, the Court makes an award to the claimant for the damages to her vehicle in the sum of $75.21.

Award of $75.21.

OPINION ISSUED OCTOBER 1, 2004

SUSAN E. EACHES
VS.
DIVISION OF HIGHWAYS
(CC-03-152)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her vehicle struck a hole while she was traveling westbound on I-64 in Cabell County. I-64 is a highway maintained by respondent in Cabell County. 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 at around 5:15 p.m. to 5:30 p.m. on March 13, 2003, a sunny evening. Claimant was traveling westbound on I-64 towards Kentucky in her 2000 Cadillac El Dorado. I-64 is a four-lane highway with a speed limit of sixty-five miles per hour. The section of I-64 where this incident took place was on a bridge. Claimant testified that she drove this section of I-64 every day. She was on her way home from work the evening of the incident, and was driving between sixty-two and sixty-five miles per hour. As Ms. Eaches proceeded over the bridge in the right lane there was traffic to her left. Claimant testified that she knew there was a hole in the pavement that she was approaching, but due to the glare of the sun it appeared as though it had been repaired. By the time she realized that the hole was still there, she had no choice but to drive over it because of the car to her left and the concrete bridge barrier to her right. Her vehicle struck the hole and sustained damage to the left front tire and rim totaling $757.38.

The position of the respondent was that it did not have notice of the hole on I-64. Charlene Pullen, I-64 supervisor for Section One in Cabell County, testified that respondent did not have notice of the hole in question in this claim. Ms. Pullen testified that there had been problems with this bridge in the past, but that the problems had been in the left or passing lane. At 5:44 p.m. on the evening of March 13, 2003, Ms. Pullen received a telephone call regarding numerous complaints about the hole in question here on I-64. She responded by sending crews out immediately to block off the lane so that the defective condition could be repaired as soon as possible. Ms. Pullen testified that the hole in the bridge was repaired the very next morning. Respondent maintains that there was no prior notice of any holes in the right lane of this stretch of I-64 prior to claimant's incident.

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*, 130 W.Va. 645, 46 S.E.2d 81 (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, claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on I-64 in Cabell County on the date of her accident. Respondent received no notice prior to claimant's incident of a hole in the right lane of traffic westbound on I-64. While the Court is sympathetic to claimant's 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 OCTOBER 1, 2004

ARTHUR W. SANTOWASSO
VS.
DIVISION OF HIGHWAYS
(CC-04-217)

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 his vehicle striking a large hole while he was traveling northbound on W. Va. Route 20 near Lumberport, Harrison County. W. Va. Route 20 is a road maintained by respondent in Harrison County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on December 9, 2003, at approximately 7:00 p.m. On the foggy evening in question, claimant was traveling northbound on W. Va. Route 20 in his 1996 Lincoln Town Car Cartier. W. Va. Route 20 is a two-lane road in the area of the incident involved in this claim. Mr. Santowasso was on his way home from an evening of dinner and shopping. He was traveling northbound on W. Va. Route 20 and a large truck also traveling northbound was several car lengths in front of his vehicle. Claimant was traveling at approximately twenty-five miles per hour when his vehicle struck a large hole in the road that he did not see. The hole was located just to the right of the center line. Claimant's vehicle sustained damage to both the front driver's side tire and rim, totaling $497.63. Claimant's insurance deductible was $250.00.

The position of the respondent was that it did not have notice of the condition on W. Va. Route 20 at the site of the claimant's accident for the date in question.

John Barberio, Highway Administrator for respondent in Harrison County, testified he had no knowledge of any holes on W. Va. Route 20 in the area of claimant's accident for the date in question. This road receives maintenance when an employee of respondent notes a problem or when a citizen reports a problem. Mr. Barberio stated that respondent had done patching on this stretch of W. Va. Route 20 on November 7, 2003, when respondent used hot mix, a permanent patching material, to fill the problem areas. He stated that based upon weather conditions, it was possible for a hole such as the one that claimant's vehicle struck to form again in the winter months. Mr. Barberio further testified that he was unaware of any complaints regarding holes in this area of W. Va. Route 20 prior to the date of claimant's incident.

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*, 130 W.Va. 645, 46 S.E.2d 81 (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 had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and its location in the travel portion of the highway leads the Court to conclude that respondent had notice of this hazardous condition and further, that it 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 his 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 the claimant in this claim in the amount of $250.00, which is claimant's insurance deductible.

Award of $250.00.

OPINION ISSUED OCTOBER 1, 2004

JUDITH A. MCNEMAR
VS.
DIVISION OF HIGHWAYS
(CC-03-557)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her vehicle struck a hole while she was traveling on W. Va. Route 58 in Bridgeport, Harrison County. W. Va. Route 58 is a road maintained by respondent in Harrison County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred around 5:00 p.m. on October 17, 2003, a clear afternoon. Claimant was traveling on W. Va. Route 58 in her 2003 Chrysler PT Cruiser. W. Va. Route 58 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that she was driving in heavy traffic which was stop-and-go due to an upcoming traffic signal. As Ms. McNemar drove forward, her vehicle struck a hole that she had not seen because it was hidden from her view by a vehicle in front of her. Her vehicle struck the hole sustaining damage to the right front and rear rims and tires. Claimant's vehicle sustained damage totaling $913.30. Her insurance deductible was $500.00

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 58 at the site of the claimant's accident for the date in question.

John Barberio, Highway Administrator for the respondent in Harrison County, testified that this area of W. Va. Route 58 had been paved sometime in September of

2003. He stated that the only way this hole likely could have formed was if there was a manhole cover there, and when it was paved over, the crews left the pavement there high. Mr. Barberio stated that the first time he was made aware of this hole was when a complaint from a private citizen was received stating that there was a hole near a grate and that the citizen was going to mark it in some way so that respondent could find it easier. It was at this point that respondent went out and filled the hole. Respondent maintains that it had no actual or constructive notice of any holes on W. Va. Route 58 on the date of or prior to claimant's incident 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).

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Photographs in evidence depict the hole and provide the Court an accurate portrayal of the size and location of the hole on W. Va. Route 58. The size of the hole and the time of the year in which claimant's incident occurred leads the Court to conclude that respondent had notice of this hazardous condition, and further, respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage 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 the claimant in this claim in the amount of $500.00, her insurance deductible.

Award of $500.00.

OPINION ISSUED OCTOBER 1, 2004

JOANN G. STRAIGHT
VS.
DIVISION OF HIGHWAYS
(CC-04-295)

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 her vehicle striking a tree while she was traveling on W. Va. Route 20 near Wallace, Harrison County. W. Va. Route 20 is a road maintained by respondent. 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 June 4, 2003, at approximately 2:00 a.m. On the stormy and foggy morning in question, claimant was traveling on W.

Va. Route 20 in her 1987 Ford Conversion Van with a passenger. W. Va. Route 20 is a two-lane road in the area of the incident involved in this claim. Ms. Straight was traveling on W. Va. Route 20 to her house on the morning of the incident. She was driving over a hill when she came upon a tree that she had not seen until she was upon it. It appeared that the limbs of the tree were overhanging the road, but as Ms. Straight got closer to it, she realized the tree was covering the right lane in which she was traveling. She attempted to drive to the left to go around the tree, but her vehicle struck the tree. Claimant's vehicle sustained significant damage to the windshield, roof, and passenger side totaling $3,068.29. Ms. Straight is asserting a claim in the amount of $2,200.00 which represents the value of the vehicle at the time of the incident.

Otis Dennis, a friend of the claimant, returned to the accident scene with the claimant shortly after the accident. He testified that he observed the tree hanging over the roadway. He noted that it was a live tree and that it apparently came from the bank adjacent to the road. The bank is approximately six to eight feet above the road. He was unable to provide testimony as to where the trunk of the tree or the stump of the tree had been in the ground.

The position of the respondent was that it did not have notice of the tree on W. Va. Route 20. John Barberio, Highway Administrator for respondent in Harrison County, testified that respondent had no knowledge of any tree falling onto W. Va. Route 20. He stated that there was no notice to respondent and that respondent did not remove the tree from W. Va. Route 20. Respondent maintains that there was no prior notice to respondent of the fallen tree on W. Va. Route 20.

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,* 130 W.Va. 645, 46 S.E.2d 81 (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).

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 present claim, the evidence established that the respondent did not have actual or constructive knowledge of a tree on W. Va. Route 20 near Wallace, Harrison County. The tree was not a dead tree. Had it been, respondent could have observed its condition and known that it could pose a hazard to the traveling public. There also was no evidence to establish that the tree fell from within the State's right of way. Consequently, there is insufficient evidence of negligence upon which to justify 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 OCTOBER 1, 2004

MICHAEL J. BLAND
VS.
DIVISION OF HIGHWAYS
(CC-04-065)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his vehicle struck several pieces of steel rebar while his father was driving the vehicle on the Chestnut Street exit ramp from U.S. Route 50 in Harrison County. The Chestnut Street exit ramp is a road maintained by respondent in Harrison County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 7:30 a.m. and 8:00 a.m. on February 3, 2004, a snowy morning. Claimant's father, John H. Bland, was driving claimant's 1994 Ford Explorer on the Chestnut Street exit from U.S. Route 50. The exit ramp is a two-lane bridge at the area of the incident involved in this claim. John H. Bland testified that he was traveling at approximately twenty-five miles per hour on the exit ramp. As he drove over a pile of snow, the vehicle struck several pieces of steel rebar which were protruding approximately fourteen inches out of the concrete bridge deck but were concealed by the snow. Claimant's vehicle sustained damage to the four wheel drive axle and the transmission. The damages were estimated at $1,002.43.

The position of the respondent is that it did not have actual or constructive notice of the condition on the Chestnut Street exit from U.S. Route 50 at the site of the claimant's accident for the date in question.

John Barberio, Highway Administrator for the respondent in Harrison County, testified that he first received notice of the steel rebar protruding from the Chestnut Street exit between 10:00 a.m. and 10:30 a.m. He further stated that he immediately called the bridge department, as that department is responsible for maintenance of the bridge involved herein. Respondent presented no witness from the bridge department to testify. Respondent maintains that it had no actual or constructive notice of any rebar protruding from the Chestnut Street exit from U.S. Route 50.

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 also previously held respondent liable for negligence related to rebar protruding from the Chestnut Street exit from U.S. Route 50. See *Anderson vs. Div. of Highways*, 21 Ct. Cl. 131 (1996).

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the steel rebar which claimant's vehicle struck, due to the fact that

several pieces of rebar were sticking out of the concrete about fourteen inches high, and that the rebar presented a hazard to the traveling public. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his 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 the claimant in this claim in the amount of $1,002.43.

Award of $1,002.43.

OPINION ISSUED OCTOBER 1, 2004

DAWN M. THOMAS
VS.
DIVISION OF HIGHWAYS
(CC-04-161)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 1996 Ford Escort struck a hole while she was traveling on W. Va. Route 119/33 in Morgantown, Monongalia County. W. Va. Route 119/33 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 10:00 a.m. and 10:30 a.m. on September 15, 2003, a rainy day. W. Va. Route 119/33 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that she was driving on W. Va. Route 119/33 when she saw the hole. She stated that she had seen the hole previously but had been able to avoid it on other occasions. Ms. Thomas was unaware of how deep the hole was because it was filled with water. Claimant's vehicle struck the hole sustaining damage to the right front rim and tire. Ms. Thomas stated that the hole was four-and-a-half inches deep. Claimant's vehicle sustained damage totaling $470.22.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 119/33 at the site of the claimant's accident for the date in question.

William Henderson, a Crew Supervisor for the respondent in Monongalia County, testified that he had no knowledge of any holes on W. Va. Route 119/33 in Morgantown for the date in question or the days immediately prior. Mr. Henderson stated that there were no records of either complaints concerning the condition of the road or any maintenance done on this stretch of road for two weeks prior to claimant's incident and two weeks after. Respondent maintains that it had no actual or constructive notice of any holes on W. Va. Route 119/33.

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 case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Photographs in evidence depict the hole and provide the Court an accurate portrayal of the size and location of the hole on W. Va. Route 119/33. The size of the hole and the time of the year in which claimant's incident occurred leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage 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 the claimant in this claim in the amount of $470.22.

Award of $470.22.

OPINION ISSUED OCTOBER 1, 2004

MARGARET YANCHAK and GEORGE YANCHAK
VS.
DIVISION OF HIGHWAYS
(CC-03-506)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 1991 Honda Accord struck a hole on I-79 near Fairmont, Marion County. I-79 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 1:30 p.m. and 3:00 p.m. on September 3, 2003, a clear day. I-79 is a four-lane highway and Mr. Yanchak was driving on a bridge in the area where this incident occurred. He testified that he was proceeding southbound on the interstate at around sixty-five miles per hour in his right lane or the "slow" lane. He stated that he had not seen the hole previously. Claimants' vehicle sustained damage to the right front rim, tire, and hubcap, totaling $229.06.

The position of the respondent is that it did not have actual or constructive notice of the condition on I-79 at the site of the claimant's accident for the date in question.

Norman Cunningham, a crew supervisor for the respondent in the I-79, Section 1, Goshen Road office, testified that he had no knowledge of the hole on I-79 near Fairmont for the date in question or the days immediately prior. Mr. Cunningham stated that the first notice his office received of a hole on the I-79 bridge was on September 4,

2003. Respondent received a telephone call from the West Virginia State Police informing their office of a large hole on I-79. Crews then went to repair the hole, only to find that it was a full-depth hole meaning a hole that goes all the way through the bridge deck. Mr. Cunningham stated that he then contacted the bridge department, and respondent and the bridge department repaired the hole that day. He further stated that while the hole was on an interstate bridge, his office and the bridge department work together to implement bridge repairs, including patching of holes. Respondent maintains that it did not have actual or constructive notice of any holes on I-79 prior to claimants' 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).

In the instant 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. Respondent described this hole as a full-depth hole, a hole that goes all the way through the bridge deck. The size of the hole and the time of the year in which this incident occurred leads the Court to conclude that respondent had constructive, if not actual, notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to their 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 the claimants in the amount of $229.06.

Award of $229.06.

OPINION ISSUED OCTOBER 1, 2004

ROGER AMOS
VS.
DIVISION OF HIGHWAYS
(CC-04-146)

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 January 6, 2004, claimant was doing preventive maintenance in the District Four Equipment Shop. He was removing a hydraulic cylinder which was leaking. The cylinder slipped out of the nylon choker that was being used to remove it. The

hydraulic cylinder fell onto his tool box, damaging the drawers, drawer structure and wheel.

2. Respondent was responsible for equipment that claimant was using on the date of this incident.

3. As a result of this incident, claimant's equipment sustained damage in the amount of $2,400.00.

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 equipment used to remove the hydraulic cylinder on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's tool box; 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 $2,400.00.

Award of $2,400.00.

OPINION ISSUED OCTOBER 1, 2004

KALA ANN GORBEY
VS.
DIVISION OF HIGHWAYS
(CC-04-175)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her vehicle struck a hole while she was traveling on U.S. Route 19 north of Fairmont, Marion County. U. S. Route 19 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred around 10:00 p.m. on February 8, 2004, a clear evening. Claimant was traveling on U. S. Route 19 in a leased 2004 Chrysler PT Cruiser. U. S. Route 19 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that she was driving with the vehicle's lights on high beam when she saw another vehicle approaching in the oncoming lane. She stated that when she turned her lights off high beam, her vehicle struck a hole that she had not seen. Claimant's leased vehicle sustained damage to both right side rims and tires. Ms. Gorbey stated that the hole her rental vehicle struck was about twelve inches in diameter and four to six inches deep. The leased vehicle sustained damage totaling $731.96. Claimant's insurance deductible was $500.00 and it was applicable to the leased vehicle.

The position of the respondent is that it did not have actual or constructive notice of the condition on U. S. Route 19 at the site of the claimant's accident for the date in

question.

Don Steorts, Highway Administrator for the respondent in Marion County, testified that he had no knowledge of this particular hole on U. S. Route 19 north of Fairmont on the date in question or the days immediately prior thereto. Mr. Steorts stated that there had been a crew patching a stretch of U. S. Route 19 in the area of claimant's accident the day after her accident. Respondent maintains that it had no actual or constructive notice of the particular hole on U. S. Route 19 that claimant's vehicle struck.

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 case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's leased vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole leads the Court to conclude that respondent had at least constructive notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to the vehicle which she was driving on the date of the accident.

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 this claim in the amount of $500.00, her insurance deductible.

Award of $500.00.

OPINION ISSUED OCTOBER 1, 2004

HAROLD WALTERS and LORRAINE WALTERS
VS.
DIVISION OF HIGHWAYS
(CC-02-375)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their vehicle was struck by a tree limb that fell while they were traveling northbound on County Route 7 in Wayne County. County Route 7 is a road maintained by 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.

The incident giving rise to this claim occurred at approximately 10:30 a.m. on August 10, 2002. On the morning in question, claimants were traveling northbound on County Route 7, also known as Buffalo Creek Road, in their 1995 Buick Park Avenue. County Route 7 is a two-lane road with a posted speed limit of fifty-five miles per hour. Claimant Harold Walters was driving down a slight hill at around thirty to thirty-five

miles per hour when a branch that had been hanging in the canopy of trees above the roadway fell and struck the claimants' car. Claimants previously had observed the branch hanging in the canopy of the tree for about three weeks. Claimant Lorraine Walters testified that on two occasions prior to the incident she had made telephone calls to respondent to inform them of the potentially dangerous condition of the branch which was overhanging the road. Claimants' vehicle sustained damage to the windshield and body of the car totaling $2,059.37.

The evidence adduced at hearing established that the respondent was aware of the branch hanging in the tree. Geoffrey Adkins, storekeeper for respondent in Wayne County, testified that respondent received two telephone calls about a downed tree and a branch overhanging the road. Mr. Adkins stated that crews for respondent made two or three attempts to find the tree and the branch, but that on none of those occasions were they able to locate the branch.

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 constructive, if not actual, notice of the hazard presented by the tree limb in question and finds that claimants are entitled to an award for the damages to their vehicle. The claimants damages totaled $2,059.37. The windshield which needed to be replaced and inspected came to a total of $212.66. The remaining amount was an estimate for the damages done to the vehicle. Claimants have since traded the vehicle and testified that they did not know how much the trade in value was affected by the damages received from the incident. The Court will not speculate as to the value of claimants' vehicle before or after the incident.

Accordingly, the Court makes an award to the claimants in the amount of $212.96 for the windshield which had to be replaced.

Award of $212.96.

OPINION ISSUED OCTOBER 1, 2004

STEVE CAMPBELL
VS.
DIVISION OF HIGHWAYS
(CC-04-304)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1998

Honda Civic struck a hole on W.Va. Route 131 near Bridgeport, Harrison County. W. Va. Route 131 is a road maintained by respondent in Harrison County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 8:00 p.m and 8:30 p.m. on April 13, 2004, a dry evening. W.Va. Route 131 is a two-lane highway at the area of the incident involved in this claim. Claimant's son, Jeremy Campbell, testified that he was driving the claimant's vehicle on W.Va. Route 131 at about forty miles per hour with traffic coming towards him when the vehicle struck two holes. He stated that the holes were both about twenty-two inches wide and three or four inches deep. Claimant's vehicle struck the holes sustaining damage to the right front rim and tire. Claimant's vehicle sustained damage totaling $213.02.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 131 at the site of the claimant's accident for the date in question.

John Barberio, Highway Administrator for the respondent in Harrison County, testified that he had no knowledge of any holes on W. Va. Route 131 near Bridgeport for the date in question or the days immediately prior. Mr. Barberio stated that there had been crews out in February of that year to patch holes along W.Va. Route 131. He stated that there were no telephone calls in regard to the holes that claimant's son hit on the day of or prior to the incident. Respondent maintains that it had no actual or constructive notice of any holes on W. Va. Route 131.

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 case, the Court is of the opinion that respondent had at least constructive notice of the holes which claimant's vehicle struck and that the holes presented a hazard to the traveling public. Photographs in evidence depict the holes and provide the Court an accurate portrayal of the size and location of the holes on W. Va. Route 131. The size of the holes leads the Court to conclude that respondent had constructive notice of this hazardous condition and an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his 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 the claimant in this claim in the amount of $213.02.

Award of $213.02.

OPINION ISSUED NOVEMBER 29, 2004

ROBERT K. TOMBLIN and LINDA S. TOMBLIN
VS.
DIVISION OF HIGHWAYS

(CC-03-181)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 1999 Toyota Camry struck a metal object lying in the road. The driver, Robert K. Tomblin, was traveling westbound on I-64, under the Route 34 bridge, in Putnam County. I-64 in Putnam County is a road maintained by respondent. 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 22, 2003, at approximately 6:15 p.m.
Mr. Tomblin was driving around sixty-two miles per hour in the rain and was in the passing lane with a tractor-trailer in front of him and traffic all around. He was approximately three or four car lengths behind the tractor-trailer, approaching the Route 34 overpass when he noticed the truck drive over an object lying in the road. Mr. Tomblin attempted to slow down but he did not attempt to stop, due to traffic. He testified that the object may have been a piece of guardrail retainer used on overpasses. Claimants' vehicle struck the object, a piece of metal slightly curved with some concrete on the end, and sustained damage to the underside of the vehicle totaling $4,038.76. Claimants' insurance deductible was $1,000.00 for which they make this claim and an additional $76.95 not covered by insurance for a rental vehicle and $300.00 in lost wages.

The position of the respondent was that it did not have notice of the object on I-64. Barney Sigman, Foreman for respondent in Putnam County, testified that there was nothing documented as to any objects in the road near the Route 34 bridge on I-64 at any time on or around the date of Mr. Tomblin's incident. Mr. Sigman testified that the there was no construction on the bridge at that time of claimant's accident. He stated that if there had been construction, it would have been his office's responsibility to close part of the highway down for any construction on the side or underneath of a bridge. Respondent maintains that it had no prior notice of any objects on U.S. Route 119 immediately prior to the incident in question.

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,* 130 W.Va. 645, 46 S.E.2d 81 (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, claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on I-64 in Putnam County. There was no evidence presented as to how the object that claimants' vehicle struck came to be in the roadway and the Court will not speculate as to such. 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 NOVEMBER 29, 2004

DAVID GRANT PEVAVAR
VS.

DIVISION OF HIGHWAYS
(CC-04-129)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1990 Buick Century Limited struck a hole while he was traveling on Route 40/8 in Wheeling, Ohio County. Route 10/8 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred around 2:30 p.m. on February 6, 2004, a sunny day. Route 40/8 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving on Route 40/8 with traffic in both directions when his vehicle struck a hole. He stated that he could not really see the hole as it was filled with water, and due to this and all the traffic coming in the opposite direction, he was not able to avoid the hole. Mr. Pevavar stated that the hole was probably about eight inches deep and eighteen to twenty inches in circumference. Claimant's vehicle struck the hole sustaining damage to the water pump and the right rear turn, totaling $399.54. Claimant's insurance deductible was $100.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 40/8 at the site of the claimant's accident for the date in question.

Mick Davis, a highway administrator 2 for the respondent in Ohio County, testified that he had no knowledge of any holes on Route 40/8 in Wheeling for the date in question. Mr. Davis testified that on two previous occasions, February 3, 2004, and February 5, 2004, respondent had been out on Route 40/8 patching holes with cold mix. Mr. Davis also stated that crews for respondent had been out on snow removal and ice control in the days prior to claimant's accident. Respondent maintains that it had no actual or constructive notice of any holes on Route 40/8 on the date of claimant's accident.

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 case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the fact that respondent had been out twice previously in the same week to patch holes leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage 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 the claimant in this claim in the amount of $100.00.

Award of $100.00.

OPINION ISSUED NOVEMBER 29, 2004

STEVE KEPLINGER
VS.
DIVISION OF HIGHWAYS
(CC-04-068)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1995 Pontiac Grand Am struck a hole while he was traveling on W. Va. Route 2 near Follansbee, Brooke County. W. Va. Route 2 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 6:00 a.m. and 6:30 a.m. on February 6, 2004, a dreary morning. W. Va. Route 119/33 is normally a four-lane highway at the area of the incident involved in this claim, but due to construction was reduced to a two-lane highway at the time of this incident. Claimant testified that he was driving on W. Va. Route 2 near the Pittsburgh Steel Company with traffic in front of him and headed in the opposite direction when his vehicle struck a hole in the road that he had not seen. Mr. Keplinger stated that he drives this road every day, but that he had not noticed any hole this bad the previous morning. He was unaware of how deep the hole was because he needed to get to work and did not want to walk back to see the hole. Claimant's vehicle struck the hole sustaining damage both passenger side tires totaling $345.90.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 2 at the site of the claimant's accident for the date in question.

Sheldon Beauty, a county administrator for the respondent in Brooke County, testified that he had no knowledge of any holes on W. Va. Route 2 near Follansbee for the date in question or the days immediately prior. Mr. Beauty stated that this was a

construction zone where work was contracted out to a third party. He stated that the construction had been ongoing for a year and a half. Mr. Beauty testified that the construction contractor would usually patch holes that occurred within the construction area, but that crews for respondent would occasionally go out and also patch some areas. Mr. Beauty also testified that there was a hold-harmless clause in respondent's contract with the contractor. This clause was designed to hold respondent harmless for any and all damages which might occur in the construction area. Mr. Beauty testified that there were several telephone calls later on during the same day as claimant's accident, but he was not aware of any complaints before claimant's incident. Respondent maintains that it had no actual or constructive notice of any holes on W. Va. Route 2.

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 case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The testimony that the hole had not been there the day before and the time of the year in which claimant's incident occurred leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Further, the Court is well aware that such hold-harmless clauses are common place in third party construction contracts and that respondent may seek to be reimbursed for any damages for which it is found responsible. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his 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 the claimant in this claim in the amount of $345.90.

Award of $345.90.

OPINION ISSUED NOVEMBER 29, 2004

JOHN A. CUSTER
VS.
DIVISION OF HIGHWAYS
(CC-04-320)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2001 Ferrari 360 Spider struck a hole while he was traveling on W.Va. Route 34 in Putnam County. W.Va. Route 34 is a road maintained by respondent. The Court is of the opinion

to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred around 1:20 p.m. on March 29, 2004, a clear afternoon. W.Va. Route 34 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that Jeannette Davis was driving his vehicle on W.Va. Route 34 with a tractor trailer in front of their vehicle. Mr. Custer stated that he saw a hole in the road just before the vehicle hit it, while Ms. Davis stated that she did not see the hole before the vehicle struck it. Upon striking the hole, claimant's vehicle skidded into the opposite lane of traffic before skidding into an area in the middle of the road where it came to rest. Mr. Custer testified that the vehicle most likely struck two holes in the road that were directly in line with the passenger side tires. He stated that the holes had to be somewhat deep, as the front bumper of his vehicle scraped the pavement upon striking the hole. Claimant's vehicle struck the holes sustaining damage to the front passenger side tire and lower A-arm. Claimant had to have the vehicle towed back to the dealership in Ohio and also had to rent a vehicle to drive back to Ohio. Claimant's damages totaled $6,274.81. Claimant's insurance deductible was $5,000.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on W.Va. Route 34 at the site of the claimant's accident for the date in question or at any point in the days prior to the accident. Respondent did not call any witnesses to testify.

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 case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the holes and the location of the holes on W.Va. Route 34 leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage 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 the claimant in this claim in the amount of $5000.00.

Award of $5,000.00.

OPINION ISSUED NOVEMBER 29, 2004

MARY E. THOMASELLI
VS.
DIVISION OF HIGHWAYS
(CC-04-216)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1999 Honda Prelude struck a hole while she was traveling on County Route 11 near Weirton, Hancock County. County Route 11 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred around 10:00 p.m. on March 31, 2004, a rainy evening. County Route 11 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that she was driving on County Route 11 with traffic coming towards her. She stated that she had noticed the holes a couple of weeks before her accident and had called respondent to complain about them. Mrs. Thomaselli testified that she knew the holes in the road ahead of her, but due to the rain she could not see them. She also stated that due to the traffic and the fire hydrant that was located just on the other side of the holes, she could not avoid them. Claimant stated that the holes were probably about eight inches deep and both were fairly wide. Claimant's vehicle struck the holes sustaining damage to both passenger side tires, rims, and bearing assemblies totaling $1,304.26. Claimant's insurance deductible was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 11 at the site of the claimant's accident for the date in question or at any point in the days prior to the accident.

Sam DeCapio, a highway administrator 2 for the respondent in Hancock County, testified that he had no knowledge of any holes on County Route 11 near Weirton for the date in question. Mr. DeCapio testified that his office did receive a telephone call from claimant the day after the incident and that they had sent a crew out to repair the holes upon receiving that complaint. Respondent maintains that it had no actual or constructive notice of any holes on County Route 11 on the date of claimant's accident or prior to that date.

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 case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the holes and the location of the holes on County Route 11 leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage 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 the claimant in this claim in the amount of $500.00.

Award of $500.00.

OPINION ISSUED NOVEMBER 29, 2004

JEAN L. WRIGHT
VS.
DIVISION OF HIGHWAYS
(CC-04-211)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of her 2000 Kia Sophia striking rocks while she was traveling on State Route 2 in the Glendale area, also known as "the narrows," Marshall County. State Route 2 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 6:00 p.m and 6:30 p.m. on February 14, 2004. On the date in question, claimant was traveling northbound on State Route 2 near Glendale. State Route 2 is a four-lane road that is marked as a "falling rock" area. Ms. Wright was proceeding along State Route 2 when the vehicle she was driving struck a rock that had fallen into the roadway. Claimant's vehicle sustained damages to the radiator totaling $842.69.

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. There are "rock fall" signs at both the north and south ends of "the narrows," the respondent undertakes periodic patrols through the area, and keeps the area lighted at night. Respondent also maintained that it had no notice of this particular rock fall prior to claimant's accident.

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. This Court has previously made awards in "the narrows cases" numerous times. *See Branicky vs. Div. of Highways*, 24 Ct. Cl. 273 (2003); *Cusick vs. Div. of Highways*, 24 Ct. Cl. 216 (2002); *Hall vs. Div. of Highways*, 24 Ct. Cl. 212 (2002); *Foster vs. Div. of Highways*, 23 Ct. Cl. 248 (2000); *Williams vs. Div. of Highways*, CC-99-114, (Ct. Cl. Dec. 6, 1999),

available at http:// 129.71.164.29/court_claims/CC-99-114.htm ; Hundagen *vs. Div. of Highways*, CC-98-303 (Ct. Cl. Dec. 6, 1999), *available at* http://129.71.164.29/court_claims/CC-98-303.htm. 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 $842.69.

Award of $842.69.

OPINION ISSUED NOVEMBER 29, 2004

RONALD W. OSTROSKY
VS.
DIVISION OF HIGHWAYS
(CC-04-106)

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 10, 2004, claimant was traveling on W. Va. Route 27 in Wellsburg, Brooke County, when his vehicle struck a large hole in the road damaging a tie rod and the right front wheel.

2. Respondent was responsible for the maintenance of W. Va. Route 27 in Brooke County and respondent failed to maintain properly W. Va. Route 27 on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damages in the amount of $144.29.

4. Respondent agrees that the amount of $144.29 for the 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 W. Va. Route 27 in Brooke County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained by claimant; 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 $144.29.

Award of $144.29.

OPINION ISSUED NOVEMBER 29, 2004

RUDY ROSNICK
VS.
DIVISION OF HIGHWAYS
(CC-04-238)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2001 Hyundai Sante Fe struck a hole while she was traveling on W. Va. Route 105 in Weirton, Hancock County. W. Va. Route 105 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 9:30 p.m. and 10:00 p.m. on March 31, 2004, a rainy evening. W. Va. Route 105 is a two-lane highway with a turn lane in the middle at the area of the incident involved in this claim. Mr. Rosnick stated that it was raining out and that he did not see the hole before his vehicle struck it. Claimant's vehicle struck the hole sustaining damage to one passenger side rim and both passenger side tires. Claimant's vehicle sustained damage totaling $486.28. Claimant's insurance deductible was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 105 at the location of the claimant's accident for the date in question.

Sam DeCapio, Highway Administrator II for the respondent in Hancock County, testified that he had no knowledge of any holes on W. Va. Route 105 in Weirton for the date in question or the days immediately prior. Mr. DeCapio stated that the first time that his office was made aware of this hole on W. Va. Route 105 was the morning after claimant's accident when the Weirton Police Department contacted the office. After receiving the notice from the police, respondent sent a crew out to patch the hole. Respondent maintains that it had no actual or constructive notice of any holes on W. Va. Route 105 prior to claimant's accident.

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 case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Photographs in evidence depict the hole and provide the Court an accurate portrayal of the size and location of the hole on W. Va. Route 105. The size of the hole and its location in the travel portion of the highway on a high priority

road leads the Court to conclude that respondent had constructive 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 damage to his 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 the claimant in this claim in the amount of $486.28.

Award of $486.28.

OPINION ISSUED NOVEMBER 29, 2004

ROBIN DOTY
VS.
DIVISION OF HIGHWAYS
(CC-04-101)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of her1995 Ford Escort wagon striking rocks while her daughter, Ashley Doty was traveling on State Route 2 in the Glendale area, also known as "the narrows," Marshall County. State Route 2 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on February 20, 2004. On the date in question, claimant's daughter, Ashley Doty, was traveling northbound on State Route 2 around Glendale. State Route 2 is a four-lane road that is marked as a "falling rock" area. Claimant's daughter was proceeding along State Route 2 when the vehicle she was driving struck a rock that had fallen into the roadway. Claimant's vehicle sustained damages to two tires totaling $110.66.

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. There are "rock fall" signs at both the north and south ends of "the narrows," the respondent undertakes periodic patrols through the area, and keeps the area lighted at night. Respondent also maintained that it had no notice of this particular rock fall prior to claimant's accident.

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. This Court has previously made awards in "the narrows cases" numerous times. *See Branicky vs. Div. of Highways*, 24 Ct. Cl. 273 (2003); *Cusick vs. Div. of Highways*, 24 Ct. Cl. 216 (2002); *Hall vs. Div. of Highways*, 24 Ct. Cl. 212 (2002); *Foster vs. Div. of Highways*, 23 Ct. Cl. 248 (2000); *Williams vs. Div. of Highways*, CC-99-114, (Ct. Cl. Dec. 6, 1999), *available at* http://129.71.164.29/court_claims/CC-99-114.htm; Hundagen *vs. Div. of Highways*, CC-98-303 (Ct. Cl. Dec. 6, 1999), *available at* http://129.71.164.29/court_claims/CC-98-303.htm. 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 $110.66.

Award of $110.66.

OPINION ISSUED NOVEMBER 29, 2004

FLOSSIE GOLDEN
VS.
DIVISION OF HIGHWAYS
(CC-04-228)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her Dodge Caravan struck a hole while she was traveling on W. Va. Route 105 in Weirton, Hancock County. W. Va. Route 105 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred around 9:00 p.m. on March 31, 2004, a rainy evening. W. Va. Route 105 is a two-lane highway with a turn lane in the middle at the area of the incident involved in this claim. Claimant's daughter, Jackelyn Golden, was driving her mother's vehicle on W. Va. Route 105 when her mother, who was in the vehicle with her, suggested that she drive closer to the right edge of the road in order to avoid a hole in the road. Ms. Golden was unaware of how large the hole was

as it had just started to rain. Jackelyn Golden stated that she had driven on that road about a week prior to the incident and that she had noticed several small holes, but not the hole that the vehicle she was driving struck. Claimant's vehicle struck the hole sustaining damage to the right front rim and tire. Claimant's vehicle sustained damage totaling $421.36. Claimant's insurance deductible was $100.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 105 at the site of the claimant's accident for the date in question.

Sam DeCapio, a Highway Administrator II for the respondent in Hancock County, testified that he had no knowledge of any holes on W. Va. Route 105 in Weirton for the date in question or the days immediately prior. Mr. DeCapio stated that the first time that his office was made aware of this hole on W. Va. Route 105 was the morning after claimant's accident when the Weirton Police Department contacted the office. After receiving the notice from the police, respondent sent a crew out to patch the hole. Respondent maintains that it had no actual or constructive notice of any holes on W. Va. Route 105 prior to claimant's accident.

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 case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Photographs in evidence depict the hole and provide the Court an accurate portrayal of the size and location of the hole on W. Va. Route 105. The size of the hole and its location in the travel portion of the highway on a high priority road 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 of her insurance deductible as damages 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 make an award to the claimant in this claim in the amount of $100.00.

Award of $100.00.

OPINION ISSUED NOVEMBER 29, 2004

CHRISTOPHER NORMAN and SUSAN NORMAN
VS.
DIVISION OF HIGHWAYS
(CC-04-131)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2000 Grand Prix GT struck a series of holes while he was traveling on County Route 25 in Wheeling, Ohio County. County Route 25 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred around 7:30 p.m. on January 29, 2004, a cold evening. County Route 25 is a two-lane highway at the area of the incident involved in this claim. Claimant was driving his vehicle on County Route 25 when he came to a curve in the road. There was traffic traveling in the opposite direction. Mr. Norman saw a series of holes in the road but could not avoid them because of the traffic in the other lane. Claimant had driven County Route 25 the previous week but had not noticed the holes at that time. Mr. Norman stated that one of the holes was about seven inches deep and about one foot wide. Claimant's vehicle struck the holes sustaining damage to the right front rim and tire, totaling $562.93. Claimant's insurance deductible was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 25 at the site of the claimant's accident for the date in question.

Mick Davis, Highway Administrator II for the respondent in Ohio County, testified that he had no knowledge of any holes on County Route 25 in Wheeling for the date in question or the days immediately prior. Mr. Davis stated that the first time that his office was made aware of these holes on County Route 25 was around February 11, 2004, when crews for respondent patched that stretch of road in response to a telephone call. Respondent maintains that it had no actual or constructive notice of any holes on County Route 25 prior to claimant's accident.

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 case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Photographs in evidence depict the hole and provide the Court an accurate portrayal of the size and location of the hole on County Route 25. The size of the hole and its location in the travel portion of the highway leads the Court to conclude that respondent had constructive notice of this hazardous condition and an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimant may make a recovery of his insurance deductible as damages 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 make an award to the claimant in this claim in the amount of $500.00.

Award of $500.00.

OPINION ISSUED NOVEMBER 29, 2004

GREGORY A. JORDAN
VS.
DIVISION OF HIGHWAYS
(CC-03-296)

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 April 15, 2003, claimant was traveling on Interstate 64/77 in Charleston, Kanawha County, on the Elk River Bridge when his vehicle struck a loose steel joint that damaged the left rear tire on his 2001 Ford F-150.

2. Respondent was responsible for the maintenance of Interstate 64/77 in Kanawha County and respondent failed to maintain properly Interstate 64/77 on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $153.70.

4. Respondent agrees that the amount of $153.70 for the 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 Interstate 64/77 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 loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $153.70.

Award of $153.70.

OPINION ISSUED NOVEMBER 29, 2004

JOSEPH G. MANONI
VS.
DIVISION OF HIGHWAYS
(CC-03-224)

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

PER CURIAM:

Claimant brought this action for damage which occurred when his 2003 Harley Davidson Low Rider motorcycle struck a hole as he was traveling northbound on W. Va. Route 34 in Putnam County. W. Va. Route 34 is a road maintained by respondent in Putnam County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred at approximately 5:00 p.m on November 24, 2003, a clear day. W. Va. Route 34 is a two-lane road that was under construction to widen the roadway at the time of the claimant's accident. Mr. Manoni was on his way home the afternoon of the incident, and was driving around five to ten miles per hour because traffic was stopping for a vehicle making a left turn. As claimant was proceeding slowly on the road, his motorcycle struck a hole that he had not seen. The hole was described by Mr. Manoni as being about four to six inches deep, a foot to a foot-and-a-half wide, and a foot to a foot-and-a-half long. Upon striking the hole, the motorcycle "bucked" causing Claimant to drop the motorcycle. Claimant's motorcycle sustained damage in the amount of $3,170.68. Claimant's insurance deductible was $500.00 for which he is making this claim.

The position of the respondent was that it did not have notice of the hole on W. Va. Route 34. Respondent admitted that the area in question had been prone to having holes in the roadway due to the ongoing construction. Danny Tucker, Foreman for respondent in Putnam County, testified that the construction being done on W. Va. Route 34 was not being done by respondent's own employees, but rather was being performed by contractors. Mr. Tucker testified that respondent would attempt to patch any holes that they came upon in traveling the road in the construction zones, traffic permitting. Mr. Tucker testified that there were no telephone calls to respondent's office concerning the existence of the hole in question in this claim. Respondent also sent inspectors out to the construction site to ensure that the roads were passable for the traveling public. Respondent maintains that there was no prior notice to respondent of this hole on W. Va. Route 34.

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,* 130 W.Va. 645, 46 S.E.2d 81 (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 had the responsibility to ascertain that W. Va. Route 34 was passable for the traveling public. Respondent has inspectors who are responsible for the conditions in construction sites and who oversee a contractor's maintenance of the roadways. In the instant claim, respondent was aware of the ongoing construction in the area, and it was also aware that the roadway was more apt to have holes in the pavement due to the construction activities. Thus, the Court concludes that respondent was negligent in its maintenance of W. Va. Route 34 on the date of claimant's accident, and further, that claimant may make a recovery for the damage to his motorcycle.

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 this claim in the amount of $500.00.

Award of $500.00.

OPINION ISSUED NOVEMBER 29, 2004

RALPH E. STANDIFORD, JR.
VS.
DIVISION OF HIGHWAYS
(CC-03-250)

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 his vehicle striking rocks when he was traveling northbound on U.S. Route 119 in Kanawha County. U.S. Route 119 is a road maintained by respondent in Kanawha County. 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 April 21, 2003, at approximately 6:30 a.m. On the rainy morning in question, claimant was traveling northbound on U.S. Route 119 in his 1997 Dodge Ram 1500 Series. U.S. Route 119 is a two-lane road that is marked at the location of claimant's accident as a "falling rock" area with a speed limit of forty-five miles per hour. Mr. Standiford was driving northbound on U.S. Route 119 toward the interstate and he was driving around twenty-five to thirty miles per hour due to the weather conditions. Claimant was proceeding on U.S. Route 119 when rocks from the hillside adjacent to U.S. Route 119 fell into his lane of traffic. Claimant's vehicle struck the rocks and sustained damage to the passenger side tires and rims totaling $1,100.00.

The position of the respondent was that it did not have notice of the rocks on U.S. Route 119. Respondent admitted that the area in question is a rock fall area and stated that there are "rock fall" signs located at various locations along U.S. Route 119 to warn drivers proceeding on the roadway. Mr. David Fisher, Highway Administrator for respondent in Kanawha County, testified that this is an area that has rock falls occasionally and that there are rock fall signs placed along the highway. Mr. Fisher testified that there was a telephone call about a rock fall, but it came after the claimant's incident. Respondent maintains that there was no prior notice of any rocks on U.S. Route 119 immediately prior to the incident in question.

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*, 130 W.Va. 645, 46 S.E.2d 81 (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 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).

In the present claim, claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on U.S. Route 119 in Kanawha County. Respondent has placed "falling rock" warning signs to warn the traveling public of the potential for rock falls at this location. 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 NOVEMBER 29, 2004

ROBERT D. SMITH, JR.
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-04-519)

Claimant appeared *pro se*.
Robert D. Williams, 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 $180.00 for items of personal property that were entrusted to respondent's employees when he was taken to South Central Regional Jail, a facility of the respondent. At the time his mother appeared to pick up his personal belongings, she discovered the 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 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.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $180.00.

Award of $180.00.

OPINION ISSUED DECEMBER 27, 2004

BRENDA MURPHY, as Administratrix
of the Estate of SCOTT CHARLTON
VS.
DIVISION OF HIGHWAYS
(CC-01-188)

James G. Bordas, Jr., Attorney at Law, for claimant.
Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

BAKER, JUDGE:

Claimant Brenda Murphy brought this action as Administratrix of the Estate of Scott Charlton, her son, who died in an incident that occurred when Scott Charlton was operating his motorcycle on U.S. Route 250, Wetzel County, and he allegedly encountered a bump on a bridge near Hundred, West Virginia, causing him to lose control of his motorcycle. U.S. Route 250 is a road maintained by respondent. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on May 30, 1999, at approximately 4:00 p.m. Claimant's son, Scott Charlton, was traveling northbound on U.S. Route 250 on his 1993 Suzuki GSR sport motorcycle. U.S. Route 250 is a two-lane, paved highway in the area of the incident involved. Mr. Charlton was riding his motorcycle and he was joined by his friend Mark Malkoff who was also riding a motorcycle. Mr. Malkoff testified that he and Mr. Charlton had decided to go for a long ride that day, looking over their motorcycles for any problems before they left. They traveled on W. Va. Route 7 and U.S. Route 250. Upon reaching Hundred in Wetzel County, they stopped to have soft-drinks. After a brief rest, they again drove onto U.S. Route 250, proceeding northbound. The posted speed limit for U.S. Route 250 at this location is fifty-five miles per hour. The two men came to a bridge, before which is a curve warning sign and speed reduction plate of thirty-five miles per hour. Both men had on two prior occasions driven across this bridge, but on both occasions they had been traveling in the opposite, southbound lane. Mr. Malkoff stated that he did not recall seeing the curve sign or the cautionary speed limit sign. Mr. Malkoff, who was riding about five motorcycle lengths in front of Mr. Charlton, testified that his speed was fifty-five miles per hour. Mr. Malkoff testified that when he drove onto a bridge over a creek which was opposite from the Hundred Lumber Company, he encountered a lateral crack in the roadway which made both wheels of his motorcycle jump off the ground for a split second. Mr. Malkoff testified that:

> "I was basically right next to the double yellow line closest to the inside of the lane. I was actually taking the apex on the corner wrong and that basically saved my life. It made both my wheels front and back jump up off the ground for a split second. When I came back down, I found myself almost to the white line on the right-hand side of the road, pulled myself back over. When I pulled myself back over, I looked in my rearview and I watched Scott wreck his motorcycle."

He had been riding close to the center yellow lines when he suddenly found himself closer to the white lines on the right side of the northbound lane. He was able to control his bike and align himself closer to the center lines when he looked in his rearview mirror to see Scott Charlton, who was no longer in control of his motorcycle and who then crashed his motorcycle into the hillside on the east side of U.S. Route 250. Mr. Malkoff testified that he did not see whether the bump on the bridge caused Mr. Charlton to lose control of his motorcycle. Mr. Charlton died as a result of his accident.

Claimant is seeking $2,000,000.00 in damages, including medical bills and expenses, funeral bills, burial expenses, attorney's fees, costs associated with the probate of the estate, and the loss of the expected income that Scott Charlton would have earned in his lifetime. Scott Charlton is survived by a pretermitted son as well as two siblings, his mother, and his stepfather.

Fred Hanscom, a highway research engineer, testified as an expert for Claimant in this claim. Mr. Hanscom is a member of the committee that writes the Manual of Uniform Traffic Control Devices (hereafter MUTCD), a guideline for all traffic control devices used by every state, including West Virginia, in marking its highways. The MUTCD is the standard of practice for applying signs, hazard warning signs, pavement markings, and all applicable roadway markings. Mr. Hanscom explained that warning signs are designed and intended to be placed at specific advance distances so that a driver has adequate time to see the sign, comprehend what it says, and recognize the hazard. Due to this prerequisite perception-reaction time, the MUTCD prescribes specific advance placement distances for warning signs, such as the curve warning sign and speed reduction sign involved in this case. According to the MUTCD, a warning sign placed in an area of a fifty-five miles per hour speed limit to advise a motorist to slow to thirty-five miles per hour requires an advance placement distance of three hundred fifty feet. In the instant case, there is a curve warning sign and speed reduction plate in advance of the curve on the bridge located on U.S. Route 250. This sign is located one hundred thirty-nine feet in advance of the beginning of the curve, some two hundred eleven feet short of the three hundred fifty feet prescribed by the MUTCD. Mr. Hanscom indicated that not only was the sign placed well short of the recommended distance, but it was blocked from view by the embankment that ran along the roadside. He testified that even if a motorist could read the thirty-five miles per hour sign where it is located, it would still provide inadequate warning of the hazard involved. Mr. Hanscom stated that in his opinion this was an obvious violation of the MUTCD standards, resulting in an inadequate warning of the curve and the advised speed reduction.

Mr. Hanscom also testified as to the lack of a sign warning of a "bump" in the roadway. According to Mr. Hanscom, the bump on the bridge in the northbound lane was not perceivable to a motorist, and thus was a dangerous hazard that was not marked in any way. He believed that it was incumbent upon respondent, based upon the use of the MUTCD standards, to place warning signs in advance of this hazard. Mr. Hanscom further stated that based upon a West Virginia State Inspector's bridge report recommending a repair of the bridge, a warning sign should have been placed there warning of the bump in the road, as recommended by the MUTCD. However, respondent did not place a warning sign for this bump: therefore, it did not provide the proper warning to any motorists using the road, including the claimant's son, Mr. Charlton.

Dr. John F. Burke, Jr., who has a doctorate in economics, testified for the claimant as to the earning capacity of Scott Charlton over a lifetime. Mr. Charlton was twenty-four at the time of his death, working in lawnmower sales at a reported $2,000.00 per month. Dr. Burke calculated that had Mr. Charlton survived, his life expectancy was an additional 51.3 years, based upon statistics produced by the U.S. Department of Health and Human Services. A typical man in Mr. Charlton's position also had a work-life expectancy of an additional 34.3 years. Based upon his calculations of work-life and life expectancy, and based upon the average wages of a person who has some post-high school education but not a four-year college education, Dr. Burke determined that Mr. Charlton would have earned $2,145,000.00 had he worked to the age of fifty-nine, and $2,560,000.00 had he worked to the age of sixty-seven to attain his full Social Security benefits.

The position of the respondent is that it was Scott Charlton's failure to maintain control of his motorcycle that caused this accident, and not a "bump" in the northbound roadway of the bridge or the placement of the curve warning sign and the speed reduction plate.

Respondent asserts that Mr. Charlton did not have enough experience in the operation of motorcycles on roadways. Despite the fact that Mr. Charlton had been riding dirt bikes for some years, he did not obtain a motorcycle endorsement on his driver's license until April 1999, one month prior to the date of the incident herein. Further, the motorcycle on which Mr. Charlton was riding had been purchased by him in April 1999. West Virginia State Trooper Michael Fordyce, the investigating officer, testified that he believed that the cause of the accident was a lack of experience in the operation of motorcycles combined with an unfamiliar road. In the accident report, Trooper Fordyce cited failure to maintain control of the motorcycle as a contributing factor in the accident.

Mark Poe, Maintenance Crew Leader for respondent in Wetzel County, testified that he had no knowledge of any problems associated with U.S. Route 250 in the area of Mr. Charlton's accident. Mr. Poe stated that in August of 1998, his crew undertook a patching project along U.S. Route 250 for routine maintenance and hole patching. At that time, they made a small patch at the edge of the bridge in question in this case, in order to repair a low spot in the roadway. Randy Rush, Highway Administrator II for respondent in Wetzel County, testified that between 1997 and 1999 his office had received no complaints in regard to anything along that stretch of roadway on U.S. Route 250, including the bridge and the bridge approach. Respondent had not received any complaints concerning this patch between the time of the maintenance and the date of the incident involved herein.

Darrell Broughton, a team leader for respondent's bridge inspection team, was in charge of the inspection of the bridge that took place on November 13, 1998. On a bridge inspection, the inspectors examine the wearing surface, railing, waterway alignment, and basically everything to do with the bridge. Upon this inspection, the only defect he noted was the approach roadways. Mr. Broughton stated that the northbound approach roadway to the bridge had already been repaired, which in fact was the section that respondent had patched in August 1999. However, Mr. Broughton testified that the southbound lane had settled about three-quarters of an inch. He stated "the settlement was continuous all the way across the roadway along the back wall but with the patch there, the patch smoothed out the transition located in the northbound lane." He stated

that he was satisfied with the patch that had been made to the northbound lane. Mr. Broughton stated that he recommended that the partial repair be dealt with, in that it needed to be made completely across the roadway and not just in the northbound lane. His repair recommendation was submitted to the bridge inspection coordinator. Mr. Broughton stated that once he submitted his report it was up to the Bridge Department to decide what actions needed to be taken to implement his recommendations. The testimony of Randy Rush established that at no time were the respondent's employees in Wetzel County made aware of the recommendations of Mr. Broughton as put forth in the bridge inspection report.

Charles Raymond Lewis, II, Planning and Research Engineer for the Traffic and Engineering Division, testified for respondent as to the placement of the warning signs involved in this case. He testified that the distance from the point of curvature to the curve sign and speed reduction plate was one hundred thirty-nine feet. This sign assembly first became completely visible to oncoming motorists some five hundred sixty-seven feet before the sign. The MUTCD states that such a sign should be placed three hundred fifty feet from the point of curvature, but Mr. Lewis stated that the values included in the MUTCD are guidelines for engineers to base the placement of signs and that engineering discretion plays a large role in the actual placement of signs. These guidelines are not mandatory. They're not rigorous. He stated that there were several factors that led to the placement of the curve and speed reduction plate at one hundred thirty-nine feet away from the curve as opposed to three hundred fifty feet as recommended by the MUTCD. There is a side road sign which indicates to a northbound driver that he is approaching an intersection. Mr. Lewis stated that without this sign, there would be no way for a driver new to the road to know of the upcoming intersection and that another driver may be pulling out onto the roadway. There is also a guide sign placed at the intersecting road, informing drivers of which way destinations are located on U.S. Route 250. There is also a stretch along the northbound roadway that has been improved for vehicles to park alongside the road. Mr. Lewis stated it would be inadvisable to place signs in an area where vehicles maneuver as the sign is likely to get knocked down. Further, there are sight distance constraints in this area due to the embankment that is on the east side of the northbound lane. Due to these considerations, Mr. Lewis stated that the location of the sign at one hundred thirty-nine feet was not unreasonable. He went on to state that because the MUTCD is only a guideline, there can be no violations of it. In order for there to be a violation, it has to be a standard that applies in all cases. The applicable sections of the MUTCD are only recommendations, recommendations that allow for engineer discretion.

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 may be held liable only for defective conditions on or near a highway caused by its negligence. *State ex rel. vs. Gainer*, 151 W.VA. 1002; 158 S.E.2d 145 (1967). However, respondent is held liable only for those defective conditions that are the proximate cause of claimant's injuries or death. *Roush vs. 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 vs. Cumberland & Allegheny Gas Co.*, 138 W.Va. 639; 77 S.E.2d 180 (1953).

In the instant claim, the claimant has 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. Charlton's tragic death. Although the evidence established that respondent had notice of the need for further repairs on the bridge on U.S. Route 250 in Wetzel County, the evidence further established that the recommended maintenance was to have been performed on the southbound lane of traffic. The testimony adduced at hearing established that a crew for respondent had patched the northbound approach to the bridge involved in the incident herein in August of 1998. Respondent received no complaints in regard to this patch from the time the patch was put in place to the time of Mr. Charlton's accident. The testimony at hearing also established that the while the northbound approach to the bridge had a satisfactory patch on it, the southbound lane was in need of a repair. Darrell Broughton testified that in his recommendation for repairs to the bridge on U.S. Route 250, he recommended that the partial patch be completed, as the patch that was in the northbound lane needed to be extended to repair the southbound lane which had also settled. Based upon the evidence with regard to the southbound lane needing repairs while the northbound lane was in a satisfactory condition, the Court is of the opinion that claimant has not established that the alleged bridge or road conditions were the proximate cause of the motorcycle leaving the roadway. Claimant also alleged that the placement of the curve sign and advisory speed plate by respondent was negligent in that the placement of the signs was short of the recommended distance. The Court is of the opinion that the MUTCD recommended distance is an advisory one and that respondent was not negligent in its placement of the curve sign and advisory speed plate.

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 family; 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.

Claim disallowed.

The Honorable Benjamin Hays Webb, II, Judge, took part in the hearing of this claim, but he did not participate in the decision or opinion due to his untimely death. The Honorable Franklin L. Gritt. Jr., Presiding Judge, took no part in the hearings of this claim, having recused himself. The Honorable Robert B. Sayre and the Honorable George F. Fordham, Jr., Interim Judges, took part in the decision and the opinion in this claim.

OPINION ISSUED DECEMBER 27, 2004

JEFFREY LAFFERTY

VS.
DIVISION OF HIGHWAYS
(CC-03-071)

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 October 15, 2002, claimant was a pedestrian walking along Lochgelly Road in Oak Hill, Fayette County, when he stepped off the road and into an open drain that was covered by grass. Stepping into the hole caused injury to claimant's right leg.

2. Respondent was responsible for the maintenance of Lochgelly Road in Fayette County and respondent failed to maintain properly Lochgelly Road on the date of this incident.

3. As a result of this incident, claimant sustained medical expenses in the amount of $3,500, for which he had no insurance coverage.

4. Respondent and claimant have agreed that the sum of $2,100.00 is a fair and reasonable settlement for claimant's out-of-pocket medical expenses and for claimant's past and future pain resulting from his injury.

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

Accordingly, the Court is of the opinion to and does make an award in the amount of $2,100.00.

Award of $2,100.00.

OPINION ISSUED DECEMBER 27, 2004

RUTH SEARS
VS.
DIVISION OF HIGHWAYS
(CC-03-514)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 1996 Dodge Avenger struck a portion of broken blacktop on the edge of the road and berm while she was traveling on W. Va. Route 41 near Summersville, Nicholas County. W. Va. Route 41 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 1:00 p.m. on September 27, 2003, a sunny day. W. Va. Route 41 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that her husband, Dale Sears, was driving her vehicle on W. Va. Route 41 when another vehicle attempted to pass their vehicle. There was another vehicle approaching from the opposite direction, so her husband drove to the right side of the road to allow the passing vehicle to complete its pass of the claimant's vehicle. They suddenly heard a low "pop" so they proceeded a short distance and stopped. They exited the vehicle to find that both passenger side rims had been bent. Later that evening they went back to look at the area where their rims had been damaged. Mr. Sears described the broken blacktop section as having about an eight (8) to ten (10) inch depth, it was probably as long as a car and it was about one (1) foot wide. The broken section extended into the white line. Claimant's vehicle struck this broken section of blacktop and sustained damages totaling $930.68.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 41 at the site of the claimant's accident for the date in question.

Roger Brown, Assistant Supervisor for the respondent in Nicholas County, testified that he had no knowledge of this particular section of broken blacktop along the shoulder and berm on W. Va. Route 41 near Summersville for the date in question. Mr. Brown stated, however, that W. Va. Route 41 is a road that his crews work on quite often because of heavy coal truck and wood chip truck traffic. He testified that crews try to pull the stone back against the road to keep the berms maintained at least twice a year, sometimes three or four times during the year. He further stated that if any complaints are received, crews attempt to respond to these within two weeks. Mr. Brown also stated that his office receives many complaints at this time of year, however, he was aware of no complaints near the date of claimant's accident.

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). 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 instant case, the Court is of the opinion that respondent had constructive, if not actual notice of the section of broken blacktop on the edge of the road and the berm which claimant's vehicle struck and that this presented a hazard to the traveling public. The size of the section of broken pavement and the testimony that this was an area where large trucks routinely travel lead the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage 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 the claimant in this claim in the amount of $930.68.

Award of $930.68.

OPINION ISSUED DECEMBER 27, 2004

TIMOTHY DUNHAM, LORETTA DUNHAM, his wife
and JOEY SMITH
VS.
DIVISION OF HIGHWAYS
(CC-02-470)

Sharon N. Bogarad, Attorney at Law, for claimant
Andrew Tarr and Xueyan Zhang, Attorneys 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 19, 2000, claimants Timothy Dunham and Joseph Smith were passengers in a vehicle owned by Timothy Dunham and being operated by Gary F. Yingst. They were traveling on Hudson Hill Road in Weirton, Hancock County, when the driver of the vehicle lost control. The vehicle then went off the roadway, down a hill and collided into a tree.

2. Respondent was responsible for the maintenance of Hudson Hill Road in Hancock County and respondent failed to maintain properly Hudson Hill Road on the date of this incident.

3. As a result of this incident, claimants Timothy Dunham and Joey Smith sustained personal injuries.

4. Respondent and claimant have agreed that a sum of $31,000.00 is fair and reasonable settlement for claimants' out-of-pocket medical expenses and for claimants' past and future pain and suffering resulting from their injuries.

5. Respondent and claimant have agreed that of the total sum of $31,000.00 to be paid by respondent, claimants Timothy Dunham and Loretta Dunham are to receive the total sum of $24,000.00.

6. Respondent and claimant have agreed that of the total sum of $31,000.00 to be paid by respondent, claimant Joey Smith, who is now an adult, is to receive the total sum of $7,000.00.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Hudson Hill Road in Hancock County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained by claimant; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their losses.

Accordingly, the Court is of the opinion to and does make an award in the total amount of $31,000.00.

Award of $24,000.00 to Timothy Dunham and Loretta Dunham.

Award of $7,000.00 to Joey Smith.

OPINION ISSUED DECEMBER 27, 2004

ANDREA DEPTA, an infant through her father
and next friend, GARY DEPTA

VS.
DIVISION OF HIGHWAYS
(CC-02-163)

Mark Hobbs, Attorney at Law, for claimants.

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

PER CURIAM:

Claimants brought this action for damages related to an incident that occurred when 8 year old Andrea Depta (hereafter referred to as Andrea) fell off a bridge over Buffalo Creek near Kistler in Logan County. The bridge is maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on August 25, 2001. Claimant Andrea Depta, who had celebrated her 8th birthday about a month before the time of the accident, was standing on her bicycle on the bridge over Buffalo Creek looking for catfish. The bridge involved in this incident is a 15 feet wide, concrete, pre-fabricated bridge that is 45 feet long. The bridge had a curb that was five inches high and about six inches wide, but it had no guard rails. Andrea had been riding her bicycle with her friend, John Toler, also on his own bicycle, for a couple of hours when they decided to look for catfish in Buffalo Creek. She testified that she had previously looked for catfish in the creek while standing on the bridge, despite warnings from her parents to stay off the bridge. Her parents had warned her to stay off the bridge because there were no guard rails. Andrea testified that she was standing astride her bicycle with her foot on the curb looking over the edge when her foot slipped and she fell over the edge. Andrea fell about 10 or 11 feet and landed on a rocky area at the side of the creek. She attempted to break

her fall with her hands. As a result of the fall, she sustained two fractured wrists and lacerations to her forehead. She blacked out for a short period of time but then got up and started walking back to her home. John Toler ran to get help and was able to get his mother. Ms. Toler discovered Andrea walking up the street bleeding freely from her head. Ms. Toler got a cloth to put on her head and then walked Andrea to her parents' house. Gary Depta, Andrea's father, called for an ambulance and then proceeded to put her in his truck to take her to the hospital. On the way to the hospital, they were able to flag down the ambulance which then took Andrea to Logan General Hospital. She was then transferred to Charleston Area Medical Center where the wounds on her head were treated and both broken wrists were set. Claimant incurred over $9,800.00 in medical bills which were covered by Medicaid. Claimant seeks compensation for pain and suffering, mental anguish, and future medical expenses for cosmetic surgery on the scars that remain on Andrea's forehead.

Gary Depta, Andrea's father, testified that at the time of the accident he had been sitting in his home. Mr. Depta stated that the bridge had been installed about 12 years before the incident and that it had never had guard rails on it. He testified that he had told Andrea every day that she should not go onto the bridge because there were no guard rails on it and it was not safe for her to be there. He also stated that he had previously found her on the bridge despite his warnings and had punished her for this. Mr. Depta said that he had contacted respondent on several occasions before the accident to inquire about putting guard rails on the bridge, since this was the only access across Buffalo Creek to Route 16 for the residents in the area where the Depta's lived. This was also the only way the children in the area could get to their bus stop. He stated that after the accident Andrea had been in a lot of pain the entire time he was with her. He rode in the ambulance with her from Logan General Hospital to Charleston Area Medical Center. He testified that Andrea had surgery performed on her head the next morning followed by surgery to set her wrists. She was finally released from the hospital later in that day. Mr. Depta testified that Andrea could not do anything when she got home as both her arms were in casts. He and the rest of the family had to help Andrea do just about everything. He stated that because of her injuries, she missed six or seven weeks of school and that they had to bring in a home tutor to help her complete the school work she was missing. Mr. Depta testified that she had the cast on her left wrist for about five weeks and the cast on her right wrist, which was more severely broken, about two or three more weeks.

Sherry Depta, Andrea's mother, testified that when the bridge had first been put in place about 12 years ago, she had called the Logan Department of Highways to inform them that this was an area where children had to cross the bridge everyday to get to their bus stop. She also informed respondent that children play near this bridge all the time and for these reasons there should be guard rails on the bridge. Mrs. Depta was told on that occasion and on subsequent occasions when she called about the need for guard rails that the guard rails were not installed so that mobile homes could be moved in and out of the area. She testified that she made at least six or seven telephone calls to respondent about the need for guard rails before her daughter's accident. Mrs. Depta stated that on the date of the accident, she had taken her son to the local Dairy Queen and then on to her grandmother's house. When she got to her grandmother's, she was told to go home because there had been an accident. She arrived home just as Mr. Depta was preparing

to take Andrea to the hospital. They then put her into Mrs. Depta's vehicle and drove her until they were able to flag down the ambulance, which took her the rest of the way to the hospital. Mrs. Depta testified that while at the hospital, the doctors had given Andrea a local anesthesia while they put stitches in the wounds on her forehead but she had to be under general anesthesia when they set her wrists. After they got Andrea home, they had to help her do everything including feeding her, to dress her and to take her to the bathroom. Mrs. Depta testified that it was about a year before Andrea was fully recovered from her injuries, though she still favors her wrists when she trips and she sometimes complains of her wrists being sore if she writes for too long. Mrs. Depta also stated that her daughter has had dreams about falling off a bridge after the incident and that she now does not like high places.

Danielle Depta, Andrea's older sister, testified that she had taken Andrea across the bridge on numerous occasions. She further testified that their parents had told them on a regular basis that the bridge was not safe. She also stated that on previous occasions she had seen Andrea on the bridge and had told her that she should not be there.

The position of the claimant is that respondent was negligent by failing to properly maintain the bridge and by failing to properly install guard rails, and that as a direct and proximate result of the negligent acts of respondent claimant fell from the bridge and suffered damages.

The position of the respondent is that no action or failure to act on its part caused the claimant's injuries or the incident that led to those injuries. Upon the completion of claimant's case, respondent made a motion to dismiss based upon *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947), in that there had never been any guard rails at this location and this should be left to the discretion of the State Road Commissioner. Respondent also based its motion to dismiss on the fact that there had been no expert testimony presented by the claimant to show that the accident would not have happened if a guard rail had been in place. Further, respondent argued that the rebuttable presumption that a 7 to 14 year old is incapable of negligence established in *Pino vs. Szuch*, 185 W. Va. 476; 408 S.E.2d 55 (1991), had been met and Andrea should be found to be negligent in her actions that led to her falling from the bridge. The motion to dismiss was taken under advisement.

Terry Ellis, a transportation crew chief for the respondent in Logan County, testified that the bridge in question, which is just off Route 16 in Logan County, was installed in 1990 or 1992. He testified that he had received no complaints concerning any problems with this bridge prior to claimant's accident. Mr. Ellis found out about the accident a couple of days later. He also talked to Mrs. Depta several days after the accident about there being no guard rails on the bridge. Mr. Ellis maintained that he had received no notice of any problems or complaints about the bridge prior to the claimant's accident.

Curley Belcher, County Supervisor for the respondent in Logan County, testified that he had no knowledge of any complaints about this bridge prior to the date of the claimant's accident. Mr. Belcher stated that he found out that someone had fallen from the bridge at some point after claimant's accident, but that he had heard nothing else in regard to the bridge in question prior to that. He stated this bridge was the newest bridge that he was aware of that does not have guard rails. Mr. Belcher stated that for bridges

installed from around 1990 to the present, the bridge involved in this claim is the only one that he knows of that does not have any guard rails.

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). To be actionable, respondent's negligence must be the proximate cause of the claimant's injuries. *Roush vs. 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 vs. Cumberland & Allegheny Gas Co.*, 138 W.Va. 639; 77 S.E.2d 180 (1953). For a child between the ages of 7 and 14, there is a rebuttable presumption that the child is incapable of negligence; the burden is upon the party attempting to overcome the presumption to prove that the child has the capacity to be contributorily negligent. *Pino vs. Szuch*, 185 W. Va. 476; 408 S.E.2d 55 (1991).

This claim involves an eight year old child who slipped and fell from a bridge. As established in *Pino vs. Szuch*, there is a rebuttable presumption that a child between the ages of 7 and 14 is incapable of negligence. The burden lies upon the party that is attempting to overcome the presumption to prove by a preponderance of the evidence that the child had the capacity to be contributorily negligent. In this matter, respondent has made a motion to dismiss, based partly on the assertion that this burden has been met and Andrea should be held contributorily negligent. However, this Court finds that this burden has not been met and Andrea cannot be found contributorily negligent. In *Pino vs. Szuch*, the Supreme Court of Appeals established the standard to be followed holding that a child under the age of 7 is incapable of negligence, a child between the ages of 7 and 14 is presumed incapable of negligence, and a child over 14 is presumed to be capable of being negligent. The Supreme Court of Appeals went on to state that "[i]n order to rebut the presumption that a child between the ages of 7 and 14 lacks the capacity to be negligent, evidence of the child's intelligence, maturity, experience, and judgmental capacity must be presented ... It is also permissible to show that the child had been recently warned of the dangers associated with the activity that gave rise to his injury." *Id.* at 477, Syllabus 4. The Supreme Court of Appeals also stated that "[a] party is not entitled to rebut the presumption that a child between the ages of 7 and 14 is incapable of negligence with a binding instruction which focuses only on two factors, i.e., whether the child has been warned of the danger that caused his injury and whether the child was of sufficient intelligence to understand the danger." *Id.* at 477, Syllabus 4. The Supreme Court of Appeals further stated "there is no doubt, as the Pennsylvania court said in *Berman vs. Philadelphia Board of Education*, 310 Pa.Super153; 456 A.2d 543 (1983), that the presumption grows weaker as the fourteenth year grows closer." *Id.* at 479. In the instant case, there was substantial evidence that Andrea had been warned repeatedly of the dangerous condition of the bridge by her parents. There was also evidence presented that Andrea was a good student in school both before and after the accident. This however, was the limit of the evidence presented to rebut the presumption

that Andrea, as an eight year old, was incapable of negligence. Further, Andrea had turned eight years old about one month before this accident. As in *Pino*, if the presumption grows weaker as the fourteenth year grows closer, it can also be said that the presumption is stronger the closer the child is to the age of seven. Based upon the fact that Andrea was only 13 months removed from her seventh birthday, along with only the evidence that she had been warned of the danger and her intelligence, this Court finds that the rebuttable presumption that Andrea was incapable of negligence was not met; therefore she cannot be found guilty of contributorily negligence.

Regarding respondent's Motion to Dismiss based upon *Adkins vs. Sims*, this Court is not unmindful of it's previous decisions based upon *Adkins*. 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 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. . . ." *Adkins v Sims*, 130 W.Va. at 660, 661; 46 S.E.2d at 88, 89.

Based upon *Adkins*, this Court has previously ruled that respondent was not liable in a case where there was never guard rails on a bridge. *Springer vs. Division of Highways*, 24 Ct. Cl. 42. In *Blevins vs. Division of Highways*, 18 Ct. Cl. 164, this Court stated that "the absence of a guard rail does not in and of itself establish negligence." *Id.* at 165.

In the instant case however, the Court is of the opinion that respondent had at least constructive knowledge that installing and maintaining this bridge without guard rails was a hazard to the public. Evidence adduced at trial proved that Sherry Depta had telephoned respondent after the bridge was installed to inform them of the fact that the children in the neighborhood had to cross over this bridge every day during the school year to get to their school bus stop and then back to their homes. Mrs. Depta also informed respondent that the area in and around the bridge was one where the children frequently played. Mr. and Mrs. Depta made numerous other telephone calls to the respondent regarding this over the years. It was also established that this was the only way in and out of their neighborhood, with Route 16 just on the other side of this bridge. This bridge had replaced the only other way out of the area, thereby becoming the only

access to Route 16. The children that lived in the neighborhood had no other way to get to their school bus stop. While respondent is correct in asserting that *Adkins* leaves it to its own discretion where to place guard rails, this Court finds that the failure to place guard rails on this particular bridge, where it was made known soon after the bridge was installed that this was an area where children frequently had no choice but to be, was negligent.

Further, the Court, after considering that children frequently walked across and played on this bridge, finds that the bridge is a dangerous instrumentality. In *Sutton v. Monongahela Power Co.*, 151 W.Va. 961; 158 S.E.2d 98 (1967), the Supreme Court of Appeals stated that though this State does not recognize the doctrine of attractive nuisance, there is a similar rule for children:

> "Although the Attractive Nuisance Doctrine is not recognized in this State, this Court has adopted a rule quite similar to that doctrine and has held that where a dangerous instrumentality or condition exists at a place frequented by children who thereby suffer injury, the parties responsible for such dangerous condition may be held liable for such injury if they knew, or should have known, of the dangerous condition and that children frequented the dangerous premises either for pleasure or out of curiosity."

Id., at 971. The respondent knew that there were no guard rails on the bridge and was notified on several occasions that there were children frequently in the area of the bridge, therefore, this Court finds that the bridge was in fact a dangerous instrumentality, and therefore may be held liable for the injury sustained by the claimant.

Based upon the knowledge that children were often around and on the bridge, the claimant meets the first requisite of proximate cause where a 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. Respondent was made aware of the fact that children would be on this bridge either walking or playing. A person of ordinary prudence could foresee that children while playing on a bridge with no guard rails could in fact fall off while peering over the edge or even just walking too close to the edge. This in fact did happen when Andrea fell over the side of the bridge while looking over the edge for catfish. The Court finds that this accident was the result of respondent failing to place guard rails on the bridge, thus meeting the second requisite of proximate causation.

For the reasons stated above, the Court denies respondent's Motion to Dismiss. The Court is also of the opinion that respondent is liable for the damages which proximately flow from its inadequate protection of the traveling public in this location, and further, that respondent is liable for damages to claimants in this claim. However, it should be noted that claimants have claimed, in part, future medical expenses. In claimants' case in chief there was no evidence which established what Andrea's future medical expenses may be. No future medical expenses being proved in this case, the damages awarded in this claim do not include future medical expenses.

The Court, in making an award to Andrea, shall make the award to Gary Depta, Andrea's father and next friend, as her guardian. Accordingly, he must qualify as her guardian, and be bonded, and otherwise comply with West Virginia Code §§ 44-10-5 and 44-10-7.

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 Andrea Depta in this claim in the amount of $36,000.00.

Award of $36,000.00.

OPINION ISSUED DECEMBER 27, 2004

PAMELLA SHIELDS and DAVID SHIELDS
VS.
DIVISION OF HIGHWAYS
(CC-04-089)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their vehicle struck a hole while claimant Pamella Shields was traveling on W. Va. Route 41 near Craigsville, Nicholas County. W. Va. Route 41 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 1:00 p.m. and 1:30 p.m. on February 13, 2004, a clear afternoon. Claimant Pamella Shields was traveling on W. Va. Route 41 in their 2001 Chevrolet Cavalier. W. Va. Route 41 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that she was driving up a slight incline when the vehicle went into a dip in the road that caused her to lose control and the vehicle swerved and struck a broken section of blacktop along the berm of the road. As a result of claimants' vehicle striking the broken blacktop, there was damage to the right rear tire. The impact of the vehicle on the broken section of blacktop also caused damage to the front windshield, air conditioner, antenna, tail lamp and gas cap. Claimants' vehicle sustained damage totaling $3,834.99.[4] Claimants' insurance deductible was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 41 at the site of the claimant's accident for the date in question.

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[4]Included in the invoice provided to the Court by the claimants were some expenses to repair the front bumper, which was damaged by the tow truck that towed the vehicle in for repairs. However, the expenses incurred to repair the damages caused directly by the vehicle striking the broken blacktop substantially exceeded the insurance deductible.

Roger Brown, Assistant Supervisor for the respondent in Nicholas County, testified that he had no knowledge of any broken sections of blacktop along the berm on W. Va. Route 41 near Craigsville on the date in question. Mr. Brown stated that he was aware of no complaints concerning problems with the berm around the date of claimant's accident. He further testified that based upon photographs submitted by claimant, it appeared that at some point guard rail posts had been placed next to the shoulder to try to keep it in place.

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). 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 instant case, the Court is of the opinion that respondent had at least constructive notice of the section of broken blacktop along the berm and shoulder which claimants' vehicle struck and that this presented a hazard to the traveling public. The size of the section of broken pavement and the testimony that this was an area where the shoulder had been reinforced lead the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their 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 claimants in this claim in the amount of $500.00.

Award of $500.00.

OPINION ISSUED FEBRUARY 4, 2005

NED VIARS d/b/a CASS DIORAMA, INC.
VS.
DIVISION OF NATURAL RESOURCES
(CC-03-189)

Claimant appeared *pro se*.
Kelli Goes, Assistant Attorney General, for respondent.

GRITT, JUDGE:

Claimant brought this action for damages resulting from an alleged breach of contract for the operation of a diorama and show at the Cass Scenic Railroad State Park, a facility of the respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

On or about April 7, 1997, claimant and respondent entered into a contract for the operation of a diorama and an audio/video program at the Cass Scenic Railroad State Park (hereafter Cass). This was a new contract agreed to by the parties, although the parties had previously entered into contracts for the operation of the same diorama. The contract term was from April 7, 1997 to March 31, 2001. The contract provided that claimant was to operate the diorama during the months that Cass was open, from Memorial Day weekend until the end of October. According to the contract, claimant was to be paid $0.50 on each train ride ticket sold at Cass. Further, claimant was allowed to sell merchandise along with the operation of the diorama, and he was to pay fifteen percent (15%) of all gross receipts on merchandise sold and diorama ticket sales sold by claimant to the respondent. Claimant did not sell any tickets to the public for viewing the diorama during the period of this contract.

On January 23, 2001, a meeting was held between Bob Beanblossom, District Administrator with the Parks and Recreation section of the Division of Natural Resources, Billy Thomas, then superintendent at Cass, and claimant. At this meeting, Mr. Viars was informed that respondent would not be renewing the contract in the same form as it had been during the duration of the 1997 to 2001 contract. Mr. Viars was offered three options in the meeting: 1) a new contract with respondent which would provide that he would sell separate tickets to the public at the door for viewing the diorama and showcase; 2) respondent would buy the diorama from Mr. Viars outright; or 3) respondent would lease the diorama from Mr. Viars. Claimant stated in the meeting that he did not want to sell the diorama. The contract expired of its own terms on March 31, 2001.

In May 2001, claimant was contacted by Mr. Thomas to open the diorama and show for rail fan groups which were to be at Cass prior to its annual season. Claimant had opened the show before the season on weekends for rail fan groups in previous years. Before the beginning of the season, but after the rail fan groups came to Cass, claimant agreed to sell the diorama to respondent for $9,995.00. Claimant was not compensated for the operation of the diorama during the month of May 2001.

It is claimant's position that his company, Cass Diorama, overpaid respondent fifteen percent (15%) of the $0.50 per train ride ticket sold at Cass that it was paid during the duration of its contract with respondent, an amount that was not included in the contract, for an alleged loss of $32,500.00. Claimant also contends that respondent ordered his staff to stop selling T-shirts for 30 days, in spite of the fact that the contract with respondent provided for the sale of merchandise, for a loss of $2,000.00. Mr. Viars further alleges that respondent requested that claimant open the diorama and show in May 2001, but he was not paid for running the show during this time, resulting in a loss of revenue of $5,000.00. Additionally, claimant alleges that respondent forced him to sell the diorama, valued at $75,000.00, for $9,995.00, resulting in a $65,005.00 loss. Claimant's total alleged loss is in the amount of $104,505.00.

The position of the respondent was that the contract with Mr. Viars expired of its own terms on March 31, 2001. Respondent offered claimant three options for a new contract, one of which was for respondent to buy the diorama outright from Mr. Viars. Claimant eventually offered to sell the diorama for $10,000.00, but the final sale price was $9,995.00. Respondent further contends that there was an agreement in the contract whereby claimant was to pay respondent fifteen percent (15%) of all gross receipts on merchandise sold and diorama ticket sales sold by the contractor. Respondent subtracted the fifteen percent (15%) for the diorama ticket sales from the $0.50 they paid him for each railroad ticket sold by respondent.

DISCUSSION

The evidence adduced at hearing established that Mr. Viars originally approached Cass about building the diorama and running the show in the mid-1980s. Claimant built the diorama to look like the town of Cass between 1900 and 1930 with the help of others and collected information and photographs that were put together into a slide show. Claimant and respondent agreed to a new contract in 1997 for the operation of the diorama at Cass. Under this contract, claimant was to receive $0.50 for every train ride ticket sold. Claimant was also allowed to sell merchandise of which fifteen percent (15%) of the gross receipts would be paid to respondent. According to the contract, fifteen percent (15%) of all gross receipts on diorama ticket sales sold by claimant was also to be repaid to respondent. There were no diorama tickets sold during the entirety of the contract. However, evidence adduced at the hearing established that respondent subtracted fifteen percent (15%) from the $0.50 per ticket that claimant received from respondent. Mr. Beanblossom testified that it was his understanding that while there were no diorama tickets sold, these diorama tickets were included within the price of the train ride ticket. He stated that the fifteen percent (15%) was automatically taken out before sending Mr. Viars his share of the total tickets sold each month. Claimant testified that on several occasions he mentioned this fifteen percent (15%) that was being taken out of his payment to Mr. Beanblossom and how he did not think that he was supposed to pay this according to the contract. Mr. Viars also brought up this payment of fifteen percent (15%) to Mr. Thomas during a meeting in the spring of 2001. Claimant stated that at that time he thought that this was the reason that respondent wanted to rework the contract and did not want a contract similar to the contract of 1997 to 2001. Over the four year period of the contract, respondent deducted $19,146.15 from the $0.50 per ticket it paid Mr. Viars as per the contract terms.

The Court is of the opinion that respondent wrongfully withheld the fifteen percent (15%) from the amount that it paid claimant for the $0.50 per train ride ticket sold. While there was a provision in the contract that provided for claimant to pay the respondent fifteen percent (15%) of the gross receipts based upon any diorama tickets that were sold, the contract did not purport to include the cost of diorama tickets in the price of train ride tickets. Respondent stated that it understood the contract to include the cost of the diorama tickets in the price of the train ride ticket. The fact that there were separate provisions in the contract which set out “diorama ticket sales” and “train ride tickets” is indicative that the diorama tickets were not included in the price of the train ride tickets. Therefore, the Court is of the opinion to make an award of $19,146.15 to claimant.

The claimant's second claim is for a loss that resulted when respondent stopped his staff from selling T-shirts at the diorama. According to the terms of the contract entered into by claimant and respondent, Mr. Viars was allowed to sell merchandise at the diorama. During the term of the contract, Mr. Viars testified that the only merchandise he sold was T-shirts. Jerry Wilson, who was employed by Mr. Viars to operate the diorama during the season, testified that these shirts sold for $11.95. Mr. Wilson stated that at some point in July or August of 2000, he was approached by an employee of respondent and told to stop selling the T-shirts. He testified that he was kept from selling the shirts for a couple of weeks and then he was told that he could resume selling them. Mr. Wilson estimated that during a two week period he probably sold $500.00 to $1,000.00 worth of shirts at the diorama. Billy Thomas, Superintendent at Cass from May 2000 to August 16, 2002, testified that he had asked Mr. Wilson to stop selling the shirts briefly in July of 2000. Mr. Thomas stated that another employee of respondent had approached him and informed him that Mr. Wilson was selling shirts at the diorama and that this might be in violation of the contract between claimant and respondent. Mr. Thomas then asked Mr. Wilson to stop selling the shirts. Mr. Thomas was then advised by a superior in the Division of Natural Resources that he should allow the sale of the T- shirts. He was of the opinion that he had stopped the sale of the shirts for one day at most. Claimant testified that to his knowledge at least one week went by when the staff was not allowed to sell shirts. The Court concludes that Mr. Viars was permitted to sell merchandise according to the contract and that respondent wrongfully prevented him from selling the T-shirts for one week. This resulted in a loss for claimant of $500.00. Therefore the Court is of the opinion to and does make an award of $500.00 to claimant.

Claimant also alleges that he was not compensated for opening the diorama for rail fan groups in the spring of 2001. In May 2001, claimant opened the diorama early at the request of the respondent for rail fan groups who visited Cass prior to the official opening of the season. Mr. Viars and Jerry Wilson had to work for a couple of weeks to get the diorama ready for the early opening. Mr. Wilson stated that Cass would routinely open for visits from rail fan groups and that the diorama would also open early every year for these visitors. Billy Thomas testified that this was a common request each spring. The rail fan groups paid a group rate based upon the number of visitors that came to Cass. There were three groups that came to Cass in May 2001. All three groups typically brought a total of 335 people to Cass each year when they came in May. Mr Thomas further stated that Mr. Viars was not compensated for opening and running the diorama in May 2001. Respondent found evidence of a payment to Mr. Viars in 1998 for rail fan groups coming to Cass in the month of May that particular year. The documents established that claimant was paid $0.50 per person for each rail fan group that came to Cass.

The Court is of the opinion that respondent was responsible for compensating claimant for the work he did in opening the diorama during the month of May 2001, as respondent had previously compensated Mr. Viars for similar events. Based upon the evidence that it was typical for there to be approximately 335 total visitors to Cass with the rail fan groups, the Court is of the opinion to and does make an award to claimant in the amount of $167.50.

The last assertion made by claimant is based upon the sale of the diorama to respondent. Claimant alleges that he was forced to sell the diorama for $9,995.00, resulting in a loss of $65,005.00. The sale of the diorama came about after the January 23, 2001, meeting between Mr. Beanblossom, Mr. Thomas, and Mr. Viars. At that time, claimant was offered the previously discussed three options of respondent leasing the diorama from claimant, claimant selling his own tickets to the public at the door for viewing the diorama, or respondent would buy the diorama outright from claimant. Claimant stated that he informed Mr. Beanblossom at the meeting that he did not want to sell the diorama. Both Mr. Viars and Mr. Beanblossom stated that after the meeting each of them thought that there was going to be a new contract in some form or another. Mr. Viars eventually contacted Mr. Thomas and stated that he would be willing to sell the diorama for $10,000.00. Claimant contended that he came to this decision only after being told that he had to either sell the diorama or remove it from the building it was in, which according to claimant was not a valid option. Mr. Thomas contacted Mr. Beanblossom concerning claimant's offer. Mr. Beanblossom informed Mr. Thomas that because of purchasing guidelines, they could pay $9,999.00 or less right away. Mr. Viars eventually agreed, and on June 6, 2001, an agreement to sell was reached for a price of $9,995.00.

The Court is of the opinion that the decision made by Mr. Viars was a business decision that he made of his own accord. Testimony from both claimant and respondent established that while the contract was not going to be renewed by respondent, three options were given to claimant including selling the diorama to respondent. There was no evidence presented that indicated that respondent eliminated the other options and forced claimant to sell the diorama. Therefore, claimant's claim for the alleged lost value on the sale of the diorama is denied.

In accordance with the findings of fact as stated herein above, the Court is of the opinion to and does make a total award to claimant in the amount of $19,813.65.

Award of $19,813.65.

OPINION ISSUED FEBRUARY 8, 2005

MICHAEL T. DILLON and CHASTITY DILLON
VS.
DIVISION OF HIGHWAYS
(CC-04-424)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 1999 Jeep Cherokee struck a branch from a tree that was overhanging the roadway while claimant Chastity Dillon was traveling on County Route 4 in Monroe County. County

Route 4 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred around 9:00 a.m. on June 28, 2004. County Route 4 is a one-lane road with gravel shoulders on both sides of the road at the area of the incident involved in this claim. Claimant Chastity Dillon testified that she was driving on County Route 4 when she had to drive her vehicle onto the right shoulder to make room for a vehicle approaching in the opposite lane. Ms. Dillon testified that she saw some leaves overhanging the roadway. When she drove her vehicle under the leaves, a branch struck the corner of the vehicle's windshield, cracking the windshield. She testified that the branch also dented the upper portion of the vehicle's roof. Claimants' vehicle sustained damage totaling $671.30. Claimants' insurance deductible was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 4 at the site of the claimant's accident for the date in question.

Marion Bradley, supervisor for the respondent in Monroe County, testified that he had no prior knowledge of a tree branch overhanging County Route 4. Mr. Bradley stated that County Route 4 was a one lane road that was about 15 feet wide. He stated that after Ms. Dillon contacted him about the branch, he had a crew drive to the area of claimant's incident and cut down the branch.

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 case, the Court is of the opinion that respondent had at least constructive notice of the branch overhanging the roadway which claimants' vehicle struck and that the branch presented a hazard to the traveling public. County Route 4 is a one lane road where drivers must use the shoulders if there is another vehicle that is passing. The location of the branch over the travel portion of the road leads the Court to conclude that respondent had notice of this hazardous condition and that respondent 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.

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 claimants in this claim in the amount of $500.00, their insurance deductible.

Award of $500.00.

OPINION ISSUED FEBRUARY 8, 2005

LANDON A. KENNEDY
VS.
DIVISION OF HIGHWAYS

(CC-04-292)

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

PER CURIAM:

Claimant brought this action for damages which occurred when his dog was electrocuted by a power line that had been severed during a mowing project on County Route 6/9 in Wyoming County. County Route 6/9 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred sometime between 1:30 a.m. and 9:30 a.m. on May 4, 2004. County Route 6/9 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he had been raccoon hunting with his Red Tick Coon Dog and another dog. Mr. Kennedy had purchased the Red Tick Coon Dog in August 2003 for $1,150.00. At some point the dog caught the scent of a raccoon and chased the animal. Claimant stated that he then lost track of his dog, but having to wake up early the next day to go to work, he decided to go home for the night. Mr. Kennedy stated that raccoon hunting dogs such as his would either come home or find some place that they were familiar with in the morning if they are out hunting. He called a neighbor and asked him to pick the dogs up the next morning. At 9:30 a.m. Mr. Kennedy received a telephone call stating that his dog had been found in Reedy Creek just off of County Route 6/9. Claimant arrived at the scene of the incident shortly thereafter. A friend of claimant's had attempted to pull the dog out of the creek, but there was a downed power line in Reedy Creek that was still energized so they had to contact American Electric Power Company to come to the scene to deactivate the power line before Mr. Kennedy could recover his dog. Claimant stated that he talked to Mike Hatfield and Wayne Bailey, employees of respondent, who had been out mowing in the area of the incident the day before claimant's dog was found dead. Mr. Hatfield told claimant that they had been mowing in the area adjacent to the road when a cut tree or bush fell into the power line. Mr. Kennedy was informed that the two men had reported the incident to their office, which was supposed to contact American Electric Power Company. Claimant stated that his dog was pregnant at the time of the accident, but that he did not know how many pups his dog was carrying. He further stated that he had agreed to give the pick of the litter as a stud fee for breeding his dog. Mr. Kennedy stated that a Red Tick Coon Dog pup was valued at $450.00. Claimant also had a tracking system on the dog which cost $185.00. Claimant claims $2,500.00 in damages.

The position of the respondent is that it had done all that was required of it after knocking over a power line adjacent to County Route 6/9 at the site of the claimant's accident for the date in question.

Mike Hatfield, an equipment operator for the respondent in Wyoming County, testified that on May 3, 2004, he and Wayne Bailey were mowing brush along County Route 6/9. He stated that he was clearing brush in a blind curve so drivers could see past the curve. Mr. Hatfield testified that there was a power line amongst the brush that he was cutting that he did not see, and that when he cut the brush it hit the power line. Mr. Hatfield stated that he and Mr. Bailey then went to one of the neighboring houses where

they made a telephone call to respondent's main office in Pineville to inform them that a power line had been hit and the office needed to notify American Electric Power Company. After calling in the incident, Mr. Hatfield stated that he and Mr. Bailey left the area for the day. When they arrived at their base of operations, they again called respondent's main office in Pineville to make sure that American Electric Power Company had been called. Mr. Hatfield testified that other than making the telephone call he had not done anything else regarding the incident.

Wayne Bailey, a craft worker II for respondent in Wyoming County, testified that he had been mowing about 100 feet in front of Mr. Hatfield when Mr. Hatfield contacted him using his CB radio. Mr. Bailey stated that he turned around and saw smoke coming from the power pole that the downed power line was connected to. He reiterated the fact that they had informed respondent's main base of the incident but that after that they had done nothing more. Mr. Bailey stated that in the training he had received in the operation of the equipment he would be using while working for respondent, he had been told that in the case where a power line was hit he was to contact his headquarters and to make sure that everything was taken care of before he leaving the scene.

Oliver Stewart, county administrator for respondent in Wyoming County, stated that he first became aware of the situation regarding a downed power line when a clerk informed him that she had been called by one of the mower operators about it. He stated that he was told American Electric Power Company had been contacted, but he further stated that he did not check with American Electric Power Company himself.

In the instant case, the Court is of the opinion that respondent's employees were negligent in leaving the area where a live power line was down before a crew arrived to assess the situation. While the employees who accidentally knocked over the power line did act appropriately in contacting their headquarters about the incident, respondent should have made sure that someone was at the scene so that no one would be injured by this live power line. Thus, the Court finds respondent negligent and claimant may make a recovery for the damages of $1,150.00 for his dog, $185.00 for the tracking system and $450.00 for the stud fee, for total of $1,785.00.

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 this claim in the amount of $1,785.00.

Award of $1,785.00.

OPINION ISSUED MARCH 28, 2005

FORREST G. FIELDS
VS.
DIVISION OF HIGHWAYS
(CC-03-338)

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

PER CURIAM:

Claimant brought this action for property damage to his real estate which he alleges occurred as a result of respondent's negligent maintenance of a drainage system. Claimant's residence is located in Roane County. The Court is of the opinion to deny the claim for the reasons more fully stated below.

Claimant's property is adjacent to County Route 19/8, locally known as Mount Hope Road. The incident giving rise to this claim occurred on June 13, 2003. A heavy rainfall occurred around June 13, 2003, which resulted in part of claimant's property slipping and giving way which is the basis for the claim herein. Mr. Fields asserts that at some time prior to June 13, 2003, respondent conducted a project on County Route 19/8 and removed a ridge of dirt from the side of the road. Claimant alleges that it was this action by respondent that channeled more water onto his property, as the water from the roadway now flowed down a hillside and in front of the house on his property. Mr. Fields stated that there were two slips that occurred on June 13, 2003. The first slip occurred adjacent to the roadway, causing dirt and debris to slip onto the driveway to his house. This slip along the road had occurred previously and had been there for nearly 20 years. Mr. Fields testified that respondent had previously attempted to repair this slip on several occasions. Claimant testified that this slip blocked off the drainage ditch alongside his driveway which caused more water to flow into the front lawn. The second slip occurred in the front lawn of his property. Claimant asserts that due to the actions of respondent in removing the mound of dirt from the side of County Route 19/8, more water has flowed onto this section of his property, causing part of the lawn to slip. Mr. Fields testified that prior to the removal of the ridge of dirt by respondent there had been no slippage problems with the front lawn of his property. As a result of the land slip on his property, claimant alleged damages in the amount of $3,500.00 for the cost of repairing the damage that was done to his property.

Sheila Chapman testified on behalf of the claimant that she would help take care of claimant's property with her sister and brother-in-law when Mr. Fields was not at the property. Ms. Chapman stated that she tried to help the claimant by contacting respondent about the slip in the road. She was also at the property shortly after the slip in the front lawn occurred. Ms. Chapman testified that the slip came after a heavy rain. She also stated that she witnessed water flowing from the hill from County Route 19/8 around the date of the incident involved herein.

The position of the respondent is that it was not negligent in the maintenance of the drainage system on County Route 19/8. Respondent conducted work on the shoulders and ditches of County Route 19/8 on August 27, 2002. Lee Thorne, Assistant District Engineer for Maintenance for District Three, which includes Roane County, testified that he is in charge of the slip repair program for District Three. Mr. Thorne stated that respondent has been aware of the slip along County Route 19/8 for some time. He stated the slip is approximately 85 feet long. Mr. Thorne testified that in District Three the slip on County Route 19/8 was slip number 88 on the list of slips to repair in the district and that it was number four on the list of slips to repair in Roane County. However, Mr. Thorne stated that there is no design as of yet for the repair of this slip. According to Mr. Thorne, this was a relatively minor slip and that it is simply a matter of funding and setting priorities based on traffic flow to determine which slips are repaired. He also

stated that the soil types in the area of claimant's property are prone to slips, especially when there is a lot of rain.

Elizabeth Lilly, a professional engineer employed by respondent, conducted an on-site inspection of claimant's property. Ms. Lilly testified that she observed the natural drainage pattern of the land. She opined that regardless of whether the ditch line along the driveway of claimant's property was blocked, water would flow into the same area of claimant's front lawn due to the natural drainage in that area. Ms. Lilly testified that there was a drain pipe that led from the ditch line adjacent to the driveway to the area of the front lawn that slipped. She stated that due to the natural drainage pattern and the steepness of the driveway, the majority of the water would flow down the driveway and into the same location in the front lawn regardless of whether it flowed in the ditch line alongside the driveway or if it flowed onto the driveway because the ditch line was blocked by debris. Ms. Lilly stated that the slip in the front lawn was in the area where the water came out of the drain but much wider, which was probably attributable to a few years of excessive rain. She also stated that this area was prone to slips in the land due to the type of soil in the area. This Court has held that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught vs. 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. *Rogers vs. Div. of Highways*, 21 Ct. Cl. 97 (1996).

In the instant claim, claimant has failed to establish that respondent maintained the drainage structures on County Route 19/8 in Roane County in a negligent manner. The terrain in this area of County Route 19/8 forms a natural drainage area onto claimant's property. The Court concludes from all the testimony and evidence that the water that flowed into claimant's front lawn would have flowed into that same area regardless of whether the ditch line alongside the driveway was blocked or not. Consequently, there is insufficient 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 as stated herein above, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED APRIL 26, 2005

DANIEL BRYANT and DEBRA BRYANT
VS.
DIVISION OF HIGHWAYS
(CC-04-023)

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

PER CURIAM:

Claimants brought this action for property damage to their home which they allege occurred as a result of respondent's negligent maintenance of a drainage system. Claimants' residence is located at 200 Sidney Street, Beckley, Raleigh County. Sidney Street is a road maintained by respondent. The Court is of the opinion to deny the claim for the reasons more fully stated below.

Claimants' property is located on Sidney Road in Beckley. There were several incidents that occurred that gave rise to this claim. Heavy rainfalls occurred on November 12, 2003, November 19, 2003, and in June and October 2004, which resulted in flooding of claimants' garage and basement which is the basis for the claim herein. Debra Bryant stated that they bought the property in March 1998. She testified that they had not had problems with flooding prior to the November 2003 floods. Ms. Bryant stated that their residence is below the road level and that there is a drain at the bottom of their driveway. She testified that the drain is about four to six inches wide and four to six inches deep. Claimants assert that water flows from Cochran Street onto Sidney Street where it then it flows from Sidney Street onto their driveway. The drain at the bottom of their driveway is not large enough to accommodate all of the runoff during heavy rainfalls. During such heavy rainfalls the water accumulates around the drain where it seeps into the garage and into the basement. Ms. Bryant stated that approximately an inch or two of water would accumulate in the basement. The water also flows around the side of the house washing dirt away from the foundation of the house as it flows to the backyard. Ms. Bryant testified that they installed a curb at the top of the driveway to help prevent water from flowing down their driveway, but that this only slows the water rather than stopping any water from flowing onto the driveway. The water has caused damage to the foundation of the house as well as the problems with water in the basement and garage.

Claimants contend that respondent has failed to provide an adequate drainage system along Cochran Street and Sidney Street. Claimants also testified that there is water that flows into their driveway from the property on the opposite side of Sidney Street from their property that is at a higher elevation. Daniel Bryant testified that in October 2003 construction began on three new houses on the hillside above and across from their property. That source of water flows down the hillside from the lots of the newly constructed houses and through the backyards of other houses on a street perpendicular to Sidney Street whenever there is a heavy rainfall. The path of the flowing water was depicted in photographs submitted in evidence

The position of the respondent is that it was not negligent in the maintenance of the drainage system on Sidney Street in Beckley. Joe Adkins, foreman for respondent in Raleigh County, testified that he first learned of claimants' flooding problems in November 2003 when Ms. Bryant called to report the problem. Mr. Adkins stated that Sidney Street is a low priority, single lane road. He testified that in November 2003 there had been floods in the Beckley area. He further stated that between October 2003 and October 2004 there had been no major projects undertaken by respondent in this area and that only basic maintenance such as patching has been performed by respondent.

This Court has held that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught vs. 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. *Rogers vs. Div. of Highways*, 21 Ct. Cl. 97 (1996).

In the instant claim, claimants have failed to establish that respondent maintained the drainage structures on Sidney Street in Raleigh County in a negligent manner. The evidence establishes that water flows onto claimants' property not only from the State maintained roadways but also from private property located across the street from claimants' property on the hillside where new construction is ongoing. There are more sources of the water flowing on Sidney Street than just that from the road itself. Consequently, there is no evidence of negligence on the part of respondent upon which to base an award. While there may be other remedies available to claimants to resolve the root source of the water flowing onto their property, there is no remedy that this Court may award 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.

REFERENCES
Court of Claims

- **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**
- **MOTOR VEHICLES**
- **NEGLIGENCE – See also Berms; Falling Rocks and Rocks & Streets and Highways**
- **NOTICE**
- **PEDESTRIANS**
- **PRISONS AND PRISONERS**
- **PUBLIC EMPLOYEES**
- **STATE AGENCIES**
- **STREETS & HIGHWAYS – See also Comparative Negligence and Negligence**
- **TREES and TIMBER**
- **VENDOR**
- **VENDOR – Denied because of insufficient funds**
- **WEST VIRGINIA UNIVERSITY**

The following is a compilation of head notes representing decisions from July 1, 2003 to June 30, 2005. 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

MARTIN VS. DIVISION OF HIGHWAYS

Claimant brought this action for damage to his vehicle which occurred when he was operating his vehicle northbound on State Route 20 in Upshur County and the vehicle struck a hole on the edge of the road. The Court is of the opinion that respondent had constructive notice of the hole and the broken edge of the pavement at the location of this incident. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). The evidence established that there was a hole on the

berm that had eroded the pavement and extended well into and beyond the white edge line. Award of $50.21. . . . . p. 69

MCCOY VS. DIVISION OF HIGHWAYS (CC-03-239)
Where claimant's vehicle struck a drainage grate while he was driving onto W.Va. Route 10, Logan County. The Court held that claimant failed to establish that respondent is responsible for the drain. Claim disallowed. . . . . p. 175

MCNEMAR VS. DIVISION OF HIGHWAYS (CC-03-557)
Claimant's vehicle struck a hole on W.Va. Route 58, Harrison County. The Court concluded that respondent had notice of the hazardous condition, and had adequate amount of time to take corrective action. Thus, respondent was negligent. Award of $500.00. . . . . p. 182

PERRINE VS. DIVISION OF HIGHWAYS (CC-03-255)
Claimant brought this action for damage to her vehicle which occurred when she was operating her vehicle on State Route 41 in Persinger, Nicholas County, and the vehicle struck a large hole in the road. The size of the hole and its location in the berm leads the Court to conclude that the respondent had constructive notice of this hole. Award of $491.92. . . . . p. 78

RUNYON VS. DIVISION OF HIGHWAYS (CC-02-450)
Claimant brought this action for damage to his vehicle which occurred when he was operating his vehicle on County Route 10 in Wyoming County and he was forced to drive onto the berm of the road to avoid an oncoming truck. When he drove onto the berm, his vehicle struck a large hole. The evidence established that County Route 10 at the location of this incident presented a hazardous condition to the traveling public. Award of $500.00. . . . . p. 96

SEARS VS. DIVISION OF HIGHWAYS (CC-03-514)
Claimant's vehicle struck a portion of broken blacktop on the edge of the road and berm while she was traveling on W. Va. Route 41 near Summersville, Nicholas County. The Court made an award of $930.68. . . . . p. 215

SHIELDS VS. DIVISION OF HIGHWAYS (CC-04-089)
Claimants' vehicle struck a portion broken blacktop along the berm of the road while Pamella Shields was traveling on W. Va. Route 41 near Craigsville, Nicholas County. The Court made and award of $500.00. . . . . p. 223

WEST VS. DIVISION OF HIGHWAYS (CC-02-303)
Claimants brought this action for damage done to their vehicle which occurred when their son, Klint West, was driving their vehicle southbound on I-79 near Bridgeport, Harrison County, and the vehicle struck numerous large holes on the berm of the highway. The Court is of the opinion that the evidence established that I-79 at the location of this incident presented a hazardous condition to the traveling public. *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). Award of $500.00. . . . . p.13

BRIDGES

DOMENICO VS. DIVISION OF HIGHWAYS (CC-03-201)

Claimant brought this action for damage to his vehicle which occurred when he was traveling westbound over a bridge on Route 9 near Hedgesville, Berkeley County, and his vehicle struck a large hole in the road. The Court held that respondent owes a duty to motorists to exercise reasonable care and diligence in maintaining roads under all circumstances. *Hobbs v. Dept. of Highways*, 13 Ct. Cl. 27 (1979); *Lewis v. Dept. of Highways*, 16 Ct. Cl. 136 (1985); *Adkins v. Div. Highways*, 21 Ct. Cl. 13 (1995). p. 54

FRAZIER VS. DIVISION OF HIGHWAYS (CC-02-493)

The parties stipulated that claimants' vehicle was damaged when it struck an ice covered bridge on I-79 in Big Otter, Clay County. The Court reviewed the claim and made an award to claimant based upon the stipulation. . . . . p. 25

GUNNO VS. DIVISION OF HIGHWAYS (CC-03-077)

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent. Claimant was traveling across the Coal River Bridge on Route 60 in Kanawha County when her vehicle struck a hole. The Court found the respondent to be negligent in its maintenance of Route 60 in Kanawha County; however, claimant failed to provide a copy of her insurance declaration of coverage to determine her deductible. Claim disallowed. . . . . p. 159

HAYNES VS. DIVISION OF HIGHWAYS (CC-03-049)

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent. Claimant was traveling across the Amandaville Bridge on Route 60 in St. Albans, Kanawha County, when her vehicle struck a hole in the road causing damage. The Court held that respondent was negligent in its maintenance of the Amandaville Bridge on Route 60 in Kanawha County; 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. Award of $250.00. . . . . p.149

JONES VS. DIVISION OF HIGHWAYS (CC-02-378)

Claimant brought this action for damage to his vehicle which occurred when he was operating his vehicle northbound on I-79 near Fairmont in Marion County and it struck a hole located on a bridge. In the present claim, the Court is of the opinion that claimant failed to establish any negligence on behalf of the respondent. . . . . p. 109

JORDAN VS. DIVISION OF HIGHWAYS (CC-03-296)

The parties stipulated that claimant's vehicle was damaged when it struck a loose steel joint while he was traveling on the Elk River Bridge. The Court made an award of $153.70. . . . . p. 205

MCJUNKIN, M.D. VS. DIVISION OF HIGHWAYS (CC-02-424)

Claimants brought this action for damage to their vehicle which occurred when claimant Brittain McJunkin M.D., was operating their vehicle on I-77 near Charleston, Kanawha County, and the vehicle struck a metal expansion joint protruding between the road and the bridge. The Court is of the opinion that claimants have failed to establish by a preponderance of the evidence that respondent knew or should have known that the expansion joint on I-77 was in a state of disrepair at the time of the accident. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). Claim disallowed. . . . . p. 66

MURPHY VS. DIVISION OF HIGHWAYS (CC-01-188)

Claimant brought this action as Administratrix of the Estate of Scott Charlton, her son, who died in an incident that occurred when Scott Charlton was operating his motorcycle on U.S. Route 250, Wetzel County, and he allegedly encountered a bump on a bridge near Hundred causing him to lose control of his motorcycle. The Court held that claimant failed to establish that the respondent committed any act or omission in its maintenance of the road and bridge in question. Claim disallowed. . . . . p. 209

PITTS VS. DIVISION OF HIGHWAYS (CC-00-413)

Claimant was injured when a piece of concrete fill from the interstate bridge over Norwood Road and struck him on the head as he was walking underneath the bridge. Respondent acknowledged that it had at least constructive notice that pieces of concrete had fallen from the interstate bridge prior to the claimant's incident. Respondent and claimant agreed to settle this claim for claimant's out-of-pocket medical expenses and for claimant's past and future pain and suffering resulting from his injuries. Award of $9,000.00. . . . . p. 95

SHAFFER VS. DIVISION OF HIGHWAYS (CC-00-490)

Claimant brought this action for personal injuries and damage to her vehicle which occurred when she was operating her vehicle on the Route 60 bridge that crosses Coal River in St. Albans, Kanawha County, and a portion of the pavement gave way creating a large hole which the vehicle struck Respondent stipulated to liability in this claim. Claimant incurred medical expenses as a result of the injuries sustained in this incident. Claimant recovered medical expenses and special damages including the insurance deductible. . . . . p. 37

YANCHAK VS. DIVISION OF HIGHWAYS (CC-03-506)

Claimants' vehicle struck a hole on bridge on I-79 near Fairmont, Marion County. The size of the hole and the time of the year in which this incident occurred lead the Court to conclude that respondent had constructive, if not actual, notice of this hazardous condition. Award of $229.06. . . . . p. 187

CONTRACTS

VIARS VS. DIVISION OF NATURAL RESOURCES (CC-03-189)

Claimant brought this action for damages resulting from an alleged breach of contract for the operation of a diorama and show at the Cass Scenic Railroad State Park. The Court held that respondent wrongfully withheld fifteen percent from the amount that it paid claimant for the fee per train ride ticket sold. In addition, the Court awarded an amount for the work claimant performed in opening the diorama for the month of May 2001. However, claimant also alleged he was forced to sell the diorama for less than it was worth; however, this portion of the claim was disallowed. Award of $19,813.65. . . . . p. 225

COMPARATIVE NEGLIGENCE - See also Berms; Falling Rocks and Rocks; Negligence & Streets and Highways

BROWN VS. DIVISION OF HIGHWAYS (CC-01-213)

Claimants brought this action for personal injuries received by claimant James Brown, for loss of consortium suffered by claimant Angela Brown, his wife, and for loss of comfort suffered by his children when claimant James Brown had an accident while operating a motorcycle on Tony's Branch Road in Boone County. The Court held that respondent was negligent in its maintenance of Tony's Branch Road. See also *Hale v. Dept. of Highways*, 11 Ct. Cl. 93 (1976), *Withrow v. Dept. of Highways*, 17 Ct. Cl. 47 (1987), *Boyle v. Division of Highways*, 19 Ct. Cl. 103 (1992). In addition, the Court held that claimant James Brown bears 33⅓ of the responsibility for the accident herein and the injuries resulting therefrom. . . . . p. 31

BUNTING VS. DIVISION OF HIGHWAYS (CC-03-055)

Claimant brought this action for damage to her vehicle which occurred when she was traveling on County Route 50/9 in Smithburg, Dodddridge County, and the vehicle struck a large hole in the road. The Court held that the hole in the road on County Route 50/9 at the location of this incident constituted a hazardous condition to the traveling public; however, the Court is also of the opinion that claimant knew about the hole on County Route 50/9 and she could have avoided the defect. The Court found that claimant failed to act as a reasonably prudent driver under the circumstances, and further, that claimant's negligence in this claim is equal to or greater than the respondent's. *Bradley v. Appalachian Power Company*, 163 W. Va. 332, 256 S. E. 2d 879 (1979). Claim disallowed. . . . . p. 136

HIGGINBOTHAM VS. DIVISION OF HIGHWAYS (CC-02-261)

Claimant's vehicle sustained damage when their vehicle struck a boulder on the edge of Floradale Drive near Cross Lanes in Kanawha County. The Court held that respondent had at lease constructive if not actual notice of the rocks at the edge of the road. In addition, the Court determined that claimant was 40% negligent for the incident that occurred. Award $1,199.18. . . . . p. 10

DAMAGES

ADKINS VS. DIVISION OF HIGHWAYS (CC-03-265)

The parties stipulated that claimant, Thoms A. Adkins II was traveling westbound on I-64, Kanawha County, from Charleston to Cross Lanes, when he came upon a section of highway that was under construction. The difference in the height of the roadway caused claimants' vehicle to sustain damage. The Court made an award of $250.00. . . . . p. 174

FRIEND VS. DIVISION OF HIGHWAYS (CC-02-425)

Claimant's vehicle was damaged when it struck a piece of metal in the road. Respondent admits the validity and amount of the claim. . . . . p. 66

WATTS VS. DIVISION OF HIGHWAYS (CC-01-187)

Claimant brought this action for property damage to her home located in Dunbar, Kanawha County, from a construction project on I-64 on October 2000. The Court held that the claimant did not establish that the damage to her home was caused by any specific acts or omissions on the part of the respondent. *Louk v. Isuzu Motors, Inc.*, 198 W. Va. 250, 479 S.E. 2d 911 (1996). In addition, it would be mere speculation for the Court to assume that respondent negligently induced vibrations that proximately caused the damage to claimant's property. *Mooney v. Dept. of Highways*, 16 Ct. Cl. 84 (1986). p.16

WHITT VS. DIVISION OF HIGHWAYS (CC-03-315)

The parties stipulated that claimant was traveling on Route 2 in Flat Rock, Mason County when her vehicle struck a large hole in the road causing damage. Respondent agreed that the amount of damages as put forth by the claim was fair and reasonable. Award of $220.00. . . . . p. 175

DRAINS and SEWERS

ANDREWS VS. DIVISION OF HIGHWAYS (CC-03-153)

Claimants brought this action to recover costs associated with water damage to her home and personal property allegedly due to the negligent maintenance of the drainage system along Hamilton Addition Road and Manor Drive in White Sulphur Springs, Greenbrier County. The Court is of the opinion that the proximate cause of the damage to claimant's property was respondent's failure to maintain an adequate drainage system for the water flowing from Hamilton Addition Road and Manor Drive. Award: $1,500.00. . . . . p. 117

BEDDOW VS. DIVISION OF HIGHWAYS (CC-03-403)

Claimants are the owners of two rental units which make up a duplex apartment building on Riddle Avenue in Morgantown, Monongalia County, which sustained damages when water flowed from the ditch line across Riddle Avenue and flooded the two units. The Court concluded that claimants established that respondent was negligent in its maintenance of the ditch line on Riddle Avenue and this negligence was the proximate cause of the damages to claimants' property. *Ashworth v. Div. of Highways*,

19 Ct. Cl. 189 (1993); *Orsburn v. Div. of Highways,* 18 Ct. Cl. 125 (1991). Award $7,373.38. . . . . p. 111

BRYANT VS. DIVISION OF HIGHWAYS (CC-04-023)

Claimants brought this action for property damage to their home which they allege occurred as a result of respondent's negligent maintenance of its drainage system. The Court determined that the water flowing onto claimants' property was the result of many factors including the development of the property above claimants' property for which there was inadequate drainage provided. Claimants did not establish that respondent was not negligent in its maintenance of its drainage system in this area. Claim disallowed . . . . . p. 234

DEPTO VS. DIVISION OF HIGHWAYS (CC-02-056)

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. The Court is of the opinion that the proximate cause of the damage to claimants' property was 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. *Ashworth v. Div. of Highways,* 19 Ct. Cl. 189 (1993); *Orsburn v. Div. of Highways,* 18 Ct. Cl. 125 (1991).
Award of $8,337.30. . . . . p. 88

FIELDS VS. DIVISION OF HIGHWAYS (CC-03-338)

Claimant brought this action for property damage to his real estate which he alleges occurred as a result of respondent's negligent maintenance of a drainage system. Claim disallowed. . . . . p. 232

HUDNALL VS. DIVISION OF HIGHWAYS (CC-02-350)

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 26, in Oakvale, Mercer County. The Court is of the opinion that the proximate cause of the damage to claimants' property was respondent's failure to maintain an adequate drainage system for surface water flowing from County Route 26. Award of $19,999.99. . . . . p. 62

MARVIN CHAPEL CHURCH VS. DIVISION OF HIGHWAYS (CC-02-507)

Claimant brought this action to recover costs associated with water damage to its property which it alleges is due to respondent's negligent maintenance of the drainage system along U.S. Route 220 in Hampshire County. The Court is of the opinion that claimant established that respondent knew or should have known that its construction work on and around U.S. Route 220 created an inadequate drainage system for water flowing from U.S. Route 220, and as a result this was the proximate cause of the damage to claimant's property. *Ashworth v. Div. of Highways,* 19 Ct. Cl. 189 (1993); *Orsburn v. Div. of Highways,* 18 Ct. Cl. 125 (1991). Award of $12,695.60. . . . . p. 89

MERCER VS. DIVISION OF HIGHWAYS (CC-04-298)
Claimant brought this action for vehicle damage which occurred as a result of her vehicle striking a culvert while she was traveling on W. Va. Route 5/4 near Mannington, Marion County. The Court is of the opinion that respondent was negligent in maintaining the culvert at the time of the incident and is thus liable for the damages which proximately flow from its inadequate protection of the traveling public in this specific location. Award of $160.55. . . . . p. 167

WILSON VS. DIVISION OF HIGHWAYS (CC-00-432)
Claimants brought this action to recover for damages to their property as the alleged result of respondent's negligent design and maintenance of the drainage system on U.S. Route 119, near Morgantown, Monongalia County. Claimants failed to establish that respondent maintained its drainage structures on the west side of U.S. Route 119 in Monongalia County in a negligent manner. *Haught vs. Dept. of Highways,* 13 Ct. Cl. 237. Claim disallowed. . . . . p. 165

FALLING ROCKS AND ROCKS - See also Comparative Negligence and Negligence

BOBO VS. DIVISION OF HIGHWAYS (CC-02-351)
Claimant brought this action to recover for damages to her vehicle which occurred when she was traveling between Moorefield and Petersburg in Grant County on U.S. Route 220 and her vehicle struck a rock in the road. The Court found that there is no evidence of negligence on the part of respondent upon which to base an award. Claim disallowed. . . . . p.

DILLS VS. DIVISION OF HIGHWAYS (CC-03-023)
Claimant brought this action for damage to his vehicle which occurred when he was operating his vehicle on State Route 2 between New Martinsville and Moundsville in Marshall County at a large rock fell from a hillside striking his car. The Court is of the opinion that respondent had constructive notice of the rock fall hazards in the area at issue. While the "southern narrows" portion of highway at issue does not present as great of a risk for rock falls as "the narrows," it is nonetheless a known rock fall area. Award $2,065.00. . . . . p. 74

GLASS VS. DIVISION OF HIGHWAYS (CC-02-310)
Claimant brought this action for damages to his vehicle which occurred when he was driving his vehicle on Route 55 from Moorefield to Baker in Hardy County and his vehicle struck a rock in the road. The Court held that there is no evidence of negligence on the part of respondent upon which to base an award. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). . . . . p. 123

GOINS VS. DIVISION OF HIGHWAYS (CC-02-164)
Claimant brought this action for damage to his vehicle which occurred when he was traveling on County Route 41 near Quinnimont in Fayette County and his vehicle

struck numerous large rocks in the travel portion of the road. The Court held that claimant failed to establish sufficient evidence that respondent was negligent in maintaining the road at this location. Claim disallowed. . . . . p. 120

GREAVER VS. DIVISION OF HIGHWAYS (CC-02-417)

Claimant brought this action for damage to her vehicle which occurred when she was operating her vehicle on Old Route 50 near West Union, Doddridge County, and the vehicle struck a large rock in the road. This Court has consistently held that the unexplained falling of a rock or rock debris on the road surface is insufficient to justify an award. *Mitchell v. Division of Highways,* 21 Ct. Cl. 91 (1996); *Hammond v. Dept. of Highways,* 11 Ct. Cl. 234 (1977). Claimant failed to establish that respondent had not taken adequate measures to protect the safety of the traveling public from rock falls at the location of this incident. Claim disallowed. . . . . p. 62

HIGGINBOTHAM VS. DIVISION OF HIGHWAYS (CC-02-261)

Claimant's vehicle sustained damage when their vehicle struck a boulder on the edge of Floradale Drive near Cross Lanes in Kanawha County. The Court held that respondent had at lease constructive if not actual notice of the rocks at the edge of the road. In addition, the Court determined that claimant was 40% negligent for the incident that occurred. Award $1,199.18. . . . . p. 62

HISAM VS. DIVISION OF HIGHWAYS (CC-02-392)

Claimants brought this action for damage to their vehicle which occurred when claimant Deborah Hisam was operating their vehicle on State Route 2 near Sistersville in Tyler County and a large rock fell from a hillside and struck their vehicle. Claimants failed to establish that respondent did not take adequate measures to protect the safety of the traveling public at the location of this incident on State Route 2. Claim disallowed. . . . . p. 46

HUNLEY VS. DIVISION OF HIGHWAYS (CC-03-274)

Claimant brought this action for damage to her vehicle which occurred when she was operating her vehicle on U.S. Route 52 on Coaldale Mountain in Mercer County and a large rock fell from the hillside striking the windshield. The Court found that respondent took reasonable steps to insure the safety of the traveling public in this claim. *Adkins v. Sims,* 46, S.E. 2d 81 (130 W. Va. 645, 1947). Claim disallowed. p. 135

MCBRIDE VS. DIVISION OF HIGHWAYS (CC-02-216)

Claimant brought this action for damage to her vehicle which occurred when her son, Mark McBride, was driving the vehicle on Route 20 in Summers County near the Bluestone Dam when rocks fell from the hillside adjacent to the road and struck the vehicle causing damage. Claimant failed to establish that respondent did not take adequate measures to protect the safety of the traveling public on Route 20 in Summers County. *Adkins v. Sims,* 46 S.E. 2d 811 (130 W. Va. 645, 1947). Claim disallowed. . . . . p. 133

MULLINS VS. DIVISION OF HIGHWAYS (CC-03-066)

Claimants brought this action for vehicle damage which occurred as a result of Kathy Mullins' vehicle striking a rock while traveling northbound on State Route 10 in Logan County. The Court held that claimants have not established sufficient evidence that respondent failed to take adequate measures to protect the safety of the traveling public on State Route 10 in Logan County. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). Claim disallowed. . . . . p. 158

PECK VS. DIVISION OF HIGHWAYS (CC-03-168)

Claimants brought this action for personal injuries and property damage which occurred when she was traveling north on State Route 2 between Glendale and McMechen in Marshall County and her vehicle struck a large rock in the road. The Court is of the opinion that respondent had actual knowledge of a hazardous condition at the location of this incident on State Route 2 in Marshall County. Chapman v. Dept. of Highways, 16 Ct. Cl. 8 (1985); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). Knowledge of other rock falls in the area near an incident can be sufficient to give respondent notice of a hazard to the traveling public. *Cole v. Division of Highways,* 21 Ct. Cl. 15 (1995). This area on State Route 2 between Glendale and McMechen referred to as "the narrows" is a section of highways known for dangerous rock falls which are a hazard to the traveling public. *Foster v. Division of Highways,* 23 Ct. Cl. 248 (2000). Award of $1,386.38. . . . . p. 71

SNODERLY VS. DIVISION OF HIGHWAYS (CC-03-065)

Claimant brought this action for damage to his vehicle which occurred when he was traveling south on U.S. Route 250 near Fairmont, Marion County, and the vehicle was struck by a large rock. The Court is of the opinion that claimant did not establish that respondent had notice of a potential hazardous condition at this location. *Copen v. Division of Highways,* 23 Ct. Cl. 272 (2001). In addition, respondent did not have not of this particular rock fall until after it had occurred; therefore, respondent did not have a reasonable amount of time to take corrective actions. *Alkire v. Division of Highways,* 21 Ct. Cl. 179 (1997); *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). Claim disallowed. . . . . p. 82

SOMMERVILLE VS. DIVISION OF HIGHWAYS (CC-04-140)

Claimant's property was damaged as a result of her fence being struck by a boulder adjacent to U.S. Route 19 in Clarksburg, Harrison County. The evidence failed to establish that respondent had actual or constructive knowledge of the potential for rock falls in this area. *Coburn v. Dept. of Highways,* 16, Ct. Cl. 68 (1985). . . . p. 172

STANDIFORD VS. DIVISION OF HIGHWAYS (CC-03-250)

Claimant's vehicle struck rocks while he was traveling northbound on U.S. Route 119 in Kanawha County. The Court held that there was no evidence of negligence on the part of the respondent. Claim disallowed. . . . . p. 207

TOLER VS. DIVISION OF HIGHWAYS (CC-03-017)

Claimants brought this action for damage to their vehicle which occurred when claimant Donna Toler was driving west on Route 99 in Raleigh County, and the vehicle struck rocks in the roadway. In the present claim, claimants have not established by a preponderance of the evidence that respondent failed to take adequate measures to protect the safety of the traveling public on Route 99 in Raleigh County. *Adkins v. Sims,* 46 S.E. 2d 811 (W. Va. 1947). Claim disallowed. . . . . p. 138

WRIGHT VS. DIVISION OF HIGHWAYS (CC-04-211)

Claimant's vehicle struck rocks while she was traveling on State Route 2 in the Glendale area, also known as "the narrows," Marshall County. The area on State Route 2 is a section of highway known for dangerous rock falls. *See Branicky vs. Div. of Highways*, 24 Ct. Cl. 273 (2003); *Cusick vs. Div. of Highways*, 24 Ct. Cl. 216 (2002); *Hall vs. Div. of Highways*, 24 Ct. Cl. 212 (2002); *Foster vs. Div. of Highways*, 23 Ct. Cl. 248 (2000). Award of $842 . . . . . p. 198

MOTOR VEHICLES

RENNER VS. DIVISION OF MOTOR VEHICLES (CC-03-090)

Claimant brought this action for expenses incurred when respondent wrongfully suspended his motor vehicle driver's license, causing his car to be impounded. The Court made an award to him for these expenses. Award of $100.00. . . . . p. 14

NEGLIGENCE - See also Berms; Falling Rocks and Rocks & Streets and Highways

ANTILL VS. DIVISION OF HIGHWAYS (CC-03-156)

Claimant brought this action for vehicle damage which occurred when her vehicle struck a patch of ice while she was traveling on County Route 62 in Alkol, Lincoln County. The Court held there is no evidence of negligence upon which to justify an award. . . . . p. 168

BEARD VS. DIVISION OF HIGHWAYS (CC-03-425)

Claimant's vehicle was damaged while she was traveling on the exit ramp of Interstate Route 81 located at or near Inwood, Berkeley County. Respondent admitted the validity of the claim and that the amount is fair and reasonable. Award $102.00. . . . . p. 46

BELL VS. DIVISION OF HIGHWAYS (CC-01-375)

The parties stipulated claimant was crossing Alternate Route 2, also known as Main Street, near its intersection with 14th Street in Wheeling, Ohio County, when she stepped into a hole causing her to fall. The Court made an award based upon the stipulation. . . . . p. 41

BERRY VS. DIVISION OF HIGHWAYS (CC-03-299)

Claimant brought this action for damages to her vehicle which occurred on two separate occasions when her vehicle struck the same hole in U.S. Route 19 in Clarksburg, Harrison County. In the present claim, respondent established that it had continuously treated the hole in Route 19 which caused the damages to claimant's vehicle; however, respondent never took any steps to place a warning sign for the traveling public even though this particular hole was on a high priority road in a residential area. *Chapman vs. Dept. of Highways,* 16 Ct. Cl. 103 (1986).
Award $50 0.00. . . . . p. 100

BLAIR VS. DIVISION OF HIGHWAYS (CC-03-286)

Claimant's vehicle struck a hole on W. Va. Route 34 in Putnam County which was under construction at the time of the incident. The Court held that respondent has the duty to make sure that the contractor is protecting the traveling public, and if it does not, it is negligent. Award of $75.21. . . . . p. 178

BLAND VS. DIVISION OF HIGHWAYS (CC-04-065)

Claimant's vehicle struck several pieces of steel rebar while his father was driving the vehicle on the Chestnut Street exit ramp from U.S. Route 50 in Harrison County. The Court found respondent negligent and made an award of
$1,002.43. . . . . p. 184

COPLEY VS. DIVISION OF HIGHWAYS (CC-01-189)

This claim was submitted to the Court for decision upon a Stipulation entered into by claimants and respondent. Claimant brought this action for an incident which occurred when his wife, Teresa Copley and his son, Curtis H. Copley, were traveling northbound on U.S. Route 52 near the town of Glen Hayes, Wayne County. Curtis H. Copley was driving when the vehicle hydroplaned as a result of rainwater pooling in substantial ruts or channels in the road and collided with a Head Start bus. The collision resulted in the death of the passenger, Teresa Copley, and minor injuries to Curtis H. Copley. The Court held that respondent was negligent in its maintenance of U.S. Route 52 in Wayne County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to the claimants; and that the amount of the damages agreed to by the parties is fair and reasonable.
Award. . . . . p. 139

CRITCHFIELD VS. DIVISION OF HIGHWAYS (CC-02-397)

Claimant brought this action for damage to his motorcycle which occurred when he was driving from a parking lot onto County Route 19/71 in Shinnston, Harrison County. The motorcycle went into a drop inlet at the edge of the road causing claimant to lose control of the motorcycle and resulting in an accident. The Court held that respondent was negligent in its maintenance of the drop inlet at issue in this claim and, further, that respondent is liable for the damage to claimant's motorcycle. Award $2,928.03. . . . . p. 101

CUSTER VS. DIVISION OF HIGHWAYS (CC-04-320)

Claimant's vehicle struck a hole while he was traveling on W. Va. Route 34 in Putnam County. The Court made an award of $5,000.00. . . . . p. 196

DABIRI VS. DIVISION OF HIGHWAYS (CC-03-094)

Claimant brought this action for damage to his water line he alleges was caused by respondent's negligent failure to secure properly a portion of the hillside adjacent to Route 11/1 also referred to as Bill's Fork Road near Servia in Braxton County. In the present claim, claimant failed to establish by a preponderance of the evidence that respondent maintained County Route 11/1 or the supporting hillside in a negligent manner. Claim disallowed. . . . . p. 59

DERRINGER VS. DIVISION OF HIGHWAYS (CC-02-387)

Claimant brought this action for damage sustained to his vehicle when he drove over a bump in a stretch of road that was in the process of being re-paved along U.S. Route 19 between Oak Hill, Fayette County, and Beckley, Raleigh County. There were no signs to warn the traveling public of the difference in elevation of the roadway and this failure to warn constitutes negligence on the part of the respondent. Award of $491.57. . . . . p. 156

DUNHAM VS. DIVISION OF HIGHWAYS (CC-02-470)

The parties stipulated that Timothy Dunham's vehicle was damaged when the driver of the vehicle, Gary F. Yingst, lost control while he was traveling on Hudson Hill Road in Hancock County. The vehicle then went off the roadway, down a hill and collided into a tree. The Court reviewed the claim and made an award to claimants based upon the stipulation. . . . . p. 217

ERSKINE VS. DIVISION OF HIGHWAYS (CC-03-057)

The parties stipulated that claimant's vehicle was damaged when it struck a hole while she was driving across the Amandaville Bridge on Route 60 in St. Albans, Kanawha County. The Court reviewed the claim and made an award to claimant based upon the stipulation. . . . . p. 148

EWING VS. DIVISION OF HIGHWAYS (CC-00-437)

Claimant brought this action for damage to a tire on his vehicle which occurred when he was traveling on I-64 westbound at the Eisenhower Drive exit and his vehicle went over a piece of metal laying on the highway. Claimant failed to provide the Court with any basis to find negligence upon the respondent. *Adkins vs. Sims,* 130 W. Va. 645; 46 S.E. 2d 81 (1947). . . . . p. 132

FRIENDS OF BARBARA FLEISHCAUR AND COMMITTEE TO ELECT BASTRESS FOR JUSTICE VS. DIVISION OF HIGHWAYS (CC-02-515)

This action was brought by claimants, political committees for the elections of Barbara Evans Fleischauer and Robert M. Bastress Jr., during the 2000 election campaigns. Claimants allege that certain political signs and wire frames were destroyed

by respondent without the knowledge or consent of the claimants. The signs and wire frames were being stored in a building on Monongahela Boulevard in Morgantown, Monongalia County. The building was condemned by respondent and respondent admits that it was in possession of the particular building through an Order entered by the Monongalia County Circuit Court and it admits that its employees destroyed the political signs and wire frames which are the subject matter of the claim. The Court found the respondent to be negligent when it destroyed personal property without having attempted to contact either of the claimants to ascertain the appropriateness of destroying that property. Award to Friends of Barbara Fleischaur: $1,500.00 and to Bastress for Justice: $2,500. . . . . p. 114

KENNEDY VS. DIVISION OF HIGHWAYS (CC-04-292)

Claimant brought this action for damages which occurred when his dog was electrocuted by a power line that had been severed during a mowing project in Wyoming County. The Court determined that respondent's employees negligently left the scene without first ascertaining the live wire was being addressed appropriately by the power company. The Court made an award of $1,785.00. . . . . p. 230

KEPLINGER VS. DIVISION OF HIGHWAYS (CC-04-068)

Claimant's vehicle struck a hole while he was traveling on W. Va. Route 2 near Follansbee, Brooke County. Respondent was held to be negligent in its maintenance of the road. The Court made an award of $345.90. . . . . p. 195

KINTY VS. DIVISION OF HIGHWAYS (CC-03-056)

Claimant brought this action for personal injuries which she suffered in an incident that occurred at the entry to the parking building at BB&T Bank which is immediately adjacent to Fairmont Avenue in Fairmont, Marion County. The Court determined that the area where claimant broke her foot is the responsibility of the property owner rather than the responsibility of the respondent. Claim disallowed. . . . . p. 104

OSTROSKY VS. DIVISION OF HIGHWAYS (CC-04-106)

The parties stipulated that claimant's vehicle struck a hole while he was traveling on W. Va. Route 27 in Wellsburg, Brooke County. Award of $144.29. . . . . p. 200

PEVAVAR VS. DIVISION OF HIGHWAYS (CC-04-129)

Claimant's vehicle struck a hole while he was traveling on Route 40/8 in Wheeling. Respondent was held to be negligent in its maintenance of the road. The Court made an award of $100.00. . . . . p. 194

REESE VS. DIVISION OF HIGHWAYS (CC-03-116)

Claimants brought this action for damage to their vehicle which occurred when claimant Wallace Reese was traveling on State Route 20 in Wetzel County, and the vehicle struck a hole in the road. 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 was not negligent in its maintenance of the State Route 20 at the time of claimant's incident. *Adkins v. Sims*, 46 S.E. 2d 81. (W. Va. 1947). Claim disallowed. . . . . p. 52

ROBAYO VS. DIVISION OF HIGHWAYS (CC-02-330)

Claimant's vehicle sustained damage when he was operating his vehicle on County Route 60/4 in Barboursville, Cabell County, and the vehicle struck a large hole on the edge of the road. The Court held that respondent had at least constructive, if not actual, notice of the defect and a reasonable amount of time to remedy the defect. *Chapman v. Dept. of Highways*, 16 Ct.Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct.Cl. 8 (1985). The claimant's award was limited to the amount of her insurance deductible feature of $500. . . . . p. 20

SHREVE VS. DIVISION OF HIGHWAYS (CC-02-457)

Claimant, Betty Shreve, brought this action for damage to her vehicle which occurred when she was traveling on County Route 9 in Wetzel County, and the vehicle struck a hole on the edge of the road. In this claim, the evidence established that respondent had, at the least, constructive notice of the hole in the berm along County Route 9 at the location of this incident. *Chapman v. Dept. of Highways*, 16 Ct.Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct.Cl. 8 (1985). 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. Division of Highways*, 21 Ct. Cl. 18 (1995). Award of $198.21. . . . . p. 48

STEPHENS VS. DIVISION OF HIGHWAYS (CC-03-174)

Claimants brought this action for damage to their chain link fence which occurred when respondent plowed snow on State Route 10/1 in Martinsburg, Berkeley County, onto claimant's chain link fence knocking it to the ground. The Court held that W. Va. Code §15-5-11 bars claimants from any recovery due to the fact that employees of the respondent were operating as duly qualified emergency service workers under emergency circumstances. Claim disallowed. . . . . p. 50

TOMBLIN VS. DIVISION OF HIGHWAYS (CC-03-181)

Claimant's vehicle struck a metal object lying in the road while the driver, Robert K. Tomblin, was traveling westbound on I-64, under the Route 34 bridge, in Putnam County. The Court held that there was no evidence of negligence on the part of the respondent. Claim disallowed. . . . . p. 192

NOTICE

ADAMS VS. DIVISION OF HIGHWAYS (CC-03-100)

Claimant brought this action for damage to her 2003 Dodge Neon which occurred when she was traveling on County Route 39 near Swiss in Nicholas County, and the vehicle struck a large hole in the road. Claimant failed to establish that respondent

had notice of the hole which her vehicle struck 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. 64

BELLAMY VS. DIVISION OF HIGHWAYS (CC-02-506)

Claimant brought this action for damage to her vehicle which occurred when her husband, James Bellamy, was operating the vehicle on MacCorkle Avenue in Charleston, Kanawha County, and the vehicle struck a hole in the road. The Court is of the opinion that claimant failed to present any evidence that respondent was negligent. Claimant was unable to establish the approximate date on which this incident occurred and she was unable to establish the approximate location of the hole. 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. Division of Highways,* 21 Ct. Cl. 92 (1996). Claim disallowed. . . . . p. 126

COLLINS VS. DIVISION OF HIGHWAYS (CC-03-102)

Claimant's vehicle struck a hole while she was traveling east on I-64, Kanawha County. The evidence established that respondent did not have actual or constructive notice of a hole on W. Va. Route 33 prior to the incident in question. Claim disallowed. . . . . p. 171

DOTY VS. DIVISION OF HIGHWAYS (CC-04-101)

Claimant's vehicle struck rocks while her daughter, Ashley Doty, was traveling on State Route 2 in the Glendale area, also known as "the narrows," Marshall County, an area known for hazardous rock falls. The Court made an award of $110.66 p. 202

EACHES VS. DIVISION OF HIGHWAYS (CC-03-152)

Claimant's vehicle struck a hole while she was traveling westbound on I-64 in Cabell County. Respondent received no notice prior to claimant's incident of a hole in the right lane of traffic westbound on I-64. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). Claim disallowed. p. 179

GOLDEN VS. DIVISION OF HIGHWAYS (CC-04-228)

Claimant's vehicle struck a hole while she was traveling on W. Va. Route 105 in Weirton, Hancock County. Respondent was held to be negligent in its maintenance of the road. The Court made an award of $100.00. . . . . p. 203

GRANEY VS. DIVISION OF HIGHWAYS (CC-03-033)

Claimant brought this action for vehicle damage which occurred as a result of her vehicle striking a piece of concrete while she was traveling northbound on U.S. Route 119 between Davis Creek and Ashton Place in Kanawha County. The evidence established that the respondent did not have actual or constructive notice of a piece of concrete on U.S. Route 119 prior to the incident in question. Claim disallowed. . . . . p. 157

HICKS VS. DIVISION OF HIGHWAYS (CC-03-137)

Claimant brought this action for damage to his vehicle which occurred when he was traveling on the U.S. Route 50 exit ramp at the West Virginia Avenue Exit in Clarksburg, Harrison County, and his vehicle struck a large hole in the road. 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 81 (W.Va. 1947). Claimant did not establish that respondent had notice of the hole on the U.S. Route 50 exit ramp. Claim disallowed. . . . . p. 80

HOLLETT VS. DIVISION OF HIGHWAYS (CC-03-303)

Claimant's vehicle sustained damage when her vehicle encountered a patch of ice while traveling on County Route 35 in Cabell County. The Court held that the respondent did not have actual or constructive notice of the potential for ice to create a hazardous condition on County Route 35 at the time of claimant's accident. Claim disallowed. . . . . p. 177

MCJUNKIN, M.D. VS. DIVISION OF HIGHWAYS (CC-02-424)

Claimants brought this action for damage to their vehicle which occurred when claimant Brittain McJunkin M.D., was operating their vehicle on I-77 near Charleston, Kanawha County, and the vehicle struck a metal expansion joint protruding between the road and the bridge. The Court is of the opinion that claimants have failed to establish by a preponderance of the evidence that respondent knew or should have known that the expansion joint on I-77 was in a state of disrepair at the time of the accident. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). Claim disallowed. . . . . p. 66

MCNEMAR VS. DIVISION OF HIGHWAYS (CC-03-557)

Claimant's vehicle struck a hole while she was traveling on W. Va. Route 58 in Bridgeport, Harrison County. The Court held that the respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Award of $500.00. . . . . p. 182

MOWERY VS. DIVISION OF HIGHWAYS (CC-98-208)

Claimant brought this action for personal injuries and vehicle damage sustained when he was traveling south on U.S. Route 220 in Grant County. The evidence adduced at the hearing indicates that respondent had no notice of the defective condition on U.S. Route 220 in Grant County. *Ashworth v. Div. of Highways,* 19 Ct. Cl. 189 (1993); *Orsburn v. Div. of Highways,* 18 Ct. Cl. 125 (1991). Claim disallowed. . p. 151

PIERSON VS. DIVISION OF HIGHWAYS (CC-03-105)

Claimant brought this action for vehicle damage which occurred as a result of her vehicle striking a hole while she was traveling south on W. Va. Route 114, Kanawha County. The Court held that the respondent did have at least constructive notice of the hole on W. Va. Route 114 prior to the incident in question. *Chapman vs. Dept. of Highways,* 16 Ct. Cl. 103 (1986). Award of $500.00. . . . . p. 160

ROSNICK VS. DIVISION OF HIGHWAYS (CC-04-238)

Claimant's vehicle struck a hole while she was traveling on W. Va. Route 105 in Weirton, Hancock County. Respondent was held to be negligent in its maintenance of the road. The Court made an award for $486.28. . . . . p. 200

SALLADE VS. DIVISION OF HIGHWAYS (CC-03-109)

Claimant's vehicle struck a hole while he was traveling east on W. Va. Route 33, Putnam County. The evidence established that respondent did not have actual or constructive notice of a hole on W. Va. Route 33 prior to the incident in question. Claim disallowed. . . . . p. 170

SANTOWASSO VS. DIVISION OF HIGHWAYS (CC-04-217)

Claimant's vehicle struck a hole while he was traveling northbound on W. Va. Route 20 near Lumberport, Harrison County. The size of the hole and its location in the travel portion of the highway leads the Court to conclude that respondent had notice of this hazardous condition, and further, that it had an adequate amount of time to take corrective action. Award of $250.00. . . . . p. 181

THOMAS VS. DIVISION OF HIGHWAYS (CC-04-161)

Claimant's vehicle struck a hole while she was traveling on W. Va. Route 119/33 in Morgantown, Monongalia County. The Court held that respondent had at least constructive notice of the hole which claimant's vehicle struck. Award of $470.32. p. 186

THOMASELLI VS. DIVISION OF HIGHWAYS (CC-04-216)

Claimant's vehicle struck a hole while she was traveling on County Route 11 near Weirton, Hancock County. Respondent was held to be negligent in its maintenance of the road. The Court made an award of $500.00. . . . . p. 197

WALKER VS. DIVISION OF HIGHWAYS (CC-03-254)

Claimants brought this action for damage to their vehicle which occurred when claimant, Thomas Walker, was operating the vehicle on Cabin Creek Road near Chelyan, in Kanawha County, and the vehicle struck a large hole in the road. Claimants failed to establish by a preponderance of the evidence that respondent had notice of the defective condition on Cabin Creek Road which caused the damage to claimant's vehicle. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). Claim disallowed. . . . . p. 67

PEDESTRIANS

DEPTA VS. DIVISION OF HIGHWAYS (CC-02-163)

Claimant brought this action for damages related to an incident that occurred when their eight year old daughter fell off a bridge over Buffalo Creek near Kistler in Logan County. The Court determined that respondent was negligent in failing to provide a guard rail on the bridge to protect pedestrians, especially children. The Court made an award of $36,000.00. . . . . p. 218

KINTY VS. DIVISION OF HIGHWAYS (CC-03-056)
Claimant brought this action for personal injuries which she suffered in an incident that occurred at the entry to the parking building at BB&T Bank which is immediately adjacent to Fairmont Avenue in Fairmont, Marion County. The Court determined that the area where claimant broke her foot is the responsibility of the property owner rather than the responsibility of the respondent. Claim disallowed. . . . . p. 104

LAFFERTY VS. DIVISION OF HIGHWAYS (CC-03-071)
The parties stipulated that claimant suffered personal injuries when he was walking along Lochgelly Road in Oak Hill, Fayette County, when he stepped off the road and into an open drain that was covered by grass. Award of $2,1000.00. . . . . p. 214

PRISONS AND PRISONERS

ASH VS. DIVISION OF CORRECTIONS (CC-03-416)
Claimant, an inmate at Mount Olive Correctional Complex, brought this action to recover the cost of a Christmas Food Package alleged to have been sent to him from a company known as Securepac during December, January, or February 2003. The Court held that claimant failed to establish that respondent acted in a wrongful manner. Claim disallowed. . . . . p. 140

BOXLEY VS. DIVISION OF CORRECTIONS (CC-02-514)
Claimant brought this action to recover the value of certain personal property items that he alleges were lost or destroyed by the respondent after he was transferred from Northern Correctional Facility to Mount Olive Correctional Complex. The Court determined that respondent was not negligent in its actions with respect to care and treatment of claimant's items of personal property. Claim disallowed. . . . . p. 143

BURDETTE VS. DIVISION OF CORRECTIONS (CC-02-484)
Claimant brought this action to recover the value of certain items of personal property that he alleges were negligently seized and destroyed by the respondent while he was an inmate at Mt. Olive Correctional Center. The Court found that no bailment relationship existed. *Heard v. Division of Corrections,* 21 Ct. Cl. 151 (1997); *Edens v. Division of Corrections,* 23 Ct. Cl. 221 (2000). . . . . p. 127

CORRIVEAU VS. DIVISION OF CORRECTIONS (CC-02-006)
Claimant brought this action for breach of an employment contract by respondent while he was an inmate at St. Mary's Correctional Center. Claimant contends that he was wrongfully terminated from his job while an inmate at respondent's facility and seeks damages for lost wages, back pay, interest, and postage expenses. The Court held that respondent did not breach the job contract it had with claimant. Claim Disallowed. . . . . p. 145

KILMER VS. DIVISION OF CORRECTIONS (CC-03-285)
Claimant brought this action to recover the value of certain personal property items that he alleges were negligently destroyed by respondent while he was an inmate at Mt. Olive Correctional Complex. The Court held that respondent was not negligent in destroying claimant's food items. Claim disallowed. . . . . p. 141

NICHOLS VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-04-026)
Claimant seeks reimbursement for items of personal property that were entrusted to respondent's employees when he was taken to South Central Regional Jail, a facility of the respondent. In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. Award of $307.40. . . . . p. 150

SMITH VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-04-519)
Claimant brought this action for loss of personal property. In its Answer respondent admitted the validity and amount of claim. Award of $180.00. p. 209

SPROUSE VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-04-229)
Claimant brought this action to recover the value of stamped envelopes that had been taken from her by a correctional officer to be placed in claimant's personal property bag. In its Answer, respondent admits the validity of the claim. Award of $9.40p. 164

THOMPSON VS. DIVISION OF CORRECTIONS (CC-01-340)
Claimant, a former inmate at Mt. Olive Correctional Complex, brought this action against respondent to recover $1,222.00 which he alleges was deducted from his Veterans' benefits as a result of respondent's negligence in failing to notify timely the Veterans Administration of his incarceration. Claimant failed to produce evidence that respondent had a duty to notify the Department of Veterans Affairs of his incarceration. Claim disallowed. . . . . p. 124

TONCRAY VS DIVISION OF CORRECTIONS (CC-03-044)
Claimant, an inmate at Northern Regional Jail, seeks an award of $55.00 for loss of personal property. Respondent admits validity of the claim, but states the amount of $40.00 rather than the amount claimed. Claimant agrees to accept $40.00 as full and complete compensation. Award of $40.00. . . . . p. 98

PUBLIC EMPLOYEES

AMOS VS. DIVISION OF HIGHWAYS (CC-04-146)
The parties stipulated that claimant, an employee of the respondent State agency, was doing preventive maintenance in the District Four Equipment Shop when a hydraulic cylinder fell onto his tool box. Award of $2,400.00. . . . . p. 188

SANDERS VS. PUBLIC SERVICE COMMISSION (CC-03-426)

Claimant, an employee of the respondent State agency, filed this claim for reimbursement of travel expenses. Respondent admitted 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. Award $771.40. . . . . p. 56

STATE AGENCIES

ZIRK VS. STATE RAIL AUTHORITY (CC-03-419)

Claimant brought this action for personal property damage caused when respondent was using a tamper on a railroad near claimant's home and a hydraulic hose burst on the machine spraying hydraulic fluid on claimant's property located in Moorefield, Hardy County. Respondent admitted the validity of the claim and agreed that the amount was fair and reasonable. Award $1,765.00. . . . . p. 56

STREETS & HIGHWAYS - See also Comparative Negligence and Negligence

BROWN VS. DIVISION OF HIGHWAYS (CC-01-213)

Claimants brought this action for personal injuries received by claimant James Brown, for loss of consortium suffered by claimant Angela Brown, his wife, and for loss of comfort suffered by his children, claimants Christine Brown and Tasha Brown, when claimant James Brown had an accident while operating a motorcycle on Tony's Branch Road in Boone County. The Court held that respondent was negligent in its maintenance of Tony's Branch Road and this decision is in accordance with previous decisions. *Hale v. Dept. of Highways*, 11 Ct. Cl. 93 (1976), *Withrow v. Dept. of Highways*, 17 Ct. Cl. 47 (1987), *Boyle v. Division of Highways*, 19 Ct. Cl. 103 (1992). In addition, the Court held that claimant James Brown bears 33⅓ of the responsibility for the accident herein and the injuries resulting therefrom. . . . . p. 31

CAMPBELL VS. DIVISION OF HIGHWAYS (CC-04-304)

Claimant's vehicle struck a hole while he was traveling on W. Va. Route 131 near Bridgeport, Harrison County. The Court found the respondent negligent and awarded claimant $213.02. . . . . p. 191

CHAPMAN VS. DIVISION OF HIGHWAYS (CC-02-227)

Claimant's vehicle was damaged when it came upon a large mudslide in the road , causing her vehicle to slide into a hillside while traveling on U.S. Route 52 in Mingo County. The Court held that claimant failed to establish by a preponderance of the evidence that respondent was negligent. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986). . . . . p. 5

COOK VS. DIVISION OF HIGHWAYS (CC-02-258)

Claimant's vehicle sustained damage when it struck a sharp edge of a drainage culvert while traveling Dry Branch Road in Kanawha County. The Court held that respondent was negligent in failing to correct a defective and hazardous condition and

that respondent had at least constructive notice of the debris in the area due to claimant's telephone call to the respondent about the local ditch line being clogged. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). . . . . p. 12

COOK VS. DIVISION OF HIGHWAYS (CC-01-381)

Claimants brought this action for personal injuries and damage to their vehicle which occurred when claimant Wilma Cook was operating their vehicle on State Route 85 near Quinland, Boone County, and the vehicle struck a hole on the edge of the road causing claimant to lose control of the vehicle whereupon it crossed the road and struck the guardrail. The Court held that claimant failed to establish by a preponderance of the evidence that respondent was negligent. In addition, to find respondent negligent in this claim would require the Court to speculate, which it will not do. *Mooney v. Dept. of Highways*, 16 Ct. Cl. 84 (1986). . . . . p. 1

DAY VS. DIVISION OF HIGHWAYS (CC-03-209)

Claimant's vehicle struck a hole while she was traveling eastbound on W. Va. Route 34 in Putnam County. The Court is of the opinion that respondent failed to protect the traveling public. Award of $1,123.56. . . . . p. 173

DUNHAM VS. DIVISION OF HIGHWAYS (CC-01-390)

The parties stipulated that claimant's vehicle was damaged when it encountered some gravel on the roadway causing her to lose control of her vehicle which then struck a tree when she was traveling northbound on State and Local Service Route 30 near Martinsburg in Berkeley County. The Court reviewed the claim and made an award to claimant based upon the stipulation. . . . . p. 26

GORBEY VS. DIVISION OF HIGHWAYS (CC-04-175)

Claimant's vehicle struck a hole while she was traveling on U.S. Route 19 north of Fairmont, Marion County. The Court held that respondent had constructive notice of the hole. . . . . p. 189

GROVES VS. DIVISION OF HIGHWAYS (CC-02-391)

The parties stipulated that claimant's motorcycle was damaged when the edge of the pavement gave way causing claimant to lose control of his motorcycle which then struck the guardrail along the northern roadway edge while traveling on W. Va. Route 62 in Mason County. The Court reviewed the claim and made an award to claimant based upon the stipulation. . . . . p. 22

HITE VS. DIVISION OF HIGHWAYS (CC-02-329)

The parties stipulated that claimant's vehicle was damaged when it went off the edge of the road into a large drop off while traveling on Cedar Valley Road in Jackson County. The Court reviewed the claim and made an award to claimant based upon the stipulation. . . . . p. 3

KING VS. DIVISION OF HIGHWAYS (CC-02-183)

Claimant's vehicle sustained damage when it slid on a patch of ice causing it to strike a mountainside. The Court held that claimant failed to establish by a preponderance of the evidence that respondent was negligent in the maintenance of Route 61 at the time of her accident. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); Pritt v. Dept. of Highways, 16 Ct. Cl. 8 (1985). . . . . p. 8

MANONI VS. DIVISION OF HIGHWAYS (CC-03-224)

Claimant's motorcycle was damaged when it struck a hole as he was traveling northbound on W. Va. Route 34 in Putnam County. Respondent was held to be negligent in its maintenance of the road. The Court made an award of $500.00. . . . . p. 206

MCNEELY VS. DIVISION OF HIGHWAYS (CC-02-260)

Claimant's vehicle sustained damage when it struck a large hole on Route 85, Boone County. The Court made an award as respondent had constructive notice, if not actual, notice, of the defective condition on Route 85. . . . . p. 4

NELSON VS. DIVISION OF HIGHWAYS (CC-03-015)

Claimants brought this action for damage to their vehicle which occurred when claimant James Nelson was operating their vehicle on U.S. Route 19 near Summersville, in Nicholas County, and the vehicle struck an object in the road. The Court held that the claimants failed to establish by a preponderance of the evidence that respondent had notice of the object in the road. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1995). Claim disallowed. . . . . p. 44

NORMAN VS. DIVISION OF HIGHWAYS (CC-04-131)

Claimant's vehicle sustained damage when it struck a series of holes while he was traveling on County Route 25 in Wheeling, Ohio County. The Court held that respondent was negligent and awarded claimant the amount of his insurance deductible. . . . . p. 204

SHAFFER VS. DIVISION OF HIGHWAYS (CC-03-021)

The parties stipulated that claimants' vehicle struck a hole while traveling on U.S. Route 622, Martins Branch Road, in Pocatalico, Kanawha County, and that respondent was negligent. The Court made an award based upon the stipulation. . . . . p. 25

WILSON VS. DIVISION OF HIGHWAYS (CC-03-172)

The parties stipulated that claimant's vehicle struck a large hole while traveling on Route 27 in Brooke County, and that respondent was negligent. The Court made an award based upon the stipulation. . . . . p. 41

TREES and TIMBER

BOOTH VS. DIVISION OF HIGHWAYS (CC-03-047)

Claimants brought this action for damage to their vehicle which occurred when claimant Stephen Rich was operating their vehicle on County Route 34, also referred to as Middle Grave Creek Road, in Marshall County, and the top portion of a large tree next to the road fell onto claimants' vehicle. *Wiles v. Division of Highways*, 16 Ct. Cl. 103 (1986). While the evidence presented by the claimant established that the tree at issue was dead, respondent did not have notice of this particular hazard. *Newkrik v. Division of Highways*, 20 Ct. Cl. 18 (1993); *Chapman v. Dept. of Highways*, 16 Ct. Cl. 170 (1999). The evidence also indicated that this tree would not have been seen unless specifically brought to the attention of respondent. Claim disallowed. . . . p. 106

CARNELL VS. DIVISION OF HIGHWAYS (CC-03-333)

Claimant brought this action for damage to her vehicle which occurred when her daughter, Barbara Darlene Harris, was operating the vehicle on County Route 2 between Quinwood and Marfrance in Greenbrier County and a tree limb fell onto the vehicle causing damage thereto. The Court is of the opinion that claimant failed to establish that respondent had actual or constructive notice that this particular tree or tree stump presented a risk to the traveling public. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 9 (1985). Claim disallowed. p. 130

DILLON VS. DIVISION OF HIGHWAYS (CC04-424)

Where claimant's vehicle struck a branch from a tree that was overhanging the roadway on County Route 4 in Monroe County, the Court held that respondent had constructive notice of the tree hazard and made and award. . . . . p. 229

GRANT VS. DIVISION OF HIGHWAYS (CC-03-099)

Claimant brought this action for damage to his vehicle which occurred when his vehicle struck a tree in the road while traveling east on Route 9/5, also know locally as Mission Road, approximately seven miles east of Charles Town, Jefferson County. The general rule this Court has adopted is 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); Gerritsen v. Dept. of Highways, 16, Ct. Cl. 85 (1986). . . . . p. 42

STRAIGHT VS. DIVISION OF HIGHWAYS (CC-04-295)

Claimant's vehicle struck a tree while traveling on W. Va. Route 20 near Wallace in Harrison County. The evidence established that the respondent did not have actual or constructive knowledge of a tree on W. Va. Route near Wallace, Harrison County. Claim disallowed. . . . . p. 183

VANCE VS. DIVISION OF HIGHWAYS (CC-03-321)

Claimant brought this action for damage to his pickup truck which occurred when he was traveling on County Route 97 near Pineville in Wyoming County, and his vehicle struck a large tree to tree stump which had fallen onto the road. The Court held that claimant failed to establish that respondent had actual or constructive notice that this particular tree or tree stump presented a risk to the traveling public. . . . . p. 131

WALTERS VS. DIVISION OF HIGHWAYS (CC-02-375)

Claimant's vehicle was struck by a tree limb that fell while they were traveling northbound on County Route 7 in Wayne County. The Court determined that respondent had constructive, if not actual, notice of the hazard this tree posed to the traveling public. The Court made an award of $212.96. . . . . p.190

VENDOR

ALLTEL VS. STATE FIRE MARSHALL (CC-03-427)

The Court made an award of $507.12 for cellular telephone services provided to the respondent State agency. Respondent admits the validity and the amount of the claim. . . . . p. 57

CHARLESTON AREA MEDICAL CENTER VS. DIVISION OF CORRECTIONS (CC-03-463)

Claimant brought this action for reimbursement of the cost for medical treatment provided to an inmate at Mount Olive Correctional Complex, a facility of the respondent. Respondent's position was that any amount paid for medical services above and beyond the usual and customary charges should not be an obligation of the respondent and should not be considered a moral obligation of the State. The Court determined that the usual and customary charges standard is an appropriate standard for determining medical costs for treatment and care of an inmate in its facility. However, notice of this standard had not been provided to claimant during its medical treatment of the inmate prior to the time of treatment. Thus, claimant may make a recovery in the full amount of the medical charges in this claim.

Award $89.87. . . . . p. 161

CITY OF ELKINS VS. DIVISION OF CORRECTIONS (CC-03-396)

The Court made an award of $225.00 for waste water testing performed at Huttonsville 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. 27

MANPOWER VS. DEPARTMENT OF EDUCATION (CC-03-351)

The Court made an award of $1,855.48 for providing temporary services to respondent. Respondent admits the validity and the amount of the claim. . . . . p. 30

POMEROY IT SOLUTIONS, INC. VS. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-03-162)

Award of 18,724.00 for providing computer merchandise purchased by respondent in Kanawha County. The documentation for these services was not processed for payment within the appropriate fiscal year; there were sufficient funds expired at the end of the proper fiscal year from which the bill could have been paid. In addition, the Court denied a request for interest based upon the provisions in W. Va. Code §14-2-12. . . . . p. 14

PRIMECARE MEDICAL, INC. VS. DIVISION OF JUVENILE SERVICES (CC-03-357)

The parties stipulated that claimant provided medical laboratory tests to the employees of the WV Industrial Home for Youth, a facility of the respondent. The Court reviewed the claim and made an award to claimant based upon the stipulation. . . . . p. 30

SWEETSER VS. PUBLIC SERVICE COMMISSION (CC-03-543)

Award $4,950.00 for providing expert testimony for a case on behalf of the respondent State agency. The documentation for these services was not processed for payment within the appropriate fiscal year; there were sufficient funds expired at the end of the proper fiscal year from which the bill could have been paid. . . . . p. 99

VERIZON OF WEST VIRGINIA, INC. VS. DEPARTMENT OF ADMINISTRATION (CC-03-503)

Award of $933,785.85 for unpaid telephone charges for fiscal years 1998, 1999, and 2000 was made by the Court when the documentation for these services was not processed for payment within the appropriate fiscal year; there were sufficient funds expired at the end of the proper fiscal year from which the bill could have been paid. p. 58

WAYNE COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-03-428)

Claimant is responsible for the incarceration of prisoners who have committed crimes in Wayne County, but have been sentenced to facilities owned and maintained by respondent. 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 due to circumstances beyond the control of the county, these prisoners have had to remain in the custody for periods of time beyond the date of the commitment order. *Mineral County Comm'n. Of Mineral County vs. Div. of Corrections,* 18 Ct. Cl. 88 (1990). Award of $5,525.00. . . . . p. 84

WEST VIRGINIA ASSOCIATION OF REHABILITATION FACILITIES VS. DIVISION OF REHABILITATION SERVICES (CC-03-302)

Award of $4,053.95 for providing maintenance services to respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; there were sufficient funds expired at the end of the proper fiscal year from which the bill could have been paid. . . . . p. 13

VENDOR - 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.

CHARLESTON AREA MEDICAL CENTER, INC. VS. DIVISION OF CORRECTIONS (CC-03-449)

The Court disallowed a claim in the amount of $6,473.83 for medical services rendered to inmates in the custody of respondent and there were insufficient funds expired in the appropriate fiscal year from which to pay the claim. Claim disallowed. . p. 59

CHARLESTON PSYCHIATRIC GROUP, INC. VS. DIVISION OF CORRECTIONS (CC-03-406)

The Court disallowed a claim in the amount of $2,804.00 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. 27

CORRECTIONAL MEDICAL SERVICES INC. VS. DIVISION OF CORRECTIONS (CC-03-553)

The Court disallowed a claim for $810,063.25 for medical services provided to several inmates in the custody of respondent since there were insufficient funds expired in the appropriate fiscal year. . . . . p. 113

FEDERAL BUREAU OF PRISONS VS. DIVISION OF CORRECTIONS (CC-03-484)

The Court disallowed a claim in the amount of $9,583.77 for the housing of inmates for the respondent State agency as there were insufficient funds expired in the appropriate fiscal year from which to pay the claim. Claim disallowed. . . . . p. 57

JAN-CARE AMBULANCE VS. DIVISION OF CORRECTIONS (CC-03-529)

The Court disallowed a claim in the amount of $709.50 for transportation services rendered to an inmate in the custody of respondent and there were insufficient funds expired in the appropriate fiscal year from which to pay the claim. Claim disallowed. . . . . p. 99

KANAWHA NEPHROLOGY, INC. VS. DIVISION OF CORRECTIONS (CC-03-355)

The Court disallowed a claim in the amount of $1,520.00 for medical services rendered to an inmate in the custody of respondent since there were insufficient funds expired in the appropriate fiscal year from which to pay the claim. Claim disallowed. p. 29

MONTGOMERY GENERAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-03-243)

The Court disallowed a claim in the amount of $35,593.23 for providing medical services to an inmate in 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. Claim disallowed. . . . . p. 15

MONTGOMERY GENERAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-03-288)

The Court disallowed a claim in the amount of $4,071.25 for providing medical services to inmates in 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. Claim disallowed. . . . . p. 23

MYERS VS. DIVISION OF CORRECTIONS (CC-03-290)
The Court disallowed a claim in the amount of $2,398.45 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. Claim disallowed. . . . . p. 24

POCAHONTAS MEMORIAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-02-486)
The Court disallowed a claim in the amount of $1,674.14 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. 28

THE HEART CENTER VS. DIVISION OF CORRECTIONS (CC-03-349)
The Court disallowed a claim in the amount of $39.00 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. Claim disallowed. . . . . p. 28

UNIVERSITY HEALTH ASSOCIATES VS. DIVISION OF CORRECTIONS (CC-03-337)
The Court disallowed a claim in the amount of $6,858.00 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. 29

W. VA. UNIVERSITY

DRUSCHEL VS. HIGHER EDUCATION POLICY
Claimant, a student at West Virginia University, brought this action for personal property damage as a result of a water leak in his dormitory room in Boreman North. The Court made an award to claimant in the amount of $255.00. . . . . p. 150

TRYGAR VS. HIGHER EDUCATION POLICY COMMISSION (CC-03-332)
The Court made an award of $150.00 for personal property damage as a result of water leaking from a dormitory room located above claimant's room. Respondent admitted the validity and the amount of the claim. The Court made an award as respondent does not have a fiscal method to pay such claim. . . . . p. 24

WEBMEYER VS. HIGHER EDUCATION POLICY COMMISSION (CC-04-213)
Claimant seeks reimbursement for a damaged poster that she had hanging in her dormitory room at West Virginia University. In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. Award of $13.98. . . . . p. 164

WEI VS. HIGHER EDUCATION POLICY COMMISSION (CC-03-401)

Claimant, a graduate student attending West Virginia University in Morgantown, brought this action to recover damages to his personal property while he was residing in an apartment complex provided for faculty and owned by the University, a facility of the respondent. The Court determined that the non-liability clause in the rental agreement protects the respondent from the loss alleged by the claimant herein. Claim disallowed. . . . . p. 105

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