STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the Period from July 1, 2005

to June 30, 2007

by

CHERYLE M. HALL

CLERK

Volume XXVI

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

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LETTER OF TRANSMITTAL

To His Excellency
The Honorable Joe Manchin, III
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 five to June thirty, two thousand seven.

Respectfully submitted,

CHERYLE M. HALL,
Clerk

TERMS OF COURT

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

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OPINION ISSUED SEPTEMBER 6, 2005

ENOLIA RHODES
VS.
DIVISION OF HIGHWAYS
(CC-02-175)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her vehicle struck a sign post as she was traveling on Route 25 near Nitro, Kanawha County. Route 25 is a road maintained by respondent. This claim was heard in part on April 8, 2004, at which time the claimant testified in her own behalf. The claim was rescheduled for hearing on May 5, 2005, at which time respondent presented its witness. Claimant was not present at that hearing although she had been duly notified by the Clerk of the Court. The Court thereupon submitted the claim for determination. 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 sometime in the afternoon of April 9, 2002. Route 25 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that Loretta Hicks was driving claimant's vehicle. Ms. Hicks was turning the vehicle around in an area on the side of the road when the vehicle ran over a piece of a steel sign post that was sticking out of the ground about four inches. Claimant stated that the post was for a sign that had been removed in some way. She also stated that the piece of metal was protruding from the dirt and not from the gravel or pavement. She also stated that the post was removed after the incident herein. Claimant's vehicle sustained damage to the front right tire. The damage sustained totaled $47.38.

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

Richard Light, a foreman for the respondent in Kanawha County, testified that there had been no reports of a downed sign post made on or before the date of claimant's incident. Mr. Light stated that he had never seen a post of any kind in that area. He testified that he was not aware that there had been a sign post in that area before the time of claimant's incident. He reviewed photographs of the area and the post submitted by the claimant and he stated that the post in the photograph was not within the State's right of way for Route 25.

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 the broken sign post off of Route 25 prior to the incident in question and that the post was not within the State's right of way. Consequently, there is insufficient evidence of negligence upon which to justify an award and 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 SEPTEMBER 6, 2005

LISA ROAT LAVENDER
VS.
DIVISION OF HIGHWAYS
(CC-03-498)

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 2000 Chevrolet Impala struck a section of broken pavement while she was traveling on W. Va. Route 61 near Oak Hill, Fayette County. W. Va. Route 61 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 2:00 p.m. on September 13, 2003, a sunny and clear day. W. Va. Route 61 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 61 with a vehicle in the oncoming lane driving near the yellow line. Ms. Lavender stated that she drove her vehicle close to the edge of the highway to avoid the oncoming vehicle. Her vehicle then struck a section of broken pavement that she had not seen. Claimant stated that there was an eight inch drop off in the pavement. Claimant's vehicle struck the broken section of pavement damaging both passenger side rims and tires along with part of the undercarriage of the vehicle totaling $1,212.45. Claimant's insurance deductible was $500.00.

The position of the respondent is that it did have actual notice of the condition on W. Va. Route 61 at the site of the claimant's accident for the date in question but that it did not have sufficient time to affect a repair.

Joe Donnally, a maintenance crew leader for the respondent in Fayette County, testified that he was aware of the broken section of pavement along W. Va. Route 61. Mr. Donnally stated that he had scheduled this section of road for repair during the week following the claimant's incident. He testified that he normally makes the schedules two weeks in advance so that the crews could finish the projects that they were currently on before beginning a new one.

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 actual notice of the broken section of pavement which claimant's vehicle struck and that this section of road presented a hazard to the traveling public. Photographs in evidence depict the section of broken pavement and provide the Court an accurate portrayal of the size and location of the hole on W. Va. Route 61. The size of the broken pavement 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. Having acknowledged notice of the hazardous area, respondent was negligent in failing to warn the traveling public of the hazard. 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 SEPTEMBER 6, 2005

KARON MCGREW
VS.
DIVISION OF HIGHWAYS
(CC-03-435)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2001 Dodge Neon struck a hole while she was traveling on County Route 73 near Charleston, Kanawha County. County Route 73 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 3:00 p.m. on May 9, 2003, a clear and dry day. County Route 73 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that she was driving on County Route 73 when she saw the hole. She stated that she had not seen the hole previously as someone had been working on the road during the previous days. Ms. McGrew testified that she had seen vehicles in front of her driving around the hole, but she was unable to avoid it due to oncoming traffic in the other lane. Claimant's vehicle struck the hole sustaining damage to the passenger side rims and tires. Ms. McGrew stated that the hole was between four and six inches deep, four feet long and four feet wide. Claimant's vehicle sustained damage totaling $127.18. Claimant submitted additional bills that the Court determined to be too remote in time to definitively relate them to the incident in question.

The position of the respondent is that it did not have actual or constructive

notice of the condition on County Route 73 at the site of the claimant's accident for the date in question.

Frank McGuire, foreman for the respondent in Kanawha County, testified that he had no knowledge of any holes on County Route 73 near Charleston for the date in question or the days immediately prior. Mr. McGuire stated that there had been a crew patching holes along this stretch of road of May 1, 2003. He further testified that he had no knowledge of anyone working on the road in the days prior to the date of claimant's incident. Respondent maintains that it had no actual or constructive notice of any holes on County Route 73.

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 73. 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. However, the Court also finds that claimant was partially negligent in that she had known about the work that had been going on in the area prior to the date of her incident and she also saw other vehicles avoiding the hole before her vehicle struck it. The Court finds that claimant was twenty percent negligent in this instance.

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 $101.74.

Award of $101.74.

OPINION ISSUED SEPTEMBER 6, 2005

CHARLES R. LONG
VS.
DIVISION OF HIGHWAYS
(CC-03-380)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1982 Honda Goldwing motorcycle struck a hole while he was traveling on W. Va. Route 34 in Teays Valley, 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 9:30 a.m. on July 12, 2003, a clear and dry day. W. Va. Route 34 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving on W. Va. Route 34 when he saw the hole. He stated that he had seen the hole previously but had been able to avoid it on other occasions. Mr. Long testified that he was unable to avoid the hole because of a vehicle traveling in the opposite lane which had crossed the center yellow line. He had to maneuver his motorcycle to the side of the highway to avoid the other vehicle and his motorcycle struck the hole sustaining damage to the front shocks. Mr. Long stated that the hole was two or three feet long and one and a half to four inches deep. Claimant's motorcycle sustained damage totaling $194.23.

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, Assistant Supervisor for the respondent in Putnam County, testified that he had no knowledge of any holes on W. Va. Route 34 in the Teays Valley area for the date in question or the days immediately prior. Mr. Tucker stated that there were no records of any calls or complaints concerning the condition of the road prior to claimant's incident. Respondent maintains that it had no actual or constructive notice of any holes on W. Va. Route 34.

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 motorcycle 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 34. 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 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 to the claimant in this claim in the amount of $194.23.

Award of $194.23.

OPINION ISSUED SEPTEMBER 6, 2005

MICHAEL E. YOUNG
VS.
DIVISION OF HIGHWAYS
(CC-03-298)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when the 1990 Chevrolet Cavalier that his son was driving struck a hole as he was traveling north on County Route 44, also known as Bill's Creek Road, Putnam County. County Route 44 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 around 7:30 a.m. on May 5, 2003, a rainy morning. County Route 44 is a two-lane highway at the area of the incident involved in this claim. Claimant's son, Dustin Young, testified that he was driving between fifteen and twenty miles per hour because he had just driven through a school zone. Mr. Young also stated that it had just stopped raining. Claimant's son stated that there was a vehicle traveling in the opposite direction which caused him to drive his vehicle closer to the edge of the road as the road was not very wide through this section. The vehicle struck a hole in the road that he had not seen. Dustin Young stated that the hole knocked the vehicle out of balance, then went up a hillside next to the road and flipped onto the vehicle's top. Claimant's vehicle sustained extensive damages. Dustin Young also sustained a cut on his arm that required stitches. Claimant incurred $2,300.00 in damages for the vehicle, towing, and medical expenses for his son.

The position of the respondent is that it was not negligent in its maintenance of County Route 44, and even if it was, Dustin Young's negligence was greater than or equal to its own negligence.

Deputy C.S. Tusing, a road deputy with the Putnam County Sheriff's Department, testified that he was dispatched to investigate Dustin Young's accident. He stated that he has investigated around 500 accidents in his time as a deputy. He took a signed statement from Mr. Young in which Mr. Young stated that he had lost control of his vehicle, slid into a ditch, and then the vehicle rolled over onto its top. Deputy Tusing also cited as a contributing circumstance the slippery pavement. He testified that he did not identify a hole in the road as a contributing circumstance as there was no indication that claimant's vehicle struck a hole. Deputy Tusing testified that if anyone had mentioned a hole in the road to him, he would have marked it as a contributing circumstance in his investigative report. He further testified that based upon his experiences in investigating accidents, it was unlikely that a vehicle traveling at fifteen to twenty miles per hour would flip over in the way in which the claimant described. Deputy Tusing stated that for a vehicle to flip over like the claimant's vehicle did, it would have had to be going at a greater speed than twenty miles per hour.

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 claimant's son's negligence was the cause of the accident. Based upon the statement given to the investigating officer at the scene of the accident and the evidence adduced at trial, the Court is of the opinion that the respondent was not negligent in its maintenance of County Route 44. Thus, the claimant may not make a recovery for his 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 SEPTEMBER 6, 2005

MARK DANIEL WEBB and NANCY RANEE WEBB
VS.
DIVISION OF HIGHWAYS
(CC-04-095)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 1987 Cadillac DeVille struck rocks when claimant Mark Webb was traveling westbound on W. Va. Route 5 in Wirt County. W. Va. Route 5 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 around 5:40 a.m. on February 3, 2004, a rainy morning. W. Va. Route 5 is a two-lane road that is marked at the location of the accident as a "falling rock" area, with a speed limit of fifty-five miles per hour. Claimant Mark Webb was driving westbound on W. Va. Route 5 when rocks from the hillside adjacent to W. Va. Route 5 fell into his lane of traffic. Mr. Webb stated that he caught sight of some smaller rocks moving in his lane so he applied the brakes and attempted to avoid them. His vehicle then struck larger rocks, which were about three to four feet in diameter, that were laying in the road. Claimants' vehicle struck the rocks and sustained significant damage to the front of said vehicle totaling $4,069.29. Claimants' vehicle was totaled as a result of this incident.

The position of the respondent was that it did not have notice of the rocks on W. Va. Route 5. 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 W. Va. Route 5 to warn drivers proceeding on the roadway. Jason Nichols, County Administrator for respondent in Wirt County, testified that this is an area that has rock falls occasionally and that there are rock fall signs placed along the highway. Mr. Nichols testified that there was no notice of any rock falls or potential rock falls in this area prior to the incident involved herein. Respondent maintains that there was no prior notice of any rocks on W. Va. Route 5 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, claimants have not established that respondent failed to take adequate measures to protect the safety of the traveling public on W. Va. Route 5 in Wirt 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 SEPTEMBER 6, 2005

ARAMARK FACILITY SERVICES, INC.,
VS.
CONCORD UNIVERSITY
(CC-04-436)

Edward M. Kowal, Jr., Attorney at Law, for claimant.

Jendonnae L. Houdyschell, Senior Assistant Attorney General, for respondent.

FORDHAM, JUDGE:

Claimant brought this action for wages paid to employees under the terms of the management contract between Aramark Facility Services, Inc. (hereinafter Aramark) and Concord University (hereinafter Concord). This matter came before the Court on a motion to dismiss on behalf of respondent and a motion for summary judgment on behalf of claimant. The Court is of the opinion to deny respondent's motion to dismiss and to grant claimant's motion for summary judgment.

The management contract between Aramark and Concord was entered into on November 22, 1996. Under the terms of the contract, Aramark was to manage and operate the physical plant, grounds keeping and custodial services at Concord. According to the terms of the contract, Aramark was responsible for the wages and salaries of its personnel, but Concord was to reimburse Aramark for those salaries and benefits associated with all Aramark personnel. The contract was renewed on a yearly basis until it expired on June 30, 2001.

During the course of the contract, Aramark was requested by Concord to manage a summer painters program where seasonal workers were hired to paint dormitory rooms that had been damaged during the school year. This was in addition to the other responsibilities set out in the contract. These seasonal summer painters were paid an hourly rate of seven dollars and the lead painter received a wage of eight dollars an hour. Aramark paid the wages of these seasonal summer painters, and pursuant to the contract, Concord reimbursed Aramark for these wages.

In 2001, the West Virginia Division of Labor (hereinafter Division of Labor), received twenty-one "Requests for Assistance" from employees of Aramark based upon an apparent infringement of the Prevailing Wage Act by Aramark. Nineteen of the twenty-one complainants were the seasonal summer painters. The other two complainants were a plumber and an HVAC (heating, ventilation and air conditioning) maintenance employee. It was initially determined that Aramark had committed no violations of the Prevailing Wage Act (W. Va. Code §21-5A-3).

However, after the initial finding of the Division of Labor, there was a change in administration and a new commissioner was appointed to the Division of Labor. The complaints against Aramark were reopened and another hearing was conducted where

it was determined that Aramark owed the twenty-one complainants the amount of $508,169.66. Said amount was the Division of Labor's calculation of the difference between the wages paid and the prevailing wage rate. After several hearings before a Hearing Examiner for the Division of Labor, Aramark was ordered by the Commissioner of the Division of Labor to pay $508,169.66 to the complainants. It was found that the failure of Aramark to pay prevailing wages was the result of an honest mistake or error, as defined by the provisions of W. Va. Code §21-5A-9(b). The Circuit Court of Kanawha County affirmed the Commissioner's decision and the Supreme Court of Appeals of West Virginia denied Aramark's petition for appeal.

Aramark issued payment to the Division of Labor in the amount of $557,037.52, a figure that included post-judgment interest. Aramark filed this claim before this Court for $557,037.52, based upon its position that Concord has a duty to reimburse it for this amount in accordance with the terms of the contract.

The position of the respondent is that it is not responsible for the monies Aramark paid per the order of Division of Labor. Respondent asserts these monies were penalties Aramark had to pay to the Division of Labor for violations of the Prevailing Wage Act and, therefore, respondent should not be held liable for these amounts.

Respondent contends that the findings of the Division of Labor were, in fact, penalties assessed against Aramark for failing to follow the Prevailing Wage Act. Respondent argues that since the failure to pay prevailing wages was due to an honest mistake or error, as defined by W. Va. Code §21-5A-9(b), the workers therefore had no basis to recover the difference in wages under that section, and, therefore, this was an administrative remedy and the equivalent of a fine or penalty. While respondent was responsible for reimbursement of wages for employees of Aramark, it was not responsible for reimbursement for penalties received by Aramark for failure to follow all the applicable laws, including the Prevailing Wage Act. Thus, respondent maintains it is not responsible for the reimbursement of Aramark for any penalties it incurred.

A Motion for Summary Judgment is made and considered by a court where there is no genuine issue of material fact. The Court herein is of the opinion that in this claim there is no genuine issue of material fact and claimant's Motion will be determined by the Court at this time.

The Court is of the opinion that the monies paid pursuant to the order of the Division of Labor were not in the form of a penalty assessed against Aramark. The order of the Commissioner of the Division of Labor stated quite clearly that the failure of Aramark to pay prevailing wages was the result of an honest mistake or error, as defined by the provisions of W. Va. Code §21-5A-9(b). Further, the order stated that because it was an honest mistake or error, no penalty under the provision of the same code sections would be imposed.

The Court, in determining that the monies paid by Aramark to the employees did not constitute a penalty against Aramark, is of the opinion that there is a moral obligation on the part of Concord to reimburse Aramark for the amounts assessed as wages paid to the employees who performed services requested by Concord. The hiring of these summer employees was done for the convenience of Concord because Aramark had much more flexibility in the hiring of these employees. Further, these employees were hired by Aramark at the request of Concord by and through the contract. It is undisputed that neither Concord nor Aramark contemplated that the hiring of these particular employees (most of whom were students) pursuant to the contract would be subject to the provisions of the Prevailing Wage Act. As such, and in light of the Court's opinion that the monies paid did not constitute a penalty assessed against

Aramark, the Court finds that it would be a gross miscarriage of justice to hold Aramark responsible for these monies paid in accordance with an order of the Division of Labor. Further, the Court is of the opinion that the principles of equity and good conscience are applicable in this claim; therefore, the Court denies respondent's motion to dismiss and grants claimant's motion for summary judgment.

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 $557,037.52.

Award of $557,037.52.

The Honorable David M. Baker took part in the hearing and decision of this matter.

The Honorable Robert B. Sayre took no part in the hearing of or decision of this matter, having recused himself.

OPINION ISSUED SEPTEMBER 6, 2005

DAVIN W. GEORGE
VS.
DIVISION OF HIGHWAYS
(CC-04-562)

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 Kia Rio sedan struck a muffler as he was traveling south on W. Va. Route 14, Wood County. W. Va. Route 14 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 around 3:00 a.m. on August 30, 2004, a slightly foggy morning. W. Va. Route 14 is a three-lane highway at the area of the incident involved in this claim. Mr. George testified that he was driving in the middle lane of the highway when his vehicle hit a large muffler that he had not seen in the road. Claimant's vehicle sustained damage to the front left tire. The damage sustained totaled $150.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 14 at the site of the claimant's accident for the date in question.

Ron Galland, Assistant County Supervisor for the respondent in Wood County, testified that he had no knowledge of any debris in the roadway on W. Va. Route 14 on the date of claimant's incident. Mr. Galland stated that there had been no notice of debris in the road along this portion of W. Va. Route 14 on the day of the incident 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).

In the instant case, the evidence established that the respondent did not have actual or constructive notice of debris on W. Va. Route 14 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 his 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 SEPTEMBER 6, 2005

NIXON D. NELSON
VS.
DIVISION OF HIGHWAYS
(CC-04-034)

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 December 29, 2003, claimant was traveling on Jerico Road near Point Pleasant, Mason County, when his vehicle struck a broken edge in the road, damaging a rim.

2. Respondent was responsible for the maintenance of Jerico Road, which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $204.93.

4. Respondent agrees that the amount of $204.93 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 Jerico Road 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 $204.93.

Award of $204.93.

OPINION ISSUED SEPTEMBER 6, 2005

RALPH E. GIVENS and PHYLLIS J. GIVENS
VS.
DIVISION OF HIGHWAYS
(CC-04-505)

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 1998 Toyota Camry struck a hole while claimant Ralph E. Givens was traveling on W. Va. Route 31, in Wood County. W. Va. Route 31 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 July 24, 2004. W. Va. Route 31 is a two-lane highway at the area of the incident involved in this claim. Claimant Ralph Givens testified that he was traveling along W. Va. Route 31 through a sharp turn in the road. He stated that there was a truck crowding the center yellow line in the turn so he had to maneuver his vehicle closer to the edge of the road. The vehicle then hit a hole along the berm of the road that Mr. Givens had not seen. Mr. Givens testified that the hole was about one to two feet wide, one foot long, and ten to twelve inches deep and was located alongside the white line on the road. Claimants' vehicle struck the hole sustaining damage to a tire and rim totaling $428.59. Claimants' insurance deductible was $250.00; therefore, claimants are limited to a recovery in that amount.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 31 at the site of the claimant's accident for the date in question. Ron Galland, an Assistant County Supervisor for the respondent in Wood County, testified that he had no knowledge of any holes on W. Va. Route 31 for the date of claimant's incident. Respondent maintains that it had no actual or constructive notice of any holes on W. Va. Route 31.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the time of the year in which claimants' 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 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 $250.00.

Award of $250.00.

OPINION ISSUED SEPTEMBER 6, 2005

K. ROBERT BUCHANAN and CRYSTLE L. BUCHANAN
VS.
DIVISION OF HIGHWAYS
(CC-04-180)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 1996 Jeep Cherokee struck ice while claimant Crystle Buchanan was traveling on County Route 7/1 in Wood County. County Route 7/1 is a road maintained by respondent in Wood 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 5:55 p.m. on February 1, 2004, a cold evening. County Route 7/1 is a one-lane road at the area of the incident involved in this claim. Claimant Crystle Buchanan testified that she was driving around ten to fifteen miles per hour when her vehicle struck a patch of ice that had formed adjacent to a driveway which connects to the road. She stated that the driveway was on a steep hill and water drains off this driveway onto the road. Mrs. Buchanan stated that there had been snow and icy conditions on the road during the previous two weeks. She testified that the ice was about six to eight inches thick. Claimants' vehicle struck a hole in the patch of ice, whereupon Crystle Buchanan lost control of the vehicle which swerved, went over an embankment and flipped over before coming to a stop. The vehicle was totaled in the accident. Both Mrs. Buchanan and her son, who was a passenger in the vehicle, were taken to the hospital. Mr. and Mrs. Buchanan testified that they had called respondent on several occasions about the icy conditions on the road prior to the incident. Claimants' testified that their vehicle was valued at $6,820.00.

The position of the respondent is that its employees were involved in snow and ice removal on the high priority roads in Wood County for the date in question.

Ron Galland, Assistant Supervisor for the respondent in Wood County, testified that at the time of claimants' incident crews for respondent were involved in snow and ice removal. Mr. Galland stated that County Route 7/1 is part tar and chip and part gravel road that is low priority in terms of maintenance. He testified that due to its low priority, it would be one of the last roads to be worked on during snow and ice removal periods. Mr. Galland further stated that at the time of claimants' incident there was a lot of snow throughout the area and the crews had to perform snow and ice removal on the main routes until they were clean.

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 was involved in snow and ice removal throughout Wood County on the date of claimants' incident. Consequently, there is insufficient 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. While respondent did receive notice from the claimant of the conditions on County Route 7/1, there was evidence that there had been snowy and icy conditions for two weeks prior to the incident. The Court will not impose an impossible duty upon respondent during periods when its crews must be attending to the maintenance of ice and snow on the State's highways. Therefore, the Court has determined that claimants may not make a recovery

for their 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 SEPTEMBER 6, 2005

DEE L. MOONEY
VS.
DIVISION OF HIGHWAYS
(CC-04-858)

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 September 26, 2004, claimant was traveling on W. Va. Route 119 near Spencer, Roane County, when her vehicle struck two broken sign posts along the road damaging two tires.

2. Respondent was responsible for the maintenance of W. Va. Route 119 which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $389.56, however, claimant's insurance coverage provides for $100.00 deductible feature for collision and claimant is limited to a recovery in that amount..

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 W. Va. Route 119 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 $100.00.

Award of $100.00.

OPINION ISSUED SEPTEMBER 6, 2005

MONONGALIA GENERAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-05-214)

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

PER CURIAM:

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

Claimant seeks payment in the amount of $17,967.10 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 SEPTEMBER 6, 2005

BARBOUR COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-05-137)

Claimant appeared *pro se.*

Charles P. Houdyschell Jr., 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, Barbour County Commission, is responsible for the incarceration of prisoners who have committed crimes in Barbour County, but have been sentenced to facilities owned and maintained by respondent, Division of Corrections. Claimant brought this action to recover $48,350.00 in costs for providing housing to a prisoner who was sentenced to a State penal institution, but due to circumstances beyond the control of the county, the prisoner had to remain in the custody of the county for periods of time beyond the date of the commitment order.

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

Pursuant to the holding in *Mineral County*, respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $21,750.00. Claimant agrees that this is the correct amount to which it is entitled.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $21,750.00.

Award of $21,750.00.

OPINION ISSUED SEPTEMBER 6, 2005

TYGART VALLEY TOTAL CARE CLINIC
VS.
DIVISION OF CORRECTIONS
(CC-05-181)

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

PER CURIAM:

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

Claimant seeks payment in the amount of $3,069.03 for medical services rendered to inmates in the custody of respondent at Pruntytown Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED SEPTEMBER 6, 2005

RALPH BLANKENSHIP
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-05-275)

Claimant appeared *pro se*.
Ronald R. Brown, 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 $873.95 for items of personal property that were entrusted to respondent’s employees when he was taken to Southwestern 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. 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 $873.95.

Award of $873.95.

OPINION ISSUED SEPTEMBER 6, 2005

WEST VIRGINIA TRUCK & TRAILER, INC.
VS.
DIVISION OF LABOR
(CC-05-268)

Claimant appeared *pro se*.
Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $2,424.17 for providing maintenance for a vehicle owned by a facility of respondent in Kanawha County. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $2,424.17.

Award of $2,424.17.

OPINION ISSUED SEPTEMBER 6, 2005

ROBERT P. LANHAM
VS.
DIVISION OF HIGHWAYS
(CC-05-103)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1994 Ford F-250 struck a hole as he was traveling east on County Route 74/9, also known as Buck Run Road, in Ritchie County. County Route 74/9 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 around 11:00 p.m. on February 27, 2005. County Route 74/9 is a one-lane road at the area of the incident involved in this claim. Claimant testified that he was driving around 10 miles per hour when he drove across a bridge. Mr. Lanham was crossing the bridge when his vehicle struck a hole. Claimant's vehicle sustained damage to the left rear tire totaling $110.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 74/9 at the site of the claimant's accident for the date in question.

Harry Griffith, Highway Administrator for the respondent in Ritchie County, testified that he had no knowledge of any potholes on County Route 74/9 prior to the date of claimant's incident. Mr. Griffith stated that County Route 74/9 is a low priority, tar and chip road. Respondent had received no notice of holes in the road along this

portion of County Route 74/9 on the day of the incident 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).

In the instant case, the evidence established that the respondent did not have actual or constructive notice of a hole on County Route 74/9 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 his 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 SEPTEMBER 6, 2005

CARYL L. STINES
VS.
DIVISION OF HIGHWAYS
(CC-05-062)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2002 Ford Taurus, driven by her daughter, struck a landslide as her daughter was traveling west on W. Va. Route 95 in Wood County. W. Va. Route 95 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 around 11:00 p.m. on January 5, 2005, a rainy evening. W. Va. Route 95 is a two-lane highway at the area of the incident involved in this claim. Claimant's daughter, Amy Stines, testified that she was driving through a curve in the road when she came upon a landslide in the road. Ms. Stines attempted to stop her vehicle, but due to the water on the road, hydroplaned into the debris that covered the road. She stated that the landslide of rock and other debris was still occurring after her vehicle came to a stop in the debris. Claimant's vehicle sustained damage to both front tires and significant body damage totaling $2,729.47. Claimant's vehicle also had to be towed from the scene and then later towed to a garage. The towing bills totaled $140.00. Claimant's insurance deductible was $500.00, and did not cover towing.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 95 at the site of the claimant's accident for the date in question.

Curtis Richards, Working Crew Leader for the respondent in Wood County, testified that he had no knowledge of the landslide on W. Va. Route 95. Mr. Richards stated that in his eight years of employment with respondent in Wood County he had

never seen a landslide or a rock fall in the area of claimant's incident. Respondent had received no notice of a landslide in the road along this portion of W. Va. Route 95 prior to the incident 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). 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 instant case, claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on W. Va. Route 95 in Wood County. Evidence adduced at trial established that there had not been any rock falls or landslides along this stretch of W. Va. Route 95 prior to the 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.

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 3, 2005

CONNIE ROESE
VS.
DIVISION OF HIGHWAYS
(CC-04-064)

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

PER CURIAM:

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

1. On January 17, 2004, claimant was traveling on W.Va. Route 2 near Point Pleasant, Mason County, when her vehicle struck a hole in the road, damaging two rims.

2. Respondent was responsible for the maintenance of Route 2 which it failed to maintain properly on the date of this incident.

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

4. Respondent agrees that the amount of $450.00 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 W.Va. Route 2 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 $450.00.

Award of $450.00.

OPINION ISSUED NOVEMBER 3, 2005

TIFFANY MOORE
VS.
DIVISION OF HIGHWAYS
(CC-04-098)

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 19, 2004, claimant was traveling on I-79 near Elkview, Kanawha County, when her vehicle struck a piece of expansion joint protruding from the highway, damaging both front and rear left side tires.

2. Respondent was responsible for the maintenance of I-79 which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $118.72.

4. Respondent agrees that the amount of $118.72 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 I-79 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 $118.72.

Award of $118.72.

OPINION ISSUED NOVEMBER 3, 2005

ROBERT D. SHIRK
VS.
DIVISION OF HIGHWAYS
(CC-04-159)

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 Dodge Neon struck a broken section of road while he was traveling on County Route 8, also known as Durgon Road, in Grant County. County Route 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 9:30 p.m. on February 16, 2004. County Route 8 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving on County Route 8 when his vehicle struck a section of road that was broken up all the way across the road. Mr. Shirk stated that there were large chunks of asphalt laying throughout the road. He testified that his vehicle struck the broken section of road and chunks of asphalt, damaging the transmission pan and oil filter. Claimant's vehicle sustained damage totaling $2,194.98.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 8 at the site of the claimant's accident for the date in question.

Zyndall Thorne, a County Crew Leader for the respondent in Grant County, testified that he had no knowledge of a section of broken road on County Route 8 for the date in question. Mr. Thorne stated that there were no records of any complaints concerning the condition of the road prior to claimant's incident. He stated that respondent's crews went to the site and put up warning signs and removed asphalt chunks from the roadway after the incident. Mr. Thorne testified that this condition was the result of a base failure that occurred due to the winter weather. He also testified that the road has a history of being in pretty bad shape. He stated that the failure occurred along a stretch of road approximately fourteen feet wide and twenty five feet long. Respondent maintains that it had no actual or constructive notice of any holes on County Route 8.

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 broken section of road which claimant's vehicle struck and that it presented a hazard to the traveling public. Photographs in evidence depict the section of road and provide the Court an accurate portrayal of the size and location of the broken pavement on County Route 8. The size of the broken section of road 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 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 $2,194.98.

Award of $2,194.98.

OPINION ISSUED NOVEMBER 3, 2005

JOSHUA JAMES COOK
VS.
DIVISION OF HIGHWAYS
(CC-04-185)

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 2003 Acura CL-S Cruiser struck a hole while he was traveling southbound on U.S. Route 250 near Fairmont, Marion County. U.S. Route 250 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 4:30 p.m. and 5:00 p.m. on March 20, 2004. U.S. Route 250 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving around forty miles per hour when he noticed a hole in the road. Mr. Cook stated that there was traffic traveling in the opposite direction. He was unable to avoid the hole because of the traffic. Mr. Cook testified that the hole was one foot wide, three to four feet long, and four to five inches deep. He further stated that he was aware that U.S. Route 250 was a pretty rough road. Claimant's vehicle struck the hole sustaining damage to two rims totaling $672.97.

The position of the respondent is that it did not have actual or constructive notice of the condition on U.S. Route 250 at the site of the claimant's accident for the date in question.

Don Steorts, County Administrator for the respondent in Marion County, testified that he had no knowledge of any holes on U.S. Route 250 for the date in question. Mr. Steorts stated that there were no records of either complaints concerning the condition of the road or any maintenance done on this stretch of road prior to or after claimant's accident. He further stated that this section of road was one where there had been problems with holes. Respondent maintains that it had no actual or constructive notice of any holes on U.S. Route 250.

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 U.S. Route 250. The size of the hole leads the Court to conclude that respondent had constructive 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 his vehicle. However, the Court further finds that claimant was driving at a speed that was too fast for the conditions and that claimant was aware of the conditions on the road. The Court finds that the claimant

was also negligent, and thus may only recover for 60% of his damages.

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 $403.78.

Award of $403.78.

OPINION ISSUED NOVEMBER 3, 2005

KENNETH W. DODDRILL
VS.
DIVISION OF HIGHWAYS
(CC-04-197)

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 April 6, 2004, claimant was traveling on W.Va. Route 60 on the Amandaville Bridge in Saint Albans, Kanawha County, when his vehicle struck a hole in the road, damaging a tire and rim.

2. Respondent was responsible for the maintenance of Route 60 and the Amandaville Bridge which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $737.05. Claimant's insurance deductible was $500.00.

4. Respondent agrees that the amount of $500.00 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 Route 60 on the Amandaville Bridge 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 $500.00.

Award of $500.00.

OPINION ISSUED NOVEMBER 3, 2005

DAVID R. CARTER
VS.
DIVISION OF HIGHWAYS
(CC-04-545)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2002 Yamaha Star Warrior motorcycle struck a hole while he was traveling southbound on W. Va. Route 310 in Taylor County. W. Va. Route 310 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 12:00 p.m. on May 2, 2004, a sunny and clear day. W. Va. Route 310 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving on W. Va. Route 310 when he drove up a hill and noticed holes all over the road. Mr. Carter testified that he was traveling between fifty-five and sixty miles per hour when his vehicle struck a large hole in the middle of the road, sustaining damage to the rear tire and rim totaling $513.90. 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 310 at the site of the claimant's accident for the date in question.

At the request of this Court, respondent submitted an affidavit from John Corio, Assistant County Administrator for the respondent in Taylor County. Mr. Corio stated that W. Va. Route 310 is a feeder road that is classified as high priority and inspected by employees of respondent on a regular basis. He further 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 310.

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 location 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 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 $500.00.

Award of $500.00.

OPINION ISSUED NOVEMBER 3, 2005

SHANNON G. MASTERS
VS.
DIVISION OF HIGHWAYS
(CC-05-116)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2004 Mitsubishi Endeavor struck a hole while she was traveling on County Route 51/1 in Gerrardstown, Berkeley County. County Route 51/1 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 at approximately 3:30 p.m. on February 13, 2005, a clear and dry day. County Route 51/1 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that she was driving on County Route 51/1 when she saw the hole. She stated that she was not sure if she had seen the hole on previous occasions. Ms. Masters was unable to avoid the hole because of a vehicle traveling towards her vehicle and she could not stop in time to avoid it. Claimant's vehicle struck the hole sustaining damage to the right front tire. Ms. Masters stated that the hole was four to six inches deep. Claimant's vehicle sustained damage totaling $101.67.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 51/1 at the site of the claimant's accident for the date in question.

Mark Baker, an assistant supervisor for the respondent in Berkeley County, testified that he had no knowledge of any holes on County Route 51/1 in Gerrardstown for the date in question. Mr. Baker stated that the road had a lot of residential traffic along with a lot of tractor-trailers. He stated that it looked like water had seeped under the road at the area of claimant's incident. Mr. Baker testified that when this happened the road could deteriorate quickly with trucks frequently traveling over the road. Respondent maintains that it had no actual or constructive notice of any holes on County Route 51/1.

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 heavy amount of traffic on the road 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 $101.67.

Award of $101.67.

OPINION ISSUED DECEMBER 1, 2005

MELISSA A. RICHMOND
VS.
DIVISION OF HIGHWAYS
(CC-03-375)

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 Mitsubishi Eclipse GT struck a hole while she was traveling on County Route 22 in Berkeley County. County Route 22 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 at 6:18 a.m. on June 25, 2003, a clear and dry morning. County Route 22 is a two-lane unmarked highway at the area of the incident involved in this claim. Claimant testified that she was driving on County Route 22 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. Richmond stated that the hole was about twelve to fourteen inches deep and about three to four feet wide. Claimant's vehicle struck the hole sustaining damage to the right front rim and tire. Claimant's vehicle sustained damage totaling $239.88.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 22 at the site of the claimant's accident for the date in question.

Mark Baker, an Assistant Supervisor for the respondent in Berkeley County, testified that he had no knowledge of any particular holes on County Route 22 for the date in question. Mr. Baker testified that there were no records of complaints concerning the condition of the road, but that County Route 22 had been scheduled for maintenance for approximately three weeks prior to the incident due to the condition of the road. He stated that the road was experiencing an increase in truck traffic due to home construction along the road and that the condition of the road was an ongoing problem. Respondent maintains that it had no actual or constructive notice of any holes on County Route 22.

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, if not actual, 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 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 $239.88.

Award of $239.88.

OPINION ISSUED DECEMBER 1, 2005

MICHELLE L. HARRINGTON
VS.
DIVISION OF HIGHWAYS
(CC-03-536)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her1997 Geo Metro struck an exposed rail at a railroad crossing while she was traveling on County Route 1 near Green Spring, Hampshire County. County Route 1 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 8:15 p.m. on October 18, 2003, a clear evening. County Route 1 is a two-lane highway with a railroad crossing at the area of the incident involved in this claim. Claimant testified that she was driving south on County Route 1 at approximately thirty to thirty-five miles per hour with another vehicle coming towards her in the opposite direction. She stated that as she drove her vehicle over the railroad tracks her right front tire caught on an exposed rail along the edge of the highway. Ms. Harrington testified that her tire was caught on the rail and the vehicle slid along the railroad tracks approximately 200 feet. Claimant's vehicle sustained damage to the frame and right front wheel totaling $77.60.

Larry West, the claimant's step-father, testified that he helped tow Ms. Harrington's vehicle off the railroad tracks after the incident. Mr. West stated that a few weeks prior to the incident, he witnessed Division of Highways crews patching the railroad crossing which had recently been repaired by the railroad company. He testified that there was a section of rail left exposed along the highway due to how the intersection of the road and the railroad was paved.

The position of the respondent is that the railroad company was responsible for the maintenance of the railroad crossing on County Route 1 at the site of the claimant's accident for the date in question.

Paul Timbrook, a Foreman for the respondent in Hampshire County, testified it is the responsibility of the railroad company to maintain the railroad crossings. He stated that respondent is responsible for the road leading up to the railroad, but that the railroad company is responsible for the intersection itself. Mr. Timbrook further stated that from time to time respondent would assist in the maintenance of the railroad crossings. He testified that crews of respondent had helped with the paving of the intersection along County Route 1. Mr. Timbrook stated that equipment owned by respondent had been used to do the paving and that employees of respondent had been operating the equipment. Respondent maintains that the railroad company was responsible for the maintenance of the railroad crossing on County Route 1.

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 is responsible for the work that it completed at the railroad crossing on County Route 1; that it had at least constructive notice of the exposed rail which claimant's vehicle struck; and, further, that the exposed rail presented a hazard to the traveling public. Photographs in evidence depict the exposed rail and provide the Court an accurate portrayal of the railroad crossing on County Route 1. While a railroad company is typically responsible for the maintenance of railroad crossings, respondent took part in the repaving of this crossing after it was repaired by the railroad company. In doing so, respondent assumed responsibility and liability for the repairs. 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 $77.60.

Award of $77.60.

OPINION ISSUED DECEMBER 1, 2005

ROCKY L. MARTIN
VS.
DIVISION OF HIGHWAYS
(CC-04-028)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1994 Chevrolet Silverado struck a broken stretch of road while he was traveling on Route 21 in Fayette County. Route 21 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 the morning of January 14, 2004, a cold and clear morning. Route 21 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving on Route 21 when he drove around a curve and noticed that the road dropped down about three or four inches. He stated that the drop off went all the way across the road and that there was no way to avoid it. Mr. Martin testified that he had been driving at approximately thirty miles per hour due to the rough condition of the road when his vehicle hit the drop off. Claimant's vehicle struck the drop off sustaining damage to the right rear tire and shock. Claimant's vehicle sustained damage totaling $101.22.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 21 at the site of the claimant's accident for the date in question.

Jerry Keffer, a Crew Leader for the respondent in Fayette County, testified that Route 21 had been sliding in this area for about two months prior to claimant's incident. Mr. Keffer stated that on December 1, 2003, crews for respondent had used 60 tons of hot mix to try to fix the problem on Route 21. He stated that there is a creek that runs

near the road in that area and that the road is sliding into the creek. Mr. Keffer further stated that signs were placed along the road warning of a dip and rough road. Respondent maintains that it had no actual or constructive notice of any holes on Route 21.

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 slide in the road which claimant's vehicle struck and that the slide presented a hazard to the traveling public. Photographs in evidence depict the slide and provide the Court an accurate portrayal of the size and location of the problem area on Route 21. The size of the slide 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 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 $101.22.

Award of $101.22.

OPINION ISSUED DECEMBER 1, 2005

LAURA CALLAHAN
VS.
DIVISION OF HIGHWAYS
(CC-04-044)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 1988 Toyota Truck struck a section of road that had slid while her husband, Tommy Callahan, was traveling on County Route 7, also known as Buffalo Creek Road, in Wayne County. County Route 7 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 5:30 p.m. and 6:00 p.m. on January 4, 2004, a day where there had been some rain. County Route 7 is a two-lane highway at the area of the incident involved in this claim. Mr. Callahan testified that he was driving on County Route 7 when he noticed a sign that read "one-lane" ahead. He stated that he was driving at about fifteen miles per hour. Mr. Callahan drove his vehicle up a slight hill and around a curve when he realized that the road had subsided significantly on his left hand side. He stated that he applied his brakes but was unable to stop in time. His vehicle's front driver's side tire went over the edge of road and he was forced to leave his vehicle. Mr. Callahan's vehicle then went over the side

of the road and struck a tree. Claimant's vehicle sustained damages estimated between $1,578.91 and $1,631.01. Mr. Callahan stated that he sold the vehicle for salvage for $200.00. He further stated that he had traded a 1989 Jeep Wagoneer for which he had paid $1,200.00 in exchange for the 1988 Toyota Truck. Claimant also incurred a $100.00 towing bill due to this accident.

The position of the respondent is that it had placed warning signs on County Route 7 at the site of the claimant's accident prior to the date in question.

Colen Cox, a General Foreman for the respondent in Wayne County, testified that there had been a lot of rain and flooding throughout Wayne County in the months shortly before claimant's accident. Mr. Cox stated that the slip on County Route 7 started in December 2003. He stated that "one-lane" road signs were placed in this area along with paddles that indicated the problem with the roadway. Mr. Cox further stated that when the warning signs were placed at the scene in December 2003 there was one lane that was safe for the traveling public, but that over the course of a month the road may have slipped more causing it to be unpassable. Respondent maintains that it had placed warning signs at the area of the slip on County Route 7 a month 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 actual notice of the slide in the road which claimant's vehicle struck and that the slide presented a hazard to the traveling public. Photographs in evidence depict the slide and provide the Court an accurate portrayal of the size and location of the problem area on County Route 7. The size of the slide 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. While respondent did place warning signs at the site, the Court is of the opinion that there was not enough done to protect the traveling public from the dangerous condition of the road. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle. Further, the evidence established that claimant's husband traded a vehicle for which he paid $1,200.00 to acquire the vehicle that was damaged in this incident. Claimant received $200.00 for the salvage value of the vehicle, and the Court concludes that the vehicle had depreciated in value by $200.00 at the time of the claimant's accident. Therefore, claimant may only recover $800.00 for the vehicle along with the $100.00 she paid to have her vehicle towed.

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 $900.00.

Award of $900.00.

OPINION ISSUED DECEMBER 1, 2005

TOM DADDYSMAN
VS.
DIVISION OF HIGHWAYS

(CC-04-055)

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 January 10, 2004, claimant was traveling on Route 33 near Teays Valley, Putnam County, when his vehicle struck a hole in the road, damaging a tire and a rim.

2. Respondent was responsible for the maintenance of Route 33, which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $613.39. Claimant's insurance deductible was $250.00.

4. Respondent agrees that the amount of $250.00 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 Route 33 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

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

Award of $250.00.

OPINION ISSUED DECEMBER 1, 2005

SUSAN A. SAMPLES
VS.
DIVISION OF HIGHWAYS
(CC-04-132)

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 19, 2004, claimant was driving on I-79 in Kanawha County when her vehicle struck part of a bridge that was protruding upward, damaging two tires.

2. Respondent was responsible for the maintenance of I-79, which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $315.60.

4. Respondent agrees that the amount of $315.60 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 I-79 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 $315.60

Award of $315.60.

OPINION ISSUED DECEMBER 1, 2005

RANDY PARKER
VS.
DIVISION OF HIGHWAYS
(CC-04-133)

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 19, 2004, claimant was driving on I-79 in Kanawha County when his vehicle struck a steel expansion joint that was protruding from the bridge, damaging two tires.

2. Respondent was responsible for the maintenance of I-79, which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $314.36.

4. Respondent agrees that the amount of $314.36 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 I-79 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 $314.36

Award of $314.36.

OPINION ISSUED DECEMBER 1, 2005

PAMELA L. CAMPBELL
VS.
DIVISION OF HIGHWAYS
(CC-04-149)

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 March 8, 2004, claimant was traveling on W. Va. Route 19 near Mount Lookout, Nicholas County, when her vehicle struck a rock in the road, damaging two tires and two rims.

2. Respondent was responsible for the maintenance of W. Va. Route 19, which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $226.73.

4. Respondent agrees that the amount of $226.73 for the damages put forth by the claimants is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of W. Va. Route 19 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 $226.73.

Award of $226.73.

OPINION ISSUED DECEMBER 1, 2005

SANDRA LYNN SLIGER and RICHARD M. SLIGER
VS.
DIVISION OF HIGHWAYS
(CC-04-362)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 1992 Ford Ranger struck a hole while they were traveling on Route 91 near Farmington, Marion County. Route 91 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 a.m. on June 2, 2004, a clear and dry day. Route 91 is a two-lane highway at the area of the incident involved in this claim. Claimant Sandra Sliger testified that she was driving on Route 91 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. Sliger stated that she was unable to avoid it due to oncoming traffic. Claimant testified that the hole was between six and twelve inches deep and several feet wide. Claimants' vehicle struck the hole sustaining damage to the A-frame totaling $221.92.

The position of the respondent is that it did not have actual or constructive

notice of the condition on Route 91 at the site of the claimant's accident for the date in question.

Don Steorts, County Administrator for the respondent in Marion County, testified that he had no knowledge of any holes on Route 91 near Farmington for the date in question or the days immediately prior. Mr. Steorts 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 or two weeks after. Respondent maintains that it had no actual or constructive notice of any holes on Route 91.

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 claimants' vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the time of the year in which claimants' 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 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 $221.92.

Award of $221.92.

OPINION ISSUED DECEMBER 1, 2005

LONNIE R. CRITES and ROSA LYNN CRITES
VS.
DIVISION OF HIGHWAYS
(CC-04-422)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2001 Hyundai Elantra struck a hole while they were traveling on I-79 near the Simpson Creek Bridge in Harrison County. I-79 is a highway 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 6:30 p.m. on June 3, 2004, a clear and dry day. I-79 is a four-lane highway that was under construction at the area of the incident involved in this claim. Claimant Lonnie Crites testified that he was driving on I-79 with traffic all around him, including a tractor trailer passing him on his left, when his vehicle struck the hole. He stated that he could not avoid the hole due to

the traffic around him. Mr. Crites stated that the hole was about four or five inches deep. Claimants' vehicle struck the hole sustaining damage to both front and rear passenger side rims and tires totaling more than their $250.00 insurance deductible.

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.

Robert Suan, Crew Leader for the respondent in Taylor County at the Lost Creek Office, testified that the bridges were being widened in the area of claimants' incident around the date of the accident. Mr. Suan stated that respondent's maintenance crews will patch holes as they see them throughout construction sites. He further stated that respondent's crews had been out patching holes along I-79 on June 3, 2004, but that due to the traffic a hole could reemerge at any time. Mr. Suan also stated that there were no complaints regarding holes along I-79 prior to claimant's incident. Respondent maintains that it had no actual or constructive notice of any holes on I-79.

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 claimants' vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the time of the year in which claimants' 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 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 $250.00.

Award of $250.00.

OPINION ISSUED DECEMBER 1, 2005

CARLA R. ROSE
VS.
DIVISION OF HIGHWAYS
(CC-05-115)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2004 Dodge Neon struck a hole while she was traveling on Van Clevesville Road near Martinsburg, Berkeley County. Van Clevesville Road 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 12:30 a.m. on February

13, 2005, a clear and dry evening. Van Clevesville Road is a two-lane unmarked highway at the area of the incident involved in this claim. Claimant testified that she was driving on Van Clevesville Road with a vehicle traveling towards her when her vehicle struck a hole on the edge of the highway. She stated that she had seen the hole previously but had been able to avoid it on other occasions. Claimant's vehicle struck the hole sustaining damage both passenger side rims and tires Claimant's vehicle sustained damage totaling $850.80. 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 Van Clevesville Road at the site of the claimant's accident for the date in question.

Mark Baker, an Assistant Supervisor for the respondent in Berkeley County, testified that he had no knowledge of any holes on Van Clevesville Road for the date in question. Mr. Baker testified that there were no records of complaints concerning the condition of the road. He stated that the road was designed for residential use but has been experiencing an increase in truck traffic for agricultural purposes. Respondent maintains that it had no actual or constructive notice of any holes on Van Clevesville Road.

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

In the instant 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 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 $500.00.

Award of $500.00.

OPINION ISSUED DECEMBER 1, 2005

ORVILLE W. BELL JR.
VS.
DIVISION OF HIGHWAYS
(CC-05-212)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1997 Toyota Camry struck a broken section of pavement while he was traveling on Route 21, also known as Blue Goose Road, in Monongalia County. Route 21 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 2:00 p.m. and 3:00 p.m. on April 11, 2005, a cloudy day. Route 21 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving through a curve on Route 21 with a tractor trailer traveling towards him in the opposite lane and on the center line of the road. Mr. Bell stated that he had to drive his vehicle close to the edge of the road because of the tractor trailer. He testified that his vehicle then struck a section of broken pavement that extended almost one foot into the roadway, was three feet long, and nine to twelve inches deep. Claimant's vehicle struck the broken section of pavement sustaining damage to the both passenger side tires and one rim totaling $137.80.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 21 at the site of the claimant's accident for the date in question.

Ralph Henderson, Crew Chief for the respondent in Monongalia County, testified that he had no knowledge of any sections of broken pavement on Route 21 for the date in question. 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 prior to claimant's incident. Respondent maintains that it had no actual or constructive notice of any holes on Route 21.

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 broken section of highway which claimant's vehicle struck and that it presented a hazard to the traveling public. Photographs in evidence depict the broken section of highway and provide the Court an accurate portrayal of the size and location of the broken section of highway on Route 21. The size of the broken section of highway 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 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 $137.80.

Award of $137.80.

OPINION ISSUED DECEMBER 1, 2005

ARNOLD W. RYAN II
VS.
PUBLIC SERVICE COMMISSION
(CC-05-314)

Claimant appeared *pro se*.
Ronald R. Brown, 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 $35.88 for reimbursement of uniform cleaning fees. 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 $35.88.

Award of $35.88.

OPINION ISSUED DECEMBER 1, 2005

DAVIS MEMORIAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-05-379)

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

PER CURIAM:

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

Claimant seeks payment in the amount of $196.35 for medical services rendered to inmates in the custody of respondent at Pruntytown Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED DECEMBER 28, 2005

LENARD ANTHONY PANRELL
VS.
DIVISION OF HIGHWAYS
(CC-02-200)

Michael D. Payne and Christopher Davis, Attorneys at Law, for claimant.
Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

GRITT, JUDGE:

Claimant brought this action for personal injury which occurred when the mountain bicycle he was riding struck a hole while he was traveling through the intersection of Pleasant Street and Spruce Street in Morgantown, Monongalia County. Pleasant Street and Spruce Street are both roads 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 11:30 a.m. and 12:00 p.m. on May 6, 2000, a clear and sunny day. Pleasant Street and Spruce Street are both two-lane highways at the area of the incident involved in this claim. Mr. Panrell testified that he was test riding a bicycle from a local bicycle store. He had taken it for a ride around the city and had stopped at the home of George and Mary Beth Patandreas to show them the bicycle. They were all considering purchasing new bicycles so that they could ride the rail trail in Morgantown, and Mr. Panrell had decided to show them the bicycle he was considering to purchase. While traveling back to the bicycle store, claimant testified that he was crossing the Pleasant Street bridge. He began to slow down as the light at the intersection was red for traffic traveling in his direction. As he neared the intersection of Pleasant Street and Spruce Street, the light changed to green and he looked at the traffic at the intersection to make sure that it had stopped for the traffic light. Mr. Panrell stated that it was then that he saw a hole in the road that he had not seen before. The bicycle he was riding struck the hole causing claimant to lose control and fall from the bicycle. Mr. and Mrs. Patandreas went to the scene of the accident after receiving a telephone call informing them that Mr. Panrell had been injured. Mr. Patandreas testified that the hole in the pavement was about 27 or 28 inches long, and between five and six inches deep. Mr. Panrell sustained a broken left arm. He underwent surgery to repair his arm and had pins inserted into the bone in his arm so it would heal correctly. Claimant paid $250.00 for a traction device to use in his physical therapy. He also paid $300.00 of his medical bills and $425.00 for physical therapy sessions. Mr. Panrell's insurance paid the remainder of his medical bills in the amount of $9,425.55. The claimant incurred a total of $975.00 in unreimbursed medical expenses as a result of this accident.

Mr. Panrell testified that before this accident he was very active in outdoor activities. He stated that he formerly engaged in sky diving, scuba diving, skiing, rock climbing, white water rafting, bicycling, and riding motorcycles, among other activities. He had been a volunteer emergency medical technician for Blacksville EMS for ten years prior to the accident serving as a crew chief, but he was no longer a volunteer at the time of the accident herein. He has been employed by Consolidated Coal at the Blacksville Number 2 mine as a warehouse technician clerk since 1978 and he returned to his position some ten to eleven weeks after the accident. He also serves as an EMT while he is on duty at the coal mine if the need arises. Mr. Panrell stated that following the accident he was advised by his doctors to do nothing that would create a repetitive shock to the bone in his left arm. He is able to continue in his employment with the coal mine but he has modified how he performs his job duties to accommodate the reduced strength in his left arm. He also testified that he no longer can rock climb or rappel since he cannot support his weight with his left arm. Mr. Panrell testified that he and a group of friends would routinely get together for activities prior to the accident, but since the accident he has been unable to join them in many of the activities due to the limited use of his left arm.

The position of the respondent is that it did not have actual or constructive notice of the condition at the intersection of Pleasant Street and Spruce Street at the site of the claimant's accident for the date in question.

Kathy Westbrook, Highway Administrator for the respondent in Monongalia County, testified that she had no knowledge of any holes at the intersection of Pleasant Street and Spruce Street in Morgantown for the date in question. She stated that generally if there is a hole in the road that is an inch or an inch and a half in depth and that crews would try to patch it. Ms. Westbrook stated that there was patching done along this stretch of road on May 29, 2000, with temporary cold patch. She stated that the temporary cold patch can last for a long time or only very shortly after being put in place due to weather and traffic conditions. Ms. Westbrook further stated that she had not received any telephone calls or complaints about a hole at the intersection of Pleasant Street and Spruce Street prior to the claimant's incident.

Ralph Henderson, Crew Chief for the respondent in Monongalia County, testified that on March 23, 2000, he was in charge of a prison crew that was doing temporary cold patching on U.S. Route 119, which included the intersection of Pleasant Street and Spruce Street. Mr. Henderson stated that he did not recall patching a hole at the site of claimant's accident. He further stated that he did not receive any complaints about a hole at this intersection between March 23, 2000, and 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 bicycle 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 at the intersection of Pleasant Street and Spruce Street. 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 medical expenses that he incurred. Further, due to the nature of the permanent injury to the claimant, his diminished capacity to enjoy life and the pain and suffering he endured, claimant may make a recovery for the loss he has experienced.

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 $975.00 for his medical expenses and $100,000.00 for his permanent injury, pain and suffering and diminished capacity to enjoy life.

Award of $100,975.00.

OPINION ISSUED JANUARY 4, 2006

GARY EISENMAN and R
EBECCA EISENMAN
VS.
DIVISION OF HIGHWAYS
(CC-04-864)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2001 Chevrolet Silverado struck a washed out shoulder while Gary Eisenman was traveling on County Route 29 in Greenbrier County. County Route 29 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 a.m. on August 7, 2004, a clear and dry day. County Route 29 is a two-lane highway at the area of the incident involved in this claim. Mr. Eisenman testified that he was driving on County Route 29 when he saw a vehicle being driven towards him which was traveling in the middle of the road. He stated that he had to drive his vehicle onto the shoulder of the road to avoid the other vehicle. Mr. Eisenman stated that the shoulder was much lower than the level of the road and his vehicle veered across the road after he tried to steer his vehicle off the shoulder. The vehicle struck a telephone pole on the left side of the road. He stated that the shoulder was approximately eight inches lower than the road. Mr. Eisenman had first noticed the condition of the shoulder the previous November and had notified respondent of the condition on several occasions. Claimants' vehicle struck a telephone pole sustaining extensive damage to the driver's side of the vehicle totaling $9,832.00. Claimants' insurance deductible was $1,000.00.

The position of the respondent is that it did have actual notice of the condition on County Route 29 at the site of the claimant's accident; however, its crews were involved in snow and ice removal and repairs to flood damaged areas prior to claimants' incident.

Richard Hines, Crew Supervisor for respondent in Greenbrier County, testified that the shoulder on County Route 29 had been in a state of disrepair since November 2003, when there had been flooding in Greenbrier County. Mr. Hines stated that respondent's crews had been involved in snow and ice removal until March 2004, and then its crews began the repair work related to flood damage from November 2003.

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 actual notice of the condition of the shoulder which claimants' vehicle struck and that the washed out shoulder presented a hazard to the traveling public. The condition of the shoulder and respondent's knowledge of this condition 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 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 $1,000.00.

Award of $1,000.00.

OPINION ISSUED JANUARY 17, 2006

COLISIA A. HUFF
VS.
DIVISION OF HIGHWAYS
(CC-04-567)

Claimants 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 Dodge Caravan striking rocks while she was traveling on State Route 2 in the Glendale area, also known as "the narrows," in 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 September 8, 2004. On the date in question, Ms. Huff 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. She 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 damage to the oil totaling $342.29.

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 falling rock signs at both the north and south ends of the section of State Route 2 referred to as "the narrows." Respondent undertakes periodic patrols through the area and the area has been provided with ample lights for when it is dark. 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 has 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 many claims which occurred in this specific section of State Route 2. *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), Hundagen *vs. Div. of Highways*, CC-98-303 (Ct. Cl. Dec. 6, 1999). 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 $342.29.

Award of $342.29.

OPINION ISSUED JANUARY 17, 2006

JAMES SAMPLES
VS.
DIVISION OF CORRECTIONS
(CC-04-580)

Claimant appeared *pro se*.

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

PER CURIAM:

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

1. On March 13, 2003, claimant, an inmate at Mount Olive Correctional Center, was placed in lock up.

2. On March 31, 2003, employees for respondent appropriated, documented and stored the claimant's personal property located in his cell.

3. On May 12, 2004, claimant was released from lock-up and inspected his inventoried list of personal items and discovered twenty-eight Playstation games and two Playstation memory cards were missing.

4. At the hearing of this matter respondent admitted that this claim was valid.

5. Respondent and claimant agree that the amount of $750.00 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 failed adequately to care for claimant's personal property since it was not returned to him. 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 $750.00.

Award of $750.00.

OPINION ISSUED JANUARY 17, 2006

SANDRA S. DIETZ
VS.
DIVISION OF HIGHWAYS
(CC-05-010)

Claimants 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 her1996 Honda Accord striking rocks while she was traveling on State Route 2 in the Glendale area, also known as "the narrows," in 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 December 28, 2004. On the date in question, Ms. Dietz 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. She 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 damage to the transmission pan totaling $216.24.

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 falling rock signs at both the north and south ends of the section of State Route 2 referred to as "the narrows." Respondent undertakes periodic patrols through the area and the area has been provided with ample lights for when it is dark. 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 has 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 many claims which occurred in this specific section of State Route 2. 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); Hundagen vs. Div. of Highways, CC-98-303 (Ct. Cl. Dec. 6, 1999). 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 $216.24.

Award of $216.24.

OPINION ISSUED JANUARY 17, 2006

JOYCE ZERVOS and NICK F. ZERVOS JR.
VS.
DIVISION OF HIGHWAYS
(CC-05-042)

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 their 1996 Honda Accord striking rocks while claimant Joyce Zervos was traveling on State Route 2 in the Glendale area, also known as "the narrows," in 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 December 30, 2004. On the date in question, Ms. Servos 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. She was proceeding along State Route 2 when the vehicle she was driving struck a rock that had fallen into the roadway. Claimants' vehicle sustained damage to the oil pan totaling $616.25. Claimants' insurance deductible was $500.00.

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 falling rock signs at both the north and south ends of the section of State Route 2 referred to as "the narrows." Respondent undertakes periodic patrols through the area and the area has been provided with ample lights for when it is dark. 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 has 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 many claims which occurred in this specific section of State Route 2. *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); Hundagen *vs. Div. of Highways*,

CC-98-303 (Ct. Cl. Dec. 6, 1999). 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 claimants' 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 $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 17, 2006

PATRICIA A. WELLING
VS.
DIVISION OF HIGHWAYS
(CC-05-052)

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 January12, 2005, claimant's son was traveling on Route 67, Brooke County, when the vehicle struck rocks in the road, damaging the gas tank.

2. Respondent was responsible for the maintenance of Route 67, which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $289.30. Claimant's insurance deductible was $250.00.

4. Respondent agrees that the amount of $250.00 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 Route 67 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 JANUARY 17, 2006

GEORGE F. LANDERS
VS.
DIVISION OF HIGHWAYS

(CC-05-077)

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 2003 Dodge Ram slid on a patch of ice while he was traveling on County Route 21 in Marshall County. County Route 21 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 at approximately 6:45 a.m. on February 4, 2005, a cold and dry morning. County Route 21 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving on County Route 21 when his vehicle slid on a patch of ice. He stated that he had been traveling approximately 15 miles per hour due to the curves on the road. Mr. Landers testified that the water was run-off from a ditch adjacent to the road and that the water covered the entire road. He stated that there was a storm drain in the ditch, but that it was blocked by rocks. Mr. Landers further stated that in December 2004, he had called respondent about a rock fall at this same location and that the rocks had been moved into the ditch by respondent at that time. Claimant's vehicle slid on the patch of ice and into a guardrail damaging the bumper. Claimant's vehicle sustained damage totaling $583.95. 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 21 at the site of the claimant's accident for the date in question.

Chris Minor, Highway Administrator 2 for the respondent in Marshall County, testified that he had no knowledge of any water running across County Route 21 at the site of claimant's accident for the date in question. Mr. Minor stated that there had been a rock slide at this location several months earlier and that the rocks had just been moved out of the road so that traffic could proceed along it.

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 nor expected to keep its highways absolutely free of ice and snow at all times, and the presence of an isolated patch on a highway during winter months, or a water patch in summer is generally insufficient to charge the State with negligence. *Richards v. Division of Highways*, 19 Ct. Cl. 71 (1992); *McDonald v. Dept. of Highways*, 13 Ct. Cl. 13 (1979); *Christo v. Dotson*, 151 W. Va. 696, 155 S.E.2d 571 (1967).

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the condition in the area of County Route 21 where claimant's accident occurred and that ice on the road presented a hazard to the traveling public. Respondent had previously moved rocks from the road and placed them in the ditch adjacent to the road, also covering a storm drain. That respondent placed the rocks in this ditch 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 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 $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 17, 2006

ROBERT G. PHILLIPS
VS.
DIVISION OF HIGHWAYS
(CC-05-153)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when he drove his 1990 Chrysler New Yorker into an area which was under repair while he was traveling on County Route 25 in 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 sometime in the afternoon on March 3, 2005, a clear and dry day. County Route 25 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving on County Route 25 when he saw the hole. He stated that there was work being done along the road to repair damages that had occurred as a result of a flood during September 2004. Mr. Phillips testified that there was no one working at the site when his vehicle approached the area. He saw a cut in the pavement that was approximately four feet wide and four feet long that had been filled with slag when the workers left the area for the day. Mr. Phillips could not avoid this hole because of oncoming traffic. His vehicle struck the hole and damaged the right and left front struts. Claimant's vehicle sustained damage totaling $362.48. Claimant's insurance deductible was $50.00.

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.

Milton Davis, County Administrator for the respondent in Ohio County, testified that there had been a flood in September of 2004 that caused damage to the shoulders, embankments, and guardrails along County Route 25. Mr. Davis stated that a contractor was hired to complete the repairs. He testified that there may have been an inspector for respondent at the site of claimant's accident. Respondent maintains that it had no actual or constructive notice of defective condition at the repair site.

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 condition at

the repair site on County Route 25 presented a hazard to the traveling public. The Court is aware that it is common practice for respondent to have an inspector on site for construction projects that are completed by contractors and that these inspectors ensure that the roads are safe for the traveling public both during and after the hours that the contractor is working on the roads. The size of the depression across the road 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 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 $50.00.

Award of $50.00.

OPINION ISSUED JANUARY 17, 2006

TERESA A. LUCAS
VS.
DIVISION OF HIGHWAYS
(CC-05-245)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 1998 Suzuki Sidekick struck a washed out portion of the shoulder when she was traveling on W. Va. Route 15 in Webster County. W. Va. Route 15 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 at approximately 9:00 p.m. on March 19, 2005, a rainy and foggy evening. W. Va. Route 15 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that she was driving southbound on W. Va. Route 15 when her front passenger side tire struck a section of shoulder that had been washed out. She stated that her vehicle went into the washed out shoulder area and she could not maneuver it out of the defective shoulder. Ms. Lucas stated that the washed out section of shoulder was between three and four feet deep. Claimant's vehicle sustained damages to the right front tire and extensive damages to the vehicle totaling $3,592.45.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 15 at the site of the claimant's accident for the date in question.

Doyle Williams, Highway Administrator 2 for the respondent in Webster County, testified that there had been several inches of rain during March 2005, which caused several slips along roads in Webster County. It also caused several ditches to be washed out. Mr. Williams stated that the shoulder along W. V. Route 15 had been washed out for several days at least, but that crews for respondent had been repairing slips along other stretches of road where the roads had been blocked. However, he also testified that approximately one month passed before the shoulder was repaired.

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 washed out shoulder which claimant's vehicle struck and that the washed out shoulder presented a hazard to the traveling public. Photographs in evidence depict the shoulder and provide the Court an accurate portrayal of the size and location of the wash out on W. Va. Route 15. The size of the wash out leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to provide a warning device or take corrective action to protect the traveling public. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle. However, the Court also finds that claimant was also negligent in that she drove onto the shoulder of the road without being forced to do so by oncoming traffic. The Court concludes that claimant was twenty-five per cent (25%) negligent. Based upon the principle of comparative negligence, the award to claimant will be reduced accordingly.

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 $2,694.34.

Award of $2,694.34.

OPINION ISSUED JANUARY 17, 2006

KITTY WOLFE
VS.
DIVISION OF HIGHWAYS
(CC-05-306)

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 July 11, 2005, claimant was traveling on a bridge on Route 218 near Fairview, Marion County, when her vehicle struck a fastener attached to a steel plate and it caused damage to a tire.

2. Respondent was responsible for the maintenance of Route 218 which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $83.07

4. Respondent agrees that the amount of $83.07 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 the bridge on Route 218 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 $83.07.

Award of $83.07

OPINION ISSUED JANUARY 17, 2006

SGS NORTH AMERICA
VS.
DIVISION OF LABOR
(CC-05-395)

Chris Robbins, Attorney at Law, for claimant
Ronald R. Brown, 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 $18,040.00 for providing analysis services of samples submitted by respondent. The documentation for the analysis 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 $18,040.00.

Award of $18,040.00.

OPINION ISSUED JANUARY 17, 2006

CORRECTIONAL MEDICAL SERVICES INC.
VS.
DIVISION OF CORRECTIONS
(CC-05-422)

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

PER CURIAM:

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

Claimant seeks payment in the amount of $406,028.09 for medical services rendered to inmates in the custody of respondent at St. Mary's Correctional Center, Huttonsville Correctional Center, Pruntytown Correctional Center, Denmar Correctional Center, St. Anthony's Correctional Center, Lakin Correctional Center, and Mount Olive Correctional Complex, all facilities of the respondent. Respondent, in its Answer, admits the validity of the claim. Respondent further states that there were insufficient

funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED JANUARY 17, 2006

INTEGRATED HEALTHCARE PROVIDERS
VS.
DIVISION OF CORRECTIONS
(CC-05-433)

Claimant appeared *pro se*.

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

PER CURIAM:

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

Claimant seeks payment in the amount of $10,028.39 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. Respondent further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED JANUARY 17, 2006

CHARLESTON AREA MEDICAL CENTER INC.
VS.
DIVISION OF CORRECTIONS
(CC-05-442)

Francis C. Gall Jr., Attorney at Law, for claimant.

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

PER CURIAM:

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

Claimant seeks payment in the amount of $324,395.70 for medical services rendered to inmates in the custody of respondent at Mount Olive Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim. Respondent further states that there were insufficient funds in its appropriation for the

fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED JANUARY 17, 2006

GRAFTON CITY HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-05-443)

Claimant appeared *pro se*.

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

PER CURIAM:

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

Claimant seeks payment in the amount of $12,548.27 for medical services rendered to inmates in the custody of respondent at Pruntytown Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim. Respondent further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED JANUARY 27, 2006

EQUIFAX INFORMATION SERVICES LLC
VS.
WEST VIRGINIA DIVISION OF BANKING
(CC-06-001)

Christian Broussseau, Attorney at Law, for claimant.

Robert J. Lamont, 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 $989.01 for providing services to the respondent State agency. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have

been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $989.01.

Award of $989.01.

OPINION ISSUED MARCH 21, 2006

ARNOLD WENDT
VS.
DIVISION OF HIGHWAYS
(CC-05-013)

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 2003 Buick Century went into a slip in the road while traveling west on County Route 94 in Marshall County. County Route 94 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 at approximately 6:30 p.m. on December 11, 2004, a clear and dry evening. County Route 94 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving between twenty and twenty-five miles per hour when his vehicle struck a slip in the road that he had not seen. Mr. Wendt stated that the slip was in his right lane and was approximately six inches deep, twenty five to thirty feet long, and was about as wide as the lane of traffic. Claimant's vehicle sustained damage to the radiator totaling $544.84. 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 94 at the site of the claimant's accident for the date in question.

Chris Minor, Highway Administrator II for the respondent in Marshall County, testified that his office was first made aware of a slip along County Route 94 sometime on December 11, 2004, the date of claimant's incident. Mr. Minor stated that the slip occurred as a result of heavy rains that occurred for several months prior to claimant's incident. Mr. Minor stated that he had no way of knowing when his office was made aware of the slip in County Route 94.

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 slip in County Route 94 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 his 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 MARCH 21, 2006

DOROTHY J. MITCHEM and JOSEPH S. MITCHEM
VS.
DIVISION OF HIGHWAYS
(CC-05-032)

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

PER CURIAM:

Claimants brought this action for damage to their 1993 Pontiac Grand Prix which occurred when a large tree located on respondent's right of way fell onto their vehicle while they were traveling northbound on Route 2 in Ohio County. Route 2 is a road maintained by respondent in Ohio 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 approximately 11:30 a.m. on January 6, 2005, a rainy morning. Route 2 is a three-lane road at the site of claimants' accident. Mr. Mitchem stated that it had been raining for about three or four days prior to the accident. Mr. Mitchem was driving with traffic around the vehicle when his vehicle was struck by a tree that had fallen from the hillside adjacent to Route 2. Claimants' vehicle was struck by the falling tree on the passenger side door and trunk, causing extensive damage to the vehicle. As a result of this accident, claimants' vehicle, which they had purchased less than one month previously for $3,000.00, was totaled. Mrs. Mitchem, who was a passenger in the vehicle, was transported by ambulance to a hospital for minor injuries. Claimants' claimed $5,215.00 in damages as a result of this accident.

The position of the respondent was that it did not have notice of the tree on Route 2 prior to claimants' accident. Milton Davis Jr., County Administrator for respondent in Ohio County, testified that there had been many floods due to large amounts of rain during September of 2004 in this area. Mr. Davis testified that there had also been substantial rain just prior to this incident. He stated that there had been no complaints about anything falling into the road in the area of claimants' accident prior to claimants' accident. Respondent maintains that there was no prior notice of any trees on Route 2 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). 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 Court is of the opinion that respondent had no notice that the tree at issue posed an apparent risk to the public. The evidence adduced at the hearing established at the time of the claimants' accident there had been inclement weather throughout the county for several days and that land slides were occurring throughout the county at this time. Further, there was no evidence that respondent was made aware of a risk of a tree falling from the hillside adjacent to the northbound lane of Route 2. Consequently, there is insufficient evidence of negligence upon which to justify an award. Thus, the claimants may not make a recovery for their loss 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.

OPINION ISSUED MARCH 21, 2006

WILLIAM LOUGHRIE
VS.
DIVISION OF HIGHWAYS
(CC-05-121)

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 his 2002 Ford Taurus striking rocks when claimant's wife, Diane Loughrie, was traveling westbound on Route 27 near Wellsburg, Brooke County. Route 27 is a road maintained by respondent in Brooke 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 during the afternoon on March 15, 2005, a clear and dry day. Route 27 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. Mrs. Loughrie was driving her vehicle through a curve when she noticed a large rock in the middle of her lane of travel. She stated that she could not avoid the rock due to the traffic on the road. Mrs. Loughrie testified that the rock was approximately one and one half feet wide and between twelve and eighteen inches high. She further stated that she had seen rocks in the road in the area of this accident prior to the date of her accident. Claimant's vehicle struck the rock and sustained damage to the transmission and catalytic converter totaling $303.89.

The position of the respondent was that it did not have notice of the rocks on Route 27. 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 Route 27 to warn drivers proceeding on the roadway. Sheldon Beauty, County Maintenance Supervisor for respondent in Brooke County, testified that this is an area that has rock falls occasionally and that there are rock fall signs placed along the highway. Respondent maintains that there was no prior notice of any rocks on Route 27 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 Route 27 in Brooke 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 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 MARCH 21, 2006

ROBERT V. CONNER
VS.
DIVISION OF HIGHWAYS
(CC-05-195)

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 1997 Ford Explorer struck a piece of wood laying in the road while he was traveling west on I-64 in Summers County, on the New River Bridge. 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 at approximately 9:35 p.m., on February 24, 2005. Mr. Conner testified that it had just started to snow. I-64 is a four-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving in his left lane of traffic while he was passing a tractor trailer. Mr. Conner stated that while he was passing the tractor trailer he noticed a piece of wood laying in the roadway. He testified that it appeared to be a four by four that was about eight feet long. Mr. Conner was unable to avoid the piece of wood due to the tractor trailer that he was passing. His vehicle struck the piece of wood, causing damage to two rims and two wheels totaling $336.90.

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.

Dale Hughart, Supervisor for the respondent along I-64 in Greenbrier, Raleigh, and Summers County, testified that he had no knowledge of any pieces of wood in the

road on I-64 on the exit New River Bridge. Mr. Hughart stated that the first time his office became aware of the piece of wood was after claimant's accident. He stated that one of respondent's drivers was treating this section of road every twenty-five minutes on the night of claimant's accident. The driver did not see the debris in the road until after claimant's accident. Mr. Hughart stated that the driver plowed the debris off of the road when he first noticed it. Respondent had received no notice of any debris in the road along this stretch of I-64 on the day of the incident 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).

In the instant case, the evidence established that the respondent did not have actual or constructive notice of a piece of wood on I-64 on the New River Bridge 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 his 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 MARCH 21, 2006

NDC HEALTH CORPORATION
VS.
DIVISION OF REHABILITATION SERVICES
(CC-06-049)

Claimant appeared *pro se*.
Ronald R. Brown, 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 $10,786.56 for providing services to respondent at the West Virginia Rehabilitation Center. 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 $10,786.56.

Award of $10,786.56.

OPINION ISSUED MAY 23, 2006

JOHNSON NICHOLS FUNERAL HOME

VS.
DEPARTMENT OF HEALTH AND
HUMAN RESOURCES
(CC-05-463)

Claimant appeared *pro se.*
William P. Jones, 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 $ 1,250.00 for a burial performed which was to be paid from respondent's Indigent Burial Fund. 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 JULY 6, 2006

DOROTHY MERCER
VS.
DIVISION OF HIGHWAYS
(CC-02-085)

Eric S. Embree, Attorney at Law, for claimant.
Andrew F. Tarr and Xueyan Palmer, Attorneys at Law, for respondent.

SAYRE, JUDGE:

Claimant brought this action for property damage to her real estate which she alleges occurred as a result of respondent's negligent maintenance of a drainage system. Claimant's residence is located in Kanawha County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

Prior to the hearing of this claim, the Court granted claimant's Motion for Partial Summary Judgment. In granting claimant's Motion, the Court found that the drainage ditch along Hillcrest Drive was inadequate to carry the water from a ten-year storm and the culvert that ran beneath Riverview Drive was also inadequate to carry a ten-year storm. The issues heard at trial were notice on the part of the respondent of the condition of the drainage system and the damages incurred by claimant as a result of the excessive flow of water onto her property.

Claimant's property is adjacent to County Route 60/14, locally known as Riverview Drive. County Route 160/25, locally known as Hillcrest Drive, intersects with County Route 60/14 directly across from claimant's house. The incident giving rise to this claim occurred on February 18, 2000. A heavy rainfall occurred on and just prior to February 18, 2000, which resulted in part of claimant's basement wall

collapsing which is the basis for the claim herein. Mrs. Mercer stated that on the date of the incident, the culvert across the street from her house was clogged and filled with water. The water flowed across the street and into her yard. She testified that she heard a loud noise and went into her basement to find that the basement wall had collapsed. Mrs. Mercer stated that sometime during the 1970's there had been some minor flooding on her property and she made several telephone calls to respondent as a result. She further testified that water had entered her yard in 1997 and again she made numerous telephone calls to respondent regarding the flooding problem. As a result of the flooding that occurred on February 18, 2000, Mrs. Mercer had to have the basement wall rebuilt and the basement cleaned. Mrs. Mercer paid $29,000.00 for these services. Claimant's furnace was also destroyed as a result of the flooding. Claimant paid $593.50 to have the furnace replaced. Claimant also lost numerous items in the basement including an antique Victrola, records, canned goods and a hot water tank. Claimant's damages totaled over $30,000.00 as a result of the flood.

Gary Mercer, claimant's son, testified that the first flood occurred in the late 1970's. Mr. Mercer stated that at that time crews for respondent came to the site and installed a culvert pipe under Riverview Drive. He stated that the next flooding occurred in 1997, at which time respondent was called numerous times. Mr. Mercer stated that respondent again cleaned the culvert across the street from his mother's house.

Don Stalnaker, a Registered Professional Engineer, testified as an expert on behalf of claimant. Mr. Stalnaker prepared a report for the contractor who made repairs to Mrs. Mercer's house as to measures that should be taken to repair the basement wall that was destroyed in the flooding. In the preparation of his report, Mr. Stalnaker observed the flow of water from the culvert across the road and into Mrs. Mercer's yard. Mr. Stalnaker testified that there was a sixteen-inch culvert that was or became clogged which caused the water to leave the ditch and flow across the road. He stated that the culvert was not adequate to handle the water that flowed through it on the date of the incident.

The position of the respondent is that it did not have notice of a problem with the drainage system along County Route 160/25 and County Route 60/14. County Route 160/25 was taken into the state highway system through the Orphan Road Program on August 17, 1999, approximately six months prior to the date of the incident involved in this claim. The drainage system along County Route 160/25 was not designed or built by respondent, but rather it was inherited by respondent when it was taken into the State highway system. Doug Kirk, an hydraulics engineer for respondent, testified that the ditch and culverts both should have been designed to carry the waters of a ten-year storm. Mr. Kirk stated that the culvert is inadequate to carry the flow of water from such a storm.

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). To hold respondent liable for damages caused by an inadequate drainage system, claimant must prove that respondent had actual or constructive notice of the existence of an inadequate drainage system and a reasonable amount of time to take corrective action. *Orsburn v. Div. of Highways*, 18 Ct. Cl. 125 (1991); *Ashworth v. Div. of Highways*, 19 Ct. Cl. 189 (1993).

In the present claim, the Court previously found that the drainage ditch along Hillcrest Drive was inadequate to carry the water from a ten-year storm and the culvert that ran beneath Riverview Drive was also inadequate to carry a ten-year storm. The evidence established that respondent had installed the culvert pipe that ran beneath

Riverview Drive during the 1970's and that it had been to the area after flooding on claimant's property in 1997. In the opinion of the Court, the respondent had notice of the inadequate drainage system but did not take corrective action. Although claimant contacted respondent multiple times when flooding problems arose in the past; respondent did not perform adequate measures to alleviate the problem. The Court is of the opinion that respondent had constructive, if not actual, notice of the drainage problem in the area and a reasonable amount of time to take corrective action. Therefore, the Court has determined that respondent was negligent in its failure to adequately protect claimant's property from excessive water flowing from the roads in the area. Thus, claimant may make a recovery for the damages caused by the flooding to her basement. The Court was provided with no evidence regarding the value of items that claimant testified were in her basement at the time of the flooding. As the Court will not speculate as to the value of any such items, the award to the claimant is limited to the damage to the basement wall and the replacement of the furnace.

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 $29,593.50.

Award of $29,593.50.

OPINION ISSUED JULY 6, 2006

TRAVIS E. LONG
VS.
DIVISION OF HIGHWAYS
(CC-03-501)

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 his vehicle striking a rock when he was traveling northbound on U.S. Route 220 near Petersburg, Grant County. U.S. Route 220 is a road running through Grant County and is 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 between 5:30 p.m. and 6:00 p.m. on September 10, 2003, a clear and dry day. U.S. Route 220 is a two-lane road that is marked at the location of claimant's accident as a "falling rock" area with a containment fence along the road to keep rocks off of the highway. Claimant was proceeding on U.S. Route 220 when he noticed a rock in his lane of traffic. Mr. Long testified that he was unable to avoid the rock due to the traffic. He stated that the rock was approximately seven inches long and six to seven inches tall. Mr. Long further testified that the containment fence on the side of the road had been damaged for nearly one year, allowing rocks to fall onto the highway. Claimant's vehicle struck the rock and sustained damage to the transmission case totaling $839.13.

The respondent did not present any witnesses or evidence in this matter.

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 established that respondent failed to take adequate measures to protect the safety of the traveling public on U.S. Route 220 in Grant County. While respondent has placed "falling rock" warning signs to warn the traveling public of the potential for rock falls at this location and a fence to prevent rocks from falling into the roadway, the evidence established that the fence was extensively damaged and had been so for some time. The respondent's actions on the date of this incident were not adequate to protect the claimant from the rocks which frequently fall in this area. Thus, the Court is of the opinion that respondent is liable for the damages which flow from its inadequate protection of the traveling public. However, at the hearing of this matter, the Court requested claimant to provide a copy of his insurance declaration page to verify the amount of his insurance deductible. Claimant has failed to provide his insurance declaration page for the Court to review. Therefore, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED JULY 6, 2006

RICKEY A. WRIGHT and BONNIE D. WRIGHT
VS.
DIVISION OF HIGHWAYS
(CC-04-074)

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 1996 Jeep Grand Cherokee struck a hole while traveling on County Route 50/87, also known as Emily Drive, in Clarksburg, Harrison County. County Route 50/87 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 5:45 p.m. on February 9, 2004, a cold and clear day. County Route 50/87 is a four-lane highway at the area of the incident involved in this claim. Claimant Bonnie Wright testified that she was driving on County Route 50/87 when she saw the hole. Ms. Wright stated that the hole was one to one-and-a-half feet wide and about six to eight inches deep. Claimants' vehicle struck the hole sustaining damage to an onboard computer located over the right front fender totaling $572.40. 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 50/87 at the site of the claimant's accident for the date in question.

Ronald Davisson, a Maintenance Supervisor for the respondent in Harrison

County, testified that there had been some complaints regarding holes on County Route 50/87 in Clarksburg prior to the date of claimants' incident. Mr. Davisson stated that there was a slip along County Route 50/87 in the area of claimants' incident that was causing problems along the road. Respondent maintains that it had no actual or constructive notice of the hole that claimants' vehicle struck on County Route 50/87.

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 claimants' vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the location of the hole in the road 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 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.

Award of $500.00.

OPINION ISSUED JULY 6, 2006

BERYL BEAL
VS.
DIVISION OF HIGHWAYS
(CC-04-222)

PER CURIAM:

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

1. On April 1, 2004, claimant was traveling on Route 622 in Kanawha County, when his vehicle struck a sewer line that extended up into the road, damaging the front end of his vehicle.

2. Respondent was responsible for the maintenance of Route 622, which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $994.89. Claimant's insurance deductible was $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 Route 622 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 $100.00.

Award of $100.00.

OPINION ISSUED JULY 6, 2006

JOHN R. SHOUP
VS.
DIVISION OF HIGHWAYS
(CC-04-570)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of his 2000 Dodge Neon striking debris in the road while he was traveling east on I-64, Cabell 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 between 2:00 p.m. and 3:00 p.m. on August 31, 2004, a clear and sunny day. I-64 is a four-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving in his right hand lane at between seventy and seventy-five miles per hour with traffic in front, behind, and to his left. Mr. Shoup's vehicle struck a block that was larger than a brick that he had not seen because of the vehicle in front of him. Claimant's vehicle sustained damage to gas tank totaling $1,183.15. 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.

Charlene Pullen, I-64 Supervisor, Section 1, for the respondent in Cabell County, testified that she had no knowledge of any debris on I-64 near the site of claimant's incident. Ms. Pullen stated that there had been no complaints of debris in the road on the date of claimant's incident or for one week prior. Respondent had received no notice of holes in the road along this stretch 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 debris on I-64 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 JULY 6, 2006

MARLYN STARCHER
VS.
DIVISION OF HIGHWAYS
(CC-04-942)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2003 Ford Taurus struck holes in the road while he was traveling on Route 36 in Clay County. Route 36 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 dusk on November 3, 2004, a clear evening. Route 36 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving on Route 36 when two trucks approached his vehicle in the opposite lane. His vehicle then struck two holes in the road. He stated that he had seen the holes previously but had been able to avoid them on other occasions. Mr. Starcher testified that one of the holes was approximately eighteen inches long and eight inches deep, while the other hole was one foot long and four to six inches deep. Claimant's vehicle struck the holes sustaining damage to the right front rim and tire and the right rear rim. Claimant's vehicle sustained damage totaling $285.07.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 36 at the site of the claimant's accident for the date in question.

Scott Samples, a Crew Supervisor for the respondent in Clay County, testified that he had no knowledge of any holes on Route 36 in Clay County for the date in question Respondent maintains that it had no actual or constructive notice of any holes on Route 36.

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. The size of the hole and the location within the roadway where 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 $285.07.

Award of $285.07.

OPINION ISSUED JULY 6, 2006

ROBERT M. HAMNER
VS.
DIVISION OF HIGHWAYS
(CC-05-256)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of his 2003 Ford F-250 truck striking a tree and rocks while he was traveling southbound on Route 4 near Gassaway, Braxton County. Route 4 is a road maintained by respondent in Braxton 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 approximately 8:30 p.m. on March 30, 2005, a rainy evening. Route 4 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. Hamner was driving around forty-five miles per hour when a live tree and rocks from the hillside adjacent to Route 4 fell into his lane of traffic. Claimant stated that he had seen rock falls in this area previously. Claimant's vehicle struck the tree and rocks and sustained damage to the front end of the vehicle totaling $1,324.48. Claimant's insurance deductible was $100.00.

The position of the respondent was that it did not have notice of the rocks on Route 4. 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 Route 4 to warn drivers proceeding on the roadway. Jack Belknap, Foreman for respondent in Braxton County, testified that this is an area that has rock falls occasionally and that there are rock fall signs placed along the highway. Mr. Belknap testified that his office did learn of the trees and rock falling into the road, but it was only after the claimant's incident. Respondent maintains that there was no prior notice of any rocks on Route 4 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 Route 4 in Braxton County. Respondent has placed "falling rock" warning signs to warn the traveling public of the potential for rock falls at this location. 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 JULY 6, 2006

DANIEL SMITH and VALERIE SMITH
VS.
DIVISION OF HIGHWAYS
(CC-05-361)

Claimants appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 1998 Ford Mustang struck a hole while claimant Valerie Smith was traveling on Jordan Creek Road in Kanawha County. Jordan Creek Road 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 at approximately 3:00 p.m. on July 4, 2005, a sunny day. Jordan Creek Road is a two-lane highway at the area of the incident involved in this claim. Claimant Valerie Smith testified that she was driving on Jordan Creek Road when her vehicle struck a hole in the road that she had not seen. Mrs. Smith stated that the hole was about ten inches long and five to six inches deep. Claimants' vehicle struck the hole sustaining damage to passenger side tires and rims. Claimants' vehicle sustained damage totaling $500.00.

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

David Fisher, Highway Administrator for the respondent in Kanawha County, testified that he had no knowledge of any holes on Jordan Creek Road for the date in question or the days immediately prior. Respondent maintains that it had no actual or constructive notice of any holes on Jordan Creek Road.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the time of the year in which the 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 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.

Award of $500.00.

OPINION ISSUED JULY 6, 2006

HOMER J. ILSON III
VS.
DIVISION OF MOTOR VEHICLES
(CC-06-117)

Claimant appeared *pro se*.
Ronald R. Brown, 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 $155.00 for a title on a vehicle. The respondent did not process the title of the vehicle in a timely manner.

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 $155.00.

Award of $155.00.

OPINION ISSUED JULY 6, 2006

ARRETTA JANE WALKER
VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-04-624)

Gerald R. Lacy, Attorney at Law, for claimant
Doren C. Burrell, Senior Assistant Attorney General, for respondent

PER CURIAM:

Claimant brought this claim to recover the value of certain personal property items that she alleges were lost by the respondent. Claimant was arrested for driving under the influence of alcohol in Kanawha County and transported to a regional jail. When she was released various items of personal property that had been inventoried were not returned to her. Claimant placed a value of $2,920.72 on her personal property.

At the hearing of the matter, respondent stipulated liability for all of claimant's personal property and damages for a pair of shoes, a belt, a pair of silver earrings, a key ring, a gold chain, a silver watch, and a black folder. These items were valued at $152.00. The only issue before the Court was the valuation of three rings that were not returned to the claimant. Ms. Walker testified that there was a six diamond ring that was a gift from her mother, a ladies Black Hills ring with a diamond in a rose, and a mother's ring with three simulated stones.

Richard Mitchell, a registered jeweler and manager at McCormick Jewelers, testified that he often does ring valuations for insurance companies based on descriptions of rings. He stated that he makes his estimates based on medium quality, including such factors as eye clean, near colorless, and fourteen karat gold. Mr. Mitchell estimated the six diamond ring to be valued at $2,114.70, the Black Hills ring to be valued at $230.02, and the mother's ring at $424.00.

Respondent presented no testimony at the hearing of this matter.

This Court has held that a bailment exists when respondent records the personal property of an inmate and takes it for storage purposes, and then has no satisfactory explanation for not returning it. *Page v. Division of Corrections*, 23 Ct. Cl. 238 (2000);

Heard v. Division of Corrections, 21 Ct. Cl. 151 (1997). In the present claim, respondent has admitted that it took possession of claimant's personal property but did not return the items to her. Respondent also admitted damages for the pair of shoes, a belt, a pair of silver earrings, a key ring, a gold chain, a silver watch, and a black folder. The Court finds that the values placed on claimant's rings by the expert witness were fair and reasonable. Therefore, the Court is of the opinion to make an award to the claimant for the value of her pair of shoes, a belt, a pair of silver earrings, a key ring, a gold chain, a silver watch, a black folder, a six diamond ring, a ladies Black Hills ring with a diamond in a rose, and a mother's ring with three simulated stones. The Court is of the opinion that $2,920.72 represents a fair and reasonable reimbursement to claimant for the lost property.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $2,920.72.

Award of $2,920.72.

OPINION ISSUED JULY 6, 2006

CHARLESTON CARDIOLOGY GROUP
VS.
DIVISION OF CORRECTIONS
(CC-06-121)

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

PER CURIAM:

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

Claimant seeks payment in the amount of $4,790.00 for medical services rendered to inmates in the custody of respondent at Denmar Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED JULY 6, 2006

PHILLIP TERRY DELANEY
VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-06-123)

John R. McGhee Jr., Attorney at Law, for claimant.
Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, an inmate at the Western Regional Jail, seeks $65.00 for items of personal property that were entrusted to respondent. When claimant was transferred to South Central Regional Jail, claimant's tennis shoes, which had been taken from him upon his arrival, were unable to be located. Thus far, respondent's employees have been unable to produce claimant's personal property.

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

determination.

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

Accordingly, the Court makes an award to the claimant herein in the amount of $65.00.

Award of $65.00.

OPINION ISSUED JULY 19, 2006

PUBLIC EMPLOYEES INSURANCE AGENCY
VS.
DIVISION OF CORRECTIONS
(CC-06-116)

B. Keith Huffman, General Counsel, for claimant.
Charles P. Houdyschell Jr., Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $207,273.95 for providing health insurance coverage for employees of the Anthony Correctional Center, a facility of the respondent State agency. The agency failed to remit the premiums due for the health insurance coverage within the appropriate fiscal years from 1997-2005; 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 years from which the premiums could have been paid. Further, respondent requests this Court to consider the claim in accordance with W.Va. Code §14-2-18 in order that the respondent be authorized to make payment for the premiums in the current fiscal year of 2006.

The Court followed the statutory procedures for an advisory determination. The Joint Committee on Government and Finance declined to consider this claim under that statute.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $207,273.95.

Award of $207,273.95.

OPINION ISSUED JULY 31, 2006

LINDA BIRD, as ADMINISTRATRIX of the Estates of
EMZIE SOVINE and MILDRED SOVINE
VS.
DIVISION OF HIGHWAYS
(CC-04-232)

Claimants appeared *pro se*.
Jason C. Workman, 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 4, 2004, claimant and her parents were traveling on the Amandaville Bridge in Kanawha County when their vehicle struck a hole in the road damaging a tire and rim.

2. Respondent was responsible for the maintenance of the Amandaville Bridge, which it failed to maintain properly on the date of this incident.

3. As a result of this incident, the vehicle sustained damage in the amount of $662.35. The insurance deductible was $250.00.

4. Respondent agrees that the amount of $250.00 for the damages put forth by the claimants is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of the Amandaville Bridge on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to the vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant, as Administratrix of the Estate, may make a recovery for this 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 JULY 31, 2006

MAKHOUL GHAREEB
VS.
DIVISION OF HIGHWAYS
(CC-04-481)

Claimant appeared *pro se*.
Jason C. Workman, 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 26, 2004, claimant was traveling on I-64 near Charleston, Kanawha County, when his vehicle struck standing water in the road damaging his vehicle.

2. Respondent was responsible for the maintenance of I-64, which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $5,100.00. Claimant's insurance deductible was $500.00

4. Respondent agrees that the amount of $500.00 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 I-64 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 $500.00.

Award of $500.00.

OPINION ISSUED JULY 31, 2006

ANN B. TAO
VS.
DIVISION OF HIGHWAYS
(CC-04-482)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of her 2000 Honda Odyssey striking rocks when she was traveling westbound on Route 60 near Huntington in Cabell County. Route 60 is a road 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 approximately 5:00 p.m. on April 16, 2004, a dry day. Route 60 is a four-lane road with a speed limit of forty-five miles per hour in the area of claimant's incident. Ms. Tao was driving westbound in the passing lane of Route 60 with a vehicle to her right when she noticed a large rock

coming down the side of the mountain adjacent to the road. The rock bounced across the road, part of it striking claimant's vehicle on the roof, part of it landing in front of claimant's vehicle. Claimant's vehicle struck the rocks and sustained damage to the front bumper, gas tank, left tire, grill and hood totaling $4,557.95. Claimant's insurance deductible was $1,000.00.

The position of the respondent was that it did not have notice of the rocks falling onto Route 60. Mike King, Highway Administrator for respondent in Cabell County, testified that this is not an area that is prone to rock falls. He stated that the hillside has a bench cut, which helps to prevent rock slides. Mr. King testified that he was unaware of any rock falls occurring in this area. Respondent maintains that there was no prior notice of any rocks on Route 60 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 Route 60 in Cabell County. The hillside along Route 60 is a bench cut. Further, respondent had no notice of any danger of rock falls in the area. 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 JULY 31, 2006

RENA ROBINSON
VS.
DIVISION OF HIGHWAYS
(CC-04-631)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2003 Dodge Durango struck a culvert while she was traveling on Summerlee Road in Fayette County. Summerlee Road is a road maintained by respondent. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incidents giving rise to this claim occurred on August 6, 2004, and September 4, 2004, both sunny and dry days. Summerlee Road is a two-lane highway at the area of the incidents involved in this claim. Claimant testified that she was delivering mail to a mailbox along Summerlee Road. She stated that she had to drive her vehicle off the road to her right side to deliver the mail. Ms. Robinson stated that at 2358 Summerlee Road, approximately five to six feet away from the mailbox, was an open culvert pipe. The culvert pipe ran underneath the driveway for the home at that address. She testified that she knew it was there, but she could not avoid it on the dates of the two incidents herein. Her vehicle struck the culvert pipe causing damage to the right front tire on both occasions. The damage sustained totaled $268.08. Claimant's insurance deductible was $250.00.

The position of the respondent is that it was not responsible for the culvert at 2358 Summerlee Road. Respondent cited to W.Va. Code §17-16-9 which provides that owners or tenants of land fronting any state road shall construct and keep in repair all approaches and driveways to any state road.

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

In the instant case, the evidence established that the respondent was not responsible for the culvert that was located beneath a private driveway along Summerlee Road. 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 JULY 31, 2006

JANICE L. KINGERY
VS.
DIVISION OF HIGHWAYS
(CC-05-028)

Claimant appeared *pro se*.
Jason C. Workman, 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 December 1, 2004, claimant was traveling on Deary Road in Salt Rock, Cabell County, when her vehicle struck a hole in the road, damaging her vehicle.

2. Respondent was responsible for the maintenance of Deary Road, which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $654.11.

4. Respondent agrees that the amount of $654.11 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 Deary Road 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 $654.11.

Award of $654.11.

OPINION ISSUED JULY 31, 2006

LORI HUDNALL
VS.
DIVISION OF HIGHWAYS
(CC-05-035)

Claimant appeared *pro se*.
Jason C. Workman, 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 21, 2004, claimant was traveling on Diary Road in Poca, Putnam County, when her vehicle struck a hole in the road, damaging two tires and a rim

2. Respondent was responsible for the maintenance of Diary Road, which it

failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $2,030.24. Claimant's insurance deductible was $500.00.

4. Respondent agrees that the amount of $500.00 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 Diary Road on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $500.00.

Award of $500.00.

OPINION ISSUED JULY 31, 2006

TIMOTHY ALLEN HOLSTEIN
VS.
DIVISION OF HIGHWAYS
(CC-05-194)

Claimant appeared *pro se*.
Jason C. Workman, 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 5, 2005, claimant was traveling on I-64 in Charleston, Kanawha County, when his vehicle struck a rock in the road, damaging a tire and rim.

2. Respondent was responsible for the maintenance of I-64, which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $990.68. Claimant's insurance deductible was $500.00.

4. Respondent agrees that the amount of $500.00 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 I-64 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 $500.00.

Award of $500.00.

OPINION ISSUED JULY 31, 2006

SAM MORRISON
VS.
DIVISION OF HIGHWAYS
(CC-05-374)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1995 Ford van struck a tree limb hanging over the road while he was traveling on Route 31 in Cabell County. Route 31 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 August 4, 2005, a clear day. Route 31 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving between thirty and thirty-five miles per hour when his vehicle struck a branch that was hanging over the road. Mr. Morrison testified that the branch looked like it had broken off a tree and was hanging down over the road. The branch struck claimant's vehicle damaging the front windshield. The damage sustained totaled $162.05.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 31 prior to claimant's incident. Neal Morrison, a transportation crew supervisor for respondent in Cabell County, testified that there had been a telephone call to respondent on August 4, 2005, regarding a branch over the road on Route 31. Crews for respondent responded shortly after this telephone call at approximately 3:30 p.m. Mr. Morrison stated that crews are normally sent out to remove trees and branches as soon as possible after receiving notice of it in the road.

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

The Court, having reviewed the record in this claim, has determined that respondent was not negligent in its maintenance of Route 31 on the date of claimant's incident. Respondent received notice of a branch in the road and responded in a timely manner. Therefore, the Court cannot find liability on the part of respondent in this claim and the claimant may not make a recovery for his loss.

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

Claim disallowed.

OPINION ISSUED JULY 31, 2006

RHONDA NEAL
VS.
DIVISION OF HIGHWAYS
(CC-05-435)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2002 Dodge Neon struck a piece of a tire that was in the road while she was traveling westbound on I-64 near Barboursville, Cabell 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 at approximately 6:30 p.m. on November 15, 2005, a clear evening. I-64 is a four-lane highway at the area of the incident involved in this claim. Claimant testified that she was driving at approximately seventy miles per hour when the vehicle in front of her struck something in the road. The object came back and struck her vehicle. Ms. Neal testified that she looked in the rear view mirror after her vehicle struck the object and saw that it was a piece of a tractor trailer tire. The tire struck claimant's vehicle damaging the front hood. The damage sustained totaled $1,503.50. 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 prior to claimant's incident. Charlene Pullen, Supervisor for respondent responsible for I-64, Section 1, testified that there had been no notice of a tire in the road on the date of claimant's incident. Ms. Pullen stated that there is one employee for respondent that travels the stretch of I-64 that her office is responsible for every day to remove any debris in the roadway. She also stated that after normal work hours, her office can be notified by police or emergency services of objects in the road and that she will then be contacted. Respondent maintains that it had no notice of a tire in the road prior to claimant's incident.

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

In the instant case, the evidence established that respondent did not have actual or constructive notice of a tire in the road on I-64 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 JULY 31, 2006

WOODROW W. VANCE
VS.
DIVISION OF HIGHWAYS
(CC-06-053)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1993 Chevrolet Silverado truck struck a hole in the road while he was traveling on Route 41 near Persinger, Nicholas County. 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 at approximately 5:30 p.m. on January 19, 2006, a clear evening. Route 41 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving on Route 41, and there was also traffic traveling towards him. Mr. Vance stated that he had seen the hole previously but had been able to avoid it on other occasions. He testified that the hole was along the white line on the edge of the road and that there were no warning signs. Claimant stated that due to the traffic towards him, he was unable to avoid the hole. Claimant's vehicle struck the hole sustaining damage to a tire, rim, shock, and pivot arm. Claimant's vehicle sustained damage totaling $588.60.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 41 at the site of the claimant's accident for the date in question.

John Jarrell, Highway Administrator 2 for the respondent in Nicholas County, testified that respondent was involved with snow and ice removal around the date of claimant's incident. Mr. Jarrell stated that sometime during the month of January his office received a telephone call from the sheriff's department regarding a hole along Route 41, but he could not remember when this happened. He also stated that Route 41 has heavy coal and log truck traffic on it. Respondent maintains that it had no actual or constructive notice of any holes on Route 41.

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 Route 41. The size of the hole and its location on the roadway 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 his vehicle. However, the Court additionally finds that claimant was also negligent in this incident, since he knew of the hole previously and he could have taken other measures to avoid or attempt to avoid this hole. Therefore, the Court finds claimant was twenty-five (25) percent negligent in this claim, and thus he may recover seventy-five (75) percent of his damages.

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 $441.45.

Award of $441.45.

OPINION ISSUED JULY 31, 2006

AT&T
VS.
DIVISION OF CORRECTIONS
(CC-06-179)

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

PER CURIAM:

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

Claimant seeks payment in the amount of $152.50 for long distance telephone service provided in April 2001 for Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the invoice; therefore, no payment was made.

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 SEPTEMBER 28, 2006

JEROMEY CHAD BELLER
VS.
DIVISION OF HIGHWAYS
(CC-04-291)

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 April 19, 2004, claimant was a passenger in a vehicle operated by Ronnie Lee Williams traveling on County Route 3/4 in Raleigh County, when they were involved in an accident along County Route 3/4.

2. Respondent was responsible for the maintenance of County Route 3/4, which it was found to have failed to maintain properly on the date of this incident in a separate action styled *Ronnie Lee Williams and Tina Williams v. Division of Highways*, (CC-04-278).

3. As a result of this incident, claimant and respondent have agreed to settle this claim for the total sum of twelve thousand five hundred dollars ($12,500.00) for the claimant's out-of-pocket medical expenses and for pain and suffering claimant incurred as a result of injuries he suffered in this accident.

The Court has reviewed the facts of the claim and finds that respondent was

negligent in its maintenance of County Route 3/4 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 $12,500.00.

Award of $12,500.00.

OPINION ISSUED SEPTEMBER 28, 2006

MARLENE MIDDLETON,
dba THE CUTTING EDGE
VS.
DIVISION OF HIGHWAYS
(CC-04-337)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for property damage to her real estate which she alleges occurred as a result of respondent's negligent maintenance of a drainage system. Claimant's property is adjacent to County Route 61/24, locally known as Armstrong Creek Road and County Route 61/46, locally known as Post Office Road, in Kimberly, Fayette County. The Court is of the opinion that there is liability on the part of respondent in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred in May of 2003. A heavy rainfall occurred which resulted in flooding in the building on claimant's property, which is the basis for the claim herein. Ms. Middleton asserts that at some time prior to May of 2003, respondent had paved the parking lot for the Kimberly Post Office. Claimant alleges that it was this action by respondent that channeled more water onto her property, as the water from the parking lot now flowed down County Route 61/46, and along the back of the building on her property. Ms. Middleton stated that County Route 61/46 slopes towards her building and that the water has no where to go but to the back of her building. She testified that the grade of County Route 61/46 was previously lower than her building, but that it has been built up over the years by respondent so that the building is now lower than the level of the road. Claimant testified that respondent also came out and built a berm along the side of County Route 61/46 adjacent to her building, but that it had been flattened near her property and water still collected at the back of her building. Ms. Middleton stated that her family has owned this property for thirty years, and that the flood in May of 2003 was the only flood there had been on that property. She stated that during the flood there was damage done to carpeting, the floor, a computer, and clothing that had been prepared by The Cutting Edge business. As a result of the flooding on her property, claimant alleged damages but the amount of damages has yet to be determined.

The position of the respondent is that it was not negligent in the maintenance of the drainage system on County Route 61/46. Danny Hypes, Crew Foreman for respondent in Fayette County, testified that the first time his office became aware of a problem at claimant's property was when the claimant made telephone calls to his office about the flooding. Mr. Hypes testified that his office received a telephone call from claimant on May 13, 2003. A drop inlet and culvert pipe were placed in front of claimant's property and under County Route 61/24 in June of 2004, as a result of this complaint. He stated that as a result of a telephone call from claimant on May 22, 2003, crews for respondent put a gravel berm down the side of county Route 61/46 furthest from claimant's property. Mr. Hypes testified that there were telephone calls complaining about vehicles scraping their bottoms on this berm while pulling into the Kimberly Post Office parking lot, and as a result of these complaints, respondent placed an asphalt berm on the side of the road adjacent to claimant's property.

Doug Kirk, an hydraulics engineer for respondent, conducted an on-site inspection of claimant's property. Mr. Kirk stated that the claimant's building is lower than all of the surrounding ground and is on a concrete slab at the existing ground level. He stated that the structure is built in a low area and that the floor elevation was built

lower than any other building in the area. He also stated that the roof drains for the building drain directly to the ground adjacent to the property, further contributing to the amount of water that collects at the back of the building.

The position of the respondent is that it was not negligent in its maintenance of the drainage system for County Route 61/46 and both the property's location in a low area and the building's roof drains contributed to the claimant's flooding problem.

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 present claim, claimant established that respondent had paved the Kimberly Post Office Parking lot. The paving of this lot cast water from both the lot and County Route 61/46 onto claimant's property. While respondent did install an asphalt berm along County Route 61/46, this did not remedy the situation due to the alley directly behind claimant's property. The Court concludes from all the testimony and evidence that prior to respondent paving the post office parking lot, claimant's property did not have a problem with flooding. Thus, the Court is of the opinion that the respondent is liable for the damages which proximately flow from its inadequate protection of claimant's property from foreseeable damage, and further that respondent is liable for the damages to claimant's property.

In accordance with the findings of fact and the conclusions of law stated herein above, the Court hereby directs the Clerk of the Court to place this claim on the docket for a hearing on the matter of damages.

OPINION ISSUED SEPTEMBER 28, 2006

MIGHTY MITE CORPORATION
and
FRANKLIN GROGG and RHODA GROGG
VS.
DIVISION OF HIGHWAYS
(CC-04-382 and CC-04-383)

Walter L. Wagner, Jr., Attorney at Law, for claimants.
Andrew F. Tarr and Xueyan Palmer, Attorneys at Law, for respondent.

SAYRE, JUDGE:

Claimants Mighty Mite Corporation and Franklin Grogg and Rhoda Grogg brought actions for property damage to their real property, which claimants allege occurred as a result of respondent's negligent construction of a bridge. Mighty Mite Corporation's (hereinafter referred to as Mighty Mite) property and the Groggs' residence are adjacent to U.S. Route 35 in St. Albans, Kanawha County and are on either side of Tackett's Creek, which flows beneath a bridge on U.S. Route 35. The present bridge on U.S. Route 35 is three lanes wide and was constructed by the Respondent in 1992, replacing a two-lane bridge that had been constructed in 1924. These claims were consolidated for hearing since they arose from the same occurrence. The Court is of the opinion to deny the consolidated claims for the reasons more fully stated below.

The incident giving rise to these claims occurred on May 28, 2004. A heavy rainfall occurred on that date which resulted in flooding in the basements of both properties. Gregory Humphreys, President of Mighty Mite, stated that he had purchased the Mighty Mite property in 1997 and that the only other time that that property had flooded since then was on November 18, 2003. Mr. Humphreys testified that the flooding at issue occurred on May 28, 2004 between 11:00 pm. and 12:00 midnight. He stated that he had been at home when the rain started but that he became worried about the possibility of the property flooding again. Mr. Humphreys drove to the property with a neighbor, James Cable. Mr. Cable testified that he and Mr. Humphreys arrived at the property around 11:00 p.m. and that the water was just rising to the level of Route 35. Mr. Humphreys was in the basement of Mighty Mite's building trying to retrieve important documents, computer equipment, and other items to take these out of the building when the water started to flow into the building. He testified that there was

approximately six feet of water in the basement when the flooding stopped. Mr. Humprheys stated that by midnight the level of Tackett's Creek, which normally is about one foot deep, was up as high as approximately five feet on the upstream wall of the U.S. Route 35 bridge. Mr. Humprheys previously had built a three foot high wall between this property and Tackett's Creek after the November 2003 flood and this wall extended to the right of way of U.S. Route 35. He testified that during the May 28, 2004 flood the water went over and around this wall. He stated that there was water on U.S. Route 35, but at its highest point it still did not flow all the way across the road. Mr. Humphreys also had three storage buildings constructed on this property, each of which contained a number of storage units. There was approximately three or four feet of water inside these storage buildings. Mr. Humphreys testified that there was no flooding downstream from the bridge.

The Grogg's residence is located on the opposite side of the creek from the Mighty Mite property. Mr. Grogg testified that he and Rhoda Grogg, his wife, purchased the residence in 2002. He stated that on the night of the flooding incident herein, the water stayed in the creek bed until it rose to the bottom of the bridge. At that time, the water started flowing to either side of the creek bed onto his property and that of Mighty Mite. Mr. Grogg testified that his basement also flooded due to this incident, reaching as high as eight inches.

Samuel Wood, a Registered Professional Engineer, testified as an expert on behalf of the claimants. Mr. Wood initially came out to inspect the Mighty Mite building after the 2003 flood and he returned after the flood involved in this claim. Mr. Wood observed substantial foundation cracking on the Mighty Mite property, which was a direct result of flooding and flowing water pressure against the rear foundation of the building. After his first inspection, Mr. Wood had recommended that the block foundation wall of Mighty Mite's building be reinforced to bring it into current structural standards. Mr. Wood stated that Mr. Humphreys had tried to deal with the damage by placing a retaining wall, but that this wall would have had to extend into the middle of U.S. Route 35 to have been effective. Mr. Wood testified that it appeared to him that the bridge on U.S. Route 35 had caused a back flow that resulted in flooding upstream of the bridge onto the area where claimants' properties are located. He stated that the lack of adequate flow cross-sectional area under the bridge and the high outside curve elevation of U.S. Route 35 compounded to allow flooding of the properties. Mr. Wood testified that the orientation of the bridge, the super elevation of the road, and the fact that as a consequence the bridge deck surface was higher on the downstream side of the bridge, caused the water to back flow to the upstream side of the bridge flooding both Mr. Humphreys' and Mr. Grogg's properties. Mr. Wood stated that the water does flow through the opening under the bridge, but that the amount of flow through it was his main concern. He observed that the bottom of the bridge was approximately three feet lower than the road elevation. Mr. Wood testified that according to the design plans for the bridge, the actual upstream side of the bridge was approximately 1.4 feet lower than the design specifications indicated. He stated that the opening of the bridge was therefore one hundred sixty square feet rather than two hundred nineteen square feet as would have been provided by the original design specifications. Mr. Wood stated that because the bridge as constructed was lowered and the open area is limited to one hundred sixty square feet, a restriction of that opening would allow for excess water to back-up and flow behind the bridge on the upstream side of the bridge. He testified that his main concern was with the elevation of the bridge in that it increased the resistance of the flow of water by lowering the opening and making the cross-sectional square footage smaller. Mr. Wood admitted on cross examination that, regardless of the elevation of the bridge, a greater amount of water is able to flow through the opening under the 1992 bridge than was able to flow through the opening under the 1924 bridge.

The position of the respondent is that the bridge constructed over Tackett's Creek on U.S. Route 35 in 1992 met all the standards for such bridges at the time of its construction and that the bridge substantially improved the flooding situation in the area of the bridge. Respondent also contends that the regardless of whether the bridge is there or not, both claimants' properties are in a flood plain area and will experience periodic flooding. Chet Burgess, County Highway Administrator for the respondent in Kanawha County, testified that on the date of the incident involved in these claims there had been no notice of high water near the bridge over Tackett's Creek on U.S. Route 35. Mr. Burgess stated that there were crews out on the night of this flood for high water, but that they were not in the area of Tackett's Creek. He further stated that he was not

aware of any instances of water over the road in this location.

Ray Lewis, a Registered Professional Engineer who is a staff engineer for Traffic Engineering with respondent, testified that he developed the project for the new bridge at Tackett's Creek on U.S. Route 35. He stated that in developing his plan for the new bridge, he studied traffic conditions, traffic data, accident data, traffic counts, among other things, to try to come up with a plan to make the road operate as safely and efficiently as possible. Mr. Lewis stated that the old bridge was approximately twenty feet long with vertical abutments which are the concrete walls that support the bridge. He testified that this bridge included a 6% (six percent) super elevation due to the curvature of the road. Mr. Lewis stated that super elevation is the banking put on a curve which makes it easier for a driver to drive around a curve and keep a vehicle on the roadway. As part of this bridge replacement project, the designers decided to do a full bridge replacement with a larger structure. Mr. Lewis also testified that as part of the project there was a channel improvement, where the creek bed underneath the bridge was regraded and rip-rapped, which was done to ease the flow under the bridge and make the channel more efficient. He stated that the new bridge has a larger water way opening than the one that it replaced. The 1992 bridge has a thirty-five foot span.

Doug Kirk, an hydraulics engineer for respondent, prepared a report to determine whether or not the bridge over Tackett's Creek on U.S. Route 35 met the standard of care for replacing the former bridge at the time the new bridge was constructed. Mr. Kirk testified that the new bridge is a three-lane bridge forty-eight feet wide with a free span of thirty-five feet. The free span of the 1924 bridge was approximately twenty feet wide. He testified that the super elevation of the bridge is six percent which is consistent with a forty miles-per-hour design speed. Mr. Kirk stated that super elevation should slope toward the inside of the curve with the outside of the curve being the high side and the inside of the curve being the low side. He testified that the only way the bridge could have been designed without super elevation would have been to straighten the road. Mr. Kirk further testified that U.S. Route 35 is a trunk line according to the West Virginia Division of Highways Drainage Manual, which means that the road should be serviceable for a fifty year storm. Also, according to the West Virginia Division of Highways Drainage Manual, the 1992 bridge should not cause additional back water as compared to the 1924 bridge. Mr. Kirk described back water as an increase in the water surface elevation upstream of any structure, whether it be a bridge or a wall built along the stream that affects upstream properties.

Mr. Kirk prepared a hydraulic analysis of the new bridge to compare with the old bridge. In doing so, he looked at cross sections of the stream, determining how deep and how wide the flood plains are, what obstructions are on the flood plain, the depth and span of the bridge and roadway approaches, and anything that would affect the flow of the water. Mr. Kirk stated that he looked at cross sections immediately upstream of the bridge because if the bridge were causing a problem, these areas would be the most severely affected. He further stated that he did comparisons of the new and the old bridge for ten, twenty-five, fifty, and one hundred year floods. In each of the floods, the new bridge would have lowered the water surface elevation as compared to that of the old bridge at sixty feet upstream of the bridge, the area that would most drastically affect claimants' properties, for a ten, twenty-five, fifty, and one hundred year flood. Mr. Kirk testified that in his analysis the new bridge reduced the flooding in the area of the subject properties for each flood. According to his findings, the new bridge constructed by respondent lowered the water surface elevation which, in turn, reduced any potential flooding to the property on the upstream side of the bridge. Thus, claimants' properties were protected from flooding to a greater extent due to the construction of the new bridge.

On prior occasions, this Court has held that respondent may be held liable for the condition posed by a bridge. *Malone v. Division of Highways*, 23 Ct. Cl. 216 (2000). Respondent has an obligation to construct bridges in such a manner as not to create a subsequent flood problem for nearby property owners. *Daniels v. Dept. of Highways*, 16 Ct. Cl. 43 (1986).

However, in each of the prior opinions reviewed by this Court, where an award was made the bridge in question was erected at a site not previously spanned by a public roadway. Here the facts are otherwise. The reality is that not only West Virginia but every state has a substantial number of bridges constructed in 1924 or earlier. This Court is not prepared to hold that the respondent has either a legal or a moral obligation to replace all of those very old bridges that may create a damming effect or otherwise impede the free flow of water during a major flood. Given the fact that in many such

cases the watershed upstream of the bridge is constantly being altered and "improved," without any foreseeable relief from this kind of activity, such a ruling would make the State a moving target for property damage claims in this Court. A view of the site of the subject claims leads the Court to conclude that none of the structures belonging to the claimants herein in 2004 existed in 1924. What would be the liability of the State for these claims had the 1924 bridge not been replaced in 1992?

The question presented by these claims is rather: What obligation does the State have where, as here, the respondent in fact does replace one of these old bridges? We think that the respondent must construct such a replacement bridge in such a manner as not to create any new flood problems that did not exist before. *Daniels v. Dept. of Highways*, Id.

The claimants make much of the fact that the replacement bridge was super elevated and could have been constructed so that the bridge was higher than it is, creating a larger upstream opening and thus allowing for a greater flow of water.

The 1924 bridge, like the 1992 bridge, was super elevated on the downstream side. This was in 1924 and in 2006 continues to be necessary, given the fact that U.S. Route 35 at the site of the bridge is in a curve and, in any case, we fail to see where the elevation of the downstream side of the bridge is material to the issues in the claims.

The open area under the upstream side of the 1924 bridge was 120 square feet. That opening under the 1992 bridge is 160 square feet. In addition, the creek bed underneath the bridge was regraded and rip-rapped in 1992, which was done to ease the flow of water under the bridge.

Further, the expert witness called by the claimants, Samuel Wood, conceded that the respondent had improved the flow of water that could pass under the bridge during flood conditions. Thus the facts presented indicate that the flooding of the claimant's properties on May 28, 2004, would have been worse, not better, had the 1924 bridge been in place.

In accordance with these findings of fact and conclusions of law, the Court is of the opinion to and does deny these claims.

Claims disallowed.

OPINION ISSUED OCTOBER 25, 2006

CITIZENS TELECOMMUNICATIONS COMPANY OF WV,
dba FRONTIER COMMUNICATIONS OF WV
VS.
SUPREME COURT OF APPEALS
(CC-05-096)

Kenneth E. Tawney, Attorney at Law, for claimant.
J. Kirk Brandfass, General Administrative 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 $2,553.62 plus interest for providing telephone services to respondent for which respondent did not remit payment of the Universal Service Fund charges at the time the invoices were rendered. In a Stipulation filed by the parties the respondent admits validity of the claim and that the parties agreed that respondent is due the amount of $2,553.62 plus interest as provided in the contract. Respondent also states that there were sufficient funds expired in the appropriate fiscal year from which the charges could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $2,553.62, but the Court denies any portion of the claim for interest since this was not a part of the award in the claim which is the precedent for the issue in the instant claim. See *AT&T Corporation v. Dept. of Administration*, Claim No. CC-04-879, Opinion Issued April 27, 2006.

Award of $2,553.62.

OPINION ISSUED OCTOBER 25, 2006

HARRY W. SMITH JR.
VS.
DIVISION OF HIGHWAYS
(CC-05-254)

Claimant appeared *pro se*.
Jason C. Workman, 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 its roads. Claimant's residence is located in Wayne County. The Court is of the opinion to deny the claim for the reasons more fully stated below.

Claimant's property is adjacent to Route 924, locally known as Mill Branch Road and Moore Road. Mr. Smith had a fence on his property that was located adjacent to Moore Road. The fence was damaged by large trucks and mobile homes traveling around a curve from Moore Road onto Mill Branch Road that was not wide enough for vehicles of this size to make the turn. The vehicles struck claimant's fence on several occasions causing damage. Mr. Smith stated that respondent never placed a sign in the area of his residence warning about the size of vehicles that could navigate this curve. He testified that respondent had purchased a home across the street from his residence in 2004 and had cut some of the bank, enabling trucks to make the turn without damaging his fence. Mr. Smith stated that he was not aware of which vehicles struck and damaged his fence. He further stated that he contacted respondent regarding this situation in 2003 or 2004. Claimant sustained damages totaling approximately $700.00. His home owners insurance deductible was $500.00.

The position of the respondent is that it is not the proper party in this action as the proper defendant would be the owner(s) or driver(s) of the vehicle(s) which struck the claimant's fence.

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 cause damage to claimant's property. Consequently, there is no evidence of negligence upon which to justify an award. Thus, the claimant may not make a recovery for his 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 25, 2006

JOYCE PENNINGTON and LARRY PENNINGTON
VS.
DIVISION OF HIGHWAYS
(CC-05-255)

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 their 2002 Ford Escort striking a rock while traveling westbound on Route 50 in Harrison County. Route 50 is a road maintained by respondent in Harrison 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 approximately 8:30 p.m. on March 27, 2005, a rainy evening. Route 50 is a four-lane road at the location of claimants' accident. Ms. Pennington testified that she was driving in her right lane at approximately fifty-five to sixty miles per hour due to the wet conditions when she saw

a large rock in her lane of travel. She stated that she attempted to miss the rock but she could not avoid it. Claimants' vehicle struck the rock and sustained damage to the passenger side rear rim totaling $101.38.

The position of the respondent was that it did not have notice of the rock on Route 50 prior to claimants' incident. Paul Lister, an Investigator for respondent, testified that he was unable to find any reports of rock falls in the area of the incident herein prior to or on the date of this incident. He further testified that there are no areas along this section of Route 50 that are marked as rock fall areas.

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). 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 that respondent failed to take adequate measures to protect the safety of the traveling public on Route 50 in Harrison County. 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 OCTOBER 25, 2006

DONNIE L. SHAW
VS.
DIVISION OF HIGHWAYS
(CC-05-290)

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 claimants and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On June 25, 2005, a large rock fell into a drainage ditch along Camp Run, in Doddridge County, causing water to wash out a tunnel underneath claimant's property. A horse that was grazing on the property fell into the tunnel and died.

2. Respondent was responsible for the maintenance of Camp Run which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's horse was killed. Claimant valued his horse at $2,000.00.

4. Respondent agrees that the amount of $2,000.00 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 Camp Run on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants horse; 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 $2,000.00.

Award of $2,000.00.

OPINION ISSUED OCTOBER 25, 2006

MELISSA GAIL WILLIAMS
VS.
DIVISION OF HIGHWAYS
(CC-05-312)

Claimant appeared *pro se*.
Jason C. Workman, 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 21, 2005, claimant was traveling on the entrance ramp to I-64 from Route 119 in Charleston, Kanawha County, when her vehicle struck an open lid to the wires to the street lights in the road, damaging a tire and rim.

2. Respondent was responsible for the maintenance of the entrance ramp to I-64, which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $529.50. Claimant's insurance deductible was $500.00.

4. Respondent agrees that the amount of $500.00 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 the entrance ramp to I-64 from Route 119 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $500.00.

Award of $500.00.

OPINION ISSUED OCTOBER 25, 2006

JAMES ROBINSON and ANNE ROBINSON
VS.
DIVISION OF HIGHWAYS
(CC-06-079)

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

PER CURIAM:

Claimants brought this action for vehicle damage and property damage which occurred when a tree fell onto their property adjacent to Long Run/Greenwood Road, in Greenwood, Doddridge County. Long Run/Greenwood Road 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 the morning of September 27, 2005, a clear and calm day. Long Run/Greenwood Road is a two-lane highway at the area of the incident involved in this claim. James Robinson testified that a tree that was on both his property and respondent's right of way fell and damaged two of their vehicles, a jungle gym, and a trampoline. He stated that the tree appeared to be a live tree prior to falling. Mr. Robinson testified that it was only after the tree fell over that it was discovered that the tree was decayed on the inside. Claimants' home owners insurance deductible was $500.00 and the vehicle's insurance deductibles were $50.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on Long Run/Greenwood Road at the site of the claimant's accident for the date in question. Charles Richards, Highway Administrator for respondent in Dodridge County, testified that he had no information about the tree that fell onto claimants' property prior to the incident . Mr. Richards stated that the tree was on the edge of respondent's right of way and that it appeared to be a live tree prior to falling.

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). 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 an apparently healthy tree falls and causes property

damage as a result of a storm, the Court has held that there is insufficient evidence of negligence upon which to justify an award. *Wiles v. Division of Highways*, 22 Ct. Cl. 170 (1998); *Gerritsen v. Dept. of Highways*, 16 Ct. Cl. 85 (1986).

In the instant case, the Court is of the opinion that respondent had no notice that the tree at issue posed an apparent risk to the public. The evidence adduced at the hearing established that the tree appeared to be a healthy tree. Neither claimants nor respondent had reason to believe that the tree was in danger of falling. Thus, the claimants may not make a recovery for their 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 NOVEMBER 20, 2006

ROBERT A. ALLEN and JESSICA B. ALLEN
VS.
DIVISION OF HIGHWAYS
(CC-05-236)

Claimants appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2003 Dodge Durango struck a loose man hole cover while claimant Robert A. Allen was traveling on Washington Street in Charleston, Kanawha County. Washington Street 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 between 9:10 a.m. and 9:15 a.m. on April 8, 2005, a clear and dry morning. Washington Street is a four-lane highway at the area of the incident involved in this claim. Claimant Robert Allen testified that he was driving on Washington Street when his vehicle struck a loose manhole cover that he had not seen. Claimants' vehicle sustained damage to a tire and rim. The damage sustained totaled $643.60. Claimants' insurance deductible was $250.00.

The position of the respondent is that it was not responsible for the maintenance of the manhole cover on Washington Street at the site of the claimants' accident for the date in question. David Fisher, Highway Administrator 2 for the respondent in Kanawha County, testified the manhole cover was for a storm sewer drain and that the manhole cover belongs to the City of Charleston. He further stated that the City of Charleston is responsible for the maintenance of the manhole cover.

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

In the instant case, the evidence established that the respondent was not responsible for the manhole cover on Washington Street in Charleston. Consequently, there is insufficient evidence of negligence upon which to justify an award. Thus, the claimants may not make a recovery for their 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 NOVEMBER 20, 2006

TAMMY CRANE
VS.
DIVISION OF HIGHWAYS
(CC-05-302)

Claimant appeared *pro se*.
Jason C. Workman, 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 14, 2005, claimant was injured on a broken signpost at the corner of Pennsylvania Avenue and Lee Street.

2. Respondent was responsible for the maintenance of roadway signs located at the corner of Pennsylvania Avenue and Lee Street which it failed to maintain properly on the date of this incident.

3. Claimant and Respondent agree that the amount of $750.00 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 roadway signs located at the corner of Pennsylvania Avenue and Lee Street 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 her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $750.00.

Award of $750.00.

OPINION ISSUED NOVEMBER 20, 2006

JO ANN BERWINKLE and WILLIAM T. BERWINKLE
VS.
DIVISION OF HIGHWAYS
(CC-05-424)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when a tree fell onto their vehicle while claimant Jo Ann Berwinkle was traveling on Route 19 in Clarksburg, Harrison County. Route 19 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 at approximately 4:30 p.m. on August 13, 2005, a clear and warm day. Jo Ann Berwinkle testified that she was stopped at a red light just prior to the VA bridge in Clarksburg when a tree or large branch fell from the hillside adjacent to Route 19 and struck her vehicle. She stated that she had not noticed the tree before it fell and that there were many trees on the hillside adjacent to Route 19. Mrs. Berwinkle testified that the branch appeared to be a live tree since it had leaves on it. The tree went through her vehicle's passenger side window and broke the front windshield. Claimants' vehicle sustained $2,818.62 in damages. Claimants' insurance deductible was $250.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 19 at the site of the claimants' accident for the date in question. The respondent did not present any witnesses at the hearing of 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). 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 an apparently healthy tree falls and causes property damage as a result of a storm, the Court has held that there is insufficient evidence of negligence upon which to justify an award. *Wiles v. Division of Highways*, 22 Ct. Cl. 170 (1998); *Gerritsen v. Dept. of Highways*, 16 Ct. Cl. 85 (1986).

In the instant case, the Court is of the opinion that respondent had no notice that the tree at issue posed an apparent risk to the public. The evidence adduced at the hearing established that the tree appeared to be a live and healthy tree. Neither

claimants nor respondent had reason to believe that the tree was in danger of falling. Thus, the claimants have not established any negligence on the part of the respondent, and further, they may not make a recovery for their 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 NOVEMBER 20, 2006

CONNIE CLINE
VS.
DIVISION OF HIGHWAYS
(CC-05-427)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2002 Pontiac Grand Am struck a boulder as she was traveling westbound on I-64 in Kanawha County. I-64 is a road maintained by respondent in Putnam 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 approximately 8:30 a.m. on November 3, 2005, a clear and dry morning. I-64 is a six-lane road with a speed limit of seventy miles per hour at the area of claimant's incident. Ms. Cline was driving westbound in the middle lane on I-64 near the Nitro exit when she came across a boulder in the road. Claimant could not avoid the boulder because of traffic all around her. Claimant's vehicle struck the rock and sustained damage to the transmission totaling $2,570.36. Claimant's insurance deductible was $1,000.00.

The position of the respondent was that it did not have notice of the rock on I-64. Mike Escue, Transportation Crew Supervisor for respondent in Putnam County, testified that this is not an area that is prone to rock falls. Mr. Escue stated that most of the terrain between Cross Lanes and Nitro is valley and that there are guard rails adjacent to the west bound lanes of I-64 at the scene of the incident. He testified that his office received no notice of any rock falls in this area on the date of claimant's incident. Respondent maintains that there was no prior notice of any rocks on I-64 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 I-64 in Putnam County. It was unclear from the evidence presented at trial where the rock that claimant's vehicle struck came from. 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 DECEMBER 15, 2006

TRUDA NULL
VS.

DIVISION OF HIGHWAYS
(CC-03-495)

Larry Ford and Michael Glasser, Attorneys at Law, for claimant.
Andrew F. Tarr and Jason C. Workman, 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 November 17, 2001, claimant was walking across 21st Street in Nitro, Kanawha County, when she fell due to a crack in the road.

2. Respondent was responsible for the maintenance of 21st Street in Nitro, which it failed to maintain properly on the date of this incident.

3. As a result of this incident, the claimant suffered injuries that required medical treatment.

4. Claimant and respondent have agreed to settle this claim for the total sum of Thirteen Thousand Dollars ($13,000.00).

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of 21st Street in Nitro 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 her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $13,000.00.

Award of $13,000.00.

OPINION ISSUED DECEMBER 15, 2006

TONY GUZMAN and CONNIE SUE GUZMAN
VS.
DIVISION OF HIGHWAYS
(CC-05-347)

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 2002 Chrysler Sebring struck a hole while claimant Tony Guzman was traveling on County Route 60 in Morgantown, Monongalia County. County Route 60 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 at approximately 8:30 a.m. on August 10, 2005. County Route 60, also known as Baker's Ridge Road, is a two-lane highway at the area of the incident involved in this claim. Claimant Tony Guzman testified that he was driving on County Route 60 with a truck traveling towards him in the opposite lane. He stated that it was a clear day but that he drove his vehicle close to the edge of the road to avoid the other truck when his vehicle struck a hole along the edge of the road that he had not seen. Mr. Guzman testified that the hole was approximately sixteen inches long, twelve inches wide, and two to three inches deep. Claimants' vehicle struck the hole in the road damaging a tire and a rim totaling $296.69.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 60 at the site of the claimant's accident for the date in question. Kathy Westbrook, County Highway Administrator for the respondent in Monongalia County, testified that she had no knowledge of any holes on County Route 60 in Morgantown prior to the date of claimants' incident. Ms. Westbrook stated that based upon pictures entered into evidence, the hole appeared to be part of an edge failure. She testified that an edge failure occurs when the edge of the roadway fails due to drainage or heavy traffic traveling on the roadway. Respondent maintains that it had no actual or constructive notice of any holes on County Route 60.

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 claimants' 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 60. The size of the hole and the time of the year in which claimants' 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 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 claimant in this claim in the amount of $296.69.

Award of $296.69.

OPINION ISSUED DECEMBER 15, 2006

RICHARD MILLER and MELINDA MILLER
VS.
DIVISION OF HIGHWAYS
(CC-05-425)

J. Timothy DiPiero, Attorney at Law, for claimants.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

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

1. On June 18, 2004, claimant Richard Miller was operating his 1993 Chevrolet S-10 pickup truck on U.S. Route 60 and was proceeding across the Amandaville Bridge when his vehicle struck a large hole located in the bridge.

2. Respondent was responsible for the maintenance of U.S. Route 60 and the Amandaville Bridge, which it failed to maintain properly on the date of this incident.

3. As a result of this incident, Mr. Miller suffered severe physical injuries that required medical treatment.

4. Claimants and respondent have agreed to settle this claim for the total sum of One Hundred Ten Thousand Dollars ($110,000.00).

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of U.S. Route 60 and the Amandaville Bridge on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained by claimant Richard Miller; 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 $110,000.00.

Award of $110,000.00.

OPINION ISSUED DECEMBER 15, 2006

ANTOINE E. GERAUD
VS.
DIVISION OF HIGHWAYS
(CC-06-027)

Claimant appeared *pro se*.

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

PER CURIAM:

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

1. On January 11, 2006, claimant was traveling on W. Va. Route 2 in Marshall County, when his vehicle struck a sign lying in the road damaging two tires.

2. Respondent was responsible for the maintenance of W. Va. Route 2 which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $165.20.

4. Respondent agrees that the amount of $165.20 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 W. Va. Route 2 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 $165.20.

Award of $165.20.

OPINION ISSUED DECEMBER 15, 2006

ROBERT C. SMALL
VS.
DIVISION OF HIGHWAYS
(CC-06-060)

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 2004 Mazda struck a hole while he was traveling on Sauls Run Road in Harrison County. Sauls Run Road 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 the evening of January 21, 2006. Sauls Run Road is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving on Sauls Run Road with a pickup truck traveling towards him. He stated that it was raining and the road was narrow and that because of the oncoming traffic he was close to the edge of the road. His vehicle struck a hole along on the edge of the road that he had not noticed, damaging two tires and two rims. He stated that the hole was eight to ten inches deep and approximately one foot wide. Claimant's vehicle sustained damage totaling $736.85 a portion of which was paid by his insurance and his out-of-pocket was in the amount of $336.50.

The position of the respondent is that it did not have actual or constructive notice of the condition on Sauls Run Road at the site of the claimant's accident for the date in question. The respondent did not present any witnesses at the hearing.

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 Sauls Run Road. The size of the hole and the location of the hole in the road 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 his portion of 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 $336.50.

Award of $336.50.

OPINION ISSUED DECEMBER 15, 2006

JEFFREY FINDO
VS.
DIVISION OF HIGHWAYS
(CC-06-064)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when falling rocks struck his 1995 Subaru Impreza while he was traveling southbound on Route 250 near Fairmont, Marion County. 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 January 15, 2006. Route 250 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving between thirty-five and forty miles per hour when he noticed some small rocks in the road. As he proceeded along Route 250, his vehicle was struck by small rocks that fell from the high wall adjacent to the road. The rocks struck his vehicle on the hood and along the side causing $418.37 in damages. 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 250 at the site of the claimant's accident for the date in question. Dwayne Miller, Supervisor for the respondent in Marion County, testified that this section of Route 250 where claimant's incident occurred is a rock fall area with rock fall signs warning the traveling public both north and southbound. He stated that there are usually rock falls in the winter and spring along this stretch of Route 250.

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 the rocks that had fallen on Route 250 prior to and at the time of 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 his 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 DECEMBER 15, 2006

DENA A. MATTHEWS
VS.
DIVISION OF HIGHWAYS
(CC-06-242)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2004 Chevrolet Cavalier struck an eroded section of berm while she was traveling on County Route 7/4 in Mercer County. County Route 7/4 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 between 6:30 p.m. and 9:00 p.m. on July 21, 2006. County Route 7/4 is a one-lane highway at the area of the incident involved in this claim. Claimant testified that it was a clear and dry day and that she was driving on County Route 7/4 when she saw a logging truck coming at her from the opposite direction. Ms. Matthews maneuvered her vehicle onto the berm of the road to avoid the truck. The berm of County Route 7/4 was eroded away approximately one and a half feet deep. Claimant's vehicle struck this section of eroded berm causing damage to the vehicle's gas tank, alignment and front bumper totaling $754.99. 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 7/4 at the site of the claimant's accident for the date in question. Richard Delp, Highway Administrator for the respondent in Mercer County, testified that County Route 7/4 had a lot of logging traffic on it. He stated that crews for respondent had been working on the berm and ditches along the road at least twelve times between February 3, 2006 and September 13, 2006, due to the heavy truck traffic along the road. Mr. Delp testified that a crew had been working on the shoulders of County Route 7/4 on June 9, 2006. He also stated that due to the road's location on the slope of a mountain, a heavy rain could easily wash out any repair work respondent might have done.

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 eroded berm which claimant's vehicle struck and that the berm presented a hazard to the traveling public. Photographs in evidence depict the berm and provide the Court an accurate portrayal of the size and location of the eroded section of berm on County Route 7/4. 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 $500.00.

Award of $500.00.

OPINION ISSUED DECEMBER 15, 2006

REBECCA J. HESS
VS.
DIVISION OF MOTOR VEHICLES
(CC-06-335)

Claimant appeared *pro se*.

Ronald R. Brown, 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 $50.00 for towing expenses she incurred due to the respondent failing to properly transfer her license plate to the correct vehicle.

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 50.00.

Award of $50.00.

OPINION ISSUED JANUARY 4, 2007

DIANA S. EGGERICHS
VS.
DIVISION OF HIGHWAYS
(CC-04-520)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 1996 Ford Escort LX struck a hole when she was traveling on Route 17 in Fayette County. Route 17 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 2:00 p.m. and 2:30 p.m. on July 2, 2004. Route 17 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that on the day in question, she was driving on Route 17 when she saw the hole. Ms. Eggerichs testified that the hole was approximately two feet wide, two feet long, and eight to twelve inches deep. She stated that it was a sunny and dry day and that she had seen the hole previously but she had been able to avoid it. On this occasion she could not avoid the hole because there was oncoming traffic and a man walking along the berm of the road. Ms. Eggerichs testified that she was traveling at approximately thirty five miles per hour. She also stated that she was attempting to catch a vehicle that had sped past a group of children at a fund raiser she had been attending. Claimant's vehicle struck the hole sustaining damage to the right front axle and rim. Claimant's vehicle sustained damage totaling $169.99.

The position of the respondent is that it was aware of the hole in question on Route 17 in Fayette County but that it was attempting to maintain the road as best as possible. Joe Donnally, Maintenance Crew Supervisor for respondent in Fayette County, testified that there was a sewer line underneath Route 17 that was leaking. He stated that respondent's crews had patched this area numerous times, but due to the leaking sewer line the hole continuously appeared until the sewer company was able to repair it.

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 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. However, the Court further finds that claimant was aware of the hole and that she could have slowed her vehicle prior to striking the hole, and therefore, the Court assesses forty percent (40%) comparative negligence against the claimant.

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 $101.99.

Award of $101.99.

OPINION ISSUED JANUARY 4, 2007

TRUDY L. FORSTER
VS.
DIVISION OF HIGHWAYS
(CC-05-348)

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 1999 Buick LeSabre struck an object in the roadway while she was traveling on the exit ramp of I-470 onto Route 2 in Ohio County. I-470 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 at approximately 8:45 p.m. on August 15, 2005. The exit ramp of I-470 onto Route 2 is a two-lane highway that narrows to one lane at the area of the incident involved in this claim. Claimant testified that she was driving on the exit ramp with a vehicle behind her and a vehicle to her left attempting to pass her when she saw an object in the road. She stated that she could not avoid the object because of the traffic around her and concrete barriers to her right. Ms. Forster testified that the object appeared to be a piece of concrete that had broken off the road. Claimant's vehicle struck the concrete sustaining damage the underside of the vehicle. Claimant's vehicle sustained damage totaling $450.23.

The position of the respondent is that it did not have actual or constructive notice of the condition on the exit ramp of I-470 at the site of the claimant's accident for the date in question. Terry Kuntz, Interstate Supervisor for the respondent along the Interstates, testified that he had no knowledge of any holes or objects in the road on the exit ramp of I-470 onto Route 2 for the date in question. Mr. Kuntz stated that he was first notified of a problem at the area of claimant's incident on August 17, 2005. He further stated that this was a "blowout" where concrete breaks into pieces. Mr. Kuntz stated that this can be caused by intense heat or cold and that the concrete in this area had been breaking since the previous winter. He stated that respondent did asphalt patching along this stretch whenever it became aware of a problem. Respondent maintains that it had no actual or constructive notice of any holes on exit ramp of I-470 at the site of the claimant's accident for the date 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).

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the object which claimant's vehicle struck and that the object presented a hazard to the traveling public. The size of the object, given 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 $450.23.

Award of $450.23.

OPINION ISSUED JANUARY 4, 2007

ROGER VIRDEN
VS.
DIVISION OF HIGHWAYS
(CC-05-402)

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 2002 Ford Mustang struck a hole while he was traveling northbound on County Route 7 in Brooke County. County Route 7 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 during the evening on November 7, 2004. County Route 7, locally known as Cross Creek Road, is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving on County Route 7 when he saw the hole. He stated that he had seen the hole previously and had been able to avoid it on other occasions but he could not on this occasion because there was a vehicle approaching in the opposite lane. Claimant's vehicle struck the hole sustaining damage to two tires. Claimant's vehicle sustained damage totaling $385.24. 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 County Route 7 at the site of claimant's accident on the date in question. Mark Griffith, Assistant Superintendent for the respondent in Brooke County, testified that he first became aware of the condition of County Route 7 after claimant's incident. Mr. Griffith stated that crews for respondent then went out and put warning signs up around the hole. Respondent maintains that it had no actual or constructive notice of any holes on County Route 7 prior to claimant's incident.

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

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. A photograph in evidence depicts the area of road where claimant's accident occurred and provides the Court an accurate portrayal of the size and location of the hole on County Route 7. The size of the hole and its location in the road 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 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 $100.00.

Award of $100.00.

OPINION ISSUED JANUARY 4, 2007

DARLA FURBEE
VS.
DIVISION OF HIGHWAYS
(CC-06-031)

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 2002 Toyota RAV4 striking rocks while she was traveling on State Route 2 in the Glendale area, also known as "the narrows," in 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 December 23, 2005. On the date in question, Ms. Furbee 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. She 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 damage to two tires and two rims totaling $1,012.97.

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 falling rock signs at both the north and south ends of the section of State Route 2 referred to as "the narrows." Respondent undertakes periodic patrols through the area and the area has been provided with ample lights for when it is dark. 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 has 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 many claims which occurred in this specific section of State Route 2. *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); Hundagen *vs. Div. of Highways*, CC-98-303 (Ct. Cl. Dec. 6, 1999. Thus, the Court is of the opinion that respondent is liable for the damages which proximately flow from its inadequate protection of the traveling public in this specific location of State Route 2 in Marshall County, and further, that respondent is liable for the damages to claimant's vehicle in this claim.

In accordance with the findings of fact and conclusions of law as stated herein above, the Court is of the opinion to and does make an award to the claimant in this claim in the amount of $1,012.97.

Award of $1,012.97.

OPINION ISSUED JANUARY 4, 2007

DeWITT KEITH BLAIR
VS.
DIVISION OF HIGHWAYS
(CC-06-080)

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 his 2000 Ford Windstar striking a rock when he was traveling northbound on Route 2 in Marshall County. Route 2 is a road maintained by respondent in Marshall 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 February 25, 2006, a sunny and dry day. Route 2 is a four-lane road that is marked at the location of claimant's accident as a "falling rock" area with concrete barriers and a fence on the hillside. Mr. Blair was proceeding on Route 2 when a rock from the hillside adjacent to Route 2 fell into his lane of traffic. Claimant could not avoid the rock due to traffic in his left lane and claimant's vehicle struck the rock. Mr. Blair testified that the fence had been

damaged at least a year prior to his incident. Claimant's vehicle sustained damage to a tire and rim totaling $262.74.

The position of the respondent was that it did not have notice of the rock on Route 2. 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 Route 2 to warn drivers proceeding on the roadway. Christopher Minor, Highway Administrator 2 for respondent in Marshall County, testified that this is an area that has rock falls occasionally and that there are rock fall signs placed along the highway. He stated that there is also a concrete barrier and a fence in place in order to keep any rocks that fall from getting out into the road. Mr. Minor further testified that there had been a slide approximately a year prior to claimant's incident which had damaged two sections of the fence. He stated that respondent had attempted to clean up after this slide, but had been unable to repair the fence as it did not have the proper equipment. Mr. Minor stated that a request had been made to have the fence repaired, but that it still had not been fixed. Mr. Minor further stated that he had received no notice of any rock falls in the area of Route 2 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 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, respondent has placed "falling rock" warning signs to warn the traveling public of the potential for rock falls at this location, along with placing concrete barriers and a fence along the hillside. However, respondent was aware that the fence had been damaged for at least a year prior to claimant's incident and had not fixed the fence. 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 location of 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 stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $262.74.

Award of $262.74.

OPINION ISSUED JANUARY 4, 2007

GLORIA JUNE GALLOURAKIS
VS.
DIVISION OF HIGHWAYS
(CC-06-093)

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 2005 Subaru Forester striking rocks while she was traveling on State Route 2 in the Glendale area, also known as "the narrows," in 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 23, 2006. On the date in question, Ms. Gallourakis 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. She was proceeding on State Route 2 when the vehicle she was driving struck a rock that had fallen into the roadway. Claimant's vehicle sustained damages totaling $1,512.03. Claimant's insurance deductible was $500.00.

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 falling rock signs at both the north and south ends of the section of State Route 2 referred to as "the narrows." Respondent undertakes periodic patrols through the area and the area has been provided with ample lights for when it is dark. 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 has 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 many claims which occurred in this specific section of State Route 2. *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; Hundagen *vs. Div. of Highways*, CC-98-303 (Ct. Cl. Dec. 6, 1999. 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 $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 4, 2007

JAMES R. MEADOWS and ROBERTA J. MEADOWS
VS.
DIVISION OF HIGHWAYS
(CC-06-253)

Claimants appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2005 Harley Davidson 1200 Sportster struck a hole while traveling on Eccles Road in Beckley, Raleigh County. Eccles Road 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 3:30 p.m. and 4:00 p.m. on August 13, 2006. Eccles Road is a one-lane road at the area of the incident involved in this claim. James Meadows testified that on the sunny and dry day in question, he and his wife were riding his motorcycle with his son traveling ahead of them on another motorcycle. He stated that his son was approximately one hundred yards in front of him and that he saw his son swerve his motorcycle to avoid holes in the road. Mr. Meadows testified that there was a truck traveling towards him when he came upon the holes in the road. He stated that because there was an oncoming truck, he could not avoid the holes, and his motorcycle struck both holes. Mr. Meadows stated that the first hole was approximately twelve to eighteen inches wide, eighteen inches long, and seven inches

deep. Claimants' motorcycle struck the holes sustaining damage to the front rim and tire totaling $638.39. 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 Eccles Road at the site of the claimant's accident for the date in question. Respondent did not present any testimony or evidence at the hearing of 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).

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the holes which claimants' motorcycle struck and that the holes presented a hazard to the traveling public. Photographs in evidence depict the size and location of the holes in the road. The size of the 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 claimants may make a recovery for the damage to their motorcycle. However, the Court further finds that Mr. Meadows was aware of the holes after having seen his son swerve to avoid them and that he should have stopped his motorcycle to avoid them, and therefore, the Court assesses thirty percent (30%) comparative negligence against the claimants.

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 $350.00.

Award of $350.00.

OPINION ISSUED JANUARY 12, 2007

MISTY BROWN SPAULDING
VS.
DIVISION OF HIGHWAYS
(CC-02-119)

Kimberly E. Williams, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

FORDHAM, JUDGE:

Claimant brought this action for personal injuries and vehicle damage which occurred on March 7, 2000, when her 1998 Honda Civic went into a washed out area of the shoulder while she was traveling on W. Va. Route 501 in Cross Lanes, Kanawha County. W. Va. Route 501 is a road maintained by respondent. The Court previously found fault on the part of both the respondent and the claimant and assigned the claimant twenty five percent (25%) of that fault. This matter, therefore, was heard on the issue of damages only and the Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The claimant testified at the hearing of this matter as to the extent of her injuries. Ms. Brown Spaulding testified that after the accident she first checked on her five-week old son who did not appear to have suffered any injuries. She then noticed that her leg was rotated backwards and her ankle was broken. She also had a cut on her hand. Claimant testified that she was taken to the hospital where her leg was put back in place and because she had not been medicated while this was done, she experienced severe pain. Ms. Brown Spaulding next recalled waking up in the hospital approximately nine days later. She was told that she had suffered a head injury in the accident and stated that she could not answer basic questions. She also suffered a pelvis fracture in the incident. Claimant was moved to an inpatient rehabilitation unit on March 16, 2000, where she had to learn, among other things, how to use a walker and walk up and down stairs. Ms. Brown Spaulding required five or six surgeries due to the injuries suffered in her accident. Claimant's total medical bills, including hospital bills, surgeries, and physical therapy, totaled $117,306.84. She was unable to work for

several months following the accident so she incurred work loss which totaled $11,382.00. Ms. Brown Spaulding's vehicle was totaled in the accident. Her insurance deductible was $250.00.

Claimant testified that as a result of the injuries she suffered she is no longer work able to work as a registered nurse on the floor of a hospital; therefore, she has taken a position as a legal nurse consultant in the office of a practicing physician. She stated that she had enjoyed being in the hospital with patients since she was prepared in her education for that type of position. She stated that she is unable to run which she did prior to the incident for personal exercise. Ms. Brown Spaulding also testified that due to her injuries, she can no longer play typical games with her children such as "tag" or "hide and seek." She attempts to take walks with her family but her ankle injury tires her so that is not possible except for short walks. She enjoyed riding her bicycle prior to her injury and she continues to try to continue with this form of exercise but it is not as enjoyable for her now since she experiences pain during this activity. Her life style has changed dramatically as a result of the injury to her ankle which occurred as a result of this vehicular accident.

Clark D. Adkins M.D., stated in an evidentiary deposition that he had performed several surgeries on clamant as a result of her accident on March 7, 2000. He stated that she suffered a broken hip socket, broken tibia and broken fibula. Dr. Adkins testified that he examined Ms. Brown Spaulding on June 5, 2006, and stated that she has severe arthritis in her ankle which is progressive. He stated that her injury is permanent and that she will in the future require an ankle fusion due to the pain that she suffers. Elizabeth Davis, a certified rehabilitation counselor and certified life care planner, testified that an ankle fusion surgery would cost approximately $17,780.00.

In the instant case, the Court is of the opinion that claimant has suffered a permanent injury that will require future treatment as a result of the incident involved in this claim. Ms. Brown Spaulding has experienced and will continue to suffer a tremendous amount of severe pain and suffering as a result of her injuries and she has been forced to alter her lifestyle to accommodate her ankle. Therefore, the Court is of the opinion that an award of $498,639.36 represents a fair and reasonable reimbursement to claimant for her injuries and the resulting out-of-pocket medical bills, lost wages, future medical treatment, property loss, and past and future pain and suffering . However, the Court previously found claimant to be at fault to the extent of twenty five percent (25%) thus reducing the amount of the award to $373,979.52.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $373,979.52.

Award of $373,979.52.

OPINION ISSUED JANUARY 12, 2007

DR. LYN GUY, SUPERINTENDENT OF
MONROE COUNTY SCHOOLS and
MONROE COUNTY BOARD OF
EDUCATION
VS.
WEST VIRGINIA DEPARTMENT OF EDUCATION
(CC-03-572)

Robert E. Richardson, Attorney at Law, for claimants.
Doren C. Burrell, Senior Assistant Attorney General, for respondent.

GRITT, JUDGE:

Claimants, Dr. Lyn Guy, Superintendent of Monroe County Schools, and the Monroe County Board of Education, brought this action to recover $112,571.38 which they allege was not paid to it by the Respondent, West Virginia Department of Education, when the respondent failed to allocate a supplemental appropriation proportionately to county boards of education in the 2004 fiscal year as provided by statute. The parties stipulated certain facts in this claim as follows:

1. The Court of Claims has jurisdiction over the subject matter of this action.

2. County boards of education in seventeen West Virginia counties, including Monroe

County, experienced a net increase in student enrollment from the 2001-2002 school year to the 2002-2003 schoo1 year.

3. In the 2002-2003 budget, enacted on March 17, 2002, the Legislature appropriated $1,204,196 for aid to counties experiencing increased student enrollment from the 2001-2002 school year to the 2002-2003 school year, which, when combined with the funds appropriated for that purpose and carried over from the preceding year, provided $1,473,344
to be allocated among the various county boards of education that had experienced such a net increase in student enrollment.

4. Prior to the 2003-2004 fiscal year, appropriations for "Increased Enrollment" regularly appeared in the budget bill as a distinct line item with an assigned activity code of 140.

5. The funds appropriated for increased student enrollment in the 2002-2003 budget, together with those appropriated for that purpose under the 2001-2002 budget and carried over, were insufficient to provide fully for the increased enrollment in those counties experiencing a net increase in enrollment from the 2001-2002 school year to the 2002-2003 school year. The Department of Education therefore allocated those funds proportionately among all of the counties that experienced such a net increase in student enrollment, as required by § 18-9A-15 of the West Virginia Code. The portion of these funds allocated to Monroe County was $87,293.

6. Prior to commencement of the 2003 general legislative session, the West Virginia Department of Education requested a supplemental appropriation of $3,006,256 to fund all counties that had experienced net increased enrollment during the 2002-2003 school year.

7. When House Bill 104 was introduced in the Legislature, it did not have a line-item entry for "Increased Enrollment" as in previous years.

8. Thereafter, on March 16, 2003, the Legislature enacted a supplemental appropriations bill, identified as H.B.104, by which it appropriated the sum of $1,900,000 for "Traditional Increased Enrollment - 5 years through 12th grade" for the 2002-03 school year. This item was assigned an activity code of 997.

9. H.B. 104 did not contain any definition for the term "Traditional Increased Enrollment - 5 years through 12th grade".

10. The Department of Education did not allocate the funds appropriated pursuant to H.B. 104 among all of the counties that experienced a net increase in student enrollment from the 2001-2002 school year to the 2002-2003 school year, and did not utilize the formula and procedures set forth in §18-9A-15 of the West Virginia Code with regard to the allocation of those funds as done in previous years.

11. The Department of Education allocated the funds appropriated for "Traditional Increased Enrollment - 5 years through 12th grade" pursuant to H.B. 104 among six county boards of education, each of which had experienced a net increase in student enrollment from one year to the next in at least three of the five years considered by the Department of Education. In allocating these funds, the Department of Education considered increases in student enrollment from the 1997-1998 school year to the 1998-1999 school year, from the 1998-1999 school year to the 1999-2000 school year, from the 1999-2000 school year to the 2000-2001 school year, from the 2000-2001 school year to the 2001-2002 school year, and from the 2001-2002 school year to the 2002-2003 school year. If a county board of education experienced a net increase in student enrollment in at least three of these years, it received an allocation of the appropriated funds in proportion to its increase in enrollment from the 2001-2002 school year to the 2002-2003 school year.

12. Because Monroe County experienced a net increase in student enrollment in only two of the five years considered by the Department of Education in allocating the funds appropriated
for "Traditional Increased Enrollment - 5 years through 12th grade" pursuant to H.B. 104, it was not allocated any of those funds.

13. For each of the four years immediately preceding the 2002-2003 school year, the Legislature had appropriated sufficient amounts to fully fund the increased student enrollment in all counties experiencing a net increase in student enrollment, the total amount appropriated for each of those years was sufficient to provide to each such county an amount equal to that county's average per net pupil total state aid multiplied by the increase in that county's net enrollment.

14. Had the West Virginia Department of Education allocated the appropriation made for "Traditional Increased Enrollment - 5 years through 12th grade" under H.B. 104 among all of the counties that experienced an increase in net student enrollment between the 2001-2002 school year and the 2002-2003 school year, in the manner described in § 18-9A-15 of the West Virginia Code, the Monroe County Board of Education would have received allocations totaling $199,864.38 for increased enrollment during the 2002-2003 year, rather than an allocation of only $87,293.00 for increased enrollment during that year. In the event that the Court of Claims determines that the Monroe County Board of Education is entitled to relief in this action, its damages would be $112,571.38.

15. On March 16, 2003, the Legislature enacted H.B. 2050, which established the state's budget for 2003-2004.

16. In RB. 2050, the Legislature appropriated $2,000,000 for "Traditional Increased Student Enrollment - 5 years through 12th grade" for the 2003-2004 school year.

17. These funds appropriated for "Traditional Increased Student Enrollment - 5 years through 12th grade" in the 2003-2004 budget were insufficient to provide fully for the increased enrollment in all of those counties experiencing a net increase in enrollment from the 2002-2003 school year to the 2003-2004 school year.

18. In allocating the funds appropriated in the 2003-2004 budget for "Traditional Increased Student Enrollment - 5 years through 12th grade", the Department of Education considered only those county boards of education that had experienced a net increase in student enrollment from one year to the next in at least three of the five preceding years (that is, from the 1998-1999 school year to the 1999-2000 school year, from the 1999-2000 school year to the 2000-2001 school year, from the 2000-2001 school year to the 2001-2002 school year, from the 2001-2002 school year to the 2002-2003 school year, and from the 2002-2003 school year to the 2003-2004 school year). For county boards of education that had experienced a net increase in student enrollment from one year to the next in at least three of those years, the Department of Education allocated a share of the funds appropriated for "Traditional Increased Student Enrollment - 5 years through 12 th grade", in proportion to each such county's increase in student enrollment for the 2003-2004 school year.

19. Thereafter, on March 21, 2004, the Legislature enacted a supplemental appropriation bill identified as S.B. 1006, by which it appropriated an additional $615,000 for "Traditional
Increased Student Enrollment - 5 years to 12th grade" for the 2003-2004 school year.

20. In allocating the funds appropriated pursuant to S.B. 1006 for "Traditional Increased Student Enrollment - 5 years to 12th grade", the Department of Education included all counties that had experienced a net increase in student enrollment, without regard to any requirement for an increase in enrollment in three of the preceding five years.

21. On November 16, 2004, the Legislature enacted another supplemental appropriation bill, identified as S.B. 3006, by which it appropriated an additional $664,292.00 for increased enrollment for the 2003-2004 school year. These funds were similarly allocated among all counties that had experienced a net increase in student enrollment, without regard to any requirement for an increase in enrollment in three of the preceding five years.

22. As a result of the appropriations contained in the 2003-2004 budget and the supplemental appropriations contained in S.B. 1006 and S.B. 3006, all counties that had experienced a net increase in student enrollment from the 2002-2003 school year to the 2003-2004 school year received the full amount of funding necessary to provide for those net increases.

In addition to the Stipulation of Facts agreed to by the parties, the Court held a hearing in this claim, during which certain exhibits were admitted in evidence. Post trial briefs filed by the parties also have been accepted by the Court. Counsel for the claimant objected to the acceptance of respondent’s post trial brief due the date on which the brief was filed. Further, respondent has raised an issue in its post trial brief that had not been raised at any stage of the proceeding up to and including the hearing, i.e., the fact that the supplemental appropriation at issue in the claim was to be paid from the lottery fund rather than from general revenue as had been the funding source in prior years. In its post trial brief respondent argues that this fact relieved the respondent from following the general statute for proportioning funds to

county boards of education for increased student enrollment. The Court has considered respondent's post trial brief even though it was filed late. The Court is of the opinion that the late filing is not prejudicial to claimant. Claimant filed a brief in response which likewise was considered by the Court in its decision of this claim.

Accordingly, the Court has analyzed the positions of the parties with respect to the facts as put forth in the stipulation, the hearing of the claim, and the briefs filed by the parties. The issue in this claim is one of first impression with this Court. The issue, how a State agency distributes funds allocated to it by the Legislature, has not been considered in prior claims considered by the Court. Thus the Court has reviewed the Constitution of the State of West Virginia, the particular statute at issue, the language and provisions of House Bill 104, and the laws of this State in reaching its conclusion that the claimant Board of Education of the County of Monroe herein is entitled to an award.

The West Virginia Constitution specifically provides for the education of the children in our State. Article XII, Section 1 states that, "The Legislature shall provide, by general law, for a thorough and efficient system of free schools." That article also relates to the funding for schools as stated in Section 5, as follows:

Support of Free Schools.

The Legislature shall provide for the support of free schools by appropriating thereto the interest of the invested "School Fund," the net proceeds of all forfeitures and fines accruing to this state under the laws thereof and by general taxation of persons and property or otherwise. It shall also provide for raising in each county or district, by the authority of the people thereof, such a proportion of the amount required for the support of free schools therein as shall be prescribed by general laws.

Since this section provides that the appropriation be "by general taxation of persons and property or otherwise... ." the drafters of this section recognized that there may be funding sources other than general revenue which may be used to fund schools. Therefore, the fact that House Bill 104 used lottery money to fund the increased enrollment certainly does not amend the general law. Thus, the argument of the respondent that it could alter the method of allocation of funds to counties other than proportionately as provided in the general law logically fails.

The general laws that provide for a system of free schools are in Chapters 18 and 18A of the W. Va. Code. The section at issue in this claim is found in Chapter 18, Article 9A, Section 15 and provides as follows:

§18-9A-15. Allowance for increased enrollment.

(a) To provide for the support of increased net enrollments in the counties in a school year over the net enrollments used in the computation of total state aid for that year, there shall be appropriated for that purpose from the general revenue fund an amount to be determined in accordance with this section.

(b) On or before the first day of September, two thousand five, the State Board shall promulgate a rule pursuant to article three-b, chapter twenty-nine-a of this code that establishes an objective method for projecting the increase in net enrollment for each school district. The State Superintendent shall use the method prescribed by the rule to project the increase in net enrollment for each school district.

(c) The State Superintendent shall multiply the average total state aid per net pupil by the sum of the projected increases in net enrollment for all school districts and report this amount to the Governor for inclusion in his or her proposed budget to the Legislature. The Legislature shall appropriate to the West Virginia Department of Education the amount calculated by the State Superintendent and proposed by the Governor.

(d) The State Superintendent shall calculate each school district's share of the appropriation by multiplying the projected increase in net enrollment for the school district by the average total state aid per net pupil and shall distribute sixty percent of each school district's share to the school district on or before the first day of September of each year. The State Superintendent shall make a second distribution of the remainder of the appropriation in accordance with subsection (e) of this section.

(e) After the first distribution pursuant to subsection (d) of this section is made and

after the actual increase in net enrollment is available, the State Superintendent shall compute the total actual amount to be allocated to each school district for the year. The total actual amount to be allocated to each school district for the year is the actual increase in the school district's net enrollment multiplied by the average total state aid per net pupil. The State Superintendent shall make the second distribution to each school district in an amount determined so that the total amount distributed to the district for the year, in both the first and second distributions, equals the actual increase in net enrollment multiplied by the average total state aid per net pupil. The State Superintendent shall make the second distribution on or before the thirty-first day of December of each year: Provided, That if the amount distributed to a school district during the first distribution is greater than the total amount to which a district is entitled to receive for the year, the district shall refund the difference to the Department of Education prior to the thirtieth day of June of the fiscal year in which the excess distribution is made.

(f) If the amount of the appropriation for increased enrollment is not sufficient to provide payment in full for the total of these several allocations, each county allocation shall be reduced to an amount which is proportionate to the appropriation compared to the total of the several allocations and the allocations as thus adjusted shall be distributed to the counties as provided in this section: Provided, That the Governor shall request a supplemental appropriation at the next legislative session for the reduced amount.

(g) No provision of this section shall be construed to in any way affect the allocation of moneys for educational purposes to a county under other provisions of law.

The specific language at issue is in subsection (f) which provides that in the event that the appropriation for increased enrollment is not sufficient to pay each county so affected by an increase in enrollment then the county allocation "shall be reduced to an amount which is proportionate to the appropriation... and the allocations as thus adjusted shall be distributed to the counties as provided in this section:... ." It appears that the intention of the statute is to provide that all counties which experience an increase in enrollment are treated equally when funds are appropriated by the Legislature to address this particular situation or the words "proportionate to the appropriation...shall be distributed" for this purpose would not be included in this specific statute.

The Court recognizes that the respondent was interpreting the provisions in the supplemental appropriation bill (H.B. 104) based upon its assumption that ambiguous language in that bill was to be interpreted differently. Thus, it did not appropriate the funds provided by the supplemental bill in accordance with the general law applicable to the distribution of funds provided for counties which had an increase in enrollment for this particular fiscal year. The Court disagrees. The Court is of the opinion that the general law is to be followed unless the law has been specifically amended by the Legislature. Accordingly, it is the opinion of the Court that the respondent had a legal obligation and duty to follow the general statute rather than ambiguous language in a budget bill, i.e., the supplemental bill in question herein. A budget bill does not change the provisions of a general statute already in law which addresses the specific circumstance. The effect of respondent's interpretation of this language is to benefit certain counties to the detriment of the claimant.

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 in the amount of $112,571.39 to the Board of Education of the County of Monroe.

Award to the Board of Education of the County of Monroe in the amount of $112,571.38.

OPINION ISSUED JANUARY 12, 2007

JANE O'BRIEN, as Administratrix of the Estate of
WILLIAM PAUL O'BRIEN
VS.
DIVISION OF HIGHWAYS
(CC-04-515)

Dan R. Snuffer Jr., 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 September 7, 2002, claimant William Paul O'Brien was traveling on Route 16 in Calhoun County, when he was involved in a motorcycle accident which resulted in his death.

2. Respondent was responsible for the maintenance of Route 16 which it failed to maintain properly on the date of this incident.

3. Claimant and Respondent agree that the amount of $50,000.00 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 Route 16 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 her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $50,000.00.

Award of $50,000.00.

OPINION ISSUED JANUARY 12, 2007

CHARLES BROWNING and CONNIE BROWNING
VS.
DIVISION OF HIGHWAYS
(CC-05-152)

Claimants appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent

PER CURIAM:

Claimants brought this action for vehicle damage which occurred as a result of their 2002 Chevrolet ZR2 striking rocks when claimant Connie Browning was traveling on Route 10 in Logan County. Route 10 is a road maintained by respondent in Logan 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 11:50 a.m. on March 15, 2004. Route 10 is a four-lane road at the location of claimant's accident. Mrs. Browning testified that she was traveling in the right lane when rocks from the hillside adjacent to Route 10 fell onto her vehicle. Claimants' vehicle was struck by the rocks and sustained damage to the passenger side totaling $977.00. Claimants' insurance deductible was $500.00.

The position of the respondent was that it did not have notice of the rocks on Route 10. Curly Belcher, County Supervisor for respondent in Logan County, testified that this is an area that has rock falls occasionally but that there are no rock fall signs placed along the highway. Mr. Belcher testified that there is a three feet high barrier wall between the cliff and the road that is designed to catch rocks that come off the cliff, but that occasionally rocks will fall into the road. Respondent maintains that there was no prior notice of any rocks on Route 10 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, the Court is of the opinion that respondent had at least constructive, if not actual, notice of rock fall hazards in the area at issue. The area along this section of Route 10 is known to have rock falls which are a hazard to the traveling public. The respondent's actions on the date of this incident were not adequate to protect the claimant from the rocks which frequently fall onto the highway. Thus, the Court is of the opinion that respondent is liable for the damages which flow from its inadequate protection of the traveling public along this section of Route 10, and further, that respondent is liable for the damages to claimants' vehicle in this claim. Thus, the Court is of the opinion to make an award in this claim in the amount of $500.00.

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 claimants in the amount of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 12, 2007

MICHELLE POWNALL
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-05-294)

Claimant appeared *pro se*.
Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this claim to recover the value of certain personal property items that she alleges were lost by the respondent. Claimant was serving a term of confinement in the Northern Regional Jail, a facility of respondent. When she was released from confinement, all of her personal property was missing.

A hearing was conducted by the Court in this claim on October 26, 2006, at which time the claimant testified as to the facts and circumstances giving rise to the claim. Ms. Pownall testified that she had reported to Northern Regional Jail for thirty days on a driving under the influence conviction. She stated that she served this term in increments of five days and she would then return home on the weekends to work. When she reported to the correctional facility, her property was taken and inventoried. On June 3, 2005, she was released having completed the full sentence and upon being released, it was discovered that her personal property was missing. Ms. Pownall testified that she was missing a purse, wallet, watch, her birth certificate, driver's license, a jacket, shirt, pair of pants, shoes, a bra, and socks. She estimated that the total value of the items missing was $310.00.

Claimant asserts that respondent was responsible for her personal property once she reported to the correctional facility and it was inventoried. At that time a bailment relationship existed when she no longer had control or possession of her personal property.

Respondent contends that it was not responsible for claimant's property and that it followed proper procedures in inventorying her personal property.

Larry Conkle, Correctional Officer Two at Northern Regional Jail, testified that when an inmate reports for confinement in Northern Regional Jail, her or his property is inventoried and placed in a property bag. He stated that the property bag is then taken and hung on a rack in a secure area of the prison and then placed in a locked cage until the prisoner is released. Mr. Conkle testified that he was present when claimant reported to the correctional facility and inventoried all of her personal property. He further stated that after claimant was released and discovered her personal property missing, he checked all the other property bags for her items but could not find any of her items.

This Court has held that a bailment exists when respondent records the personal property of an inmate and takes it for storage purposes, and then has no satisfactory explanation for not returning it. *Page v. Division of Corrections*, 23 Ct. Cl. 238 (2000); *Heard v. Division of Corrections*, 21 Ct. Cl. 151 (1997). In the

present claim, the evidence adduced at the hearing established that the claimant had a purse, wallet, watch, birth certificate, driver's license, jacket shirt, a pair of pants, shoes, a bra, and socks in her possession when she reported to Northern Regional Jail. However, when she was released from confinement, none of these items were found and returned to claimant. The property was in the control and possession of respondent while the claimant was in Northern Regional Jail. However, respondent has no plausible explanation for what happened to the property items. Respondent was responsible for the personal property items when claimant was confined. Respondent was in a position to safeguard claimant's property while she was confined. The Court finds that respondent was responsible for securing the claimant's property and failed to take the appropriate action to do so. Therefore, the Court is of the opinion to make an award to the claimant for the value of her a purse, wallet, watch, birth certificate, driver's license, jacket shirt, a pair of pants, shoes, a bra, and socks. The Court is of the opinion that $310.00 represents a fair and reasonable reimbursement to claimant for the lost property.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $310.00.

Award of $310.00.

OPINION ISSUED JANUARY 12, 2007

PHILIP S. LAWRENCE
VS.
DIVISION OF HIGHWAYS
(CC-05-333)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2004 Volkswagen Golf R32 struck a hole while he was traveling eastbound on Route 60 near South Charleston, Kanawha County. Route 60 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 at approximately 12:00 p.m. on August 4, 2005. Route 60 is a four-lane highway with a right turn lane at the area of the incident involved in this claim. Claimant testified that on the clear and dry day in question, he was driving on Route 60 in the right turn lane when he saw the hole. Mr. Lawrence stated that he was unable to avoid the hole due to the traffic around him. Claimant's vehicle struck the hole sustaining damage to a tire totaling $138.21.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 60 at the site of the claimant's accident for the date in question. Respondent did not present any testimony or evidence at the hearing of 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).

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 size of the hole and its location in the road. The size of the hole and the time of year at which this 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 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 claimants in this claim in the amount of $138.21.

Award of $138.21.

OPINION ISSUED JANUARY 12, 2007

LUCY HILES and AMELIA HILES
VS.
DIVISION OF HIGHWAYS
(CC-05-355)

Claimants appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 1996 Geo Metro struck a hole while claimant Lucy Hiles was traveling on Route 94 in Kanawha County. Route 94 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 at approximately 11:00 a.m. on June 4, 2005. Route 94 is a two-lane highway at the place of the incident involved in this claim. Lucy Hiles testified that on the sunny and dry day in question, she was driving on Route 94 when she pulled off the road to go to a yard sale. She stated that as she turned her vehicle off the road, the front passenger side tire of her vehicle went into a hole that she had not seen because of grass and weeds. She testified that there were no warning signs around the hole. Her vehicle fell into the hole and had to be removed by use of a tow truck. Ms. Hiles testified that the hole was as big as her vehicle. Claimants' vehicle sustained damages totaling $2,436.37.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 94 at the site of the claimants' accident for the date in question. Frank McGuire, Foreman for respondent in Kanawha County, testified that there is a four foot shoulder along Route 94 in this area. He further stated that there were warning signs posted around this hole at some time, but he was unsure as to when they were put 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).

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the lack of warning signs around this hole at the time of claimants' incident 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 claimants may make a recovery for the damage to their vehicle. However, the Court further finds that Ms. Hiles had turned her vehicle too sharply while pulling off the road and struck the hole, which could have been avoided by properly turning into the driveway beyond the hole, and therefore, the Court assesses twenty percent (20%) comparative negligence against the claimants.

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 $1,949.10.

Award of $1,949.10.

OPINION ISSUED JANUARY 12, 2007

MARK RILEY AND CARLA RILEY
VS.
DIVISION OF HIGHWAYS
(CC-06-197)

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 2005 Saturn Relay struck two holes while claimant Carla Riley was traveling on Route 19 in Goodhope, Harrison County. 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 at night on June 9, 2006. Route 19 is a two-lane highway at the place of the incident involved in this claim. Carla Riley testified that on the evening in question, she was driving on Route 19 when her vehicle struck two holes that she had not seen. She testified that one hole was approximately one foot wide, two feet long and eight inches deep and that the other hole was approximately one foot long and eight inches deep. Claimants' vehicle struck the holes sustaining damage to a rim totaling $194.65.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 19 at the site of the claimant's accident for the date in question. Respondent did not present any testimony or evidence at the hearing of 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).

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the holes which claimants' vehicle struck and that the holes presented a hazard to the traveling public. The size of the holes and the location of the holes within the road 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 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 $194.65.

Award of $194.65.

OPINION ISSUED JANUARY 12, 2007

JOHN W. CRUSE
VS.
OFFICE OF MINERS' HEALTH, SAFETY AND TRAINING
(CC-06-367)

Claimant appeared *pro se*.
Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $6,045.32 for investigative overtime work performed from February 2006 through November 2006 due to the Sago Mine accident.

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 $6,045.32.

Award of $6,045.32.

OPINION ISSUED JANUARY 12, 2007

COUNTRY INN & SUITES
VS.
PUBLIC SERVICE COMMISSION
(CC-06-394)

Claimant appeared *pro se*.
Richard E. Hitt, 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 $3,325.58 for providing a conference room, lunch and equipment for an event hosted by the respondent State agency. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid.

In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $3,325.58.

Award of $3,325.58.

OPINION ISSUED JANUARY 17, 2007

MARLENE MIDDLETON,
dba THE CUTTING EDGE
VS.
DIVISION OF HIGHWAYS
(CC-04-337)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for property damage to her real estate which she alleges occurred as a result of respondent's negligent maintenance of a drainage system. Claimant's property is adjacent to County Route 61/24, locally known as Armstrong Creek Road and County Route 61/46, locally known as Post Office Road, in Kimberly, Fayette County. A hearing was held in this claim and the Court issued an Opinion on September 26, 2006, wherein the Court determined fault on the part of the respondent. The issue of damages was held open for claimant to provide documentation of her loss. Subsequently, the claimant filed various invoices to establish her loss in the amount of $5,060.88.

The Court has reviewed the documentation of claimant's damages which include the loss of a computer, repairs to the floor of the building, replacement of carpeting and various other items used for her business. The Court is of the opinion that the amount of $5,060.88 is fair and reasonable to compensate the claimant for her loss.

Accordingly, the Court is of the opinion to and does make an award to claimant in the amount of $5,060.88.

Award of $5,060.88.

OPINION ISSUED JANUARY 17, 2007

PANHANDLE HOMES INC.,
VS.
DIVISION OF HIGHWAYS

(CC-05-400)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when its 1995 Volvo Toter struck a broken sign post while traveling at the intersection of Lover's Lane and Walker Road in Follansbee, Brooke County. Lover's Lane and Walker Road are roads 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 at approximately 3:40 p.m. on July 28, 2005. Lover's Lane is a gravel road and Walker Road is a two-lane highway at the area of the incident involved in this claim. Ira Nutter testified that he was delivering a mobile home onto Lover's Lane. He stated that the only way to get the mobile home to where it was going was to back onto Lover's Lane from Walker Road. Mr. Nutter testified that as he was backing the vehicle onto Lover's Lane, one of the tires struck a broken off sign post that he had not seen. Janice Nutter testified that she had previously called respondent regarding this broken sign post and that grass and weeds had grown up around it so it could not be seen. Claimant's vehicle struck the broken sign post sustaining damage to a tire totaling $325.00.

The position of the respondent is that it did not have actual or constructive notice of the condition at the intersection of Lover's Lane and Walker Road at the site of the claimant's accident for the date in question. Mark Griffith, Acting Superintendent for respondent in Brooke County, testified that if a report of a broken off sign post comes to respondent, they would report it to the sign shop who would replace it. Mr. Griffith also stated that Lover's Lane is a HARP road and is a low priority road for respondent.

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 broken sign post which claimant's vehicle struck and that the broken sign post presented a hazard to the traveling public 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 its 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 $325.00.

Award of $325.00.

OPINION ISSUED JANUARY 17, 2007

JAMES E. RUBENSTEIN
VS.
DIVISION OF HIGHWAYS
(CC-05-426)

Harry M. Rubenstein, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2005 Nissan Maxima struck a hole while he was traveling on Route 60 in South Charleston, Kanawha County. Route 60 is a four-lane highway maintained by respondent at the location of the incident involved in this claim. 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 at approximately 6:10 p.m. on November 3, 2005. Claimant testified that he was traveling in the outside lane

with traffic to his left in the inside lane traveling in the same direction. He stated that as he was doing so, his vehicle struck a hole in Route 60 that he had not seen. He described the hole as being approximately three inches deep, three inches wide, and stretched from Route 60 onto F Street, which intersects Route 60 at the site of claimant's incident. He stated that the hole appeared to be a cut in the road and that there were no warning signs. Claimant's vehicle in striking the hole sustained damage to a rim and tire totaling $848.18. 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 Route 60 at the site of the claimant's accident for the date in question. Chet Burgess, Maintenance Supervisor for respondent in Kanawha County, testified that from photographs in evidence this appears to be a utility cut. Mr. Burgess stated that respondent does not perform cuts in the roadways at the time of year in which claimant's incident occurred. He further stated that the cut looked like something that the water company did. Mr. Burgess testified that the water companies do not inform respondent of when they are doing utility work on highways for which respondent is responsible. He stated that there was no record of any work done by respondent along this stretch of Route 60 either the week before or the week after claimant's incident.

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

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 its location within the highway 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 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 $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 17, 2007

JOANN HAINER and JERRY HAINER
VS.
DIVISION OF HIGHWAYS
(CC-04-533)

Claimants appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

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

1. On July 20, 2004, claimant Jerry Hainer was traveling on a bridge in Chief Logan State Park in Logan County when several boards on the bridge came loose and damaged the underside of the vehicle.

2. Respondent was responsible for the maintenance of the roads in Chief Logan State Park which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimants' vehicle sustained damage in the amount of $1,568.23.

4. Respondent agrees that the amount of $1,568.23 for the damages put forth by the claimants is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of the bridge in Chief Logan State Park 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 $1,568.23.

Award of $1,568.23.

OPINION ISSUED JANUARY 17, 2007

LAWRENCE THOMPSON
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-06-131)

Claimant appeared *pro se*.
Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

1. On April 11, 2006, claimant was released from custody at South Central Regional Jail. Upon his release it was discovered that his jacket was missing from his personal property items stored by respondent during his custody.

2. Respondent has admitted the validity of this claim.

3. Claimant and respondent have agreed to accept $75.00 as a fair and reasonable settlement of this matter.

The Court has reviewed the facts of the claim and finds that respondent was responsible for the loss of claimant's jacket 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 $75.00.

Award of $75.00.

OPINION ISSUED APRIL 3, 2007

TINA L. GIBSON
VS.
DIVISION OF HIGHWAYS
(CC-04-439)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 1991 Chevrolet Beretta struck a tree that had fallen onto Route 25, in Glen Jean, Fayette County. Route 25 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 at approximately 3:00 a.m. on June 11, 2004. Route 25 is a two-lane highway at the area of the incident involved in this claim. Tina L. Gibson testified that she was traveling at approximately thirty miles per hour due to foggy conditions when she noticed a tree in the road. She stated that the tree appeared to be alive and covered the entire road. Ms. Gibson testified that she applied her breaks but her vehicle still struck the tree, sustaining damages totaling $366.87.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 25 at the site of the claimant's accident for the date

in question. Joe Donnally, Maintenance Crew Leader for respondent in Fayette County, testified that he had no information about the tree that fell onto Route 25 prior to claimant's incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). 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 an apparently healthy tree falls and causes property damage as a result of a storm, the Court has held that there is insufficient evidence of negligence upon which to justify an award. *Wiles v. Division of Highways*, 22 Ct. Cl. 170 (1998); *Gerritsen v. Dept. of Highways*, 16 Ct. Cl. 85 (1986).

In the instant case, the Court is of the opinion that respondent had no notice that the tree at issue posed an apparent risk to the public. The evidence adduced at the hearing established that the tree appeared to be a healthy tree. Neither claimant nor respondent had reason to believe that the tree was in danger of falling. 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 APRIL 3, 2007

RICKIE M. LEVITT
VS.
DIVISION OF HIGHWAYS
(CC-05-344)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1991 Plymouth Acclaim struck a hole while he was traveling on Route 52 near Bluewell, Mercer County. Route 52 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 between 7:15 p.m. and 7:30 p.m. on August 18, 2005. Route 52 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he noticed a vehicle in the oncoming lane that was traveling close to the center line. Mr. Levitt stated that he drove his vehicle to the side of the road to avoid the oncoming vehicle and that when he did so, his vehicle struck a hole in the road. Claimant testified that he knew the hole was there prior to his vehicle striking it and that it was approximately two and a half to three feet long, two to two and a half feet wide, and six inches deep. Claimant's vehicle sustained damage to the front right tire totaling $98.76.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 52 at the site of the claimant's accident for the date in question. Respondent did not present any witnesses or evidence at the hearing of 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).

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. However, the evidence established that the claimant knew of the condition on Route 62 prior to his incident and that there was an opportunity for him to slow his vehicle down and avoid the hole prior to his vehicle striking it. Consequently, the Court is of the opinion that claimant is at least fifty percent negligent in this claim, and therefore the claimant may not make a

recovery for his 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 APRIL 3, 2007

FELICIA CORLEY
VS.
DIVISION OF HIGHWAYS
(CC-05-345)

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 1997 Dodge Avenger struck a piece of wood while she was traveling southbound on I-79 in Marion County. I-79 is a road maintained by respondent in Marion 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 approximately 9:00 p.m. on January 10, 2005. I-79 is a four-lane road at the area of the incident involved in this claim. Claimant testified that she was traveling in her left lane while passing a truck. Ms. Corley stated that as she was passing the truck, she noticed pieces of split wood or logs in the road. She testified that she could not avoid the wood because of the truck to her right. Ms. Corley's vehicle struck the pieces of wood causing damage to two tires and two rims totaling $956.75, which includes a charge for towing her vehicle.

The position of the respondent was that it did not have notice of the split wood or logs on I-79 at the time of the incident. Respondent did not present any witnesses or evidence at the hearing of this matter.

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 finds that claimant failed to establish by sufficient evidence that the damage to her vehicle was the result of any negligence on the part of respondent. While sympathetic to the claimant's position, the Court cannot speculate as to how the pieces of wood came to be on the road at the time of claimant's incident, or how the respondent could have been negligent in such a situation.

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 3, 2007

WAYNE KAUFMAN
VS.
DIVISION OF HIGHWAYS
(CC-06-004)

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 1997 Pontiac Grand Am struck a piece of concrete when his daughter, Amanda Kaufman, was traveling southbound on W. Va. Route 2 in Ohio County. W. Va. Route 2 is a road maintained by respondent in Ohio 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 during the afternoon on December 17, 2005. W. Va. Route 2 is a four-lane road at the area of the incident involved in this claim. Amanda Kaufman testified that she was traveling in her left lane at approximately fifty-five miles per hour. She stated that she saw a piece of concrete in the road, but she could not avoid it because of traffic in the right lane. The vehicle struck the piece of concrete, damaging a tire and a rim. Ms. Kaufman testified that the piece of concrete was approximately fourteen to sixteen inches long and six inches wide. Claimant's vehicle sustained damages totaling $200.00.

The position of the respondent was that it did not have notice of the piece of concrete on W. Va. Route 2. Terry Kuntz, an employee of respondent in Ohio County, testified that the piece of concrete that claimant's vehicle struck was a piece that had broken off W. Va. Route 2. Mr. Kuntz further stated that there had been no prior notice of any pieces of concrete along this stretch of W. Va. Route 2 and that there were no complaints the day before 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 evidence established that the respondent did not have actual or constructive notice of a piece of concrete on W. Va. Route 2 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 his loss 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.

OPINION ISSUED MAY 3, 2007

LINDA AREHART
VS.
DIVISION OF HIGHWAYS
(CC-05-429)

Claimant appeared *pro se*.
Jason C. Workman, 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 28, 2005, claimant was traveling on Mill Creek Road in Charleston, Kanawha County, when her vehicle struck a hole in the road damaging a tire.

2. Respondent was responsible for the maintenance of Mill Creek Road, which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damages totaling $137.75.

4. Respondent agrees that the amount of $137.75 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 Mill Creek Road 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 $137.75.

Award of $137.75.

OPINION ISSUED MAY 3, 2007

JOHN W. LACY and KRISTI R. LACY
VS.
DIVISION OF HIGHWAYS
(CC-05-390)

Claimants appeared *pro se*.

Andrew F. Tarr and Jason C. Workman, Attorneys 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 30, 2005, claimant Kristi Lacy was traveling on Woodward Drive in Charleston, Kanawha County, when her vehicle struck a hole in the road damaging a rim.

2. Respondent was responsible for the maintenance of Woodward Drive which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimants' vehicle sustained damage in the amount of $649.25. Claimants' insurance deductible was $500.00.

4. Respondent agrees that the amount of $500.00 for the damages put forth by the claimants is fair and reasonable.

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

Accordingly, the Court is of the opinion to and does make an award in the amount of $500.00.

Award of $500.00.

OPINION ISSUED MAY 14, 2007

ROBERT KELLY COLLINS
VS.
DIVISION OF HIGHWAYS
(CC-02-308)

Lacy Wright Jr., Attorney at Law, for claimant.

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

FORDHAM, JUDGE:

Claimant brought this action for personal injuries which occurred when he came upon a tree in the road while traveling in his 1999 Chevrolet Z-71 truck eastbound on Route 83 near Raysal, McDowell County. Route 83 is a road maintained by respondent. The Court took a view of the scene of claimant's accident after the hearing of this matter. 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 at approximately 5:30 a.m. on October 25, 2001. Route 83 is a two-lane highway at the area of the incident involved in this claim. There had been a thunderstorm during that night with high winds. Robert Kelly Collins testified that as he was traveling to work that morning the roads were still wet, it was dark and he had the headlights on. Claimant stated that he had been traveling at between forty and forty-five miles-per-hour. He stated

that as he traveled around a curve in the road, he noticed a tree that had fallen across both lanes of travel. Claimant testified that the tree did appear to be alive as it had leaves on it. Mr. Collins attempted to miss the largest part of the tree by steering his vehicle to the left. His vehicle struck the tree, however, and then struck a guardrail that was on his left side of Route 83. As a result of the accident, emergency crews had to use the jaws-of-life to remove Mr. Collins from his truck. Claimant was life flighted to Charleston Area Medical Center with neck, back, and leg injuries. Mr. Collins stated that since the accident, his neck, left arm, elbow, back, legs and knees often bother him and that he became depressed. Claimant's unpaid medical bills total approximately $11,500.00.

Roger Cox, a 911 dispatcher for McDowell County Emergency Services, testified on behalf of the claimant. Mr. Cox stated that at approximately 1:45 a.m. on the date of claimant's incident, there were telephone calls made to the 911 center from throughout McDowell County about trees that were down on the roads. He stated that he had reports of trees down on Route 52, Route 80, Route 1, and Route 83. Mr. Cox then stated he then tried to contact Division of Highways employees about these trees, based on an emergency call-out list that was provided to McDowell County Emergency Services by respondent. He stated that he and the other dispatchers tried to call Ronnie Gullet, Paul Gullet, and Arlie Matney several times and could not reach any of them. Mr. Cox testified that at 2:27 a.m. he made a telephone call to Gose Yates, a Supervisor for respondent in McDowell County. He stated that Mr. Yates told him to keep trying the other Division of Highways employees on the emergency call-out list about the trees that were in the roads. Mr. Cox testified that he then tried to contact the other employees on the emergency call-out list, but was unable to reach them. At 5:40 a.m., Mr. Cox stated that they received a telephone call regarding claimant's accident and that he dispatched an ambulance, the fire department, and the West Virginia State Police to the scene. Mr. Cox further stated that as of 5:40 a.m., there had been no contact with any employees of the Division of Highways other than with Gose Yates.

Trooper G.D. Williams of the West Virginia State Police testified that he investigated claimant's accident. He stated that he was first notified of the accident at approximately 6:00 a.m. Trooper Williams testified that when he arrived at the scene, the road surface was still wet. He stated that the guardrail that claimant's vehicle struck had gone through the motor, through the fire wall, and into the seat of the vehicle. Trooper Williams testified that it was his opinion that claimant was driving too fast for the roadway conditions at the time of the incident due to the fact that the road was wet.

Clifford Kendrick, Assistant Chief of the Raysal Volunteer Fire Department, and Randall Mutter, a member of the Raysal Volunteer Fire Department, testified that they responded to the scene of claimant's incident. Mr. Mutter testified that the tree had leaves on it and that it appeared to be a healthy tree. Mr. Kendrick testified that the tree that claimant's vehicle struck was a live tree with a trunk that was between twelve and fourteen inches in diameter.

Lance Robson, a civil engineer practicing in the areas of highway engineering and crash reconstruction, testified on behalf of the claimant. Mr. Robson testified that a tree in a road is a hazard and that in his opinion the respondent had more than adequate time to respond to the downed tree based upon when the McDowell County 911 center contacted Gose Yates. Mr. Robson also testified that the weather on the night of claimant's incident had been severe enough to cause numerous tree falls on several roads throughout McDowell County.

Robert Williams, a vocational consultant, testified on behalf of the claimant. Mr. Williams stated that Mr. Collins has lower back, mid-back, knees, neck, and shoulder pain. He testified that claimant's primary employment history indicated he was involved in the coal industry primarily as a heavy equipment operator, and that due to his injuries he could not work in the future as such.

Dan Selby, an economist, testified on behalf of the claimant. Mr. Selby testified that due to the injuries suffered by Mr. Collins, he has in essence a work disability. He stated that in his opinion Mr. Collins has a lost earning capacity of $647,540.00. He also stated that the claimant lost approximately nineteen hours of household services per week due to his injuries, and that these services have an approximate value of $218,960.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 83 at the site of the claimant's accident for the date

in question.

Gose Yates, Crew Leader for respondent in McDowell County, testified that the emergency call-out list was used in case a Division of Highways employee had to be contacted to deal with a situation in a part of the county. He stated that there were several different substations where Division of Highways employees were throughout the county. Mr. Yates stated that the Raysal substation, which was close to the scene of claimant's incident, was not a manned substation and it was only used as a storage facility. Mr. Yates stated that the normal procedure when he received a telephone call from 911 dispatchers about a tree in a road would be to respond as quickly as possible putting out markers to warn the traveling public while getting equipment and men together to remove the hazard from the road. Mr. Yates testified that on the date of claimant's incident he had been on annual leave from respondent. He further stated that he did not recall receiving a telephone call from the 911 dispatch center on the night of claimant's incident. Mr. Yates testified that if he had received a telephone call from the 911 dispatch center while on annual leave, he would have called other Division of Highways employees to respond to the situation.

Arlie Matney, Crew Chief for respondent in McDowell County, testified that he first found out about trees in the road on the date of claimant's incident between 7:15 a.m. and 7:30 a.m. He stated that he gathered equipment to remove the trees from the road, but that when he arrived on the scene at approximately 8:00 a.m. the tree had already been removed from the road. Mr. Matney testified that there was another tree down on Route 83 that was removed from the road later that morning. He further stated that he did not recall getting a telephone call during the night on October 25, 2001, nor did he recall the telephone ringing at all.

Kent Jenkins, the acting County Supervisor for respondent in Mercer County, McDowell County and I-77 at the time of claimant's incident, testified that he was first contacted by the 911 call center regarding trees in the road between 6:00 a.m. and 6:30 a.m. while he was traveling to work. Mr. Jenkins stated that he told the 911 dispatcher that he would contact Division of Highways' employees as soon as he got to a ground line and that they would respond to the situation. He further stated that there were several trees reported to be down in the roads. Mr. Jenkins stated that on the morning of claimant's accident that there had been two employees out on an emergency request at three different locations. He testified that these employees had been contacted by the 911 call center at 1:30 a.m. about trees down in the road on Route 52 and Route 80. These employees also checked out Route 3 and Route 1 for other debris and removed trees from Route 52, Route ½, and Route 1/11.

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). 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 an apparently healthy tree falls and causes property damage as a result of a storm, the Court has held that there is insufficient evidence of negligence upon which to justify an award. *Wiles v. Division of Highways*, 22 Ct. Cl. 170 (1998); *Gerritsen v. Dept. of Highways*, 16 Ct. Cl. 85 (1986).

In the instant case, the Court is of the opinion that respondent had no notice that the tree at issue posed an apparent risk to the public. The evidence adduced at the hearing established that the tree appeared to be a healthy tree. Neither claimant nor respondent had reason to believe that the tree was in danger of falling. Further, there was evidence that crews for respondent were out in other parts of McDowell County removing trees from the roadways. While there was evidence that there were trees down throughout parts of the county and that respondent was aware of some of these trees, the Court finds that there was no evidence presented that respondent had actual or constructive notice of the tree that claimant's vehicle struck on Route 83. The Court is sympathetic with the position of claimant who came upon an emergency situation, tried to avoid a collision with the tree, but he was unable to avoid the tree which his vehicle struck. However, since the Court finds no negligence on the part of the respondent for this tree being in the road, there may be no recovery by the claimant.

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

Claim disallowed.

OPINION ISSUED JUNE 5, 2007

DAVID L. MOLES
VS.
DIVISION OF HIGHWAYS
(CC-02-288)

David G. Thompson, Attorney at Law, for claimant.
Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent.

SAYRE, JUDGE:

Claimant brought this action for personal injuries which occurred when the vehicle in which he was a passenger struck another vehicle as he and his wife were traveling northbound on Route 35 near Pliny, Putnam County. Route 35 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 at approximately 5:56 a.m. on July 20, 2000. Route 35 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that on the date of the incident, his wife, Jessica Moles, was driving the claimant's 2000 Chevrolet Impala northbound on Route 35. Mr. Moles stated that he was awake in the passenger seat when a vehicle was driven onto Route 35 from a driveway on the right side of the road. He stated that he had not seen the other vehicle prior to observing it as it was driven onto Route 35 in front of their vehicle. Claimant's vehicle struck the other vehicle. After the accident, Mr. Moles had his wife back their vehicle off the road and into the driveway from whence the other vehicle had come. Claimant stated that he then looked to the south along Route 35 and noticed weeds that were above the guardrail, blocking the view of northbound traffic. Mr. Moles testified that his face had struck the windshield of his vehicle when his seatbelt did not hold during the accident. He lost several teeth, he continues to suffer from headaches, and he continues to experience neck pains as a result of this accident. He further stated that he could not return to work for six months as a result of this accident. Claimant alleges $25,246.79 in damages as a result of this accident.

Claimant contends that the proximate cause of the accident herein was the fact that respondent had allowed the weeds on the area of the berm of Route 35 to grow above the guardrail creating an obstruction of the highway right of way and obscuring the vision of the driver emerging from this particular driveway along Route 35, and thus resulting in the accident involved in this claim.

Dixie Martin, the driver of the other vehicle involved in the July 20, 2000, incident involved in this claim, testified at the hearing of this matter. Ms. Martin testified that on the morning of the incident, she was leaving her home to drive to work. She stated that as she drove to the end of her driveway, approaching Route 35, she looked to see whether there was any traffic. Ms. Martin stated that she saw a tractor trailer approaching from the north and that as her vehicle came to the edge of the road she noticed the headlights of the Moles' vehicle. She testified that the Moles vehicle appeared to be far enough away that she had plenty of time to make a left turn into the southbound lane on Route 35. Ms. Martin further testified that she had made the turn onto Route 35 when claimant's vehicle crossed the center line and struck her vehicle. Ms. Martin stated that there were weeds behind the guardrail on the south side of her driveway that had grown two to three feet above the guardrail. She testified that when the weeds are trimmed, she did not have to pull to the edge of the highway to see the northbound traffic. Ms. Martin stated that there was some distance between the guardrail and the edge of the pavement. However, she further stated that even with the weeds as high as they were, she had seen the Moles vehicle prior to driving her vehicle onto Route 35 and she thought that she had enough time to drive onto Route 35 to proceed southbound.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 35 at the site of claimant's accident for the date in question. Gary Stanley, Administrator for respondent in Putnam County, testified that he was not aware of any complaints regarding brush or weeks at the location of claimant's incident prior to the incident. Mr. Stanley stated that respondent does have mowers for brush and grass that are used along highways that respondent

maintains. He also stated that there is a mower that is used to cut brush and mow behind guardrails. Mr. Stanley stated that his crews attempt to cut grass and brush along Route 35 about every two months, according to how fast it grows. He stated that on May 1, 10, and 11, 2000, and July 11, 12, 14, 17, and 20, 2000, crews for respondent were mowing grass along Route 35. Mr. Stanley testified, however, that there was no way for him to know which part of Route 35 was being mowed on any given day. Mr. Martin further testified that at the site of claimant's incident there is approximately eight and a half to nine feet between the guardrail and the edge of the roadway.

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 no notice of the condition on Route 35 with respect to overgrown weeds on the berm at the scene of the accident herein. Further, while Ms. Martin testified that the weeds were above the guardrail south of her driveway, she stated that she saw claimant's vehicle prior to driving onto Route 35 to make a left turn with oncoming traffic. Consequently, the Court is of the opinion that the weeds were not the proximate cause of this accident but that the offending driver proceeded onto Route 35 without regard to oncoming vehicles. Therefore, the Court concludes that there is no evidence of negligence on the part of the 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.

OPINION ISSUED JUNE 5, 2007

JEFFERY E. CARR
VS.
DIVISION OF HIGHWAYS
(CC-04-116)

Joseph W. Caldwell, 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 claimants and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On February 13, 2004, claimant was traveling on I-64 at the base of Sandstone Mountain, when his vehicle struck a rock in the road.

2. Respondent was responsible for the maintenance of I-64 which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $3,752.53. Claimant's insurance deductible was $500.00.

4. Respondent agrees that the amount of $500.00 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 I-64 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 $500.00.

Award of $500.00.

OPINION ISSUED JUNE 5, 2007

STEVEN MEESTER
VS.
DIVISION OF HIGHWAYS
(CC-04-479)

Claimant appeared *pro se*.
Andrew F. Tarr and Jason C. Workman, Attorneys 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 St. Albans, Kanawha 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 60/2, locally known as Strawberry Road. The incidents giving rise to this claim occurred during May 2003, and specifically on May 28, 2004, and June 22, 2004. On each of these occasions heavy rainfall occurred which resulted in flooding inside claimant's residence which is the basis for the claim herein. Mr. Meester stated that he bought the property in May 2002, and that the first flooding did not occur until 2003. In May 2003, claimant testified that there was a heavy rainfall which resulted in the flooding of the entire basement. Mr. Meester stated that there was as much as one foot of water in some areas. Claimant testified that after this flood, he contacted respondent about inspecting a culvert that extends from a ditch across the street from his property, beneath County Route 60/2, then under his property and into a junction box at the rear of his property. He further stated that in June 2003, respondent inspected the culvert beneath County Route 60/2 and indicated that there were no problems with the culvert. Mr. Meester stated that there was some flooding in his residence during 2003 whenever there was a heavy rain. Michael Shields, a roommate of the claimant, testified that on May 28, 2004, there was a heavy rain which resulted in approximately six inches of water in the basement. Mr. Shields stated that there was red clay silt in the water, which he assumed came from a construction site across County Route 60/2 and up a hill away from claimant's property. In June 2004, claimant employed B-Dry Systems to install a system of three sump pumps in claimant's basement to alleviate flooding within his residence. On June 22, 2004, Mr. Shields noticed water coming up like a geyser out of a hole in the ground next to claimant's residence. The claimant testified that the hole in the ground is directly above the location of the culvert that extends underground through his property. As a result of the flooding in his residence, claimant alleges damages in the amount of $6,441.00 for the cost of the drainage system installed by B-Dry Systems.

The position of the respondent is that it was not negligent in the maintenance of the drainage system on County Route 60/2. Darrin Holmes, a professional engineer employed by respondent, conducted an on-site inspection of claimant's property. Mr. Holmes testified that he observed the natural drainage pattern of the land. He opined that claimant's back yard was the lowest point of any of the surrounding property and that at one time there was a natural ravine which included the area where claimant's residence and property is now located. Mr. Holmes stated that the natural water course for this area is where the natural ravine was once located. He stated that at some point, this ravine was covered up and an outlet pipe was installed. Mr. Holmes stated that there is a fifteen inch metal pipe that runs beneath County Route 60/2 and that this pipe connects to a concrete pipe that extends under claimant's property to a junction box at the back of claimant's property. He testified that the concrete pipe that extends under claimant's property is also fifteen inches in diameter. On September 25, 2006, respondent contracted with Underwater Services Limited to inspect the pipe that extends beneath County Route 60/2 and claimant's property. Mr. Holmes stated that there was a blockage in the pipe and that this blockage was directly under a Silver Maple tree growing on claimant's property. Mr. Holmes opined that the tree is pressing the ground of the slope of the concrete pipe on claimant's property causing a depression in the pipe. He stated that this depression provides sediment and other debris a place to slowly build up over time, causing a blockage in the pipe which causes water to back up and flow out of the hole in the ground that claimant's house mate observed on June 22,

2004, and described as appearing like a geyser of water shooting out of the ground. Mr. Holmes further stated that the tree on claimant's property is not on respondent's right of way along County Route 60/2.

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 60/2 in Kanawha County in a negligent manner. The terrain in this area of County Route 60/2 forms a natural drainage area onto claimant's property. The Court concludes from all the testimony and evidence that the water that flowed into the culvert under claimant's property would have flowed into that same area regardless of whether the culvert under claimant's property was blocked or not. Further, there was no evidence presented that respondent knew or should have known of a problem with its culvert prior to the incidents involved in this claim nor was there any evidence presented that there was a problem with respondent's culvert. It is apparent to the Court that the tree growing on claimant's property was the proximate cause of the problem with the culvert since it depressed the ground over the culvert. The Court was able to observe the blockage in the culvert from the video of the inside of the culvert prepared during an inspection of the culvert by respondent's contractor. This video provided the Court with a view of the culvert, the depression in the culvert, and the debris resulting in the blockage which caused water to flow out of the culvert and onto the ground surrounding the area where it was then able to flow into claimant's residence. Thus, the Court is of the opinion that the flooding on claimant's property was not caused by any action or inaction on the part of the respondent. Consequently, 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 JUNE 5, 2007

TRACY HAYNES and CHAD HAYNES
VS.
DIVISION OF HIGHWAYS
(CC-05-369)

Claimants appeared *pro se*.
Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2002 Ford F-150 traveled over wet paint while they were traveling on Route 21 near Sissonville, Kanawha County. Route 21 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 12:30 p.m. on May 24, 2005. Route 21 is a two-lane highway at the area of the incident involved in this claim. Chad Haynes testified that he and his wife were delivering mail near Sissonville and that they had to cross the white line lane marker along the edge of the pavement surface to get to the mail boxes. He stated that there was no indication, no signs and no traffic cones, of wet paint on the roads. He further stated that he never saw any workmen on Route 21 painting lines. Mr. Haynes testified that he could tell that the lines had been recently painted but there was no indication of when they were painted. Claimants first noticed that paint had gotten on their truck after they were finished delivering all the mail. Tracy Haynes testified that the paint was splashed on both doors on the passenger side, behind the rear tire, and in the fender wells. Claimants' vehicle sustained damage totaling

$2,045.90.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 21 at the site of the claimants' incident for the date in question. Respondent indicated to the Court at the hearing of this matter that it had subcontracted this line painting project on Route 21; however, the Court is aware that contracts with respondent for highway related projects have a hold-harmless clause, and that the subcontractor is ultimately responsible for any compensation that is granted against respondent. Respondent did not present any witnesses or evidence at the hearing of 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. *Atkins 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 recently painted white line lane markers which claimants' vehicle struck and that the paint presented a hazard to the traveling public. That there were no warning signs or indicators of fresh paint on the road 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 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 $2,045.90.

Award of $2,045.90.

OPINION ISSUED JUNE 5, 2007

ROBERT NUCKOLLS
VS.
DIVISION OF HIGHWAYS
(CC-06-213)

Claimant appeared *pro se*.
Jason C. Workman, 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 5, 2006, claimant was traveling on Kelly's Road in Pond Gap, Kanawha County, when he was involved in an automobile accident due to a stop sign that was missing.

2. Respondent was responsible for the maintenance of Kelly's Road which it failed to maintain properly on the date of this incident.

3. Claimant and respondent have agreed that an award of $3,550.00 to be a fair and reasonable amount to settle this claim.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Kelly's Road 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 $3,550.00.

Award of $3,550.00.

REFERENCES

I. COURT OF CLAIMS

The following is a compilation of head notes representing decisions from July 1, 2005 to June 30, 2007. Because of time and space constraints, the Court has decided to exclude certain decisions, most of which involve vendors, typical road hazards claims and expense reimbursements.

- **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**
- **LEASES**
- **MOTOR VEHICLES**
- **NEGLIGENCE – See also Berms; Falling Rocks and Rocks & Streets and Highways**
- **NOTICE**
- **PEDESTRIANS**
- **PRISONS AND PRISONERS**
- **STATE AGENCIES**
- **STREETS & HIGHWAYS – See also Comparative Negligence and Negligence**
- **TREES and TIMBER**
- **VENDOR**
- **VENDOR – Denied because of insufficient funds**

BERMS – See also Comparative Negligence and Negligence

BELL V. DIVISION OF HIGHWAYS (CC-05-212)

Claimant brought this action for vehicle damage which occurred when his vehicle struck a broken section of pavement while he was traveling on Route 21 in Monongalia County. The claimant testified that he was driving close to the edge of the road because there was a tractor trailer traveling towards him in the opposite lane. The position of the respondent was that it did not have actual or constructive notice of the condition on Route 21at the site of the claimant's accident for the date in question. The Court found that respondent had at least constructive notice of the broken section of highway presented a hazard to the traveling public. Award of $137.80. . . . . p.36

EISENMAN V. DIVISION OF HIGHWAYS (CC-04-864)

Where claimants brought this action for vehicle damage which occurred when their vehicle struck a washed out shoulder of the road, the Court held that respondent had notice of this hazardous condition and failed to take corrective action. Award of $1,000.00. . . . . p. 41

GIVENS V. DIVISION OF HIGHWAYS (CC-04-505)

Claimants brought this action for vehicle damage when their vehicle struck a hole along the berm of the road while one of the claimants was traveling on W.Va. Route 31 in Wood County. The Court held that respondent had at least constructive notice of the hole, which presented a hazard to the traveling public. Award of $250.00. . . . . p. 12

LUCAS V. DIVISION OF HIGHWAYS (CC-05-245)

Claimant's vehicle was damaged when it struck a washed out portion of the shoulder of the road while she was traveling on W.Va. Route 15 in Webster County. Even though the Court found that respondent had at least constructive notice of the washed out shoulder, the Court held that claimant was twenty-five percent (25%) negligent because she drove onto the shoulder of the road without being forced to do so by oncoming traffic. Award of $2,694.34. . . . . p. 49

MATTHEWS V. DIVISION OF HIGHWAYS (CC-06-242)

Claimant brought this action for vehicle damage which occurred when her vehicle struck an eroded section of berm while she was traveling on County Route 7/4 in Mercer County. In the instant case, the Court found that respondent had at least constructive notice of the eroded berm, which presented a hazard to the traveling public. Thus, the Court found that respondent was negligent. Award of $500.00. . . . . p. 93

MOLES V. DIVISION OF HIGHWAYS (CC-02-288)

Claimant brought this action for personal injuries which occurred when the vehicle in which he was a passenger struck another vehicle as he and his wife were traveling northbound on Route 34 near Pliny, Putnam County. Claimant contends that the proximate cause of the accident was that respondent had allowed the weeds on the area of the berm of Route 35 to grow above the guardrail creating an obstruction of the highway right of way and obscuring the vision of the driver emerging from his particular driveway along Route 35. The position of respondent was that it did not have actual or constructive notice of the condition on Route 35 at the site of claimant's accident for the date in question. The Court was of the opinion that respondent had no notice of the condition on Route 35 with respect to

The parties stipulated that claimant's vehicle struck a steel expansion joint protruding from a bridge; that respondent was responsible for maintenance of the road which it failed to properly maintain; and that $314.36 was a fair and reasonable amount for damages. Award of $314.36. . . . . p. 32

SAMPLES V. DIVISION OF HIGHWAYS (CC-04-132)

The parties stipulated that claimant was driving on I-79 in Kanawha County when the claimant's vehicle struck part of a bridge that was protruding upward; that respondent was responsible for maintenance of the road which it failed to properly maintain; and that damages in the amount of $315.60 was fair and reasonable. Award of $315.60. . . . . p. 31

WOLFE V. DIVISION OF HIGHWAYS (CC-05-306)

The parties stipulated that claimant was traveling on a bridge on Route 218 near Fairview, Marion County, when her vehicle struck a fastener attached to a steel plate causing damage to a tire. The Court found that the negligence of respondent was the proximate cause of the damages sustained and awarded $83.07. . . . . p. 50

CONTRACTS

ARAMARK FACILITY SERVICES, INC. V. CONCORD UNIVERSITY (CC-04-436)

Claimant brought this action for wages paid to employees under the terms of the management contract between Aramark and Concord in which Aramark agreed to provide physical plant, grounds keeping, and custodial services at Concord, and Concord was to reimburse Aramark for the salaries and benefits associated with all Aramark personnel. Seasonal painters hired to paint dormitory rooms filed a complaint against Aramark with the Division of Labor under the Prevailing Wage Act, and Aramark was ordered to pay $508,169.66 to the complainants. Aramark filed a claim in this Court for $557,037.52, which includes post-judgement interest, based upon its position that Concord has a duty to reimburse it for this amount. The Court held that there was a moral obligation on the part of Concord to reimburse Aramark for the amounts assessed as wages paid to the employees who performed services requested by Concord. Therefore, the Court denied respondent's motion to dismiss and granted claimant's motion for summary judgment. Award of $557,037.52. . . . . p. 8

COMPARATIVE NEGLIGENCE - See also Berms; Falling Rocks and Rocks; Negligence & Streets and Highways

COOK V. DIVISION OF HIGHWAYS (CC-04-185)

Where claimant's vehicle sustained damage from striking a hole in the road, the Court found that respondent had at least constructive notice of the hole. However, the Court held that claimant was negligent in driving too fast for the road conditions and could recover only sixty percent (60%) of his damages. Award of $403.78. . . . . p. 22

EGGERICHS V. DIVISION OF HIGHWAYS (CC-04-520)

Claimant brought this action for vehicle damage which occurred when her vehicle struck a hole when she was traveling on Route 17 in Fayette County. The Court found that respondent had at least constructive notice of the hole, which presented a hazard to the traveling public. However, the Court found that claimant was aware of the hole and could have slowed down prior to striking it. Thus, the Court found that claimant was forty percent (40%) negligent. Award of $101.99.
. . . . . p. 94

HILES V. DIVISION OF HIGHWAYS (CC-05-355)

When claimant pulled off the road on Route 94 to attend a yard sale, her vehicle struck a hole that she had not seen because of grass and weeds in the area. The Court found that respondent had at least constructive notice of the hole and had an adequate amount of time to take corrective action. However, the Court found that the claimant was twenty percent (20%) negligent because she had turned her vehicle too sharply while pulling off the road. Award of $1,949.10. . . . . p. 109

LEVITT V. DIVISION OF HIGHWAYS (CC-05-344)

Claimant brought this action for vehicle damage which occurred when he was traveling on Route 52 near Bluewell, Mercer County. Claimant stated that when he drove his vehicle to the side of the road to avoid an oncoming vehicle, he struck a hole in the road. Respondent alleged that it did not have actual or constructive notice of the condition on Route 52 at the site of claimant's accident. The Court found that respondent had at least constructive notice of the hole. However, the evidence established that claimant knew of the condition prior to the incident, and that there was an opportunity for him to slow his vehicle down and avoid the hole. The Court held that claimant was at least fifty percent (50%) negligent. Thus, the claimant could not make a recovery for his loss. . . . . p. 115

LUCAS V. DIVISION OF HIGHWAYS (CC-05-245)

Claimant's vehicle was damaged when it struck a washed out portion of the shoulder while she was traveling on W.Va. Route 15 in Webster County. Even though the Court found that respondent had at least constructive notice of the washed out shoulder, the Court held that claimant was twenty-five percent (25%) negligent because she drove onto the shoulder of the road without being forced to do so by oncoming traffic. Award of $2,694.34. . . . . p. 49

MEADOWS V. DIVISION OF HIGHWAYS (CC-06-253)

Where claimants' motorcycle struck a hole while traveling on Eccles Road in Beckley, Raleigh County, the Court found that respondent had at least constructive notice of the hole and was negligent. However, the Court further found that claimant was thirty percent (30%) negligent. Since claimant saw the holes, he should have stopped his motorcycle to avoid them. Award of $350.00. . . . p. 100

MCGREW V. DIVISION OF HIGHWAYS (CC-03-435)

Claimant brought this action for vehicle damage when her vehicle struck a hole while traveling on County Route 73 near Charleston, Kanawha County. Although respondent had at least constructive notice of the hole, the Court also found that claimant was partially negligent since she knew about the construction work in the area prior to the date of the accident. Thus, the Court held that claimant was twenty percent (20%) negligent. Award of $101.74. . . . . p. 3

VANCE V. DIVISION OF HIGHWAYS (CC-06-053)

Claimant brought this action for vehicle damage which occurred when his truck struck a hole in the road while traveling on Route 41 in Nicholas County. The Court found that respondent had at least constructive notice of the hole, which presented a hazard to the traveling public. Thus, the Court found that respondent was negligent. However, the Court also held that claimant was twenty-five (25%) percent negligent in this claim since he could have avoided the hole. Award of $441.45. . . . . p. 76

DAMAGES

BELLER V. DIVISION OF HIGHWAYS (CC-04-291)

The parties stipulated that claimant was a passenger in a vehicle when claimants were involved in an accident on County Route 3/4 in Raleigh County. Respondent was responsible for the maintenance of the road which it was found to have failed to properly maintain on the date of the incident in a separate action styled *Williams v. Division of Highways,* (CC-04-278). The parties agreed to settle this claim for $12,500.00 for claimant's out of pocket medical expenses and for pain and suffering. The Court found that respondent was negligent and awarded claimant $12,500.00. . . . . p. 78

CALLAHAN V. DIVISION OF HIGHWAYS (CC-04-044)

Claimant brought this action for vehicle damage which occurred when her vehicle struck a section of the road on County Route 7 in Wayne County which had subsided. The Court found that respondent had actual notice of the slide in the road, and respondent had an adequate amount of time to take corrective action. Although respondent placed warning signs at the site, the Court found that respondent did not take sufficient measures to protect the traveling public from the dangerous conditions on the road. Award of $900.00. . . . . p. 29

DADDYSMAN V. DIVISION OF HIGHWAYS (CC-04-055)

The parties stipulated that claimant's vehicle struck a hole in the road causing vehicle damage; that respondent was responsible for the maintenance of the road; and that the amount of $250.00 was a fair and reasonable amount of damages. Award of $250.00. . . . . p. 31

HUDNALL V. DIVISION OF HIGHWAYS (CC-05-035)

The parties stipulated that claimant was traveling on Dairy Road in Putnam County when her vehicle struck a hole in the road causing damage; that respondent was responsible for the maintenance of Dairy Road, which it failed to properly maintain on the date of this incident; and that respondent agreed that the amount of damages was fair and reasonable. The Court found that respondent was negligent in its maintenance of the road. Award of $500.00. . . . . p. 74

LAVENDER V. DIVISION OF HIGHWAYS (CC-03-498)

Claimant brought this action for vehicle damage when her vehicle struck a section of broken pavement while traveling along a road maintained by respondent. The Court found that respondent had notice of the hazardous condition and had an

DRAINS and SEWERS

extended up the road, damaging the front end of his vehicle; that respondent was responsible for the maintenance of the road which it failed to properly maintain on the date of the incident; and that $100.00 was a fair and reasonable amount of damages. Thus, the Court found that respondent was negligent and claimant could recover $100.00 for his loss. . . . . p. 63

MEESTER V. DIVISION OF HIGHWAYS (CC-04-479)

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. Heavy rainfall occurred on May 28 and June 22, 2004, which resulted in flooding inside claimant's residence. The position of respondent was that it was not negligent in its maintenance of the drainage system on County Route 60/2. 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 vs. Div. of Highways,* 21 Ct. Cl. 97 (1996). In the instant case, claimant failed to establish that respondent maintained the drainage structures on County Route 60/2 in a negligent manner. The Court concluded that the water that flowed into the culvert under claimant's property would have flowed into that same area regardless of whether the culvert was blocked or not. Claim disallowed. . . . . p. 123

MERCER V. DIVISION OF HIGHWAYS (CC-02-085)

Claimant brought this action for property damage when a heavy rainfall occurred and a portion of the claimant's basement wall collapsed. 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). To hold respondent liable for damages caused by an inadequate drainage system, claimant must prove that respondent had actual or constructive notice of the existence of an inadequate drainage system and a reasonable amount of time to take corrective action. *Orsburn v. Div. of Highways,* 18 Ct. Cl. 125 (1991); *Ashworth v. Div. of Highways,* 19 Ct. Cl. 189 (1993). The Court found that the respondent had constructive, if not actual, notice of the drainage problem and had a reasonable amount of time to take corrective action. Award of $29,593.50. . . . . p. 59

MIDDLETON V. DIVISION OF HIGHWAYS (CC-04-337)

Claimant brought this action for property damage which occurred as a result of respondent's negligent maintenance of a drainage system. A heavy rainfall occurred which resulted in flooding in the building on claimant's property. Claimant asserted that when respondent paved the parking lot for the post office, the paving cast water from both the lot and County Route 61/46 onto claimant's property. Since claimant's property did not have a problem with flooding before respondent paved the parking lot, the Court found that the respondent was liable for the damages which proximately flowed from its inadequate protection of claimant's property. The Court directed the Clerk of Court to place the claim on the docket for a hearing on the matter of damages. After claimant provided documentation of her loss, the Court found that $5,060.88 was a fair and reasonable amount to compensate

County. To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect 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, it was unclear from the evidence adduced at trial where the rock that claimant's vehicle struck came from. In addition, there was no evidence of negligence on the part of respondent upon which to base an award. Claim disallowed. . . . . p. 88

DIETZ V. DIVISION OF HIGHWAYS (CC-05-010)

Where claimant's vehicle struck rocks while traveling through an area known as "the narrows" in Marshall County, the Court found that respondent had failed to provide adequate protection to the traveling public in this area where rock fall is common. Award of $216.24. . . . . p. 44

FINDO V. DIVISION OF HIGHWAYS (CC-06-064)

Claimant brought this action for vehicle damage when a falling rock struck his vehicle while traveling on Route 250 in Fairmont, Marion County. The evidence established that respondent did not have actual or constructive notice of the rocks that had fallen on Route 250 prior to the incident in question. Consequently, there was insufficient evidence of negligence upon which to justify an award. Claim disallowed. . . . . p. 92

FURBEE V. DIVISION OF HIGHWAYS (CC-06-031)

Where claimant's vehicle struck rocks while traveling on State Route 2 in the Glendale area, also known as "the narrows" in Marshall County, the Court found that respondent's measures to protect the public in this area have proven inadequate. The Court has previously made awards in many claims which occurred in this specific section of State Route 2. *See Branicky v. Div. of Highways,* 24 Ct. Cl. 273 (2003); *Cusick v. Div. of Highways,* 24 Ct. Cl. 216 (2002); *Hall v. Div. of Highways,* 24 Ct. Cl. 212 (2002); *Foster v. Div. of Highways,*23 Ct. Cl. 248 (2000); *Williams v. Div. of Highways,* CC-99-114 (Ct. Cl. Dec. 6, 1999); *Hundagen v. Div. of Highways,* CC-98-303 (Ct. Cl. Dec. 6, 1999). Thus, the Court was 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. Award of $1,012.97. . . . . p. 97

GALLOURAKIS V. DIVISION OF HIGHWAYS (CC-06-093)

Claimant brought this action for vehicle damage which occurred when his vehicle struck rocks while she was traveling on State Route 2 in the Glendale area, also known as "the narrows" in Marshall County. 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,* 19 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). The Court held that respondent had constructive notice of the rock fall hazards at issue. Therefore, respondent is liable for the damages which flow from its inadequate protection of the traveling public in this specific location of State Route 2 in Marshall County. Award of $500.00. . . . . p. 99

HOLSTEIN V. DIVISION OF HIGHWAYS (CC-05-194)

The parties stipulated that claimant was traveling on I-64 in Kanawha County when her vehicle struck a rock in the road, damaging a tire and rim. Respondent was responsible for the maintenance of I-63, which it failed to properly maintain on the date of this incident. Respondent agreed that $500.00 was a fair and reasonable amount of damages. The Court found that respondent was negligent and awarded claimant $500.00. . . . . p. 74

HUFF V. DIVISION OF HIGHWAYS (CC-04-567)

Claimant brought this action for vehicle damage when her vehicle struck rocks while she was traveling on a road maintained by the respondent in Marshall County. The Court found that even though the respondent had warning signs and lights in place, these actions have not proved to be an adequate remedy to protect the traveling public in this area where rocks frequently fall. Award of $342.29. . . . . p. 42

LONG V. DIVISION OF HIGHWAYS (CC-03-501)

While claimant was traveling northbound on U.S. Route 220 near Petersburg, Grant County, claimant's vehicle struck a rock causing damage to his vehicle. Although the Court found that respondent had placed a fence to prevent rocks from falling into the roadway, the fence was extensively damaged. The Court found that respondent was liable for the damages which flowed from its inadequate protection of the traveling public. However, claimant failed to provide a copy of his insurance declaration page for the Court to verify the amount of his insurance deductible; thus the Court denied the claim. . . . . p. 61

LOUGHRIE V. DIVISION OF HIGHWAYS (CC-05-121)

Claimant brought this action to recover damages to his vehicle when his vehicle struck rocks in Brooke County. The Court found that there was no evidence of negligence upon which to justify an award. Claim disallowed. . . . . p. 56

PENNINGTON V. DIVISION OF HIGHWAYS (CC-05-255)

Claimant's vehicle struck a rock while traveling westbound on Route 50 in Harrison County. The Court found that claimant did not establish that respondent failed to take adequate measures to protect the safety of the traveling public on Route 50. Thus, the Court held that there was no evidence of negligence on the part of respondent upon which to base an award. Claim disallowed. . . . . p. 84

SHAW V. DIVISION OF HIGHWAYS (CC-05-290)

The parties stipulated that a large rock fell into a drainage ditch along Camp Run, Doddridge County, causing water to wash out a tunnel beneath claimant's property. A horse that was grazing on the property fell into the tunnel and died. Respondent was responsible for the maintenance of Camp Run which it failed to maintain properly on the date of the incident, and the Court found that respondent was negligent. Claimant was awarded $2,000.00 for the value of the horse.

p. 84

STINES V. DIVISION OF HIGHWAYS (CC-05-062)

Claimant brought this action for vehicle damage when her vehicle, driven by her daughter, struck a landslide. The Court held that claimant had not established

that respondent failed to take adequate measures to protect the safety of the traveling public, and found that there was insufficient evidence of negligence on the part of the respondent. *See Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986). Claim disallowed. . . . . p. 18

TAO V. DIVISION OF HIGHWAYS (CC-04-482)

Where claimant's vehicle struck rocks while traveling westbound on Route 60 near Huntington in Cabell County, the Court found that claimant had not established that respondent failed to take adequate measures to protect the safety of the traveling public on Route 60. Thus, the Court held that there was no evidence of negligence upon which to base an award. Claim disallowed. . . . . p. 72

WEBB V. DIVISION OF HIGHWAYS (CC-04-095)

Claimants brought this action for vehicle damage when their vehicle was struck by rocks which fell from the adjacent hillside and into their lane of traffic on W.Va. Route 5 in Wirt County. In rock fall claims, the 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. *See Coburn v. Dept. of Highways,* 16 Ct. Cl. 68 (1985). In the instant case, the Court held that respondent was not negligent because the respondent placed "falling rock" warning signs to protect the safety of the traveling public. Claim disallowed. . . . . p. 7

WELLING V. DIVISION OF HIGHWAYS (CC-05-052)

The parties entered into a stipulation where they agreed that claimant's son was traveling on a road maintained by defendant when the vehicle struck rocks in the road; that respondent failed to properly maintain the road on the date of this incident; and that the amount of $250.00 was a fair and reasonable amount of damages. Award of $250.00. . . . . p. 46

ZERVOS V. DIVISION OF HIGHWAYS (CC-05-042)

Claimant's vehicle was damaged when it struck rocks in an area known as "the narrows" in Marshall County. The Court held that although respondent had placed warning signs in the area, these actions have not proven to be an adequate remedy to protect the traveling public. Award of $500.00. . . . . p. 45

MOTOR VEHICLES

HESS V. DIVISION OF MOTOR VEHICLES (CC-06-335)

Claimant sought $50.00 for towing expenses she incurred due to the respondent's failure to properly transfer her license plate to the correct vehicle. In its Answer, respondent admitted the validity of the claim. The Court is aware that respondent did not have a fiscal method for paying claims of this nature. Therefore, the Court awarded claimant $50.00. . . . . p. 94

ILSON V. DIVISION OF MOTOR VEHICLES (CC-06-117)

Claimant sought $155.00 for a title on a vehicle which respondent did not process in a timely manner. In its Answer, respondent admitted the validity of the claim and that the amount was fair and reasonable. Award of $155.00. . . . p. 68

NEGLIGENCE - See also Berms; Falling Rocks and Rocks & Streets and Highways

ALLEN V. DIVISION OF HIGHWAYS (CC-05-236)

Claimants brought this action for damages when their vehicle struck a loose manhole cover while claimant was traveling on Washington Street in Charleston, Kanawha County. The evidence established that respondent was not responsible for the manhole cover. Consequently, there was insufficient evidence of negligence upon which to justify an award. Claim disallowed. . . . . p. 86

BUCHANAN VS. DIVISION OF HIGHWAYS (CC-04-180)

Claimant brought this action for vehicle damage which occurred when their vehicle struck ice while traveling on a road maintained by respondent. Since respondent was involved in snow and ice removal throughout Wood County on the date of the incident, the Court found that there was insufficient evidence of negligence upon which to justify an award. Claim disallowed. . . . . p. 13

CAMPBELL V. DIVISION OF HIGHWAYS (CC-04-149)

The parties entered into a stipulation where they agreed that claimant's vehicle struck a rock in the road which caused vehicle damage; that respondent was responsible for maintenance of the road which it failed to properly maintain; and that $226.73 was a fair and reasonable amount of damages. . . . . p. 33

CARTER V. DIVISION OF HIGHWAYS (CC-04-545)

Claimant's motorcycle was damaged when it struck a hole while traveling on a road maintained by respondent. The Court found that respondent had at least constructive notice of the hole, which presented a hazard to the traveling public. Also, respondent had an adequate amount of time to take corrective action. *See Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986). Therefore, the Court held that respondent was negligent and awarded the claimant $500.00 in damages.

. . . . . p. 24

DADDYSMAN V. DIVISION OF HIGHWAYS (CC-04-55)

The parties entered into a stipulation where they agreed that claimant's vehicle struck a hole in the road causing vehicle damage; that respondent was responsible for the maintenance of the road; and that the amount of $250.00 was a fair and reasonable amount of damages. . . . . p. 31

DODDRILL V. DIVISION OF HIGHWAYS (CC-04-197)

The parties stipulated that claimant's vehicle struck a hole while traveling on the Amandaville Bridge in Saint Albans, Kanawha County; that respondent was responsible for maintenance of the road which it failed to properly maintain; and that $500.00 was a fair and reasonable amount of damages. Award of $500.00.

. . . . . p. 23

LAVENDER V. DIVISION OF HIGHWAYS (CC-03-498)

Claimant brought this action for vehicle damage when her vehicle struck a section of broken pavement while traveling along a road maintained by the Division of Highways. The Court found that respondent was negligent because it had notice

of the hazardous condition and had an adequate amount of time to take corrective action and warn the traveling public of the hazard. Award of $500.00. . . . . p. 2

MARTIN V. DIVISION OF HIGHWAYS (CC-04-028)

Claimant brought this action for vehicle damage when his vehicle struck a broken stretch of road while he was traveling on Route 21 in Fayette County. The Court held that respondent had at least constructive notice of the slide in the road, and had an adequate amount of time to take corrective action. *See Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986). Award of $101.22. . . . . p. 28

MOONEY V. DIVISION OF HIGHWAYS (CC-04-858)

This parties stipulated that claimant was traveling on W.Va. Route 119 near Spencer, Roane, County, when her vehicle struck two broken signposts along the road. As a result of the incident, claimant's vehicle sustained damage in the amount of $389.56; however, claimant's insurance coverage provided for a $100.00 deductible feature for collision, and claimant was limited to a recovery in that amount. The Court found that respondent was negligent in its maintenance of the road, and that the amount of damages was fair and reasonable. Award of $100.00 . . . . . p. 14

MOORE V. DIVISION OF HIGHWAYS (CC-04-098)

The parties stipulated that claimant's vehicle struck a piece of expansion joint protruding from the highway; that respondent was responsible for the maintenance of the road; and that respondent's negligence was the proximate cause of the damages to claimant's vehicle. Award of $118.72 . . . . . p. 20

PANRELL V. DIVISION OF HIGHWAYS (CC-02-200)

Claimant brought this action for personal injury which occurred when his mountain bicycle struck a hole while he was traveling down a road maintained by respondent. The Court found that respondent had at least constructive notice of the hole and had an adequate amount of time to take corrective action. Thus, the court found that respondent was negligent and awarded claimant for his medical expenses, permanent injury, pain and suffering and diminished capacity to enjoy life. Award of $100,975.00 . . . . . p. 39

RHODES V. DIVISION OF HIGHWAYS (CC-02-175)

Where claimant's vehicle struck a sign post, the Court held that respondent did not have actual or constructive notice of the broken signpost, which was not within the State's right of way. Therefore, the Court found that there was insufficient evidence upon which to justify an award. Claim disallowed. . . p. 1

ROESE V. DIVISION OF HIGHWAYS (CC-04-064)

The parties stipulated that claimant's vehicle struck a hole in the road's surface; that respondent was responsible for maintenance of the road; that respondent was negligent; and that $450.00 was a fair and reasonable amount of damages. Award of $450.00. . . . . p. 19

RUBENSTEIN V. DIVISION OF HIGHWAYS (CC-05-426)

Claimant brought this action for vehicle damage which occurred when his vehicle struck a hole while he was traveling on Route 60 in South Charleston, Kanawha County. Claimant stated that the hole appeared to be a cut in the road and that there were no warning signs. Respondent stated that it did not have actual or constructive notice of the condition on Route 60 at the site of claimant's accident for the date in question. The witness for respondent testified that the cut looked like a cut made by the water company, and he stated that there was no record of any work done by respondent along this stretch of Route 60. The Court found that respondent had at least constructive notice of the hole which that respondent was negligent. Award of $500.00. . . . . p. 113

SHIRK V. DIVISION OF HIGHWAYS (CC-04-159)

Where claimant's vehicle struck a broken section of the road, the Court held that respondent had at least constructive notice of the hazardous condition based upon the broken pavement's size and location along the road. In addition, the Court found that respondent had an adequate amount of time to take corrective action. *See Chapman v. Dept. of Highways,* 16 Ct. Cl. 103. (1986). Award of $2,194.98. . . . . p. 21

NOTICE

CARTER V. DIVISION OF HIGHWAYS (CC-04-545)

Claimant's motorcycle was damaged when it struck a hole while traveling on W.Va. Route 310 in Taylor County. The Court found that respondent had at least constructive notice of the hole, which presented a hazard to the traveling public. Also, respondent had an adequate amount of time to take corrective action. *See Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986). Therefore, the Court held that respondent was negligent and awarded claimant $500.00 in damages. . p. 24

FORSTER V. DIVISION OF HIGHWAYS (CC-05-348)

Claimant brought this action for vehicle damage when her vehicle struck an object in the roadway while she was traveling on the exit ramp of I-470 onto Route 2 in Ohio County. Claimant testified that the object appeared to be a piece of concrete that had broken off the road. The Court found that respondent had at least constructive notice of the object. Thus, the Court found that respondent was negligent. Award of $450.23. . . . . p. 95

KAUFMAN V. DIVISION OF HIGHWAYS (CC-06-004)

Where claimant's vehicle struck a piece of concrete while traveling southbound on W.Va. Route 2 in Ohio County, the Court held that respondent did not have actual or constructive notice of the piece of concrete on Route 2 prior to the incident in question. Therefore, there was insufficient evidence of negligence upon which to justify an award. Claim disallowed. . . . . p. 117

LAVENDER V. DIVISION OF HIGHWAYS (CC-03-498)

Claimant brought this action for vehicle damage when her vehicle struck a section of broken pavement while traveling along a road maintained by respondent. The Court found that the respondent was negligent because it had notice of the hazardous condition and had an adequate amount of time to take corrective action and warn the traveling public of the hazard. Award of $500.00. . . . . p. 2

LAWRENCE V. DIVISION OF HIGHWAYS (CC-05-333)

Claimant brought this action for vehicle damage which occurred when his vehicle struck a hole while he was traveling on Route 60 near South Charleston, Kanawha County. The Court found that respondent had at least constructive notice of the hole, which presented a hazard to the traveling public. Award of $138.21.

. . . . . p. 108

MARTIN V. DIVISION OF HIGHWAYS (CC-04-028)

Claimant brought this action for vehicle damage when his vehicle struck a broken stretch of road. The Court held that respondent had at least constructive notice of the slide in the road and that respondent had an adequate amount of time to take corrective action. *See Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). Thus, respondent was negligent. Award of $101.22 . . . . . p. 28

MASTERS V. DIVISION OF HIGHWAYS (CC-05-116)

Claimant brought this action for vehicle damage caused when her vehicle struck a hole while she was traveling on County Route 51/1in Gerrardstown, Berkeley County. The Court found that respondent had at least constructive notice of the hole based on its size and the heavy amount of traffic on the road, and respondent had an adequate amount of time to take corrective action. *See Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986). Award of $101.67. . . . . p. 25

RICHMOND V. DIVISION OF HIGHWAYS (CC-03-375)

Where claimant's vehicle was damaged when it struck a hole while traveling on County Route 22 in Berkeley County, the Court found that respondent had at least constructive, if not actual notice of the hole, and that respondent had an adequate amount of time to take corrective action. *See Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986) Award of $239.88 . . . . . p. 26

SHOUP V. DIVISION OF HIGHWAYS (CC-04-570)

Claimant brought this action for vehicle damage when his vehicle struck debris in the road. The Court found that respondent did not have actual or constructive notice of the debris in the road prior to the incident in question. Claim disallowed. . . . . p. 64

SLIGER V. DIVISION OF HIGHWAYS (CC-04-362)

Claimants brought this action for vehicle damage which occurred when their vehicle struck a hole on Route 91 near Farmington, Marion County. The Court held that respondent had at least constructive notice of the hole based on its size and the time of year in which the incident occurred. *See Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986). . . . . p. 33

SMITH V. DIVISION OF HIGHWAYS (CC-05-361)

Claimants brought this action for vehicle damage when their vehicle struck a hole while claimant was traveling on Jordan CreekRoad in Kanawha County. The Court held that respondent had at least constructive notice of the hole, which presented a hazard to the traveling public. Thus, the Court found that respondent was negligent. Award of $500.00. . . . . p. 67

VIRDEN V. DIVISION OF HIGHWAYS (CC-05-402)

Claimant brought this action for vehicle damage when his vehicle struck a hole while he was traveling northbound on County Route 7 in Brooke County. 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, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. 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 presented a hazard to the traveling public. Thus, the Court held that respondent was negligent. Award of $100.00. . . . . p. 96

WRIGHT V. DIVISION OF HIGHWAYS (CC-04-074)

Claimants' vehicle struck a hole in the road while traveling on County Route 50/87 in Clarksburg, Harrison County. The Court held that respondent had at least constructive notice, which presented a hazard to the traveling public. Award of $500.00.RHODES. . . . . p. 62

PEDESTRIANS

CRANE V. DIVISION OF HIGHWAYS (CC-05-302)

The parties stipulated that claimant was injured on a broken sign post at the corner of Pennsylvania Avenue and Lee Street; that respondent was responsible for the roadway signs located at the site of the incident which it failed to maintain properly on the date in question; and that $750.00 for damages was fair and reasonable. Thus, the Court awarded claimant $750.00. . . . . p. 87

NULL V. DIVISION OF HIGHWAYS (CC-03-495)

The parties stipulated that claimant was walking across 21st Street in Nitro, Kanawha County, when she fell due to a crack in the road. Respondent was responsible for the maintenance of 21 st Street in Nitro, which it failed to properly maintain on the date of the incident. Claimant and respondent agreed to settle the claim for the total sum of $13,000.00. The Court awarded claimant $13,000.00. . . . . p. 89

PRISONS AND PRISONERS

BARBOUR COUNTY COMMISSION V. DIVISION OF CORRECTIONS (CC-05-137)

Claimant brought this action to recover costs for providing housing to a prisoner who was sentenced to a State penal institution, but due to circumstances beyond the control of the county, the prisoner had remained in custody of the county for periods of time beyond the date of the commitment order. Respondent admitted the validity of the claim in the amount of $21,750.00, and claimant agreed. *See County Comm'n. of Mineral County vs. Div. of Corrections,* 18 Ct. Cl. 88 (1990). Award of $21,750.00 . . . . . p. 15

BLANKENSHIP V. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-05-275)

Claimant sought $873.95 for items of personal property that were entrusted to respondent's employees when he was taken to Southwestern Regional Jail, a facility of respondent. Respondent admitted the validity of the claim but stated that it did not have a fiscal method of paying claims of this nature. Thus, the Court made an award of $873.95. . . . . p. 16

DELANEY V. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-06-123)

Claimant, an inmate at Western Regional Jail, sought $65.00 for items of personal property that were entrusted to respondent. Respondent admits the validity of the claim and that the amount was fair and reasonable. The Court has taken the position in prior claims that when a bailment situation is created, respondent is responsible for property of an inmate which is taken from that inmate, remains in its custody, and is not returned to the inmate. Award of $65.00. . . . . p. 70

MONONGALIA GENERAL HOSPITAL V. DIVISION OF CORRECTIONS (CC-05-214)

Claimant sought payment in the amount of $17,967.10 for medical services rendered to an inmate in the custody of respondent at Huttonsville Correctional Center. Respondent admitted the validity of the claim, and further stated that there were insufficient funds in its appropriation for the fiscal year to pay the claim. The Court held that an award could not be recommended based upon its decision in *Airkem Sales and Service, et. al v. Dept. of Mental Health,* 8 Ct. Cl. 180 (1971). Claim disallowed. . . . . p. 14

POWNALL V. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-05-294)

Claimant brought this claim to recover the value of certain personal property items that she alleged were lost by respondent. When claimant was released from prison, it was discovered that her clothing, purse, wallet, driver's license, and birth certificate were missing. The Court has held that a bailment relationship exists when respondent records the personal property of an inmate, takes it for storage purposes, and then has no satisfactory explanation for not returning it. *Page v. Division of Corrections,* 23 Ct. Cl. 238 (2000); *Heard v. Division of Corrections;* 21 Ct. Cl. 151 (1997). The Court found that respondent was responsible for securing the claimant's property and failed to do so. Therefore, the Court awarded claimant $310.00. . . . . p. 107

SAMPLES V. DIVISION OF CORRECTIONS (04-580)

The parties stipulated that claimant's property was documented and stored while he was an inmate at Mount Olive Correctional Center. When claimant was released from jail, he discovered that some of his personal items were missing. Respondent and claimant agreed that $750.00 was a fair and reasonable amount of damages. Award of $750.00 . . . . . p. 43

THOMPSON V. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-06-131)

The parties reached a settlement in which they agreed that when claimant was released from custody at South Central Regional Jail, it was discovered that his

BUCHANAN V. DIVISION OF HIGHWAYS (CC-04-180)

Claimant brought this action for vehicle damage which occurred when their vehicle struck ice while traveling on a road maintained by respondent. Since respondent was involved in snow and ice removal throughout Wood County on the date of the incident, the Court found that there was insufficient evidence of negligence upon which to justify an award. Claim disallowed. . . . . p. 13

COOK V. DIVISION OF HIGHWAYS (CC-04-185)

Where claimant's vehicle sustained damage when it struck a hole in the road, the Court found that respondent had at least constructive notice of the hole. However, the Court held that claimant was negligent in driving too fast for the road conditions and could recover for only sixty percent (60%) of his damages. Award of $403.78. . . . . p. 22

CORLEY V. DIVISION OF HIGHWAYS (CC-05-345)

Where claimant's vehicle struck a piece of wood while traveling on I-79 in Marion County, the Court found that claimant failed to establish by sufficient evidence that the damage to her vehicle was the result of any negligence on the part of respondent. Claim disallowed. . . . . p. 116

GEORGE V. DIVISION OF HIGHWAYS (CC-04-562)

Claimant brought this action for vehicle damage when his vehicle struck a muffler while traveling on a road maintained by respondent. In the instant case, there was no evidence that respondent had actual or constructive notice of the debris on the road. *See Chapman v. Dept. of Highways,* 16 Ct. of Cl. 103 (1986). Therefore, there was insufficient evidence of negligence upon which to justify an award. Claim disallowed . . . . . p. 10

GERAUD V. DIVISION OF HIGHWAYS (CC-06-027)

The parties stipulated that claimant was traveling on Route 2 in Marshall County when his vehicle sustained damage when it struck a sign lying in the road. The Court found that respondent was responsible for the maintenance of Route 2, and the negligence of respondent was the proximate cause of the damages to claimant's vehicle. Award of $165.20. . . . . p. 91

GHAREEB V. DIVISION OF HIGHWAYS (CC-04-481)

The parties stipulated that claimant was traveling on I-64 when his vehicle struck standing water in the road damaging his vehicle. Respondent was responsible for the maintenance of I-64 which it failed to properly maintain on the date of the incident, and claimant's vehicle sustained damage in the amount of $5,100.00. Claimant's insurance deductible was $500.00 so his recovery was limited to that amount. The Court held that the negligence of respondent was the proximate cause of the damages to claimant's vehicle. Award of $500.00. . . . . p. 71

GUZMAN V. DIVISION OF HIGHWAYS (CC-05-347)

Where claimants' vehicle was damaged when it struck a hole while traveling on Route 60 in Monongalia County, the Court found that respondent had at least constructive notice of the hole. *See Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986). Award of $296.69. . . . . p. 89

HARRINGTON V. DIVISION OF HIGHWAYS (CC-03-536)

Claimant brought this action for vehicle damage when her vehicle struck an exposed rail at a railroad crossing while she was traveling on County Route 1 near Green Spring, Hampshire County. The Court found that respondent had at least constructive notice of the exposed rail. *See Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986). Even though a railroad company is typically responsible for the maintenance of railroad crossings, respondent took part in repaving of that crossing and in doing so, it assumed responsibility for the repairs. Award of $77.60.

. . . . . p. 27

HAYNES V. DIVISION OF HIGHWAYS (CC-05-369)

Claimants brought this action for vehicle damage which occurred when their vehicle traveled over wet paint while they were traveling on Route 21 near Sissonville, Kanawha City. Claimant stated that there was no indication, via signs or traffic cones, of wet paint on the roads. Claimants' vehicle sustained damage totaling $2,045.90. The respondent asserted that it did not have actual or constructive notice of the condition on Route 21 at the site of claimants' incident for the date in question. The Court held that respondent had at least constructive notice of the recently painted white line lane markers which claimant's vehicle encountered, and that the paint presented a hazard to the traveling public. That there were no warning signs or indicators of fresh paint on the road led the Court to conclude that respondent had notice of the hazardous condition, and respondent had an adequate amount of time to take protective action. Award of $2,045.90. p. 124

KINGERY V. DIVISION OF HIGHWAYS (CC-05-028)

The parties stipulated that claimant was traveling on Deary Road in Cabell County when her vehicle struck a hole in the road; that respondent was responsible for the maintenance of Deary Road, which it failed to properly maintain on the date of the incident; and that claimant's vehicle sustained damages in the amount of $654.11. The Court held that respondent was negligent and awarded the claimant $654.11 . . . . . p. 73

LACY V. DIVISION OF HIGHWAYS (CC-05-390)

The parties stipulated that one of the claimants was traveling on Woodward Drive in Charleston, Kanawha County, when their vehicle struck a hole in the road, damaging a rim. The Court found that respondent was negligent in its maintenance of Woodward Drive on the date of the incident, and that the negligence of respondent was the proximate cause of the damages to the claimants' vehicle. Thus, claimants were awarded $500.00 for their loss. . . . . p. 118

LANDERS V. DIVISION OF HIGHWAYS (CC-05-077)

Where claimant's vehicle was damaged when it slid on a patch of ice while traveling on a road maintained by respondent, the Court held that respondent had at least constructive notice of the condition in the area and had adequate time to take corrective action. Award of $500.00. . . . . p. 47

LANHAM V. DIVISION OF HIGHWAYS (CC-05-103)

Claimant brought this action for vehicle damage which occurred when his vehicle struck a hole as he was traveling east on County Route 74/9 in Ritchie County. The Court held that respondent did not have actual or constructive notice of

the hole prior to the incident, and there was insufficient evidence of negligence upon which to justify an award. *See Adkins v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). Claim disallowed. . . . . p. 17

LONG V. DIVISION OF HIGHWAYS (CC-03-380)

Claimant brought this action for vehicle damage when his motorcycle struck a hole in a road maintained by respondent which he was unable to avoid. The Court found that respondent had constructive notice of the hole based on its size and the time of year in which the incident occurred. Furthermore, respondent had adequate time to take corrective action. *See Chapman vs. Dept. of Highways*, 16. Ct. Cl. 103 (1986). The Court found that respondent was negligent. Award of $194.23 . . . . . p. 4

MASTERS V. DIVISION OF HIGHWAYS (CC-05-116)

Claimant brought this action for vehicle damage caused when her vehicle struck a hole in the road. The Court found that respondent had at least constructive notice of the hole based on its size and the heavy amount of traffic on that road. Also, the Court found that respondent had an adequate amount of time to take corrective action. *See Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). Award of $101.67 . . . . . p. 25

NEAL V. DIVISION OF HIGHWAYS (CC-05-435)

Where claimant's vehicle struck a piece of tire on the road while she was traveling on I-64 in Cabell County, the Court held that respondent did not have actual or constructive notice of the tire, and there was insufficient evidence of negligence upon which to justify an award. Claim disallowed. . . . . p. 75

NUCKOLLS V. DIVISION OF HIGHWAYS (CC-06-213)

The parties stipulated that claimant was traveling on Kelly's Road in Pond Gap, Kanawha County, when he was involved in an automobile accident due to a missing stop sign. Respondent was responsible for the maintenance of Kelly's Road, which it failed to maintain properly on the date of the incident. Claimant and respondent agreed that an award of $3,550.00 was a fair and reasonable amount of settlement. The Court finds that respondent was negligent in its maintenance of Kelly's Road on the date of the incident and found that the amount of damages agreed to by the parties was fair and reasonable. Award of $3,550.00. . . . . p. 125

O'BRIEN V. DIVISION OF HIGHWAYS (CC-04-515)

The parties stipulated that claimant was traveling on Route 16 in Calhoun County when he was involved in a motorcycle accident which resulted in his death; that respondent was responsible for maintenance of Route 16 on the date of the incident; and that claimant and respondent agreed that the amount of $50,000.00 in damages put forth by claimant was fair and reasonable. The Court found that respondent was negligent and awarded the claimant $50,000.00. . . . . p. 106

PANRELL V. DIVISION OF HIGHWAYS (CC-02-200)

Claimant brought this action for personal injury which occurred when his mountain bicycle struck a hole while he was traveling down a road maintained by respondent. The Court found that respondent had at least constructive notice of the

hole and had an adequate amount of time to take corrective action. Thus, the Court found that respondent was negligent and awarded claimant for his medical expenses, permanent injury, pain and suffering and diminished capacity to enjoy life. Award of $100,975.00 . . . . . p. 39

PHILLIPS V. DIVISION OF HIGHWAYS (CC-05-153)

Claimant's vehicle struck a hole while traveling through a repair site on County Route 25 in Ohio County. The Court held that respondent had at least constructive notice of the hole and that the conditions presented a hazard to the traveling public. Thus, the Court found that respondent was negligent. Award of $50.00. . . . . p. 48

RILEY V. DIVISION OF HIGHWAYS (CC-06-197)

Claimants brought this action for vehicle damage which occurred when their vehicle struck two holes while claimant was traveling on Route 19 in Goodhope, Harrison, County. The Court held that respondent had at least constructive notice of the holes and that the holes presented a hazard to the traveling public. Thus, the Court found that respondent was negligent, and claimants were awarded $194.65. . . . . p. 110

SMALL V. DIVISION OF HIGHWAYS (CC-06-060)

Claimant brought this action for vehicle damage when his vehicle struck a hole while he was traveling on Sauls Run Road in Harrison County. The Court found that respondent had at least constructive notice of the hole and thus, respondent was negligent. Award of $336.50. . . . . p. 91

STARCHER V. DIVISION OF HIGHWAYS (CC-04-942)

Claimant's vehicle was damaged when it struck holes in the road while traveling on Route 36 in Clay County. The Court found that respondent had at least constructive notice of the holes, which presented a hazard to the traveling public. Thus, the Court found that respondent was negligent, and awarded claimant $285.07. . . . . p. 65

WENDT V. DIVISION OF HIGHWAYS (CC-05-013)

Claimant's vehicle sustained damage when it struck a slip in the road while he was traveling west on County Route 94 in Marshall County. The Court found that respondent did not have actual or constructive notice of the slip prior to the incident in question. Therefore, there was insufficient evidence of negligence upon which to justify an award. Claim disallowed. . . . . p. 54

WILLIAMS V. DIVISION OF HIGHWAYS (CC-05-312)

The parties stipulated that claimant was traveling on the entrance ramp to I-64 from Route 119 in Charleston, Kanawha County, when her vehicle struck an open lid containing wires to the street lights in the road, damaging a tire and rim. The Court found that respondent was negligent in its maintenance of the entrance ramp to I-64 from Route 119, and claimant was awarded $500.00. . . . . p. 85

YOUNG V. DIVISION OF HIGHWAYS (CC-03-298)

Claimant brought this action for vehicle damage which occurred when the vehicle that his son was driving struck a hole in a road maintained by respondent.

The Court, relying upon a statement by the investigating officer at the scene, found that claimant's son's negligence was the cause of the accident. The Court further held that respondent was not negligent in its maintenance of the road. Claim disallowed. . . . . p. 5

TREES and TIMBER

BERIWINKLE V. DIVISION OF HIGHWAYS (CC-05-424)

Claimant was traveling on Route 19 in Clarksburg, Harrison County when a tree fell onto their vehicle. 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 respondent will be held liable. However, when an apparently healthy tree falls and causes property damage as the result of a storm, the Court has held that there is insufficient evidence of negligence upon which to justify an award. *Wiles v. Division of Highways*, 22 Ct. Cl. 170 (1998); *Gerritsen v. Dept. of Highways*, 16 Ct. Cl. 85 (1986). In the instant case, the Court found that respondent had no notice that the tree posed an apparent risk to the public. The evidence adduced at the hearing established that the tree appeared to be a live and healthy tree, and neither claimants nor respondent had reason to believe that the tree was in danger of falling. Thus, claimants failed to establish negligence on the part of respondent. Claim disallowed. . . . . p. 87

COLLINS V. DIVISION OF HIGHWAYS (CC-02-308)

Claimant brought this action for personal injuries which occurred when he came upon a tree in the road while traveling on Route 83 in McDowell County. Claimant stated that as he traveled around a curve in the road, he noticed that a tree had fallen across both lanes of travel. Claimant testified that the tree appeared to be alive. His vehicle struck the tree, and then struck a guardrail on the left side of Route 83. As a result of the accident, claimant was life-flighted to Charleston Area Medical Center. The position of respondent was that it did not have actual or constructive notice of the condition on Route 83 at the site of claimant's accident for the date in question. The Court found that neither claimant nor respondent had reason to believe that the tree was in danger of falling. While there was evidence that there were trees down throughout parts of the county and respondent was aware of some of those trees, the Court found that there was no evidence presented that respondent had actual or constructive notice of the tree that claimant's vehicle struck on Route 83. Thus, the Court held that there was no negligence on the part of the respondent. Claim disallowed. . . . . p. 119

GIBSON V. DIVISION OF HIGHWAYS (CC-04-439)

Claimant brought this action for vehicle damage when her vehicle struck a tree that had fallen onto Route 25 in Fayette County. Claimant stated that the tree appeared to be alive and covered the entire road. Respondent alleged that it did not have actual or constructive notice of the condition on Route 25 at the site of claimant's accident for the date in question. The Court held that respondent had no notice that the tree at issue posed an apparent risk to the public. Neither claimant nor respondent had reason to believe that the tree was in danger of falling. Claim disallowed. . . . . p. 115

HAMNER V. DIVISION OF HIGHWAYS (CC-05-256)

Claimant brought this action for vehicle damage when his vehicle struck a live tree and rocks from a hillside adjacent to Route 4 in Braxton County. The Court found that claimant failed to establish that respondent did not take adequate measures to protect the safety of the traveling public. Therefore, the Court held that there was insufficient evidence of negligence upon which to base an award. Claim disallowed. . . . . p. 66

MITCHEM V. DIVISION OF HIGHWAYS (CC-05-032)

Claimants brought this action for damage to their vehicle when a large tree fell onto it. The general rule regarding tree fall claims is that if a tree is dead and poses an apparent risk, then respondent may be held liable. However, when a healthy tree falls and causes property damage as the 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). The Court found that respondent did not have notice that the tree posed a risk to the public. Therefore, there was insufficient evidence of negligence upon which to justify an award. Claim disallowed. . p. 55

MORRISON V. DIVISION OF HIGHWAYS (CC-05-374)

Claimant brought this action for vehicle damage which occurred when his vehicle struck a tree limb hanging over the road while he was traveling on Route 31 in Cabell County. The Court determined that respondent was not negligent in its maintenance of Route 31 on the date of claimant's incident since respondent received notice of a branch in the road and responded in a timely manner. Claim disallowed. . . . . p. 75

ROBINSON V. DIVISION OF HIGHWAYS (CC-06-079)

Claimants brought this action for vehicle damage and property damage which occurred when a tree fell onto their property adjacent to Greenwood Road in Greenwood, Doddridge County. When an apparently healthy tree falls and causes property damage as the 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). The Court held that respondent had no notice that the tree at issue posed an apparent risk to the public. Neither claimants nor respondents had reason to believe that the tree was in danger of falling. Thus, the Court disallowed the claim. p. 85

VENDOR

BARBOUR COUNTY COMMISSION V. DIVISION OF CORRECTIONS (CC-05-137)

Claimant brought this action to recover $48,350.00 in costs for providing housing to a prisoner who was sentenced to a State penal institution, but due to circumstances beyond the control of the county, the prisoner had remained in the custody of the county for periods of time beyond the date of the commitment order. Respondent admitted the validity of the claim in the amount of $21,750.00, and claimant agreed that this was the correct amount to which it was entitled. *See County Comm'n. of Mineral County v. Div. of Corrections,* 18 Ct. Cl. 88 (1990). Award of $21,750.00. . . . . p. 15

CITIZENS TELECOMMUNICATIONS COMPANY OF WV V. SUPREME COURT OF APPEALS (CC-05-096)

Claimant sought $2,553.62 plus interest for providing telephone services to respondent. Respondent did not remit payment of the Universal Service Fund charges at the time the invoices were rendered. Respondent stated that insufficient funds expired in the appropriate fiscal year from which the charges could have been paid. The Court awarded claimant $2,553.62. . . . . p. 83

COUNTRY INN & SUITES V. PUBLIC SERVICE COMMISSION (CC-06-394)

Claimant sought $3,325.58 for providing a conference room, lunch and equipment for an event hosted by respondent agency. The documentation for those services was not processed for payment within the appropriate fiscal year; therefore, claimant was not paid. Respondent admitted the validity of the claim as well as the amount. The Court awarded claimant $3,325.58. . . . . p. 111

CRUSE V. OFFICE OF MINERS' HEALTH, SAFETY AND TRAINING (CC-06-367)

Claimant sought $6,045.32 for investigative overtime work performed due to the Sago Mine accident. Respondent admitted the validity of the claim and that the amount was fair and reasonable. The Court was aware that respondent did not have a fiscal method for paying claims of this nature and awarded claimant $6,045.32. . . . . p. 111

EQUIFAX INFORMATION SERVICES LLC V. WEST VIRGINIA DIVISION OF BANKING (CC-06-001)

Claimant sought $989.01 for providing services to respondent. Documentation for those services was not processed for payment within the appropriate fiscal year; therefore, claimant was not paid. Respondent admitted that sufficient funds expired at the end of the appropriate fiscal year from which the invoice could have been paid. Award of $989.01. . . . . p. 54

GHAREEB V. DIVISION OF REHABILITATION SERVICES (CC-05-447)

The Court made an award of $224.00 for medical services provided to a patient at respondent's facility. The Court found that sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid. . . . . p. 71

NDC HEALTH CORPORATION V. DIVISION OF REHABILITATION SERVICES (CC-06-049)

Claimant provided services to respondent and was not paid. However, the Court found that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid. The Court awarded claimant $10,786.56. . . . . p. 58

PUBLIC EMPLOYEES INSURANCE AGENCY V. DIVISION OF CORRECTIONS (CC-06-116)

Claimant sought $207,273.95 for providing health insurance coverage for employees at a facility of respondent. The agency failed to remit the premiums due for the health insurance coverage within the appropriate fiscal years from 1997-2005, therefore, claimant was not paid. Respondent admitted the validity of the

claim as well as the amount and requested that the Court consider the claim in accordance with W.Va. Code § 14-2-18 in order that respondent be authorized to make payment for the premiums in the current fiscal year of 2006. Award of $207,273.95. . . . . p. 70

RYAN V. PUBLIC SERVICE COMMISSION (CC-05-314)

Claimant brought this claim for reimbursement of uniform cleaning fees. Claimant was not paid because the documentation for those services was not processed within the appropriate fiscal year. Respondent admitted the validity of this claim and stated that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid. Award of $35.88. . . . . p. 38

SGS NORTH AMERICA V. DIVISION OF LABOR (CC-05-395)

Claimant sought $18,040.00 for providing analysis services. Documentation for the services was not processed for payment within the appropriate fiscal year; therefore, claimant was not paid. Respondent admitted the validity of the claim as well as the amount, and stated that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid. Award of $18,040.00. . . . . p. 51

WEST VIRGINIA TRUCK & TRAILER, INC. V. DIVISION OF LABOR (CC-05-268)

The Court made an award of $2,424.17 to claimant for providing maintenance to a vehicle owned by a facility of respondent. Documentation for those services was not processed for payment within the appropriate fiscal year; thus claimant was not paid. Respondent admitted the validity and the amount of the claim and stated that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid. Award of $2,424.17. . . . . p. 17

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 them in overexpenditure bills; declared the claims to be moral obligations of the State; and received funds to pay the claims were provided to the Court.

AT&T V. DIVISION OF CORRECTIONS (CC-06-179)

Claimant sought payment in the amount of $152.50 for long distance telephone services provided to respondent. Respondent admitted the validity of the claim, but stated that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the invoice; therefore, no payment was made. Claim disallowed. . . . . p. 77

CHARLESTON CARDIOLOGY GROUP V. DIVISION OF CORRECTIONS (CC-06-121)

Claimant sought payment in the amount of $4,790.00 for medical services rendered to inmates in the custody of respondent. Respondent admitted the validity of the claim, but stated that there were insufficient funds in its appropriation for the fiscal year in question in which to pay the claim. Claim disallowed. . . . . p. 69