STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the Period from July 1, 2011

to June 30, 2013

by

CHERYLE M. HALL

CLERK

Volume 29

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

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LETTER OF TRANSMITTAL

To His Excellency
The Honorable Earl Ray Tomblin
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 eleven to June thirty, two thousand thirteen.

Respectfully submitted,

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 JULY 1, 2011

TERRY J. WOODSIDE,
as Administrator of the Estate of Terry J. Woodside Jr.
V.
DIVISION OF HIGHWAYS
(CC-09-0603)

James J. Sellitti, Attorney at Law, for Claimant.
Michael J. Folio, 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 13, 2007, Harrison County and the area near WV Route 131, known as Saltwell Road, experienced a widespread rain and flood event. Water had accumulated on the roadway. Respondent attempted to clear the roadway of accumulated water, but failed to clear completely water from the roadway.

2. Respondent is responsible for the maintenance of WV Route 131 situated near and between Bridgeport and Shinnston, Harrison County.

3. Claimant's decedent was operating a motor vehicle in the northerly direction on WV Route 131 when he came upon accumulated water on the roadway, hydroplaned, and struck a tree.

4. Respondent had been working in the area of the accident earlier in the day and attempted to clear a drain that was not functioning properly and causing the

standing water on the road. However, Respondent was unsuccessful in its effort to correct the problem.

5. Claimant alleges that Respondent failed to place a warning sign alerting motorists of high water at the location where Claimant's decedent struck a tree. Respondent alleges that a warning sign was placed at the southern entrance of WV Route 131 near Bridgeport, Harrison County, just off I-79.

6. Respondent received various communications throughout the day regarding water in the area and on the roadway.

7. Claimant estimates that the Claimant has sustained economic losses in excess of One Million dollars ($1,000,000.00) due to the decedent's death.

7. Based on the parties' investigation, the parties to this claim agree that the total sum of Two Hundred Fifty Thousand dollars ($250,000.00) to be paid by Respondent to Terry J. Woodside, Sr., as Administrator of the Estate of Terry J. Woodside, Jr., Deceased, will be a full and complete settlement of this claim.

The Court has reviewed the facts of the claim and finds that the amount of the damages agreed to by the parties is fair and reasonable. Thus, the Court is of the opinion to and does make an award in the amount of $250,000.00.

Award of $250,000.00.

OPINION ISSUED JULY 1, 2011

RONALD HALL
V.
DIVISION OF HIGHWAYS
(CC-09-0236)

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, 2009, Claimant's 2002 Audi struck a hole on a bridge on Route 98 near Nutter Fort, Harrison County, when a metal plate over the hole was not secured properly.

2. Respondent is responsible for the maintenance of Route 98 which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $1,032.20. Claimant's insurance deductible was $500.00 at the time of the incident.

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 98 on the date of this incident; that the negligence of Respondent was the proximate cause of the damages sustained to Claimant's vehicle; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00 on this claim.

Award of $500.00.

OPINION ISSUED JULY 1, 2011

RUSTI MENENDEZ-YOUNG
V.
DIVISION OF HIGHWAYS
(CC-10-0102)

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 22, 2010, Claimant's 2009 Chevrolet Aveo struck a hole in the roadway of Route 19 in Harrison County.

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

3. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $623.65. Claimant's insurance deductible was $750.00 at the time of the incident.

4. Respondent agrees that the amount of $623.65 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 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for his loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $623.65 on this claim.

Award of $623.65.

OPINION ISSUED JULY 1, 2011

TERRY JORDAN
V.
DIVISION OF HIGHWAYS
(CC-09-0222)

Richelle K. Garlow, 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 or around May 24, 2007, Claimant was operating a motorcycle on WV Route 62 in or near Leon, Mason County, when he lost control of the vehicle.

2. Respondent is responsible for the maintenance of WV Route 62 in Mason County.

3. Claimant alleges that on the day of the accident, a portion of WV Route 62 was in disrepair, that the condition of the road caused his accident, and that Respondent either knew or should have known about the condition of the road at that location.

4. Respondent does not dispute the allegations contained in Paragraph 3 for the purpose of settlement of this claim.

5. Claimant was injured as a result of the accident and required medical treatment for his injuries.

6. Claimant and Respondent agree that an award in the amount of $30,000 payable to the Claimant is a fair and reasonable amount to settle this claim.

The Court has reviewed the facts of the claim and finds that the amount of the damages agreed to by the parties is fair and reasonable. Thus, the Court is of the opinion to and does make an award in the amount of $30,000.00.

Award of $30,000.00.

OPINION ISSUED JULY 1, 2011

KELLY L. PINTI
V.
DIVISION OF HIGHWAYS
(CC-10-0163)

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

PER CURIAM:

Claimant Kelly Pinti brought this action for vehicle damage which occurred when her 2003 Toyota Sequoia struck rocks located on the surface of Interstate-79 near Fairmont, Marion County. I-79 is a public road maintained by Respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 6:15 p.m. on March 7, 2010. I-79 is a four-lane, paved interstate highway with two lanes of traffic in each direction and a speed limit of 70 miles per hour. At the time of the incident, Claimant was driving past mile marker 139 with four small children in the back of her car. Claimant testified that she was driving at or below the speed limit when she encountered two large rocks in the road, each approximately 2-3 feet wide and 1 ½ feet tall. She testified that she did not have time to avoid the rocks so she attempted, unsuccessfully, to straddle them with her vehicle, which resulted in the left side of her vehicle striking the rocks. Claimant drives this road frequently and could not recall seeing warning signs or rocks in the road before the incident.

As a result of this incident, Claimant's vehicle sustained damage to the front and rear left tires and rims in the amount of $1,472.10. Claimant's insurance declaration sheet indicates that her collision deductible is $2,000.00.

It is the Claimant's position that Respondent knew or should have known about the rocks in the road on I-79 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to provide proper warning to the traveling public of a known hazardous condition prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the rocks on I-79 prior to this incident. Norman Cunningham, Transportation Crew Supervisor for Respondent in Marion County, testified that he is familiar with I-79 and stated that at the location of Claimant's incident the road is on a cut with rock ledges on either side of the interstate. Mr. Cunningham testified that Respondent is aware of the potential for rock falls on I-79 and attempted to warn drivers by erecting "falling rock" signs. Respondent introduced a DOH-12 work order indicating that warning signs were installed on March 31, 2009 along I-79 from mile marker 139 to 157, as well as photographs demonstrating that they were still present in May 2011. Mr. Cunningham testified that rock falls are infrequent in this section of I-79, and that Respondent was not notified about the rocks in question prior to this incident; however, upon receiving notice of the rocks struck by Claimant, Respondent's crews immediately responded to clear them from the road.

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

action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986). In rock fall claims, this Court has held that the unexplained falling of rocks 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. Dep't 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 I-79. Respondent placed "falling rock" signs to warn the traveling public of the potential for rock falls at this location. Although the rocks created a dangerous condition on the road, there is no evidence that Respondent had notice of this hazard. While the Court is sympathetic to the Claimant's plight, the fact remains that there is insufficient evidence of negligence on the part of Respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JULY 1, 2011

ERIC SPATAFORE
V.
DIVISION OF HIGHWAYS
(CC-10-0356)

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

PER CURIAM:

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

1. On May 10, 2010, Claimant's 2009 Honda Accord struck a hole in the roadway of Darrison Run Road in Harrison County.

2. Respondent is responsible for the maintenance of Darrison Run Road which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $782.92. Claimant's insurance deductible was $300.00 at the time of the incident.

4. Respondent agrees that the amount of $300.00 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 Darrison Run 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $300.00 on this claim.

Award of $300.00.

OPINION ISSUED JULY 1, 2011

RICHARD GONZALEZ
V.
DIVISION OF HIGHWAYS
(CC-10-0409)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant, Richard Gonzalez, brought this action for vehicle damage which occurred when his 2005 Buick Lacrosse struck a hole on WV Route 98 in Clarksburg, Harrison County. WV Route 98 is a public road maintained by Respondent. The Court is of the opinion to make an award in this claim for the reasons stated below.

The incident giving rise to this claim occurred at approximately 7:30 p.m. on April 5, 2010. WV Route 98 is a two-lane, paved road with one lane of traffic in each direction. At the time of the incident, Claimant was driving westbound on WV

Route 98 past the VA Medical Center across a highway bridge. Claimant testified that he was aware of a hole in the pavement on the driving portion of his lane on the far side of the bridge, approximately 6 inches deep, 2 feet wide, and 4 feet long. Gonzalez stated that it is possible to avoid striking the hole if there is no oncoming traffic by maneuvering left of the center line. However, according to the Claimant, the likelihood of encountering another vehicle at the location of the hole is approximately 85%. Gonzalez testified that he was driving over the bridge at approximately 25 miles per hour when he spotted oncoming traffic and attempted to slow down, but Claimant's vehicle struck the hole. As a result of this incident, Claimant's vehicle sustained damage to the front and rear right tires and rims in the amount of $2,006.42. Since Claimant's insurance declaration sheet indicates that his collision deductible is $500.00, Claimant's recovery is limited to that amount.

It is Claimant's position that Respondent knew or should have known about the hole on WV Route 98 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain WV Route 98 prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the condition on WV Route 98 at the time of the incident. David Cava, Highways Administrator for Respondent in Harrison County, testified that he is familiar with WV Route 98, which he described as a first priority road, and the location of Claimant's incident. Respondent submitted into evidence a DOH-12 work record which indicates that on March 5, 2010, one month before the incident, Respondent patched holes on WV Route 98 with 8 tons of cold mix. Cava testified that cold mix is a temporary patching material that can last one day or all winter, and Respondent's crews do not return to monitor roads after they have been patched. After looking at pictures of the hole submitted by Claimant, Cava testified that it appeared to contain remnants of cold mix.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the condition on WV Route 98. Since the size of the hole and its location in the driving portion of the lane created a hazard to the traveling public, the Court finds Respondent negligent. Although Claimant began braking prior to hitting the hole, since he was aware that there was an 85% chance of encountering oncoming traffic and striking the hole, the Court believes he could have further reduced his speed on this particular day. The Court finds that Claimant was ten percent (10%) negligent in the operation of his vehicle. Thus, Claimant's recovery is limited to ninety-percent (90%) of his loss.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $450.00.

Award of $450.00.

OPINION ISSUED JULY 1, 2011

NICHOLAS CUMBERLEDGE and ELIZABETH CUMBERLEDGE
V.
DIVISION OF HIGHWAYS
(CC-10-0620)

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

PER CURIAM:

Claimants Nicholas Cumberledge and Elizabeth Cumberledge brought this action to recover damages to the tires of two vehicles that were punctured by sharp rocks on County Route 20/39, locally designated Shaw Hollow Road, in Wallace, Harrison County. County Route 20/39 is a public 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 first of two incidents giving rise to this claim occurred at approximately 6:30 a.m. on September 21, 2010. Claimant Elizabeth Cumberledge was driving Claimants' 2001 Dodge Stratus on Route 20/39 to drop her daughter off at the bus stop. The surface of the road at this point was macadam, which, however, was in

poor condition. A few days before September 21, Respondent accordingly had placed crushed stone on top of this pavement. Ms. Cumberledge testified that a sharp stone on top of the pavement, placed there by Respondent, punctured a tire on the Stratus.

A few days later, Ms. Cumberledge was driving Claimants' 2008 Dodge Durango back to her home along the same stretch of road and gravel when two of that vehicle's tires were punctured by sharp rocks. Claimants opted to replace all four tires on both vehicles, in the total amount of $1,225.80. Claimants had no collision coverage on the 2001 Stratus; however, they had a collision deductible of $500.00 on the Dodge Durango, thus, Claimants' recovery for the tires on that vehicle is limited to that amount.

It is the Claimants' position that Respondent knew or should have known that they created a hazardous condition to the traveling public on Route 20/39 by laying sharp gravel on top of pavement, and that Respondent was negligent in failing to properly maintain Route 20/39 or provide proper warning to the traveling public of a known hazardous condition prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the condition on Route 20/39 at the time of the incident. Respondent submitted into evidence a DOH-12 work report from September 8, 2010, that indicated Respondent's crews had placed 10 tons of crusher rock on Route 20/39. David Cava, Highway Administrator for Respondent in Harrison County, testified that based upon his observation of the photographs submitted by Claimants, the rocks that punctured Claimants' tires appeared to be of the type commonly used by 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 v. Sims,* 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimants must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that since Respondent placed the gravel on Route 20/39 it had, at the least, constructive notice of the condition prior to the incident. Since sharp rocks on top of the paved surface of the road created a hazard to the traveling public, the Court finds Respondent negligent.

Considering the age and preexisting wear on the punctured tires, the Claimant may make a recovery of $100 per tire damaged.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimants should be awarded the sum of $300.00.

Award of $300.00

OPINION ISSUED JULY 1, 2011

AB CONTRACTING INC.
V.
DEPARTMENT OF EDUCATION
(CC-11-0208)

Claimant appeared *pro se*.

Gretchen A. Murphy, Assistant Attorney General, for Respondent.

PER CURIAM:

This claim was submitted for decision without a hearing based upon the allegations in the Notice of Claim and Respondent's Answer.

Claimant seeks payment in the amount of $20,000.00 for approved construction work performed at the behest of Respondent. Respondent, in its Answer, admits the validity of the claim and the amount of $20,000.00, and states that there were sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $20,000.00.

Award of $20,000.00.

OPINION ISSUED SEPTEMBER 15, 2011

TERRI L. FARLEY
V.
DIVISION OF HIGHWAYS
(CC-10-0375)

Claimant appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2008 Suzuki SX4 all-wheel drive struck a hole on WV Route 3 near Dameron, Raleigh County. Respondent stipulated to liability in this claim; therefore, the only issue this Court shall address is the issue of damages.

The incident giving rise to this claim occurred at approximately 7:15 p.m. on May 7, 2010. While driving her vehicle on Route 3, the Claimant encountered a large hole, approximately six feet wide, that she was unable to avoid. The right side of Claimant's car struck the hole, resulting in damage to the alignment, two tires and one rim in the initial amount of $300.27. However, Claimant testified that after making the aforementioned repairs her vehicle continued shake whenever she pressed the brake. Claimant attempted to correct the problem by having her tires rotated and balanced numerous times. Ten months after the incident, Claimant took her vehicle to have the air conditioner checked, at which time it was discovered that she needed to have the tie-rod and bushing replaced in the amount of $377.08. Claimant testified that this repair resolved her vehicle's problem immediately. Thus, it is Claimant's position that the incident resulted in vehicle damages totaling $677.35. Since Claimant's insurance declaration sheet indicates that her collision deductible is $500.00, Claimant's recovery is limited to that amount.

It is Respondent's position that it should not be held liable for repairs to the tie-rod and bushing, because the ten month time frame between the incident and the repair suggests that the later-in-time repair was unrelated to Claimant's incident.

The evidence adduced at hearing established that the damage to Claimant's vehicle's tie-rod and bushings were more than likely a result of the incident. Thus, the Court is of the opinion that claimant is entitled to the price of two tires, one rim, a wheel alignment, and the tie-rod and bushing replacement.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED SEPTEMBER 15, 2011

M.E. WALKER AND MEGAN WALKER SMITH
V.
DIVISION OF HIGHWAYS
(CC-10-0455)

Claimant appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

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

1. On June 19, 2010, Claimants' 2006 Honda CRV encountered a rock fall in the roadway of Route 20 near Hinton in Summers County.

2. Respondent is responsible for the maintenance of Route 20 which it failed to maintain properly on the date of this incident.

3. As a result, Claimants' vehicle sustained damage to its windshield, hood, grill and tires in the amount of $1,000.00. Claimants insurance deductible was $1,000. 00 at the time of the incident.

4. Respondent agrees that the amount of $1,000.00 for the damages put forth by the Claimants is fair and reasonable.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Route 20 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 damages agreed to by the parties is fair and reasonable. Thus, Claimants may make a recovery for the loss.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $1,000.00 on this claim.

Award of $1,000.00.

OPINION ISSUED SEPTEMBER 15, 2011

WILLIAM H. KECK
V.
DIVISION OF HIGHWAYS
(CC-10-0633)

Claimant appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant William Keck brought this action for vehicle damage which occurred when his 2005 Kia Sedona struck a tree on WV Route 61 near Montgomery, Fayette County. WV Route 61 is a public road maintained by Respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 2:00 a.m. on July 30, 2010. West Virginia Route 61 is a two-lane paved road with one lane of traffic in each direction and a speed limit of 45 miles per hour. At the time of the incident, Claimant was returning home from Montgomery, where he had gone to buy cigarettes for himself and his wife. According to the Claimant, when he drove to Montgomery less than 15 minutes prior to the incident the road was clear. However, as he drove away from Montgomery, he encountered a tree that had fallen onto the road, across all the lanes, from the left bank. Claimant testified that he crested a hill on the road at 45 miles per hour when he first saw the tree about 15 feet in front of him. Claimant stated that he attempted to stop, but was unable and his vehicle struck the tree, approximately 18 inches in diameter. As a result of this incident, Claimant's vehicle sustained damage to the front end in the amount of $550.00. Claimant has a $250.00 collision deductible on his motor vehicle insurance.

It is the Claimant's position that Respondent knew or should have known about fallen tree on WV Route 61 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain the trees along WV Route prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the decaying or fallen trees on or alongside WV Route 61 at the time of the incident. Respondent presented no witnesses.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v.*

Sims, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In cases involving falling trees or tree limbs, the Court has held that respondent is liable for dangerous trees or tree limbs on its property or rights-of-way. *Wiles v. Division of Highways*, 22 Ct. Cl.170 (1999). The general rule is that if a tree is dead and poses an apparent risk then the respondent may be held liable.

In the instant case, the Court is of the opinion that Respondent did not have notice of the condition of the tree prior to the incident on WV Route 61. Claimant failed to demonstrate that Respondent should have been aware that the tree potentially posed a danger to the traveling public prior to its falling in the early morning hours on the date of this incident, thus, Respondent cannot be held liable for Claimant's damages.

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

Claim disallowed.

OPINION ISSUED SEPTEMBER 15, 2011

BRENT M. COMBS
V.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-11-0048)

Claimant appeared *pro se*.
Gretchen A. Murphy, Assistant Attorney General, for Respondent.

PER CURIAM:

This claim was submitted for decision without a hearing based upon the allegations in the Notice of Claim and Respondent's Answer.

Claimant, an inmate at Potomac Highlands Regional Jail at the time of the incident, seeks to recover $15.45 for a book that was taken from his possession and never returned to him or placed with his personal property.

In its Answer, Respondent admits the validity of the claim and that the amount is fair and reasonable.

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

Accordingly, the Court is of the opinion to make an award to the Claimant herein in the amount of $15.45.

Award of $15.45.

OPINION ISSUED SEPTEMBER 15, 2011

RUTH A. WARE
V.
DIVISION OF HIGHWAYS
(CC-11-0145)

Claimant appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2007 Mitsubishi Galant struck a hole in the berm on WV Route 25 near Dunbar, Kanawha County. WV Route 25 is a public road maintained by Respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 8:00 p.m. on October 5, 2010. The evening was dark but clear. WV Route 25 is a two-lane, paved road with slightly faded white lane lines. The incident giving rise to this claim occurred in front of the Cold Spot where the road curves right to left, over the railroad tracks, and then right again. Claimant testified that she was driving approximately 25-30 miles per hour through the curves when her vehicle struck a hole located to the right of the white lane line on the berm. Claimant frequently

travels this road and was aware of the hole prior to this incident, but she stated she could not see it in the dark. Claimant further testified that there was no traffic in the opposite direction. As a result of this incident, Claimant alleges that her vehicle sustained damage to the right front and rear wheels and tires, as well as the right and left sides of her front fender. Claimant testified that she paid a friend $500.00, the amount of her insurance deductible, to fix her vehicle.

It is the Claimant's position that Respondent knew or should have known about the hole in the berm on WV Route 25 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain WV Route 25 prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the condition on WV Route 25 at the time of the incident; and that regardless of notice, Respondent is not liable for damage caused by Claimant's driving on the berm. Gil Schoolcraft, a foreman for Respondent, testified that he is familiar with the location of Claimant's incident and that the speed limit for the vicinity of the railroad crossing is 25 miles per hour. Schoolcraft also testified that the white lane lines were present in October of 2010.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986). The Court has previously held Respondent liable where the driver of the vehicle was forced to use the berm in an emergency situation, and the berm was in disrepair. *See Handley v. Div. of Highways,* CC-08-0069 (2008); *Warfield v. Div. of Highways,* CC-08-0105 (2008).

In the instant case, Claimant chose to drive onto the berm and the Court cannot hold Respondent liable for failure to maintain the berm when the berm was not used in an emergency situation. Thus, there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED SEPTEMBER 15, 2011

RONALD D. DEULEY
V.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-11-0242)

Claimant appeared *pro se*.
Gretchen A. Murphy, 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 Tygart Valley Regional Jail at the time, seeks to recover $535.00 for certain articles of clothing that were confiscated by Respondent and never returned to him.

In its Answer, Respondent admits the validity of the claim as well as the amount.

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

Accordingly, the Court is of the opinion to make an award to the Claimant herein in the amount of $535.00.

Award of $535.00.

OPINION ISSUED SEPTEMBER 15, 2011

INFOPRINT SOLUTIONS COMPANY
V.
DEPARTMENT OF ADMINISTRATION / OFFICE OF TECHNOLOGY
(CC-11-0368)

Claimant appeared *pro se*.

Stacy L. DeLong, 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 to recover $83,174.39 for services rendered to Respondent.

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

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $83,174.39.

Award of $83,174.39.

OPINION ISSUED OCTOBER 26, 2011

MARY BALMER-GAGE
V.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-08-0481)

J. Mark Sutton, Attorney at Law, for Claimant.

Gretchen A. Murphy, Assistant Attorney General, for Respondent.

PER CURIAM:

Claimant Mary Balmer-Gage 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 and transported to Eastern Regional Jail, a facility of the Respondent, where the Claimant alleges her engagement and wedding rings were taken from her and were not returned to her when she was released. Claimant placed a value of $2,245.00 on her personal property.

The Claimant testified at the hearing of this matter that she was arrested on September 29, 2008, and taken to Eastern Region Jail where all of her personal items were removed and inventoried, except for her engagement and wedding rings, which had been soldered together to form one ring, and were too tight to remove during

her initial admission. A few hours after Claimant was admitted she and two officers were able to remove her ring with the aid of butter. Claimant testified that in her haste to leave the jail when she was released the following day she took the personal property given to her by the officer, signed the property transaction report, and left without making sure she had everything. Claimant testified that on the car ride home with her husband after leaving the jail she noticed that her wedding rings were missing. Both the Claimant and her husband, Charles Gage, testified that she called Eastern Regional Jail the same day to report the rings missing, but that they were never located and returned to her.

Claimant submitted into evidence an invoice which lists the "regular price" and "purchase price" for each of the rings. Claimant seeks to recover the "regular price" of the rings in the amount of $2,245.00 ($450 for the wedding band and $1,795.00 for the engagement ring), although she testified that she and her husband paid the "purchase price" of $1,571.00 for both rings.

It is the Claimant's position that a bailment was created once she surrendered her rings to the officers, and as such, Respondent was responsible for the safekeeping of her property until it was returned to her.

Respondent contends that it not liable for Claimant's property and that it followed proper procedure in inventorying her personal property.

April Grona, Sergeant at Eastern Regional Jail, testified that she was present for both the admission and discharge of the Claimant. Sgt. Grona testified that when Claimant was brought to the jail she appeared to be very inebriated, stumbling, and falling asleep. Sgt. Grona testified that she removed from the Claimant a watch and two rings, which she placed on the counter to be inventoried and then sealed in an envelope to be placed in Claimant's property bag. However, because the Claimant's wedding rings were too tight they were not removed during her admission and Sgt. Grona testified that she informed Sgt. Holliday, who was working the next shift, that Claimant's wedding rings needed to be removed. The next day, Sgt. Grona was informed that the rings had been removed, however the property transaction report continued to reflect that the rings were "retained" by the Claimant. When the Claimant was discharged, Sgt. Grona gave her her property bag which contained an envelope full of jewelry. Sgt. Grona testified that she saw the Claimant take the jewelry out of the envelope, ball up the envelope, and throw it away. When asked by Sgt. Grona if she received all of her property back the Claimant stated that she had.

Michelle Holliday, Sergeant at Eastern Regional Jail, testified that after the Claimant was admitted and showered, she and another officer were able to remove the Claimant's wedding rings with butter. Once the ring was removed, Sgt. Holliday testified that they were placed in an empty envelope, and handed to Officer Alexander who sealed the envelope with tape. Sgt Holliday did not see what happened to the envelope containing the rings after it was given to Officer Alexander.

Claudia Alexander, Officer at Eastern Regional Jail, testified that she was present with the Claimant and Sgt. Holliday when Claimant's rings were removed with butter. Officer Alexander testified that once removed the rings were sealed in an envelope and then placed in the Claimant's property bag. According to Officer Alexander there were two jewelry envelopes in the property bag.

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 Claimant arrived at Respondent's facility with her wedding rings on; she could not remove the rings during the initial property inventory; and, that they were subsequently removed by the officers and retained by Respondent for storage. The Court finds that although the officers did not record Claimant's wedding rings on her Property Transaction Report, bailment was nonetheless created when Respondent took control and possession of Claimant's rings. The evidence adduced at hearing established that two envelopes should have been present in Claimant's property bag when she was released, however only one envelope (the one that did not contain the wedding rings) was accounted for. The Court finds that Respondent was responsible for safeguarding Claimant's property while she was confined and failed to take appropriate actions to do so. Therefore, the Court is of the opinion to make an award to the Claimant for the purchase price of her wedding rings in the amount of $1,571.00.

Accordingly, the Court is of the opinion to and does make an award to the Claimant in the amount of $1,571.00.

Award of $1,571.00.

OPINION ISSUED OCTOBER 26, 2011

SAMUEL S. STEWART and GERTRUDE STEWART
V.
DIVISION OF HIGHWAYS
(CC-09-0329)

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 2007 Hyundai Sonata struck a hole in the road on US Route 60 East in Huntington, Cabell County. US Route 60 is a public 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 17, 2009. At the location of the incident, US Route 60 is a four lane road with two lanes of traffic in either direction, and a speed limit of 40 miles per hour. At the time of the incident, Mrs. Stewart was driving east on US Route 60 at 40 miles per hour in the inside lane. Mrs. Stewart testified that she was aware of the hole in her lane, but that she was prevented from avoiding it by a car located in the outside lane. As a result of this incident, Claimants' vehicle sustained damage to a tire and rim in the amount of $570.13. Since Claimants' insurance declaration sheet indicates that their collision deductible is $500.00, Claimants' recovery is limited to that amount.

It is the Claimants' position that Respondent knew or should have known about hole in the road on US Route 60 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain US Route 60 or provide proper warning to the traveling public of a known hazardous condition prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the hole on US Route 60 at the time of the incident. Randolph Smith, Administrator for the Respondent in Wayne County, testified that he is familiar with the location of Claimant's incident on US Route 60, which he described as a heavily traveled, priority one stretch of road. Smith testified that during the month of February, Respondent's main concerns are keeping the road free of ice and water.

Additionally, Smith testified that the only material available to patch the road during the winter is a temporary material which may last only two days or two weeks.

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, Claimants must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the hole on US Route 60. Since a hole in the travel portion of a heavily travel road created a hazard to the traveling public, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimants should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED OCTOBER 26, 2011

FREDDIE A. MARKS
V.
DIVISION OF HIGHWAYS
(CC-09-0364)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred to his 2002 Mitsubishi Galant after daily driving over a road alleged to be poorly maintained. County Route 7/5, locally designated Woodland Road, in West Columbia, Mason County, which is a public 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 approximately June 2008 and June 2009. County Route 7/5 is an unmarked two-lane tar and chip road with holes scattered all over, and without a posted speed limit. The Claimant testified that he lives on County Route 7/5 and drives it on a daily basis. Claimant testified that there are so many holes on the road they are impossible to avoid, and estimates that his vehicle strikes anywhere from ten (10) to twenty (20) per day. Claimant stated that he and his neighbors notified Respondent of the condition of the road prior to his experiencing problems with his vehicle. Claimant alleges that as a result of the condition of the road, his vehicle sustained damage to the front and rear struts and inner tie rods requiring their replacement and an alignment in the amount of $870.00. Claimant's vehicle had liability insurance only.

It is Claimant's position that Respondent knew or should have known about the deteriorating condition of County Route 7/5 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain County Route 7/5 prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the condition on County Route 7/5 at the time of the incident. James Halfhill, Mechanic for Respondent in Mason County, testified that he does general diagnostic and maintenance to all state equipment, including state motor vehicles. Halfhill testified that, in his opinion, the condition of the roadway could not have damaged Claimant's vehicle's struts and tie rods in one year.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the deteriorating condition of County Route 7/5. Since Respondent's failure to maintain a deteriorating roadway created a hazard to the traveling public, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $870.00.

Award of $870.00.

OPINION ISSUED OCTOBER 26, 2011

WILMA JEAN BEEGLE-GERMAN
V.
DIVISION OF HIGHWAYS
(CC-10-0103)

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 13, 2010, Claimant's 2007 Ford 500 struck a hole in the road on WV Route 87 towards Ripley, Mason County.

2. Respondent is responsible for the maintenance of WV Route 87 which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to the right front rim and tire in the amount of $460.04. Claimant's insurance deductible was $500.00.

4. Respondent agrees that the amount of $460.04 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 WV Route 87 on the date of this incident; that the negligence of Respondent was the proximate cause of the damages sustained to Claimant's vehicle; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for her loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $460.04 on this claim.

Award of $460.04.

OPINION ISSUED OCTOBER 26, 2011

EMANUEL FERGUSON
V.
DIVISION OF HIGHWAYS
(CC-10-0105)

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 2007 Ford 500 struck a hole on County Route 3, locally designated Walker Branch Road, in Huntington, Cabell County. County Route 3 is a public 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 8:15 p.m. on February 22, 2010. It was a dark and rainy evening. At the time of the incident, Claimant was driving home from watching his grandson play basketball. Claimant testified that there was traffic coming from the opposite direction when his vehicle struck a hole in his lane that was filled with water and impossible to see. As a result of this incident, Claimant's vehicle sustained damage to right front and rear rims and tires in the amount of $1,360.85. Since Claimant's insurance declaration sheet indicates that his collision deductible is $500.00, Claimant's recovery is limited to that amount.

It is Claimant's position that Respondent knew or should have known about the hole in the roadway on County Route 3 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain County Route 3 prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the condition on County Route 3 at the time of the incident. Randolph Smith, Highway Administrator two for Respondent in Wayne County, testified he familiar with County Route 3, which he described as four mile long secondary road. Smith stated that during the winter months the primary responsibility of Respondent's crews is to treat snow and ice, but only as weather permits, holes are repaired with cold patch, a temporary patching material.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the hole in the roadway on County Route 3. Since holes in the main travel portion of the road created a hazard to the traveling public, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED OCTOBER 26, 2011

KAREN DEAVERS
V.
DIVISION OF HIGHWAYS
(CC-10-0303)

Claimant appeared *pro se*.
Michael J. Folio, 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, 2010, Claimant's 1998 Chevrolet S-10 Pickup Truck struck a hole in the roadway of North Texas Road in Augusta, Hampshire County.

2. Respondent is responsible for the maintenance of North Texas Road which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to its tires in the amount of $209.82.

4. Respondent agrees that the amount of $209.82 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 North Texas 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $209.82 on this claim.

Award of $209.82.

OPINION ISSUED OCTOBER 26, 2011

CLIFFORD ROTENBERRY and JANICE ROTENBERRY
V.
DIVISION OF HIGHWAYS
(CC-10-0357)

Claimants appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2006 Ford Taurus was struck by a falling tree on US Route 52 near Kimball, McDowell County. Route 52 is a public road maintained by Respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 5:10 p.m. on May 5, 2010. US Route 52 is a two-lane paved road with a double-yellow center line and white lane lines. At the time of the incident, Claimant Clifford Rotenberry was driving north towards Welch, with his brother as a passenger in the vehicle. Mr. Rotenberry testified that as he rounded a curve a small tree fell from the right cliff bank adjacent to the road onto the front right side of his vehicle. As a result of this incident, Claimants' vehicle sustained damage to right front fender in the amount of

$1,468.53. Since Claimants' insurance declaration sheet indicates that their collision deductible is $500.00, Claimants' recovery is limited to that amount.

It is the Claimants' position that Respondent knew or should have known about the possibility of tree falls on Route 52 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain Route 52 or provide proper warning to the traveling public of a known hazardous condition prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the potential for a falling tree on Route 52 at the time of the incident. Douglas A. Berkel, an investigator for the Respondent's Legal Division, testified that he is familiar with the location of Claimants' accident. Berkel testified that Respondent's right-of-way extends 20 feet from the center line, and that the offending tree's stump was located 53 feet from the center line, and thus, outside of Respondent's right-of-way.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimants must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In cases involving falling trees or tree limbs, the Court has held that respondent is liable for dangerous trees or tree limbs on its property or rights-of-way. *Wiles v. Division of Highways*, 22 Ct. Cl.170 (1999). The general rule is that if a tree is dead and poses an apparent risk then the respondent may be held liable. However, where a healthy tree or tree limb falls as a result of a storm and causes damage, the Court has held that there is insufficient evidence upon which to justify an award. *Gerritsen v. Dept. of Highways*, 16 Ct. Cl. 85 (1986).

In the instant case, the Court is of the opinion that Respondent did not have actual or constructive notice of the fallen tree on Route 52 on or prior to the day in question. The evidence adduced at hearing indicated that the tree was not located within Respondent's right-of-way. The Court will not place a burden on Respondent with respect to trees surrounding its highways unless the tree poses an obvious hazard to the traveling public. While the Court is sympathetic to Claimants' loss, the Court has determined that there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED OCTOBER 26, 2011

DONALD CROSEN
V.
DIVISION OF HIGHWAYS
(CC-10-0534)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

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

1. On August 5, 2010, Claimant's 1991 Harley Davidson FXSTS struck a hole in the road on Myers Street in Berkeley Springs, Morgan County.

2. Respondent is responsible for the maintenance of Myers Street which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's motorcycle sustained damage to the front wheel and tire in the amount of $3,300.00. Claimant's insurance deductible was $250.00

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

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $250.00 on this claim.

Award of $250.00.

OPINION ISSUED OCTOBER 26, 2011

WV PUBLIC EMPLOYEES INSURANCE AGENCY
V.
DIVISION OF CORRECTIONS

(CC-10-0671)

B. Keith Huffman, Attorney at Law, for Claimant.
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 a Stipulation entered into by Claimant and Respondent.

Claimant seeks to recover $508,958.79 for health and life insurance benefits provided to the Respondent's employees.

In the Stipulation, Respondent admits the validity of the claim and the parties agree that an award in the amount of $438,129.71 is fair and reasonable to settle this claim.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $438,129.71.

Award of $438,129.71.

OPINION ISSUED OCTOBER 26, 2011

GREENBROOKE ASSOCIATES LLC
V.
DEPARTMENT OF ADMINISTRATION/REAL ESTATE DIVISION,
THE TAX DEPARTMENT, AND THE INSURANCE COMMISSION
(CC-11-0085)

Michael T. Chaney and Luci R. Wellborn, Attorneys at Law, for Claimant.
Stacy L. DeLong, Assistant Attorney General, and Katherine A. Schultz, Senior Deputy Attorney General, for Respondents.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and Respondents' Answers.

Claimant seeks to recover $388,488.51from Respondents for real property taxes assessed and paid by Claimant for the years 2005, 2006, 2007, and 2008, during which time Respondents were contractually obligated to pay their portion of ad valorem taxes based upon their proportionate occupancy of Claimant's building. The Tax Department owes the Claimant $119,461.89 for the years 2005, 2006, 2007, and 2008. The Insurance Commission owes the Claimant $269,026.62 for the years 2005, 2006, 2007, and 2008.

In their Answers, Respondents admit the validity of the claim as well as the amounts with respect to the property taxes paid in the total sum of $388,488.51, and state that there are no funds remaining in the agencies appropriations from the appropriate fiscal years from which the obligations can be paid. The Respondents, Tax Department and Insurance Commission, admit that $119,461.89 and $269,026.62, respectively, is fair and reasonable.

It is the opinion of the Court of Claims that the Claimant should be awarded $119,461.89 owed by the Tax Department and $269,026.62 owed by the Insurance Commission.

Award of $119,461.89 owed by the Tax Department.
Award of $269,026.62 owed by the Insurance Commission.
Total award of $388,488.51.

OPINION ISSUED OCTOBER 26, 2011

WILBURN SINER
V.
DIVISION OF HIGHWAYS
(CC-11-0165)

Claimant appeared *pro se*.
Michael J. Folio, 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 15, 2011, Claimant's 2009 Suzuki SX4 struck a hole in the roadway of Route 19 in Mercer County.

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

3 As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $636.45. Claimant's insurance deductible was $500.00 at the time of the incident.

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 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00 on this claim.

Award of $500.00.

OPINION ISSUED OCTOBER 26, 2011

JOHN HOUCK and KATHERINE M. SEIBEL
V.
DIVISION OF HIGHWAYS
(CC-11-0216)

Claimants appeared *pro se*.

C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant John Houck brought this action for vehicle damage which occurred to Claimant Katherine Seibel's 2003 Dodge Caravan when it struck rocks near the edge of the road on County Route 4/1, locally designated Ben Speck Road, in

Hedgesville, Berkeley County. County Route 4/1 is a public 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 4:20 p.m. on March 13, 2011. At the location of the incident, County Route 4/1 is an unmarked two-lane road with one lane of traffic in either direction, and a speed limit of 35 miles per hour. On the northwest side of County Route 4/1 there was a number of large sharp rocks, approximately nine (9) feet from the center of the road. Claimant John Houck was driving his daughter's van 20-25 miles per hour southwest on Route 4/1 when a vehicle approached him from the opposite direction in the middle of the road. Houck testified that the oncoming car forced him slightly off the roadway, where Seibel's van struck the pile of rocks, approximately six inches off the blacktop and twelve inches high. Houck testified that prior to the incident he had reported the rocks to the Respondent, but was informed by Respondent that the air compressor necessary to remove the rocks was broken, and, therefore, the rocks could not be moved. The photographs introduced at the hearing of this matter depict the pile of rocks marked by a white reflective warning pole, which Claimant Houck testified was not present on the day of his accident. As a result of this incident, Claimants' vehicle sustained damage to a rear passenger tire and rim in the amount of $158.95. Claimants' insurance declaration sheet indicates that their collision deductible is $500.00.

It is the Claimants' position that Respondent knew about the rocks that were dangerously close to the edge of the road on County Route 4/1, which created a hazardous condition to the traveling public, and that Respondent was negligent in failing to maintain properly County Route 4/1prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the rocks next to the road on County Route 4/1 at the time of the incident. Ronald Allen, Administrator for Respondent in Berkeley County, testified that he was familiar with the rocks on the shoulder of County Route 4/1, which he described as a highly traveled, secondary road. Allen stated that prior to this incident there were plans to remove the rocks from the side of the road, but because there is only one hammer to be used statewide there are higher priorities for its uses. Allen testified that the rocks at issue are located within the State's 30 foot right-of-way; however, a vehicle being driven within its lane on the pavement would not strike the rocks.

It is a well established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads and highways. *Adkins v. Sims*, 130

W.Va. 645; 46 S.E.2d 81 (1947). The Court has consistently held that the unexplained falling of a rock or rock debris on the road surface is insufficient to justify an award. *Mitchell v. Div. of Highways*, 21 Ct. Cl. 91 (1996); *Hammond v. Dep't of Highways*, 11 Ct. Cl. 234 (1977). In order to establish liability on behalf of Respondent, the evidence must establish that Respondent had notice of the dangerous condition posing a threat of injury to property and a reasonable amount of time to take suitable action to protect motorists. *Alkire v. Div. of Highways*, 21 Ct. Cl. 179 (1997).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the dangerous rocks next to road on County Route 4/1. Since the rocks were located within the Respondent's right-of-way, and dangerously near the edge of a heavily traveled road, creating a hazard to the traveling public, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimants should be awarded the sum of $158.95.

Award of $158.95.

OPINION ISSUED JANUARY 10, 2012

JOYCE YIRBERG
V.
DIVISION OF HIGHWAYS
(CC-09-0322)

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

PER CURIAM:

Claimant brought this action for the loss of a Border Collie, which she alleges occurred as a result of Respondent's negligent maintenance of a boundary fence located along Interstate 64. Claimant's residence, located at 584 Fairwood Road, in Huntington, Cabell County, abuts Respondent's boundary fence. Claimant asserts that the boundary fence should have been maintained so as to prevent her chattel's escape onto Interstate 64. The Court is of the opinion to award the claim for the reasons more fully stated below.

Claimant purchased her property in 1983 in large part because of a chainlink fence that surrounded the back yard.[1] This fence was set within inches of an existing Division of Highways boundary fence. Maintenance of the fence line was never an issue for Claimant. Both parties testified that the Respondent maintained the fence line in immaculate condition since the purchase of the property in 1983.

Claimant testified that at some point she became concerned about the rising occurrence of intruders coming onto her property after crossing nearby Interstate 64.[2] In response, Claimant erected a privacy fence within six inches of her original chainlink fence. The privacy fence is six feet tall and was only placed on the property to keep unwanted intruders from climbing the fence and crossing onto her property. Claimant felt assured that maintenance of both of the chainlink fences behind the newly erected privacy fence would continue, and that her beloved Border Collies would remain safely within the confines of her property.

[1]Claimant is a Border Collie breeder. The property location was believed at the time of purchase to be a perfect location because her fence and Respondent's fence gave her confidence that her dogs were protected within the property boundary; thus, her dogs were not subject to the hazards of Interstate 64.

[2]Trespassers would routinely cross Interstate 64 and jump both fences before crossing her property.

In May 2009, as Claimant peered through her kitchen window at her Border Collies roaming in the back yard, she saw that one collie had escaped through all three fences and onto Interstate 64 where it was struck and killed. The Border Collie was able to escape because both chainlink fences were in such a state of disrepair that there were visible gaping holes. Specifically, Claimant asserts that weeds and vines grew too thick along the fences and caused the hole to occur. Respondent admits to no longer maintaining the fence line after a new mowing policy was put into place in 2008 requiring Respondent to mow one deck length past the ditch line.[3] However, Claimant maintains that she relied on Respondent's maintenance of both fences, and that the sole reason for her Border Collie's death was the negligent maintenance of the chainlink fences.

Claimant offered testimony to establish that the value of her Border Collie (a female Blue Merle which had almost finished her championship through the American Kennel Club) was approximately $2,700.00 to $3,000.00[4]. The cost to repair the fencing was in the amount of $475.00.

Respondent argues that the boundary fence is designed to do precisely that–serve as a boundary marker. Respondent does not accept responsibility for negligent maintenance of a fence that was erected only to serve as a reminder for employees. Respondent's witness testified that these fences were certainly not designed to hold animals. Respondent next contends that Claimant is ultimately responsible for the maintenance of her own property, despite her reliance on the

[3]The pre-2008 mowing policy mandated the mowing of every area to which the Respondent could maneuver the mowers. Respondent maintains that employees cannot mow up to Claimant's fence because a concrete drainage culvert presents too large of an obstacle for the mowers. However, Respondent does not refute the fact that employees had no trouble maintaining the fence line prior to 2008. In fact, based on Respondent's witness's own admission, she always had the area mowed beyond the 2008 policy despite the more lax mowing standards currently in place.

[4] Claimant and her daughter, Kimberly Houston, both testified that Claimant's dog would have been expected to have twelve to fifteen (12-15) puppies during her breeding years but the Court finds this evidence to be speculative in nature and it will not base an award upon speculation.

occasions that Respondent maintained the fence line. Respondent argues that if Claimant had monitored her property more frequently she would have noticed the holes years prior to the incident; therefore, Respondent should not be responsible for Claimant's loss of her dog or damages to her fence.

The Court disagrees in part. In instances where it has been found that the State had a moral obligation to pay claimants, the Court has awarded damages based on that obligation. *See McDowell County Bd. of Education v. West Virginia Bd. of Education*, CC-84-128 (1984).

In the instant case, it is generally the duty of a landowner to maintain his or her own property. However, when a State agency undertakes that maintenance on a continuous basis, and the discontinuance of that maintenance occurs causing the landowner to suffer damages, the State has a moral obligation to pay for the damages created based on that reliance. Respondent maintained the property from approximately1983 until the privacy fence was erected. Claimant erected the fence without regard to maintenance of the chainlink fences behind her fences based on Respondent's conduct. However, the Court is also of the opinion that Claimant bears some responsibility for her loss since she failed to adequately check and maintain her own fences with sufficient care to notice the disrepair which occurred due to the growth of the weeds and vines between the fences.

Accordingly, the Court is of the opinion to make an award to Claimant in the amount of $3,175.00 reduced by Claimant's comparative negligence which the Court determined to be thirty percent (30%) for an award of $2,222.50. Award of $2,222.50.

OPINION ISSUED JANUARY 10, 2012

CHARLES L. TURNER JR.
V.
DIVISION OF HIGHWAYS
(CC-10-0160)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred while he was driving his 1997 Saturn SW2. Claimant's vehicle struck a large hole while traveling along W. Va. Route 2 near Moundsville, Marshall County. W. Va. Route 2 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 12:30 p.m. on March 8, 2010. W. Va. Route 2 is a four-lane road running through the center of Moundsville. Claimant testified that he was approaching the intersection of Fifth and Route 2 while riding in the right lane when the vehicle hit a massive hole measuring approximately three feet wide by eight inches deep. As a result, the Claimant's vehicle sustained a cracked frame which rendered the vehicle totaled. Claimant paid $2,000.00 for the vehicle approximately two months before the incident. Shortly after the incident Claimant sold the vehicle as salvage for $200.00; therefore, Claimant's total loss amounts to $1,800.00. Claimant carried only liability insurance on the vehicle at the time of the incident.

The position of the Respondent is that it did not have actual or constructive notice of the pothole in question. Respondent's witness, Rick Poe, testified that crews had done patch work along this roadway previously, but that they did not recall seeing the pothole that caused Claimant's damage.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the hole that caused damage to Claimant's vehicle. Given the apparent size of the hole and its location on the main travel portion of a heavily traveled road leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $1,800.00.

Award of $1,800.00.

OPINION ISSUED JANUARY 10, 2012

ANDREA KIRBY
V.
DIVISION OF HIGHWAYS
(CC-11-0190)

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 2007 Saturn Ion struck a hole on Earl Core Road, designated as W. Va. Route 7, near Sabraton, Monongalia County. W. Va. 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 at approximately 9:00 p.m. on March 15, 2011. W. Va. Route 7 is a two-lane, paved road with an approximate speed limit of forty to forty-five miles per hour. At the time of the incident, Claimant was driving to a business location before returning to her home in Fairmont. As she was traveling at approximately forty to forty-five miles per hour, her vehicle struck a hole on W. Va. Route 7. The hole was situated on the right portion of the roadway. The hole was located inside the white edge line. Although she normally drives into the opposite lane to avoid the holes, on the day in question, there was traffic traveling in the opposite direction. In addition, there is no shoulder on this portion of W. Va. Route 7. Claimant stated that she takes this route approximately once every two months and had noticed a different hole but she had not noticed the hole in question. Claimant notified the Division of Highways the following day of the hole in the roadway. Her right front and passenger tires ruptured due to the impact, sustaining $484.37 in damages. The amount of Claimant's insurance deductible is $500.00.

The position of Respondent is that it had two times previously made repairs to the hole. Respondent's witness testified at hearing that its employees had placed "cold patch" in the hole on March 2, 2011, and March 16, 2011. Respondent

maintains that by placing a patch on the roadway, they did not have actual or constructive notice of the condition of the roadway at the time of the incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins 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. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which Claimant's vehicle struck and that it presented a hazard to the traveling public. The size of the hole and its location on the travel portion of the road lead the Court to conclude that Respondent had notice of this hazardous condition. Thus, there is sufficient evidence of negligence to base an award. Notwithstanding the negligence of the Respondent, the Court is also of the opinion that the Claimant was negligent. In a comparative negligence jurisdiction such as West Virginia, the Claimant's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that the Claimant's negligence equals thirty-percent (30%) of her loss. Since the negligence of the Claimant is not greater than or equal to the negligence of the Respondent, Claimant may recover seventy-percent (70%) of the loss sustained.

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 $339.06.

Award of $339.06.

OPINION ISSUED JANUARY 10, 2012

DAVID R. MICHAELS
V.
DIVISION OF HIGHWAYS
(CC-10-0297)

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

PER CURIAM:

Claimant brought this action for motorcycle damage which occurred while he was driving his 2002 Harley Davidson Low Rider. Claimant's motorcycle struck a series of deep gouges while traveling along W. Va. Route 2 near Chester, Hancock County. W. Va. Route 2 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 10:00 p.m. on April 12, 2010. W. Va. Route 2 is a two-lane road with painted white edge lines and a center line. Claimant was operating his motorcycle in the turning lane along W. Va. Route 2 in order to make a right hand turn onto Old Route 30 at the time of the incident. Claimant testified that there was a sign that read "rough road"; however, he did not expect to encounter road conditions as severe as the kind that damaged his motorcycle. Claimant described the road conditions as "gouges" with sharp edges. Claimant testified that the holes were so severe that sparks were emitted from the motorcycle. As a result, the Claimant's motorcycle sustained damage to its front tire and wheel mount in the amount of $200.00. Claimant's motorcycle had insurance, which requires a $500.00. Claimant is limited to an award up to the amount of that deductible; however, Claimant's damages are well below the deductible amount.

The position of the Respondent is that it did not have actual or constructive notice that the sign was not adequate to alert motorists of the road condition.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the improperly placed sign, and that the deep depressions in the road presented a hazard to the traveling public. The size of the depressions and their location on the travel portion of the road leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to his motorcycle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $200.00.

Award of $200.00.

OPINION ISSUED JANUARY 10, 2012

JAMES A. CLEMENS and MARY F. CLEMENS
V.
REGIONAL JAIL AUTHORITY
(CC-10-0469)

Raymond Yackel, Attorney at Law, for Claimant.
Harden C. Scragg Jr., Assistant Attorney General, for Respondent.

PER CURIAM:

This claim was submitted for decision without a hearing based upon the allegations in the Notice of Claim and Respondent's Answer.

Claimant, an inmate at North Central Regional Jail at the time of the incident, seeks to recover $87.00 for lost prescription glasses that were not returned to him and an additional $87.00 for the pair purchased originally.

In its Answer, Respondent admits the validity of the claim for one pair of eye glasses and that the amount of $87.00 is fair and reasonable. The Court is aware that Respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

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

Although Claimants allege a loss for two pairs of eye glasses, the Court has determined that Claimants may make a recovery for the pair of eye glasses which are the replacement pair for those lost, and no recovery for the pair which were actually lost by Respondent.

Accordingly, the Court is of the opinion to make an award to the Claimant herein in the amount of $87.00.

Award of $87.00.

OPINION ISSUED JANUARY 10, 2012

DONALD E. BURKEY
V.
DIVISION OF HIGHWAYS
(CC-10-0535)

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

PER CURIAM:

Claimant brought this action for vehicle damage, which occurred while he was driving his 2003 Mazda Miata. Claimant's vehicle struck a series of holes while traveling along W. Va. Route 88 near Bethlehem, Marshall County. W. Va. Route 88 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 9:30 p.m. on August 3, 2010. Claimant testified that he had been out joy riding when he met an oncoming vehicle which he felt crowded him to the side of the road where his vehicle struck two holes measuring approximately three inches in diameter. As a result, the Claimant's vehicle sustained damage to its front and rear passenger tires and wheels in the amount of $1,441.92. Claimant's vehicle had insurance, which requires a $500.00 deduction; therefore, any award to Claimant is limited to the amount of the deduction. The position of the Respondent is that it did not have actual or constructive notice of the road condition that led to Claimant's damages.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the road condition, and that the general road condition poses a hazard to the traveling public's property. The frequency of the holes coupled with the knowledge that these roads are being used more heavily and the roads were not constructed for such traffic leads the Court to conclude that

Respondent was negligent. Thus, Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 10, 2012

EDWARD L. GREEN
V.
DIVISION OF HIGHWAYS
(CC-10-0561)

Claimant appeared *pro se*.
Travis E. Ellison III, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred while he was driving his 2005 Chrysler Pacifica. Claimant's vehicle struck a large hole measuring approximately six inches in depth while traveling along W. Va. Route 20 near Webster Springs, Webster County. W. Va. Route 20 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 11:30 a.m. on July 29, 2010. W. Va. Route 20 is a two-lane paved road with painted white edge lines and a center line. The hole was not located in the main travel portion of the road. The hole was located along the white edge line. Claimant stated that he saw the hole, but the hole was too close to avert impact. Furthermore, Claimant testified that he had driven this road many times a day for many years due to his work as a Webster County school bus driver. As a result, the Claimant's vehicle sustained damage to its tires and wheels in the amount of $1,489.02. Claimant's vehicle had insurance, which requires a $1,000.00 deduction; therefore, any award to Claimant is limited to the amount of the deduction.

The position of the Respondent is that it did not have actual or constructive notice that the sign was not properly placed at a safe distance. Respondent's

witness, Vincent Cogar, maintains that his labor crews were in the area patching holes before the incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the hole in question. Respondent also should have known that it presented a hazard to the traveling public. The size of the hole and its location on the travel portion of the road leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $1,000.00.

Award of $1,000.00.

OPINION ISSUED JANUARY 10, 2012

DENZIL GRAHAM
V.
DIVISION OF HIGHWAYS
(CC-10-0565)

Claimant appeared *pro se*.
Travis E. Ellison III, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred while he was driving his 2007 Jeep Compass. Claimant's vehicle struck a large hole while traveling along Coal Lick Road, also designated as County Route 22 near Albright, Preston County. County Route 22 is a public road maintained by Respondent. The Court

believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred in the morning hours sometime in June 2010. County Route 22 is a narrow, two-lane road without a painted center lines or edge lines. Claimant testified that the weather was clear on the day in question; therefore, visibility was not an issue. The hole was located in the main travel portion of the road. Claimant testified that the road is in a general state of disrepair, and that he travels the road almost daily. The current deteriorated state of the road is due to a large increase in oil and gas production traffic in the area. Claimant stated that Respondent has failed to keep up with the current pace of deterioration caused by this increase in traffic. As a result of the impact with the hole, the Claimant's vehicle sustained damage to two struts and a stabilizer bar totaling $717.73. Claimant's vehicle was insured at the time of the incident. Claimant's insurance required a $1,000.00 deduction; therefore, any award to Claimant is limited to that amount.

The position of the Respondent is that it did not have actual or constructive notice of the hole in the road despite testimony from Respondent's witness that it has been an ongoing problem for the maintenance crews to keep up with the pace of deterioration of the road due to the traffic increase. Respondent argues that there needs to be new legislation designed to resolve this issue, and that they are not an "enforcement" agency.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't 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 that caused damage to Claimant's vehicle. There may indeed be a gap in the current permitting procedures for out-of-state oil and gas producers that causes a lack of cooperation between Respondent and producers; however, this is an issue for the State agencies to resolve and not this Court. Thus, Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $717.73.

Award of $717.73.

OPINION ISSUED JANUARY 10, 2012

DENZIL GRAHAM and SHELLEY GRAHAM
V.
DIVISION OF HIGHWAYS
(CC-10-0566)

Claimants appeared *pro se*.
Travis E. Ellison III, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for vehicle damage, which occurred while Shelley Graham was driving the couple's 2003 Mitsubishi Outlander. Claimants' vehicle struck a large hole while traveling along Coal Lick Road, also designated as County Route 22, near Albright, Preston County. County Route 22 is a public road maintained by Respondent. The Court believes that Claimants should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred in the morning hours sometime in April 2010. County Route 22 is a narrow two-lane road, without a painted center line or edge lines. Claimants testified that the weather was cold and moist on the date of the incident; however, visibility was not a concern. The hole was located in the main travel portion of the road. Claimants testified that the road is in a general state of disrepair, and that she travels the road almost daily. The current deteriorated state of the road is due to a large increase in oil and gas production traffic in the area. Claimants stated that Respondent has failed to keep up with the current pace of deterioration caused by this increase in traffic. As a result of the impact with the hole, the Claimants' vehicle sustained damage to a brake caliper, which led to the rapid deterioration of the brake pads. The Claimants' vehicle also sustained damage to its struts. The damage to the vehicle totaled $619.59. Claimants' vehicle was insured at the time of the incident. Claimants' insurance required a $1,000.00 deduction; therefore, any award to Claimants is limited to that amount.

The position of the Respondent is that it did not have actual or constructive notice of the hole in the road despite testimony from Respondent's witness that it has been an ongoing problem for the maintenance crews to keep up with the pace of deterioration of the road due to the traffic increase. Respondent argues that there needs to be new legislation designed to resolve this issue, and that they are not an "enforcement" agency.

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, Claimants must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't 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 that caused damage to Claimants' vehicle. There may indeed be a gap in the current permitting procedures for out of state oil and gas producers that causes a lack of cooperation between Respondent and producers; however, this is a question for the State agencies to resolve and not this Court. Thus, Claimants may make a recovery for the damage to their vehicle.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $619.59.

Award of $619.59.

OPINION ISSUED JANUARY 10, 2012

DEBRA LONGSTRETH
V.
DIVISION OF HIGHWAYS
(CC-10-0595)

Claimant appeared *pro se*.

Travis E. Ellison III, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred while she was driving her 1999 Chrysler LHS. Claimant's vehicle struck a series of holes while

traveling along Mountaindale Road, designated County Route 11, near Bruceton Mills, Preston County. County Route 11 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 7:30 p.m. on August 19, 2010. County Route 11 is a two-lane paved road, but the road does not have painted lines. Claimant testified that the weather was clear on the date of the incident. Claimant was returning home from a camping trip in Maryland. Claimant stated that she was aware of the condition along County Route 11; however, on this occasion an oncoming car made it impossible for her to avoid the holes. Furthermore, as a result of the impact, the Claimant's vehicle sustained damage to its tires and wheels as well as extensive strut damage totaling $1,440.33. Claimant maintained liability insurance only on the vehicle.

The position of the Respondent is that it did not have actual or constructive notice that the condition of the road in question. Respondent maintains that Claimant did not call and complain about the condition; therefore, no notice was given.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the general condition of the roadway, and that the holes in the road presented a hazard to the traveling public. The size of the holes and their frequency on the travel portion of the road leads the Court to conclude that Respondent was negligent. Nevertheless, the Court also finds that Claimant was also negligent. In a comparative negligence jurisdiction such as West Virginia, Claimant's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that Claimant's negligence equals twenty-percent (20%) of her loss. Since the negligence of Claimant is not greater than nor equal to the negligence of Respondent, Claimant may recover eighty-percent (80%) of the loss sustained.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $1,152.26.

Award of $1,152.26.

OPINION ISSUED JANUARY 10, 2012

TEMPORARY EMPLOYMENT SERVICES INC.
V.
DIVISION OF TOURISM
(CC-10-0600)

Claimant appeared *pro se*.
Gretchen A. Murphy, 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 to recover $474.15 in unpaid wages from Respondent.

In its Answer, Respondent admits the validity of the claim as well as the amount, and states that Claimant was indeed not paid for 27 1/4 hours of work performed for which Claimant should have been.

It is the opinion of the Court of Claims that the claimant should be awarded the sum of $474.15.

Award of $474.15.

OPINION ISSUED JANUARY 10, 2012

DENNIS L. WARD and TERRI WARD
V.
DIVISION OF HIGHWAYS
(CC-10-0619)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred while they were traveling in their 2002 Cadillac Deville. Claimants' vehicle struck a deep hole

when Claimant Dennis L. Ward was driving their vehicle on County Route 21 near Moundsville, Marshall County. County Route 21 is a public road maintained by Respondent. The Court believes that Claimants should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 9:00 p.m. on March 15, 2010. County Route 21 is a narrow, two-lane, paved rural road with painted edge and center lines. Mr. Ward testified that the weather conditions on the day in question were dark and damp. As he approached an oncoming vehicle, he drove to the edge of the road to allow the other vehicle enough room to pass, and his vehicle struck a deep hole on the passenger side. As a result, the Claimants' vehicle sustained damage to its tires and shocks in the amount of $1,144.70. Claimants had vehicle insurance which required a $250.00 deduction; therefore, any award to Claimants is limited to the amount of the deduction.

The position of the Respondent is that it did not have actual or constructive notice of the condition of the roadway. Furthermore, Respondent's witness, Rick Poe, testified that since the incident occurred near the end of winter, the only material available to fill the hole would have been cole patch–a less than adequate remedy for holes because it is only temporary.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the conditions along County Route 21. The frequency and severity of the holes along the roadway should have been obvious to Respondent. Thus, Claimants may make a recovery for the damage to their vehicle.

It is the opinion of the Court of Claims that Claimants should be awarded the sum of $250.00.

Award of $250.00.

OPINION ISSUED JANUARY 10, 2012

ROBERT E. DUVALL and ELIZABETH C. DUVALL
V.
DIVISION OF HIGHWAYS
(CC-10-0628)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred while Mr. Duvall was driving their 2004 Ford F-350 Super Duty. Claimants' trailer rolled over and struck their vehicle while entering their driveway located along County Route 55 near West Liberty, Ohio County. County Route 55 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 11:30 a.m. on September 26, 2010. County Route 55 is a two-lane road with painted white edge lines and a center line. Respondent contracted Lash Paving Incorporated to pave County Route 55 prior to this incident. After completion of the paving project, Claimants' vehicle sustained damage when the trailer it was hauling flipped over while Mr. Duvall attempted to pull into his driveway. Claimants testified that the damage is due to an extremely steep grade leading from the highway to Claimants' driveway. In fact, Claimants characterized the condition as a severe "drop-off". Claimants stated that they measured the drop-off to be approximately fifteen inches. As a result, the Claimants' vehicle sustained extensive damage to the trailer as well as the truck's toolbox. The amount of damages totaled $4,493.66. Claimants' vehicle had insurance, which requires a $250.00 deduction; therefore, any award to Claimant is limited to the amount of the deduction.

The position of the Respondent is that it did not have actual or constructive notice that the roadway posed a risk at the time of the incident. Furthermore, Respondent's witness maintains that the contractor is responsible.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective

action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the poor workmanship that lead to this incident. The unusually steep grade leading from the roadway to Claimants' driveway leads the Court to conclude that Respondent was negligent. Thus, Claimants may make a recovery for the damage to their vehicle.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $250.00.

Award of $250.00.

OPINION ISSUED JANUARY 10, 2012

STEVEN HARDMAN
V.
DIVISION OF HIGHWAYS
(CC-10-0638)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred while he was driving his 2008 Chevrolet Cobalt. Claimant struck a series of large holes while traveling along Despard Road, designated as W. Va. Route 24/2 in Clarksburg, Harrison County. W. Va. Route 24/2 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 4:30 p.m. on February 26, 2010 as Claimant was returning home from work. W. Va. Route 24/2 is a two-lane road with painted white edge lines and a center line. Claimant testified that it had been snowing the day in question and the road was icy. The hole was located in the main travel portion of the road and the holes were not marked. Claimant testified that he knew about the holes and that the holes required him to steer into the opposite lane to miss hitting them. On the day in question, Claimant

swerved into the opposite lane; however, he was forced to reenter his lane by oncoming traffic and slid into the holes. As a result, the Claimant's vehicle sustained damage to two of his tires and rims in the amount of $557.39. Claimant's vehicle had insurance which requires a $1,000.00 deduction; therefore, any award to Claimant is limited to the amount of the deduction.

The position of the Respondent is that it did not have actual or constructive notice of the condition of the road.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the 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 holes, their frequency, and the location on the travel portion of the road leads the Court to conclude that Respondent was negligent for eighty-five percent (85%) of the damages. The Court finds that the Claimant was also negligent for fifteen percent (15%) of the damage. Thus, Claimant may make a recovery for the damage to his vehicle reduced by the amount of his comparative negligence.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $473.78.

Award of $473.78.

OPINION ISSUED JANUARY 10, 2012

BILLIE JO PYLES
V.
DIVISION OF HIGHWAYS
(CC-10-0650)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred while she was driving her 2003 Subaru Baja over a wooden bridge. Claimant struck a nail while traveling along Plum Road, designated as County Route 68/5 near Tunnelton, Preston County. County Route 68/5 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 4:30 p.m on September 5, 2010. County Route 68/5 is a narrow dirt road with a wooden bridge spanning one small portion. Claimant testified that she was visiting her sister and that this was the only route to get there. Claimant states that she does not like to visit her sister because the bridge along the route scares her due to its state of disrepair. The weather on the date of the incident was sunny. Claimant does not know the exact location of the nail that became lodged in her tire, but states that the bridge has many protruding nails. As a result, the Claimant's vehicle sustained damage to one of its tires in the amount of $124.02. Claimant's vehicle had liability insurance.

The position of the Respondent is that it did not have actual or constructive notice of the condition of the bridge along County Route 68/5.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the conditions of the wooden bridge where Claimant's vehicle incurred damage from a nail. The deteriorated condition of the bridge deck presented a hazard to the traveling public. Given the serious state of disrepair and the length of time the bridge had been there, Respondent should have known about the deteriorating condition. Thus, Claimant may make a recovery for the damage to her vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $124.02.

Award of $124.02.

OPINION ISSUED JANUARY 10, 2012

JOSHUA POLAN
V.
DIVISION OF HIGHWAYS
(CC-10-0672)

Claimant appeared *pro se*.

Travis E. Ellison III, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred while he was driving his 2006 Acura TSX. Claimant's vehicle struck a large hole while traveling along County Route 47 near West Liberty, Ohio County. County Route 47 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 3:55 p.m. on October 10, 2010. County Route 47 is a one and a half lane road without painted white edge lines or a center line. Claimant testified that when a vehicle meets an oncoming vehicle along this road, the only alternative is to slow down and drive to the right side of the road as far as possible. The hole was not located in the main travel portion of the road. The hole was located on the shoulder of the road directly in the path of Claimant when he drove to the right to pass an oncoming vehicle. Claimant stated that this particular road is in general disrepair which is in worse condition as the road gets closer to the Pennsylvania border. As a result of striking the hole, Claimant's vehicle sustained damage to its tire and wheel in the amount of $776.10. Claimant's vehicle had insurance, which requires a $500.00 deduction; therefore, any award to Claimant is limited to the amount of the deductible

The position of the Respondent is that it did not have actual or constructive notice that the there was a hole and that it posed a risk to the traveling public.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or

constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the hole along the side of County Route 47. The size of the hole on this narrow road leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 10, 2012

RACHEL S. RINEHART and MARK W. RINEHART
V.
DIVISION OF HIGHWAYS
(CC-11-0029)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when their 2002 Ford Escape struck a patch of ice and slid into an embankment on County Route 106 near Terra Alto, Preston County. County Route 106 is a public road maintained by Respondent. The Court is of the opinion to grant the claim but reduce the award amount by Claimant's comparative negligence.

The incident giving rise to this claim occurred at approximately 6:50 a.m. on January 3, 2011. It had not snowed in the area for a week; however, the weather remained below a freezing temperature. The road is a two-lane paved road and frequently traveled by Claimant Rachel Rinehart. Ms. Rinehart was maintaining the speed limit when her vehicle slipped on a patch of ice, losing control of her vehicle and crashing into an embankment. Claimant testified that she had driven this road for many years without an accident, and that Respondent knew or should have known about icy conditions on County Route 106 which created a hazard to the traveling

public. Claimant maintains that Respondent was negligent in failing to properly maintain County Road 106 prior to the incident.

As a result of this incident, Claimants' vehicle sustained damage in the amount of $982.00. Claimants insurance carry a $500.00 deductible; therefore, any recovery is limited to that deductible.

The position of the Respondent is that it did not have actual or constructive notice of ice posing a risk to the traveling public on Timber Hill Drive at the time of the incident. Respondent stated that its employees had removed snow from the road a week earlier; therefore, they had no reason to be aware of ice accumulation.

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. Dep't of Highways,* 16 Ct. Cl. 103 (1986); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, Respondent did engage in snow removal along County Route 106 prior to the incident; however, the Respondent should have taken greater care to reduce ice accumulation. Respondent could have limited the accumulation by placing various materials on the road. Especially since it is heavily traveled by school buses. However, to what degree Respondent could have known or should have known cannot be determined. Nevertheless, Claimants should be granted recovery for their damages. However, the Court is also of the opinion that Claimants bear some responsibility for their loss since she failed to take precautions due to it being the middle of winter. It is common knowledge to every West Virginian that black ice (especially on mountainous terrain) can form without warning. Thus, the Court finds Claimant also negligent for twenty-five percent (25%) of her damages.

Accordingly, the Court makes an award of $500.00 reduced by comparative negligence of twenty-five percent for a total award of $375.00.

Award of $375.00.

OPINION ISSUED JANUARY 10, 2012

NATASHA STEPHENS and ANTHONY P. STEPHENS
V.

DIVISION OF HIGHWAYS
(CC-11-0071)

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

PER CURIAM:

Claimant Natasha Stephens brought this action for vehicle damage, which occurred while she was driving her 2001 Chrysler PT Cruiser. Claimant struck a series of holes while traveling along Camden Avenue, designated as W. Va. Route 95 near Parkersburg, Wood County. W. Va. Route 95 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 1:00 p.m. on February 3, 2011. W. Va. Route 95 is a four-lane paved road separated by a grass median. Claimant testified that although it was the middle of winter at the time of the incident, there was no snow or ice accumulation. The holes were located in the main travel portion of the road and there were no warning signs or hazard paddles to alert drivers of the road conditions. Claimant stated that she knew the holes were there; however, she could not steer around the holes on this particular occasion. As a result, the Claimants' vehicle sustained damage to the front passenger wheel in the amount of $675.54. Claimants had liability insurance only on the date of this incident.

The position of the Respondent is that it did not have actual or constructive notice of the holes along W. Va. Route 95.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the holes which Claimants' vehicle struck, and that hole presented a hazard to the traveling public. The size of the holes and their location

on the travel portion of the road leads the Court to conclude that Respondent was negligent. Thus, Claimants may make a recovery for the damage to their vehicle.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $675.54.

Award of $675.54.

OPINION ISSUED JANUARY 10, 2012

BARBARA J. CROUSE
V.
DIVISION OF HIGHWAYS
(CC-11-0083)

Claimant appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred while her husband was driving her 2008 Ford F–250 Super Duty. Claimant struck a protruding road sign while traveling on County Route 85 near Van, Boone County. County Route 85 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 3:30 p.m. on February 8, 2011. County Route 85 is a two-lane road with painted lines. Thomas D. Crouse, the driver, testified that he had driven this route frequently over the years and had noticed the sign before. He also testified that he had to hit the sign in order to avoid hitting an oncoming Coca-Cola truck. There is nothing in the record to suggest that inclement weather played a part in the incident. Hitting this sign caused the vehicle to sustain damage to its right review mirror and door trim in the amount of $682.50; however, the Claimant has a $500.00 deductible; therefore, any award is limited to $500.00.

The position of the Respondent is that it did not have actual or constructive notice of the condition on County Route 85 at the time of the incident, and that Respondent did not own the retaining wall that caused the sign to protrude; therefore, Respondent maintains that the property owner is liable.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the sign in question. Furthermore, Respondent's claim that the property owner is to blame has no merit and amounts to speculation at best.[5] Thus, Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 10, 2012

SEDEDE COLLIERS
V.
DIVISION OF HIGHWAYS
(CC-11-0166)

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

PER CURIAM:

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[5]Respondent argued for a hypothetical investigative conclusion concerning the ownership of the retaining wall despite the fact that no investigation was ever conducted and no witness offered at hearing. (Transcript, page 17.)

Claimant brought this action for vehicle damage which occurred while he was driving his1995 Chevrolet Caprice. Claimant's vehicle struck a large hole located on a bridge while traveling along W. Va. Route 105 near Weirton, Hancock County. W. Va. Route 105 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 10:30 p.m. on March 16, 2011. W. Va. Route 105 is a two-lane road with painted white edge lines and a center line. Claimant testified that the conditions on the date of the incident were dark and clear. The hole is located in the main travel portion of the bridge and is so severe that rebar was visible through the twenty-four inch hole. Claimant testified that his vehicle went into the hole and he immediately drove to the side of the road to replace a tire. As a result of the incident, the Claimant's vehicle sustained damage to its tires and wheels in the amount of $549.28. Claimant carried liability insurance at the time of the incident.

The position of the Respondent is that it did not have actual or constructive notice of the conditions on the bridge in question, but a witness for Respondent testified that the poor condition of bridges in the area will be an ongoing issue in the future. Respondent's witness stated that Respondent just does not have the funds to make all necessary repairs.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the poor condition of the bridge and roadway. The size of the depression and its location on the travel portion of the road leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $549.28.

Award of $549.28.

OPINION ISSUED JANUARY 10, 2012

KYLE HESS and EARL K. HESS
V.
DIVISION OF HIGHWAYS
(CC-11-0174)

Claimants appeared *pro se*.
Travis E. Ellison III, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2009 Mercedes C300 struck a hole along Canyon Road, designated as W. Va. Route 67 near Morgantown, Monongalia County. W. Va. Route 67 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 vehicle is registered in the names of Kyle Hess and his father, Earl K. Hess.

The incident giving rise to this claim occurred at approximately 9:45 p.m. on March 12, 2011. W. Va. Route 67 is a two-lane, paved road with a speed limit of thirty-five miles per hour. At the time of the incident, claimant Kyle Hess was driving to his home from a friends house. As he was traveling at approximately thirty-three miles per hour, his vehicle struck a hole. The hole was situated on the right portion of the roadway and measured approximately eight to ten inches in depth. Claimant Kyle Hess drives on this road approximately ten times a year so he was not aware of the condition of the roadway. Claimant states that he did not contact Respondent about the hole because of the timing of the incident which occurred on a Saturday evening. Claimant's vehicle sustained damage to a tire and a rim in the amount of $555.44. Claimant's collision insurance carries a $500.00 deduction.

The position of the respondent is that it did not have actual or constructive notice of the condition of W. Va. Route 67.

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. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which Claimant's vehicle struck, and that it presented a hazard to the traveling public. The size of the hole and its location on the travel portion of the road lead the Court to conclude that respondent had notice of this hazardous condition. Thus, there is sufficient evidence of negligence to base an award. Notwithstanding the negligence of Respondent, the Court is also of the opinion Claimant was negligent. In a comparative negligence jurisdiction such as West Virginia, Claimant's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that Claimant's negligence equals ten-percent (10%) of his loss. Since the negligence of Claimant is not greater than or equal to the negligence of Respondent, Claimant may recover ninety-percent (90%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to Claimant in the amount of $500.00 which is reduced to $450.00 based upon Claimant's comparative negligence. Award of $450.00.

OPINION ISSUED JANUARY 10, 2012

TERRI ANE' BERKLEY
V.
DIVISION OF HIGHWAYS
(CC-11-0258)

Claimant appeared *pro se*.
Travis E. Ellison, III, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage, which occurred while she was driving her 2003 Lexus ES 300. Claimant's vehicle was traveling east on Raven Drive and collided with a vehicle traveling south on Davidson Avenue. Claimant alleges that there was no stop sign at what was intended to be a two way stop intersection, and that this omission caused the two vehicles to collide. The incident took place in the City of Rand, Kanawha County. This intersection is on a heavily

traveled public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 6:00 p.m. on February 24, 2011. The intersection is a two-lane paved roadway. Claimant testified that it had been raining on the day in question; however, she was still able to see clearly and followed all traffic laws to the best of her knowledge. Claimant stated that as she approached the intersection she did not see a stop sign; therefore, she proceeded through the intersection. As a result of her actions a collision occurred and the Claimant's vehicle sustained damage to its front bumper in the amount of $1,138.26. Claimant's vehicle had insurance, which requires a $500.00 deduction; therefore, any award to Claimant is limited to the amount of the deduction.

The position of the Respondent is that it did not have actual or constructive notice that the sign was not properly in place. Respondent's witness testified that he received the initial report of a missing stop sign at approximately 8:00 p.m. on the evening of the incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the missing stop sign. Given the risk created without a stop sign at an intersection on a heavily traveled road the Claimant should make a recovery for the damage to her vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 10, 2012

SAMUEL E. KERWOOD
V.
DIVISION OF HIGHWAYS

(CC-10-0263)

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 Ford Explorer struck a missing portion of a curb located along W. Va. Route 507, also designated as Cove Road, near Weirton. The incident occurred between the Brook and Hancock County line markers. W. Va. Route 507 is a road maintained by Respondent. The Court is of the opinion to award this claim for reasons more fully set forth below.

The incident giving rise to this claim occurred at approximately10:30 a.m. on March 24, 2010. W. Va. Route 507 is a two lane, paved road with painted edge and center lines. Claimant testified that while trying to locate a storefront to his left–admittedly taking his eyes off of the road for a moment. Claimant did not notice that the road had abruptly narrowed and the passenger side of his vehicle struck a jagged remains of a missing portion of the curb. Claimant testified that there were no signs indicating that the road would suddenly narrow although there were painted lines on the roadway surface which indicated a narrowing of the road. As a result of this incident, two tires were punctured, causing Claimant to replace four tires. The total of Claimant's damages equals $1,043.25. Claimant's insurance carried a $500.00 deduction on the date of the incident; therefore, any award is limit to the deductible amount.

The position of Respondent is that it did not have the duty to maintain the curb in question. Respondent claims that the responsibility lies with the City of Weirton. As support for its argument, Respondent cites a 1982 memorandum circulated to all district engineers and county superintendents stating that "[i]n the absence of a formal agreement to the contrary, no maintenance on curbs and sidewalks will be permitted." The Court is not persuaded. Respondent has not provided evidence that the City of Weirton was a recipient of the 1982 memorandum. This Court has denied claims involving curbs in the past. See *Hash v. Division of Highways*, 27 Ct. Cl. 253 (2007). However, the Court is not constrained by this ruling where the facts suggest a flagrant disregard for an open and obvious risk along the roadway.

In *Fields v. Division of Highways*, 28 Ct. Cl. 148 (2007), this Court held that the State can be liable for duties not undertaken despite the existence of an agreement between themselves and another entity holding the State harmless for nonperformance of those duties. In *Fields*, Claimant struck a manhole cover in the travel portion of the roadway. Respondent provided the Court with an agreement in which the city agreed to maintain manhole covers as well as curbs. Respondent testified that since the city agreed to maintain manhole covers it did not have the duty to remove a manhole cover from the road–even if it was an open and obvious danger to anyone traveling along the roadway. The Court's reasoning stated that "the Respondent bears the [ultimate] responsibility for the maintenance of the roads. The Respondent took this road under its system. If there is another entity such as the City of Williamson that, by agreement, assumes this responsibility, then the Respondent has the right to seek reimbursement from the City of Williamson for the damages arising from this claim."

In the instant case, Respondent provides a memorandum that does suggest that cities have a duty to maintain the curbs within city limits. Although this may be the case, the curb was in such disrepair that Respondent had an affirmative duty to correct the open and obvious risk posed by it. This duty is compounded by the fact that this particular stretch of highway is a rapidly narrowing portion of W. Va. Route 507. If Respondent had corrected the condition of the curb, it could have sought indemnification from the City of Weirton if such an agreement actually exists. Thus, Respondent is negligent for the damage caused to Claimant's vehicle.

Notwithstanding Respondent's negligence, the Court is also of the opinion that the claimant was negligent since he admittedly was looking for a storefront rather than watching the road. In a modified comparative negligence jurisdiction such as West Virginia, Claimant's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that Claimant's negligence equals ten percent (10%) of his loss. Since the negligence of Claimant is not greater than or equal to the negligence of Respondent, Claimant may recover ninety percent (90%) of the loss sustained. In accordance with the findings of fact and conclusions of law stated above, it is the opinion of the Court of Claims that Claimant should be awarded the sum of $450.00.

Award of $450.00.

OPINION ISSUED JANUARY 10, 2012

KARLA HANES
V.
DIVISION OF HIGHWAYS
(CC-11-0273)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred while her daughter was driving her 2000 Saab 9-3 Convertible. Claimant's vehicle struck a large hole while Lauren Hanses was traveling along U.S. 119 near Morgantown, Monongalia County. U.S. 119 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 1:03 a.m. on February 26, 2011. Claimant's daughter testified that on the night in question it was clear. Claimant's daughter was not familiar with the road before the time of the incident. Claimant's vehicle struck a large pothole measuring approximately three feet wide. As a result, the Claimant's vehicle sustained damage to its two right tires and wheels in the amount of $996.58. Claimant's vehicle was covered by insurance, which requires a $500.00 deduction; therefore, any award to Claimant is limited to the amount of the deduction.

The position of the Respondent is that it was aware of the condition on U.S. 119; however, Respondent's witness maintains that hole was filled with cold patch before the incident. Therefore, Respondent maintains that it did not have actual or constructive notice of the condition that led to Claimant's vehicle damage.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the hole that caused damage to Claimant's vehicle. The size of the depression and the fact that cold patch is a less than temporary fix leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to her vehicle.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 10, 2012

RONALD HAMBRICK and LINDA VINEYARD
V.
DIVISION OF HIGHWAYS
(CC-11-0285)

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

PER CURIAM:

Claimants brought this action for vehicle damage, which occurred while claimant Ronald Hambrick was driving his 2002 Toyota Avalon. Claimants' vehicle struck a large bump while traveling along W. Va. Route 31 near Deerwalk, Wood County. W. Va. Route 31 is a public road maintained by Respondent. The Court believes that Claimants should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 10:30 p.m. on April 4, 2011. W. Va. Route 31 is a two-lane road with painted white edge lines and a center line. Claimant testified that it had been raining on the day in question, and water had accumulated along the roadway. The bump was located in the main travel portion of the road and a sign was present to alert drivers of a bump in the road. Claimant stated that he saw the sign, but the sign was too close to the bump in order to effectively brace for impact. Furthermore, Claimant states that the sign is located in the middle of a sharp curve that makes it impossible to read the sign in a safe amount of time. As a result, the Claimants' vehicle sustained damage to its tires

and wheels in the amount of $269.00. Claimants' vehicle had insurance, which requires a $500.00 deduction; therefore, any award to Claimants is limited to the amount of the deduction.

The position of the Respondent is that it did not have actual or constructive notice that the sign was not properly placed at a safe distance. Furthermore, Respondent's witness maintains that the sign is visible and provides an adequate warning to drivers.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the improperly placed sign, and that the deep depression in the road presented a hazard to the traveling public. The size of the depression and its location on the travel portion of the road leads the Court to conclude that Respondent was negligent. Thus, Claimants may make a recovery for the damage to their vehicle.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $269.00.

Award of $269.00.

OPINION ISSUED JANUARY 12, 2012

JONATHAN BURSON and DONNA VAUGHAN
V.
DIVISION OF HIGHWAYS
(CC-11-0311)

Claimants appeared *pro se*. Travis E. Ellison III, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage, which occurred while he was driving his 2011 Kia Rio between the dates of March 10, 2011 and March 14, 2011, along W. Va. Route 218 near Carolina and Idamay, Marion County. State Route 218 is a public road maintained by Respondent. The Court believes that Claimant should receive an award for the reasons more fully stated below.

The incident giving rise to this claim occurred between the dates of March 10, 2011 and March 14, 2011. State Route 218 is a two-lane road with white edge lines and a center line (though the paint has all but faded completely). The Claimant testified that he was the driver between the dates in question. The Claimant was working at Wal-Mart between these dates and State Route 218 was the quickest route between work and his residence. There is not one specific hole that the Claimant alleges caused the damage; however, evidence was presented that the section of this road in question, taken as a whole, was the cause due to its numerous and unavoidable holes. As a result of these conditions, the Claimant's vehicle was damaged and required four new wheels and tires totaling $972.83. Claimant and his mother are co-owners of the vehicle and do have insurance; however, their policy does not cover the damages alleged.

The position of Respondent is that Claimant did not allege with particularity what actually caused the damage; that to allow this type of "general claim" would create bad precedent that would work to automatically award almost any future claim against Respondent. Respondent presented Michael Roncone, a highway administrator for the Division of Highways with the Marion County District Office as its witness.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, Respondent's witness admited to having actual notice of the defects along W. Va. Route 218 and that the Division of Highways had done all that it could do to fix the road in question; however, Roncone further testified that the Division of Highways does not have the right materials or necessary funding to actually repair the roadway. (Transcript, page 41.) Also, the witness has provided

numerous dates and figures concerning when Division of Highways employees actually placed "cold patch" on the holes in question. The evidence suggests, however, that cold patch is an unreliable manner for permanent repairs. Clearly Respondent had notice in this instance. Thus, Claimant's evidence is sufficient to allow a recovery for the damages to his vehicle.

It is the opinion of the Court of Claims that Claimants should be awarded the sum of $972.83.

Award of $972.83.

OPINION ISSUED JANUARY 10, 2012

KAREN RATCLIFFE and KIT RATCLIFFE
V.
DIVISION OF HIGHWAYS
(CC-11-0320)

Claimants appeared *pro se*.
Travis E. Ellison III, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred while their daughter was driving their 2002 Ford Escort. Claimants' vehicle struck a massive hole while traveling east along Interstate 70 near Triadelphia, Ohio County. Interstate 70 is a public road maintained by Respondent. The Court believes that Claimants should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 4:30 p.m. on April 22, 2011. Interstate 70 is a four-lane road with painted white edge lines and a grass median that evenly splits the four lanes. The speed limit along Interstate 70in the area of the incident at that time was 55 miles per hour. While driving to her first day of work Claimants' daughter entered the right lane and struck a massive hole. When the vehicle struck the hole in the paved portion of the road, Claimants' daughter testified that she lost control of the vehicle which then left the interstate and came to rest against a rock. Claimants' daughter testified that she saw the hole before striking it; however, she was unable to safely maneuver around it. Claimants' daughter stated that she drives this road frequently; however, to her knowledge this

hole was not present on any of those previous trips. Claimant, Kit Ratcliffe, came to the scene shortly after the accident and he testified that it had been lightly raining on the day in question; however, no water had accumulated along the roadway. He also observed the large hole in the pavement and the location of the vehicle off the interstate and against the rock. As a result, the Claimants' vehicle sustained a total loss with damages totaling $4,813.00. Claimants carried only liability insurance on the vehicle.

The position of the Respondent is that it did not have actual or constructive notice of the hole in question at the time of this incident. Respondent did acknowledge that its employees were aware of the defective condition and attempted to maintain it with cold patch material, a temporary patching material which comes out of large holes quite easily with heavy traffic and rainy weather. In fact, employees came to the scene of this accident shortly after Claimants' daughter encountered this hazardous condition to fill the hole with cold patch.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the large hole and that the condition of the road presented a hazard to the traveling public. The fact that this was a very large and deep hole on a heavily traveled interstate places Respondent in the position of having to be constantly aware of the danger posed to the traveling public. The Court is of the further opinion that there was not adequate notice to the travelers on I-70 at this location to warn travelers of this hazardous condition.

The size of the depression and its location on the travel portion of the road leads the Court to conclude that Respondent was negligent. Thus, Claimants may make a recovery for the damage to their vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $4,813.00.

Award of $4,813.00.

OPINION ISSUED JANUARY 10, 2012

CHRISTI A. SCHROYER
V.
DIVISION OF HIGHWAYS
(CC-11-0349)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred while she was driving her 2010 Subaru Impreza. Claimant struck a large hole while traveling along Custer Hollow Road near the entrance to the FBI Complex in Harrison County. Custer Hollow Road, designated by Respondent as County Route 24/27, is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 8:15 p.m. on April 21, 2011. Custer Hollow Road is a flat, two-lane road with painted lines. Claimant testified that she was driving between twenty-five and twenty-seven miles per hour when her vehicle struck a large hole in the road. The hole was located in the main travel portion of the road. Claimant stated that she did not see the hole until she came directly upon it and she could not swerve to avoid it due to oncoming traffic. As a result, the vehicle's tires ruptured and her right front wheel bent. Damages to the vehicle totaled $876.37, which Claimant paid out-of-pocket rather than filing a claim with her insurer. Claimant's insurance requires a $500.00 deductible; therefore, any award to the Claimant is limited to $500.00.

The position of the Respondent is that it did not have actual or constructive notice of the condition on Custer Hollow Road at the time of the incident. Respondent presented a witness at hearing to testify as to the general description of the roadway in question and the FBI's plans to secure its own funding for repairs resulting from increased construction traffic.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or

constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the hole which Claimant's vehicle struck. It is immaterial whether the FBI was performing new construction on the premises and intended to secure its own funding for repairing the roadway. The conversation between the witness and the FBI Complex was sufficient to establish that Respondent had constructive notice of the conditions on Custer Hollow Road which posed a hazard to the traveling public.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 10, 2012

RICHARD ASHMORE
V.
DIVISION OF HIGHWAYS
(CC-11-0364)

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

PER CURIAM:

Claimant brought this action for vehicle damage, which occurred while his wife was driving his 2008 Subaru Legacy. Claimant's wife was driving his vehicle when it struck a large hole while she was traveling along Gregory Run Road, designated as County Route 9 near Wilsonburg, Harrison County. County Route 9 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 9:00 p.m. on March 16, 2011. County Route 9 is a two-lane road with a painted center line. Claimant's wife testified that she was maintaining the speed limit. She also testified that she is aware of the holes and usually can swerve into the opposite lane to avoid

them. However she stated that oncoming traffic prevented her from doing so on this occasion. The hole was located in the main travel portion of the road and was not marked to alert drivers. She further stated that she could not have avoided this particular hole. As a result, the Claimant's vehicle sustained damage in the amount of $434.07. Claimant's vehicle had insurance, which requires a $500.00 deductible; therefore, any award to Claimant is limited to the amount of the deductible.

The position of the Respondent is that it did not have actual or constructive notice of the condition of the road

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the 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 on the travel portion of the road leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $434.07.

Award of $434.07.

OPINION ISSUED JANUARY 10, 2012

BRYAN FORD
V.
DIVISION OF HIGHWAYS
(CC-11-0391)

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

PER CURIAM:

Claimant brought this action for vehicle damage, which occurred while he was driving his 2008 BMW 335XI. Claimant struck a large hole while traveling along County Route 50/32 near Bridgeport, Harrison. County Route 50/32 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 10:30 p.m. on May 7, 2011. County Route 50/32 is a two-lane road with painted white edge lines and a center line. Claimant testified that he had not taken this particular road in many years so he was not aware that a hole was on the roadway. The hole was located in the main travel portion of the road and there was no warning sign or hazard paddle to alert drivers. As a result, the Claimant's vehicle sustained damage to one tire and two wheels in the amount of $445.17. Claimant's vehicle had insurance, which requires a $500.00 deduction; therefore, any award to Claimant is limited to the amount of the deduction.

The position of the Respondent is that it had already placed "cold patch" along County Route 50/32 and it did not have actual or constructive notice of the hole that Claimant's vehicle struck.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the hole which Claimant's vehicle struck, and that hole presented a hazard to the traveling public. The size of the hole, its location on the travel portion of the road, and the fact that this is the only road leading to the airport leads the Court to conclude that Respondent was negligent in its maintenance of the road. Thus, Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $445.17.

Award of $445.17.

OPINION ISSUED JANUARY 10, 2012

DELORIS LANDIS and RONALD LANDIS
V.
DIVISION OF HIGHWAYS
(CC-11-0396)

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

PER CURIAM:

Claimants brought this action for vehicle damage, which occurred when Claimant Deloris Landis was driving their 2010 Honda Fit. Claimants' vehicle struck a large hole while Mrs. Landis traveling along W. Va. Route 20 in Clarksburg, Harrison County. W. Va. Route 20 is a public road maintained by Respondent. The Court believes that Claimants should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 6:00 p.m. on April 12, 2011. W. Va. Route 20 is a one-way street with painted white edge lines at the location where this incident occurred. It becomes a four-lane road beyond the scene of this incident. Mrs. Landis testified that it had been raining on the day in question, and water had accumulated along the roadway. As a result of the water on the roadway, she stated that she was not able to see the defective condition around a manhole located in the main travel portion of the road. It was not marked with any warning signs. As a result, the Claimants' vehicle sustained damage in the amount of $458.88. Claimants carried vehicle insurance which requires a $500.00 deductible; therefore, any award to Claimants is limited to the amount of the deductible.

The position of the Respondent is that it had no actual or constructive notice of the condition of the road. Now that the condition has been brought to Respondent's attention, however, Respondent's witness testified that there is nothing that they can do about manhole covers that are not extended to be level with resurfaced roads.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective

action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the condition of the deterioration at the site of the manhole which Claimants' vehicle struck, and that the condition presented a hazard to the traveling public. The Court concludes that Respondent was negligent for its maintenance of this area of the roadway . Thus, Claimants may make a recovery for the damage to their vehicle.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $458.88.

Award of $458.88.

OPINION ISSUED JANUARY 10, 2012

MICHAEL A. SMITH
V.
DIVISION OF HIGHWAYS
(CC-11-0515)

Claimant appeared *pro se*.
Travis E. Ellison III, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage, which occurred while he was driving his 2007 Dodge Ram 1500. Claimant's vehicle struck a large hole while he was traveling along Old W. Va. Route 53, just off of W. Va. Route 100 approximately two-tenths of a mile past the railroad track near Maidsville, Monongalia County. Old W. Va. Route 53 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 6:35 a.m. on July 26, 2011. Old W. Va. Route 53 is a two-lane road with painted white edge lines and a center line. Claimant states that the weather was clear on the morning of the incident. The hole was located near the edge of the road. Claimant stated that he had to take evasive action to avoid coming into contact with a coal truck that was on

his side of the road. Claimant's vehicle then struck the hole along the side of the road. As a result, the Claimant's vehicle sustained damage to one tire and two wheels in the amount of $1,046.12. Claimant carried liability insurance on the vehicle at the time of the incident.

The position of the Respondent is that the cause of this accident was the oncoming coal truck which placed Claimant in the position of having to drive to the far right side of the his lane of travel where his vehicle encountered the hole. The Court disagrees that Claimant does not have a cause of action against the Respondent because the whole travel lane is necessary for use by the traveling public; therefore, the travel lane and the berm should be maintained properly by 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 v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the hole. This leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $1,046.12.

Award of $1,046.12.

OPINION ISSUED JANUARY 10, 2012

CHERYL JARVIS
V.
DIVISION OF HIGHWAYS
(CC-11-0564)

Claimant appeared *pro se*.
Travis E. Ellison III, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred while she was driving her 1998 Chevrolet Malibu. Claimant's vehicle struck two large holes while traveling along Old W. Va. Route 250 near Farmington, Marion County. Old W. Va. Route 250 is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 5:30 p.m. on May 12, 2011. Old W. Va. Route 250 is a two-lane road with painted white edge lines and a center line. Claimant testified that the weather was clear on the day in question. The incident occurred as she was driving to visit her daughter. The holes were located in the main travel portion of the road. Claimant stated that the holes had to have been very large because she noticed paint from her vehicle along the perimeter of the hole. As a result, the Claimant's vehicle sustained damage to its tires and wheels in the amount of $508.43. Claimant carries liability insurance on her vehicle.

The position of the Respondent is that it did not have actual or constructive notice that there were two large holes and that they posed a risk to the public.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the two holes. The size of the holes and the location on the travel portion of the road leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to her vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $508.43.

Award of $508.43.

OPINION ISSUED JANUARY 10, 2012

CHRISTOPHER RIFFE
V.
DIVISION OF HIGHWAYS
(CC-07-0312)

R. Chad Duffield, 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 or around October 14, 2005, Christopher Riffe was a guest passenger in a motor vehicle being driven by Jeffrey Lane north on U.S. Route 52 in or near Hanover in Wyoming County.

2. Respondent was responsible for the maintenance of U.S. Route 52 in or near Hanover in Wyoming County, which it failed to maintain properly on the date of this incident.

3. While Mr. Lane was operating his vehicle in or near Hanover, he lost control of the vehicle which traveled off the road onto the berm, returned to the road and then collided with a vehicle traveling south on U.S. Route 52.

4. Claimant alleges that on the day of Mr. Lane's accident, the berm at the location where the accident occurred on U.S. Route 52 was in a defective condition, that the defective condition of the berm caused or contributed to Mr. Lane's accident and that Respondent either knew or should have known of the condition of the berm at that location.

5. Under the specific facts and circumstances of this claim and for purposes of settlement of said claim, Respondent does not dispute the allegations.

6. Christopher Riffe was injured as a result of the accident and required medical treatment for his injuries.

7. Both Claimant and Respondent believe that in this particular incident and under these particular circumstances that an award of One Hundred Sixty-Five Thousand Dollars ($165,000.00) would be a fair and reasonable amount to settle this claim.

8. The parties to the claim agree that the total sum of One Hundred Sixty-Five Thousand Dollars ($165,000.00) is to be paid to Claimant and will be a complete settlement of all matters in controversy in this claim and full and complete satisfaction of any and all past and future claims Claimant may have against Respondent arising from the matters described.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of U.S. Route 52 on the date of this incident; that the negligence of Respondent was the proximate cause of the injuries sustained by Claimant; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for damages.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $165,000.00 in this claim.

Award of $165,000.00.

OPINION ISSUED JANUARY 10, 2012

AT&T
V.
THE WEST VIRGINIA STATE SENATE
(CC-11-0652)

Claimant appearing *pro se.*
Rita Pauley, Counsel to the Majority Leader, 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 to recover $526.23 for telephone calling card services provided to Respondent in prior fiscal years, but for which Claimant has not received payment.

In its Answer, Respondent admits the validity of the claim as well as the amount of $526.23. Respondent states that there were sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid. Claimant agrees that the amount of $526.23 is fair and reasonable, and is willing to accept it as full satisfaction for this claim.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $526.23.

Award of $526.23.

OPINION ISSUED JANUARY 10, 2012

RONCEVERTE VOLUNTEER FIRE DEPARTMENT
V.
WEST VIRGINIA STATE FIRE MARSHAL
(CC-11-0714)

Mark D. Moreland, Attorney at Law, for Claimant.
Stacy L. DeLong, 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 to recover $10,238.49 for its portion of state-issued funds for volunteer fire departments operating in good standing. Claimant alleges that Respondent failed to make a timely report to the State Treasurer indicating that Claimant was in good standing and that this failure kept Claimant from receiving funds for the second quarter of 2011.

In its Answer, Respondent admits the validity of the claim as it was timely filed, and Respondent further agrees to the amount with respect to the funds not dispersed, and states that there were sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $10,238.49.

Award of $10,238.49.

OPINION ISSUED JANUARY 19, 2012

ROY J. MCDANIEL
V.
DIVISION OF HIGHWAYS
(CC-11-0108)

Claimant appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant Roy J. McDaniel brought this action for vehicle damage which occurred when his 2001 Toyota Camry XLE struck a hole on Kanawha Turnpike in South Charleston, Kanawha County. Kanawha Turnpike is a public 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 7:10 a.m. on January 4, 2011. Kanawha Turnpike is a heavily traveled two-lane, paved road with one lane of traffic in each direction. At the time of the incident, Claimant was returning to his home after dropping his daughter off at school. Claimant testified that it was a dark, cold morning and that the road appeared to have a light frost on it. Claimant was driving straight on Kanawha Turnpike, near the Spring Hill Drive intersection, when the car in front of him swerved. Claimant testified that he tapped on the brakes, but was unable to prevent his vehicle from striking a long hole located in the travel portion of the roadway. As a result of this incident, Claimant's vehicle sustained damage to the right front and rear wheels, tires, and struts. Based on the recommendation of his mechanic, Claimant replaced all four wheels, tires, and struts, and had his tires balanced and wheels realigned for a total of $1,947.91. Claimant's vehicle had liability insurance only.

It is Claimant's position that Respondent knew or should have known about the hole on Kanawha Turnpike which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain Kanawha Turnpike prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the condition on Kanawha Turnpike at the time of the incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the condition on Kanawha Turnpike. Since a large hole in the travel portion of a heavily traversed road created a hazard to the traveling public, the Court finds Respondent negligent. However, Respondent may only

be held liable for the actual damage caused by its negligence. Thus, Claimant may only recover the cost to repair or replace the right front and rear wheels, tires, and struts, in the amount of $1,069.61.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $1,069.61.

Award of $1,069.61.

OPINION ISSUED JANUARY 19, 2012

NICHOLAS S. PRESERVATI
V.
BOARD OF COAL MINE HEALTH AND SAFETY
(CC-11-0444)

Claimant appeared *pro se*.
Hard C. Scragg Jr., Assistant Attorney General, for Respondent.

PER CURIAM:

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

Claimant seeks to recover $12,556.00 in attorney fees for legal services rendered to Respondent.

In its Answer, Respondent admits the validity of the claim as well as the amount with respect to the services rendered in the sum of $12,556.00, and states that there were sufficient funds with which the invoices could have been paid.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $12,556.00.

Award of $12,556.00.

OPINION ISSUED JANUARY 30, 2012

JAMES A. MAYS and BONNIE J. FRIEND
V.
DIVISION OF HIGHWAYS
(CC-11-0388)

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

PER CURIAM:

Claimants brought this action for vehicle damage, which occurred while claimant James A. Mays was driving his 2007 Chevrolet Silverado pickup truck. Claimant struck a large hole while traveling along County Route 11 near Mannington, Marion County. County Route 11 is a public road maintained by Respondent. The Court believes that Claimants should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 4:30 p.m. on May 23, 2011. County Route 11 is a two-lane road with painted white edge lines and a center line. Claimant testified that it had been raining on the day in question, and water had accumulated along the roadway, which caused him to hit the hole. The hole was located in the main travel portion of the road and was not painted orange to alert drivers. Claimant stated that he did not see the hole before the vehicle struck it. As a result, the Claimant's vehicle sustained damage to one of his tires in the amount of $238.50.

The position of the Respondent is that it had already placed "cold patch" along County Route 11 and did not have actual or constructive notice of the hole Claimant struck.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the hole which Claimants' vehicle struck, and that hole presented a hazard to the traveling public. The size of the hole and its location on the travel portion of the road leads the Court to conclude that Respondent was negligent. Thus, Claimants may make a recovery for the damage to their vehicle.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $238.50.

Award of $238.50.

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OPINION ISSUED MARCH 23, 2012

HENDERSON TRANSFER LLC
V.
DIVISION OF HIGHWAYS
(CC-09-0588)

Robert E. Barrat, Attorney at Law, for Claimant.
Travis E. Ellison III, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage when a tractor-trailer owned by Claimant struck a rock while traveling in the northbound lane of W. Va. Route 340 near Harpers Ferry, Jefferson County. W. Va. Route 340 is a public road maintained by Respondent. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred at approximately 2:00 a.m. on September 25, 2009. W. Va. Route 340 is an uncompleted four-lane road that bottlenecks into a two-lane road along various stretches of the highway. This particular incident occurred along a stretch of two-lane road. At the time of the incident, Claimant's driver, Lloyd Boyer, was delivering a load of lumber to its purchaser in Whitewash, Maryland. Mr. Boyer testified that as he was traveling along W. Va. Route 340 he suddenly came across a rock situated in the middle of the travel portion of the roadway. Mr. Boyer had no time to safely react to the presence of the rock, and consequently struck the rock with the Claimant's truck. Mr. Boyer maintains that he has driven this particular route for at least five years on a daily basis and is familiar with the potential for rock falls in the area. As a result of the incident, Claimant's tractor-trailer sustained extensive damage to its motor, oil pan, and tires in the amount of $26,502.50.

The position of the Respondent is that it did not have actual or constructive notice of the rock situated in the roadway along W. Va. Route 340. Nathan Ware, Crew Supervisor for Respondent in Jefferson County, testified that he is familiar with W. Va. Route 340 but could not recall a particular incident in his thirteen years of employment in which a significant rock fall has occurred along the road. Mr. Ware

testified that Respondent is aware of the potential for rock falls along W. Va. Route 340 and attempted to warn drivers by placing "falling rock" signs along the location.

It is a well-established principle of law in West Virginia that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645; 46 S.E.2d 81 (1947). To hold Respondent liable, Claimant must establish by a preponderance of the evidence that 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 a sudden and unexplained rock fall 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 this case, the dangerous condition at issue is the presence of a rock in the travel portion of the roadway. Respondent's tractor-trailer was not struck by falling rocks while traveling along the road–the tractor-trailer *struck* a *stationary* rock. Respondent was given no notice of this condition and had no reason to know of the condition despite the fact that Respondent admittedly was aware of the *possibility*–no matter how remote–of a rock fall in the area.

Based on a clear lack of notice to Respondent, this Court is of the opinion to and does hereby deny this claim.

Claim disallowed.

OPINION ISSUED MARCH 23, 2012

ROBERT ELLINGTON
V.
DIVISION OF HIGHWAYS
(CC-10-0422)

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. Respondent is responsible for the maintenance of West Virginia Route 94 (Lens Creek Road) in or near the community of Hernshaw, which is located in Kanawha County, West Virginia.

2. Claimant alleges that due to the poor maintenance of a culvert underneath West Virginia Route 94, water backed up and flooded the basement of his home on May 14, 2010.

3. As a result of the flood on May 14, 2010, Claimant suffered the damage and loss of a hot water tank, sump pump, Christmas decorations and other items of personal property that were stored in the basement.

4. Under the specific facts and circumstances of this claim and for purposes of settlement of said claim, Respondent does not dispute the allegations contained in Paragraph 2 of this stipulation.

5. Both the Claimant and Respondent agree that in this particular incident and under these particular circumstances that an award of One Thousand Five Hundred Dollars ($1,500.00) would be a fair and reasonable amount to settle this claim.

6. The parties to this claim agree that the total sum of One Thousand Five Hundred Dollars ($1,500.00) to be paid by Respondent to the Claimant in Claim No. CC-10-0422 will be a full and complete settlement, compromise and resolution of all matters in controversy in said claim and full and complete satisfaction of any and all past and future claims Claimant may have against Respondent arising from the matters described in said claim.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $1,500.00 in this claim.

Award of $1,500.00.

OPINION ISSUED MARCH 23, 2012

ROBERT BOOKER
V.
DIVISION OF HIGHWAYS
(CC-10-0616)

Shannon M. Bland, Attorney at Law, for Claimant.
Travis E. Ellison III, Attorney at Law, for Respondent.

MCCARTHY, JUDGE:

Claimant, Robert Booker, brought this action for medical bills and pain and suffering for injuries sustained while attempting to traverse the Dunbar Bridge on foot. The Dunbar Bridge is located between South Charleston and Dunbar in Kanawha County, and is a public road maintained by Respondent. The Court believes that Claimant should receive an award in this claim for reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 10:45 p.m. on November 7, 2008.[6] On the date in question, the Claimant had spent the entire day with a close friend, Ms. Herbert. Ms. Herbert testified that the Claimant arrived at her house at approximately 11:30 a.m. to watch television and "visit" and remained at her house until she transported him to the bus stop located under the Dunbar Bridge at approximately 10:30 p.m. The Claimant testified that upon exiting Ms. Herbert's vehicle he proceeded on foot up the stairway to the top of the Dunbar Bridge. As he turned the corner to enter the sidewalk area, the Claimant lost his footing on a damaged section of the sidewalk. The Claimant then fell from the sidewalk onto the travel portion of the roadway where he was narrowly missed by oncoming traffic. Due to the severity of his fall, the Claimant sustained several injuries, some of which are permanent, to his back and hip as well as his left arm. The Claimant has also undergone extensive physical therapy for his injuries. The Claimant's medical bills total $7,983.35.

Respondent admits that the sidewalk area of the Dunbar Bridge is its responsibility, and does not dispute that it had actual notice of the condition prior to the incident. The position of the Respondent is that the Claimant also had actual notice of the condition of the sidewalk, before the incident because he routinely traversed it on his many visits to Ms. Herbert's residence. Therefore, Respondent

[6]There is some confusion as to whether November 7, 2008, is the correct date of the incident. The best that the Court can adduce from the testimony provided at the hearing is that the incident occurred before midnight on Friday November 7, 2008. However, the Claimant did not seek medical attention until Sunday November 9, 2008.

maintains that any award to the Claimant should be decreased dollar for dollar based on the Claimant's comparative fault.

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). Therefore, in order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect, and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986). "Actual notice" is based on direct evidence known by a person or entity while "constructive notice" is defined as "[n]otice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of . . .; notice presumed by law to have been acquired by a person and thus imputed to that person." *Mace v. Ford Motor Co.*, 221 W. Va. 198, 653 S.E.2d 660 (2007) (citing *Black's Law Dictionary* at 1090 (8th Ed. 2004)).

In the instant case, even without the Respondent's admission that it had notice of the condition, the Court is of the opinion that Respondent had actual notice of the deplorable condition of the bridge's sidewalk. This condition was particularly dangerous due to the size of the condition and exposed rebar. Respondent's witness, Kevin Quinlan, an investigator for Respondent with many years of experience testified that he ". . . traverse[s] that road in the course of [his] investigations of other cases, and because of this case [he] drove across that road several times . . ." Furthermore, pictures taken two years after the date of the incident by Respondent show that this dangerous condition has still not been corrected. Based on these facts, the Court concludes that Respondent did have actual notice of the dangerous condition that caused Mr. Booker's injuries; therefore, Respondent was negligent.

Despite Respondent's own negligence, the Court is also of the opinion that Mr. Booker at least knew or should have known about the dangerous condition of the sidewalk based on the frequency that he crossed the Dunbar Bridge. In a comparative negligence jurisdiction such as West Virginia, the claimant's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that the Claimant's negligence equals twenty-percent (35%) of his loss. Since the negligence of the Claimant is not greater than or equal to the negligence of the Respondent, the Claimant may recover eighty-percent (65%) of the loss sustained. Therefore, the Court agrees that an award of $10,378.03 is a fair and reasonable amount to compensate Mr. Booker for his injuries.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $10,378.03.

Award of $10,378.03.

OPINION ISSUED MARCH 23, 2012

LUTHER DEMPSEY dba DEMPSEY
ENGINEERING COMPANY
V.
DIVISION OF HIGHWAYS
(CC-11-0438)

Claimants appeared *pro se*.

Travis E. Ellison III, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2011 Chevrolet Silverado was struck by a falling tree along County Route 57, also designated as Collins Ferry Road, near Morgantown, Monongalia County. County Route 57 is a road maintained by Respondent. The Court is of the opinion to award this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred at approximately 2:00 p.m. on April 4, 2011. County Route 57 is a two-lane paved road with painted edge lines. Claimant testified that while driving in the southbound lane just past the intersection with Aspen Street, a tree fell and hit the cab of his truck. Claimant testified that the tree was large and was noticeably rotten. Due to the force with which the tree struck Claimant's truck cab, the estimated cost of repair is in the amount of $887.00. Claimant carried liability insurance only on his vehicle at the time of the incident.

The position of Respondent is that it did not have the duty to maintain the right of way in question. Respondent claims that responsibility lies with the City of Morgantown. As support for its position, Respondent cites a 1982 inter-agency memorandum sent to all district engineers and county superintendents stating that "[i]n the absence of a formal agreement to the contrary, no maintenance on curbs and sidewalks will be permitted." However, the Court is not persuaded that the city was responsible in this instance.

Respondent has not provided evidence that the City of Morgantown was a recipient of the 1982 memorandum of understanding or that they made any kind of collateral agreement with Respondent to assume maintenance of the Respondent's right of way inside of city limits. This Court has denied claims in the past involving damage caused by curbs and other areas claimed to be maintained by a municipality. *See Hash v. Division of Highways*, 27 Ct. Cl. 253 (2007). However, the Court is not constrained by these decisions when the facts of a claim suggest a flagrant disregard for an open and obvious risk along the roadway.

In *Fields v. Division of Highways*, 28 Ct. Cl. (2007) this Court held that the State can be liable for duties not undertaken despite the existence of an agreement between themselves and another entity holding the State harmless for not performing those duties. In *Fields*, Claimant struck a manhole cover in the travel portion of the roadway. Respondent provided the Court with an agreement in which the city agreed to maintain manhole covers as well as curbs. Respondent testified that since the city agreed to maintain manhole covers, and that it did not have the duty to remove a manhole cover from the road–even if it was an open and obvious danger to anyone traveling along the roadway. This Court stated that "the Respondent bears the [ultimate] responsibility for the maintenance of the roads. The Respondent took this road under its system. If there is another entity such as the City of Williamson that, by agreement, assumes this responsibility, then the Respondent has the right to seek reimbursement from the City of Williamson for the damages arising from this claim."

In the instant case, Respondent provides a memorandum that, although very old, does suggest that municipalities have a duty to maintain the curbs within city limits. However, Respondent has not provided the Court with proof of the city's assumption of maintenance responsibilities. Even if Respondent can show that there was an agreement with the city, the right of way and the tree located on it was in such a poor condition that Respondent had an affirmative duty to correct the open and obvious risk posed by it. If Respondent had corrected the condition of the right of way, it could have sought indemnification from the City of Morgantown if such an agreement actually exists.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $887.00.

Award of $887.00.

OPINION ISSUED MARCH 23, 2012

IKON MANAGEMENT SERVICES
V.
WEST VIRGINIA CORRECTIONAL INDUSTRIES
(CC-12-0075)

Claimant appeared *pro se*.
Charles P. Houdyschell Jr., Senior Assistant Attorney General, appeared 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 to recover $118,230.00 for services rendered to Respondent and documented by seven unpaid invoices sent between June and December 2011.

In its Answer, Respondent admits the validity of the claim as well as the amount with respect to the services rendered in the sum of $118,230.00, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid. Respondent states that these payments were not made due to changes in the Quick Copy Operation and that the Division of Purchasing would not permit an additional extension.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $118,230.00.

Award of $118,230.00.

OPINION ISSUED APRIL 16, 2012

VICKY L. MEANS
V.
DEPARTMENT OF ADMINISTRATION/
DIVISION OF REAL ESTATE
(CC-12-0034)

Claimant appeared *pro se*.
Stacy L. DeLong, 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 to recover $15,561.39 for wages owed upon termination of employment.

In its Answer, Respondent admits the validity of the claim as well as the amount with respect to the services rendered in the sum of $11,534.04, and states that there were sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid. Respondent denies the claim with respect to the remaining $4,027.35. Claimant has agreed to waive her claim for the remaining $4,027.35.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $11,534.04 and that the amount is fair and reasonable.

Award of $11,534.04.

OPINION ISSUED APRIL 16, 2012

DAVID R. KARR JR.
V.
WEST VIRGINIA PUBLIC DEFENDER SERVICES
(CC-11-0036)

Claimant appeared *pro se*.

L.Wayne Williams, Assistant Attorney General, for Respondent.

PER CURIAM:

Claimant, David R. Karr Jr., an Attorney at Law duly licensed in the State of West Virginia, brought this action for $20,851.89 in unpaid legal fees. Respondent is the agency responsible for paying vouchers for legal services provided by appointed attorneys but denied Claimant's right to receive compensation in this instance. The Court believes that this claim should be granted, in part, and denied, in part, for the reasons more fully stated below.

This claim involves twelve (12) vouchers for legal services provided by the Claimant encompassing a period of fifteen years. It was deduced at hearing that the vouchers can be separated into two batches for ease of reference.

The first batch contains one voucher and involves representation throughout the mid to late 1990's of a client named "Webster." The last date of legal services for this representation was July 11, 2000. Claimant testified that he then submitted this voucher to now retired Kanawha County Circuit Court Judge A. Andrew MacQueen

seeking that court's approval before submitting it to Respondent for payment. Claimant maintains that he was unable to obtain approval from Judge MacQueen because the voucher's were lost after submission to the court. Claimant attempted on numerous occasions to locate the submitted voucher after learning of Judge MacQueen's retirement but to no avail. Approximately nine years later, Claimant found a copy of the voucher and submitted it directly to Respondent for payment–hoping to conform to the statutory time limit.

Batch two was submitted contemporaneously with batch one and contained numerous vouchers for representations made between the dates of August 3, 2006 and January 20, 2009. Only three vouchers were paid by Respondent, because Respondent determined the remaining vouchers to be more than ninety days old.

Respondent argues that Claimant is not entitled to receive payment for any of the vouchers submitted, because they were submitted after the statutory time period. Nevertheless, Claimant maintains that he should be paid for all of the vouchers because he was not aware of any changes to the time limitation. Also, specific to batch one, Claimant argues that he should not be penalized for an error on the part of the circuit court.

The West Virginia Code created payment procedures for "panel attorneys" and allowed the executive director to establish submission guidelines. The statute expressly states time limitations for the submission of vouchers. W. Va. Code § 29-21-13a(a) states that

> claims for fees and expense reimbursements shall be submitted to the appointing court on forms approved by the executive director. The executive director shall establish guidelines for the submission of vouchers and claims for fees and expense reimbursements under this section. Claims submitted more than ninety calendar days after the last date of service shall be rejected, unless for good cause, the appointing court authorizes in writing an extension: Provided, That claims where the last date of service occurred prior to the first day of July, two thousand eight, shall be rejected unless submitted prior to the first day of January, two thousand nine.

This language was added by a 2008 amendment to this code section.

In the instant case, Claimant argues that batch one involving client Webster should be paid, because the Kanawha County Circuit Court lost the

voucher that he submitted for approval. The statute states that "[c]laims submitted more than ninety calendar days after the last date of service shall be rejected, *unless for good cause* . . . ." § 29-21-12a(a) (emphasis added). The Court is of the opinion that when an attorney submits a voucher for approval to a judge as prescribed in the statute, and the voucher subsequently becomes lost through no fault of the attorney, there exists "good cause" to toll the ninety day time period.

In reviewing the record as it pertains to batch two, the Claimant argues that he was not aware of the statutory amendments of 2008, which changed the time period for submitting vouchers from four years to ninety days. The Court is not persuaded by this argument. While a laymen may find "ignorance of law" to be a arguable defense in some cases of equity and garner some sympathy among jurists, a licensed attorney does not enjoy the same latitude. The statute is written for all to see, and it clearly states that a claim must be submitted within ninety days of the last date of service. Claimant did not submit the vouchers claim to Respondent until well after January 1, 2009. Submissions were untimely and must be denied.

Based on the foregoing, the Court is of the opinion to allow an award to the Claimant for services rendered on behalf of client Webster and deny an award for the remaining unpaid vouchers based on the statutory time limit.

Award of $9,888.50.

OPINION ISSUED JULY 24,2012

SOUTHERN APPALACHIAN LABOR SCHOOL
V.
DIVISION OF HIGHWAYS
(CC-11-0423)

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

PER CURIAM:

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

1. On May 10, 2011, John P. David, as an agent of the Claimant, was traveling along W. Va. Route 61 near Page, Fayette County, when the Claimant's 1999 SAAB struck a large hole and debris in the travel portion of the road.

2. Respondent was responsible for the maintenance of W. Va. Route 61, 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 $67.19. The Claimant's insurance requires a $2,500.00 deduction; therefore, no limitation applies to the Claimant's award.

4. The amount of $67.19 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 61 on the date of this incident; that the negligence of Respondent was a proximate cause of the damages sustained to Claimant's vehicle; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the damage.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $67.19 in this claim.

Award of $67.19.

OPINION ISSUED JULY 24,2012

PENELOPE A. BRANDENBURG
V.
DIVISION OF HIGHWAYS
(CC-11-0500)

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 14, 2011, the Claimant, Penelope A. Brandenburg, was traveling along W. Va. Route 41 near Prince, Fayette County, when her 2006 Ford F-150 was struck by a tree limb hanging in the travel portion of the road.

2. Respondent was responsible for the maintenance of W. Va. Route 41, 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 $291.50. The Claimant's insurance requires a $500.00 deduction; therefore, no limitation applies to the Claimant's award.

4. The amount of $291.50 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 41 on the date of this incident; that the negligence of Respondent was a proximate cause of the damages sustained to Claimant's vehicle; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the damage.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $291.50 in this claim.

Award of $291.50.

OPINION ISSUED JULY 24,2012

DENNIS E. BALLARD AND WHITNEY K. BALLARD
V.
DIVISION OF HIGHWAYS
(CC-11-0606)

Claimants appeared *pro se*.
Travis E. Ellison III, 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 September 24, 2011, Claimant Dennis E. Ballard was traveling along Gee Lick Road near Weston, Lewis County, when his 2005 Dodge Neon struck a deteriorated portion of the roadway.

2. Respondent was responsible for the maintenance of Gee Lick Road, 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 $806.52. The Claimants only carried liability insurance on the vehicle on the date of the incident; therefore, no limitation applies to the Claimants' award.

4. The amount of $806.52 is fair and reasonable.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Gee Lick Road on the date of this incident; that the negligence of Respondent was a proximate cause of the damages sustained to Claimants' vehicle; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, Claimants may make a recovery for the damage.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $806.52 in this claim.

Award of $806.52.

OPINION ISSUED JULY 24,2012

MARY A. MCKINNEY
V.
DIVISION OF HIGHWAYS
(CC-11-0659)

Claimant appeared *pro se*.

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

PER CURIAM:

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

1. On October 30, 2011, the Claimant, Mary A. McKinney, was traveling along Clearbrook Avenue near Bud, Wyoming County, when her 2008 Buick Lacerne CXL struck a large, newly-formed ditch. There were no warning signs for the traveling public.

2. Respondent was responsible for the maintenance of Clearbrook Avenue, 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 $353.19. The Claimant's insurance requires a $1,000.00 deduction; therefore, no limitation applies to the Claimant's award.

4. The amount of $353.19 is fair and reasonable.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Clearbrook Avenue on the date of this incident; that the negligence of Respondent was a proximate cause of the damages sustained to Claimant's vehicle; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the damage.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $353.19 in this claim.

Award of $353.19.

OPINION ISSUED JULY 24,2012

GORDON CLENDENIN
V.
DIVISION OF HIGHWAYS
(CC-11-0694)

Claimant appeared *pro se*.

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

PER CURIAM:

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

1. On November 26, 2011, the Claimant, Gordon Clendenin, was traveling along W. Va. Route 60 near Ansted, Fayette County, when his 1992 Dodge Dynasty came in contact with a patch of ice located in the travel portion of the road.

2. Respondent was responsible for the drainage maintenance of W. Va. Route 60, 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 $1,551.16. The Claimant only carried liability insurance on the date of the incident; therefore, an award to the Claimant is not limited.

4. The amount of $1,551.16 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 60 on the date of this incident; that the negligence of Respondent was the proximate cause of the damages sustained to Claimant's vehicle; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the damage.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $1,551.16 in this claim.

Award of $1,551.16

OPINION ISSUED DECEMBER 13,2012

G.A. BROWN & SON INC.,
V.
DEPARTMENT OF ADMINISTRATION and DIVISION OF VETERANS AFFAIRS
(CC-10-0564)

Charles M. Johnstone II, Attorney at Law, for Claimant.
Katherine A. Schultz, Senior Deputy Attorney General, for Respondent Division of Veterans Affairs, and Stacy L. Nowicki, Assistant Attorney General, for Respondent Department of Administration.

CECIL, JUDGE:

G.A. Brown & Son Inc. ("Claimant"), a duly licensed contractor operating within the State of West Virginia, brings this claim for damages arising from an alleged breach of contract by the Department of Administration and the Division of Veterans Affairs (collectively the "Respondents," "DOA" or "WV/VA"), for payments and accrued interest due and owing under a contract involving the construction of a veterans nursing home facility located in Clarksburg, West Virginia. The Respondent denies the allegations in the Claimant's Notice of Claim and asserts that the claimed funds were denied as work performed outside the scope of the construction contract.

In 2003, Governor Bob Wise was advised that West Virginia was one of only two states in the nation without a veterans nursing home facility, and believing the absence of such a facility was unacceptable, Governor Wise advised his Secretary of Administration, Tom Susman, and newly-appointed Director of WV/VA, Larry Linch, that acquiring a nursing home facility ("the facility") for the State would be a top priority for the remainder of his administration. Linch's office worked tirelessly submitting applications to the United States Department of Veteran's Affairs ("US/VA") in order to obtain necessary financial assistance for the facility. The process for obtaining federal funds was complicated. A series of applications was required at specific times, and the qualification process was extremely competitive. The US/VA eventually narrowed applicants down to a list of ten.

Through the assistance of Senator Rockefeller's office, WV/VA emerged as the top candidate for construction of a new VA facility. However, the US/VA's rules and procedures provided that a failure to meet approaching deadlines for document submissions could result in a loss of the first qualified position and an automatic placement at the bottom of the qualification list. One of the documents required by the US/VA was a budget. In order to fairly and properly formulate the budget for the facility, WV/VA initiated the bid-letting process, and on July 9, 2003, bids were solicited for the construction of the facility pursuant to the Request for Quotation ("RFQ").

The RFQ required bidders to hold their bids firm for ninety days, or until December 11, 2003. Whiting-Turner Company ("Whiting-Turner"), a

Maryland contractor, was the lowest bidder on the project. However, on January 14, 2004, after the expiration of the ninety-day firm bid/offer requirement, Whiting-Turner advised WV/VA that increases in materials costs prevented it from holding its bid price firm, and that to accept the award of the contract, it would need to increase its bid by $450,000.00-$500,000.00. This increase was rejected by the Division of Purchasing who informed Whiting-Turner that West Virginia purchasing laws would not permit them to increase their bid.

Faced with the dilemma of a rapidly approaching deadline for submitting a budget to the US/VA, and with little time to re-bid the project, WV/VA concentrated all of its efforts on getting the VA project under contract. Being under pressure to have a construction contract in place as soon as possible, the WV/VA and DOA then contacted the Claimant in this action, as the next lowest bidder, to discuss whether, and under what conditions, James Edward Brown, as principal for the Claimant, would consider accepting the project. At a meeting, held after Whiting-Turner revoked its bid, amongst Brown, architect James Kenton Blackwood, and the Respondent agencies, Brown indicated that he would like to help, but advised all parties that the cost of materials had, since the time of the bid, spiraled out of control.[7] Based on market volatility, Brown indicated that he would have to raise the total cost of the project by $500,000.00.

On February 24, 2004, a meeting was held in Cabinet Secretary Susman's office, the sole purpose of which was to save the VA project. There were a number of individuals present at this meeting including Linch; Blackwood; Greg Isaacs, Cam Siegrist, and Van Coleman, bond representative and counsel; Heather Connolly, legal counsel for the Respondent; Meg Cianfrocca, a representative from Senator Rockefeller's office; Cabinet Secretary Susman; and Steve Canterbury, Executive Director of the Regional Jail and Correctional Facility Authority. Canterbury attended this meeting at the

[7]These price increases were due to a dramatic increase in demand for steel. At the time, professionals in the industry documented that the market was particularly volatile due to Asian companies' purchasing tremendous quantities of steel. This became a well known phenomena within the construction industry and was later dubbed the "Asian Impact."

personal request of the Governor and the Secretary of Military Affairs and Public Safety, because of his extensive experience with state construction contracts. Brown was not physically present at the meeting, but was later joined by telephone.

Those present at the meeting discussed problems relating to the project, and ideas were presented concerning how to assure Brown that his company would be adequately compensated for entering into the contract. The unrebutted testimony is that Canterbury informed those in attendance at the meeting that price increases in the cost of materials could be reimbursed through the submission of change orders.[8] Therefore, according to Canterbury, price increases could be paid without including an escalation clause in the contract.[9] Architect Blackwood also informed Canterbury that he would be willing to do all that he could personally to lower the cost of the total project. This meant that Blackwood would engage in value engineering to reduce costs in key facets of the construction.[10] Value engineering, in the opinion of Architect Blackwood, should account for approximately half of the anticipated change orders likely to be submitted by Brown throughout the course of construction. Thus, Blackwood and Canterbury agreed that through the use of value engineering, and by the payment of change orders for the increased cost of materials, Brown could be assured of not losing money on the project.

On the same date and with this new plan and contract proposal at issue, the uncontradicted testimony was that Secretary Susman suggested that Linch, Architect Blackwood, Canterbury, and Ciancfrocca enter an adjoining office to place a call to Brown concerning the new proposal. During the telephone conversation, Canterbury told Brown that legitimate material price

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[8]Transcript (Canterbury at 317-18).

[9]*Id.* at 319.

[10]For example, Architect Blackwood testified that the original specifications of the project called for a large canopy to be built at the entrance of the facility. However, Blackwood reduced the size of this canopy to lower the overall cost of the project.

increases could be processed as change orders under the contract and paid through the Respondent. Canterbury also informed Brown that Blackwood would engage in value engineering to assist in reducing costs where feasible.

Based on these representations, Brown agreed to enter into a contract with Respondent WV/VA for the construction of the project. Canterbury testified that, although Brown was hesitant to agree to enter into the contract, Canterbury believed that Brown felt assured that while he may not make as much money as he would have prior to the expected escalation in material costs, he would not lose money on the project. Following the conversation with Brown, the WV/VA contacted the Division of Purchasing and requested that the contract for the construction of the project be issued to the Claimant. Thus, by Purchase Order dated March 3, 2004, the Respondent, the Claimant, and Architect Blackwood respectively became parties to a contract for the construction as Owner, Contractor, and Architect. The entire contract included general, supplementary, and other conditions to the contract; drawings; manuals; and specifications. Reaching an agreement with the Claimant allowed the Respondent to comply with all of the critical deadlines necessary to receive funding from the US/VA and preserve the project.

During the course of construction, which spanned approximately four years, ten change orders were submitted by Claimant to the Respondent, which contained either a cost increase or an extension of the completion date. These change orders were promptly approved and paid, and two change orders alone included cost increases totaling more than $200,000.00. All change orders were approved and paid while David Tincher, Director of the Division of Purchasing, was employed in his capacity as Director.[11]

Upon the completion of the project, the Claimant submitted a final change order ("Change Order #11") dated September 23, 2008, which reflected

[11]Director Tincher was not present at the meeting on February 24, 2004, during which representations were made to Brown concerning the payment of change orders. However, it is clear from the record that Tincher routinely approved such change orders for construction projects, and Brown testified that in his more than thirty years experience with State contracts he has never had a change order denied.

increased costs for steel and other materials in the amount of $582,677.32.[12] Change Order #11 was then submitted to WV/VA. Change Order #11 was approved consistent with the AIA format and promptly sent to the Division of Purchasing for final approval.[13] Director Tincher, however, refused to approve payment of Change Order #11 for what he found were cost increases outside the scope of the contract.[14]

The Claimant now petitions this Court alleging that failure to pay Change Order #11 was a breach of contract entitling the Claimant to compensatory damages and accrued interest on that amount since the date of the alleged breach. The Claimant maintains that the agreement reached at the February 24, 2004, meeting is part of the integrated contract, and that a failure to pay Change Order #11 was a breach of an express term of that agreement. Conversely, Respondents argue that the parol evidence rule bars reliance on an oral agreement made prior to or contemporaneous with the final written agreement. Also, Respondents maintain that the West Virginia Code gives discretion to the Director of the Division of Purchasing to make final decisions regarding the approval and payment of such change orders. Based on a full and complete review of the record, the Court is of the opinion to award the Claimant's claim, in part, and deny, in part, for the reasons more

[12]All parties have stipulated to this amount as being the amount in dispute.

[13]The State, unfortunately, continued to utilize the AIA Document to process change orders even though there is no indication on the form that the Purchasing Director alone has final approval authority for proposed changes.

[14]Specifically, Director Tincher stated in an e-mail dated December 17, 2008, that "[w]e are unable to find any reference in the written contract to an escalation clause. A long ago verbal discussion by parties that do not have the authority to bind the state has no impact on the formal written contract. I regret that I am unable to approve your request." It is clear to the Court that Director Tincher knew when he rejected Change Order #11 of the oral agreement between the parties.

fully stated below. The Court will attempt to address all of the issues raised by the parties in their pleadings and testimony separately.

I.

Parol Evidence

It is well-settled law in West Virginia that "[e]xtrinsic evidence of statements and declarations of the parties to an unambiguous written contract occurring contemporaneously with or prior to its execution is inadmissable to contradict, add to, detract from, vary or explain the terms of such contract . . . ." Syllabus Point 1, *Kanawha Banking and Trust Co. v. Gilbert*, 131 W. Va. 88, 46 S.E.2d 225 (1947). Therefore, prior statements that contradict clear, unambiguous language contained within a fully integrated contract are inadmissible and "[p]arol evidence may only be admitted to explain uncertain, incomplete or ambiguous terms." *Glenmark Associates, Inc. v. Americare of West Virginia, Inc.*, 179 W. Va. 632, 371 S.E.2d 353 (1988); *Holiday Plaza Inc. v. First Federal Savings and Loan Ass'n of Clarksburg*, 168 W. Va. 356, 285 S.E.2d 131 (1981); *Mundy v. Arcuri*, 165 W. Va. 128, 267 S.E.2d 454 (1980); *WV Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv. Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985).

In this case, the written contract for this particular project was evidenced by the Purchase Order, manuals, drawings, specifications, numerous conditions, and other contract documents including the West Virginia Purchasing Division Policies and Procedures Handbook.[15] There can be no doubt that these large construction contracts are intimidating, and almost never-ending in sheer volume. This Court is also mindful, however, that these contracts are typical of the type of construction project at issue. As between laymen, this contract fails as a concise, fully-integrated contract. However, as between two sophisticated parties consisting of a contractor with more than thirty years of construction experience and a State agency responsible for procuring bids, it is routine. Therefore, we must proceed with

[15]Specifically, the Handbook states as follows: 1.4 Required Use of Handbook: State procurement officers and their support staffs are required to use this handbook to perform procurement and other related activities. It also states that "the purchasing division policy and procedures handbook is provided for reference purposes only."

the presumption that the contract at issue was a complete integration, and that it memorialized the intent of both parties to the agreement.

However, that is not to say that had this been a private parties contract, the agreement reached on February 24, 2004, could not be examined to construe the specific terms of the contract. The Court is of the opinion that Brown acted in reliance, despite his sophistication, to contract terms that were misleading and ambiguous as to the payment of change orders. As stated in *Glenmark Associates, Inc.*, *supra*, if a contract contains terms that are ambiguous, parol evidence may be used to determine the meaning of those terms. Thus, ambiguity has long been held to be an exception to the otherwise rigid parol evidence rule. The Supreme Court of Appeals of West Virginia has held that

> [w]hile the general rule is that the construction of a writing is for the court; yet where the meaning is uncertain and ambiguous, parol evidence is admissible to show the situation of the parties, the surrounding circumstances when the writing was made, and the practical construction given to the contract by the parties themselves either contemporaneously or subsequently. If the parol evidence be not in conflict, the court must construe the writing; but, if it be conflicting on a material point necessary to interpretation of the writing, then the question of its meaning should be left to the jury under proper hypothetical instructions.

Syllabus Point 7, *Frederick Mgmt. Co., L.L.C. v. City Nat'l Bank*, 2010 W. Va. LEXIS 144, 723 S.E.2d 277 (2010).

Here, based on a plain reading of the contract documents, specifically section 4.3.6 of the AIA A201 document, and Section 1250 of the Project Manual, there are two ambiguous terms relevant to the time of the formation of the contract and the issues before this Court. For example, in section 4.3.6 of the AIA document, Brown was authorized to submit a claim for the architect's consideration if Brown believed that "additional costs were involved for reasons such as . . . *other foreseeable grounds*."[16] Furthermore, Section

[16]The full text of this provision states that

1250 of the Project Manual states with regard to contractor-initiated proposals for modification of the contract that "[i]f *latent or unforeseen conditions* require modification to the Contract, Contractor may propose changes by submitting a request for change."[17] These provisions make it difficult to determine what circumstances trigger the approval of a change order. The contract uses the terms "foreseeable" and "unforeseen" inconsistently, making every provision allowing for the payment of change orders ambiguous.[18]

> [i]f the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Architect, (4) failure of payment by the Owner, (5) termination of the contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with this Paragraph 4.3.

[17]The Project Manual states with regard to contractor-initiated proposals the following:

> B. Contractor-Initiated Proposals: If latent or unforeseen conditions require modifications to the Contract, Contractor may propose changes by submitting a request for a change.

[18]For example, the AIA document allows payment for ". . . other *foreseeable* grounds." However, 7.4.3 of the Project Manual states with regard to the Purchasing Director's discretion to grant change orders that the director ". . . may grant a change in any amount if *unforeseen* circumstances

have occurred and such change is in the best interest of the State of West Virginia." If change orders may be granted for foreseeable grounds, yet the Director of Purchasing retains the discretion to grant change orders for unforeseen circumstances, then the contract is clearly inconsistent and ambiguous as to the issue of foreseeability.

Furthermore, it is difficult to ascertain the parties' intended meaning from the language contained within these two sections because the language appears to be adopted as "catch-all" language. Moreover, this language could easily have been excluded in the final contract by the use of the Respondents' Supplementary Conditions to the AIA Document A201-1997 General Conditions of the Contract for Construction, but it was not. The Court can only conclude, therefore, that the Respondent intended for the ambiguous language to remain, and the plain meaning of the language must be used to construe it.[19]

Here, Brown obviously relied on the representations made by Canterbury at the February 24, 2004 meeting conducted in Cabinet Secretary Susman's office, and that agreement went beyond a mere "gentlemen's agreement." This agreement outlined what constituted *other foreseeable grounds*–an expected increase in the price of steel. Thus, if an increase in the cost of construction materials was deemed to be foreseeable based on a collateral agreement, then that definition should apply to the term *foreseeable* contained in the final written contract.

Accordingly, the Claimant offered parol evidence of an ambiguous term of the written contract. The Court finds that the collateral agreement entered into between Brown and other attendees of the February 24, 2004 meeting defines *foreseeable grounds* as well as *latent conditions* as they apply to the construction contract, and these terms directly addressed the method for payment of price increases due to an unpredictable steel market.

[19]In fact, the Court notes the testimony of Dawn E. Warfield, Deputy Attorney General, who serves as the director of the contract and bond sections, when she stated that "the AIA documents themselves and the supplementary conditions allow change orders for changes in the work. Cost increases due to changes in the work, either due to unforeseen circumstances arising during the construction period, increased cost due to changes requested by the owner and the architect, or necessitated by circumstances are legitimate changes in the work, the scope of the project. [I]f they result in additional costs, then the contract documents, the AIA documents, and the purchase order allow price increases based on the changes in the work."

Therefore, the Claimant had a reasonable expectation of payment of Change Order #11 based on this ambiguous language.

II.

Apparent Authority

It is central to the findings in this case that an agreement was reached at both the meeting on February 24, 2004, and in the construction contract, and that both should be read together in construing the final written contract. However, there is still a question as to whether anyone at the meeting on February 24, 2004, had authority to bind the Respondents. Thus, the answer to the authority question determines whether the collateral agreement upon which the Claimant relies would ordinarily permit the Claimant to construe ambiguous language in the written contract as binding on the Respondents.

With regard to the doctrine of apparent authority or "ostensible authority," as it is sometimes referred to, the Supreme Court of Appeals of West Virginia has held that "[o]ne who by his acts or conduct [permits] another to act apparently or ostensibly as his agent, to the injury of a third person who has dealt with the apparent or ostensible agent in good faith and in the exercise of reasonable prudence, is estopped to deny the agency relationship." Syllabus Point 1, *Gen. Electric Credit Corp. v. Fields*, 148 W. Va. 176, 133 S.E.2d 780 (1963).

It has become obvious to this Court through the credible testimony of Brown that he did indeed act in good faith, despite what might have been a mistaken factual belief that Canterbury was someone with authority within the DOA. Based on Brown's testimony and voluminous factual evidence presented, it is understandable why Brown believed that Canterbury was an agent of the DOA–the agency that Brown believed held the ultimate authority to bind the State.

If this claim were between private parties, then the inquiry would stop here, and a breach of contract would be obvious to this Court. However, there are well-established legal prohibitions that directly address the issues in this case. While it is true that the acts of private agents may bind a principal where they are acting within their apparent scope of authority, this is not so with a public officer because the State is bound only by authority actually vested in the officer, and his powers are limited and defined by its laws. In

addition, our law is clear that public officers are not subject to the doctrine of estoppel, which never applies to the State. See generally, *Carper v. Cook*, 39 W. Va. 346, 19 S.E. 379 (1894); *State v. Chilton*, 49 W. Va. 453, 39 S.E. 612 (1901); *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 174 S.E.2d 318 (1970); *Western M R.R. v. Goodwin*, 167 W. Va. 804, 282 S.E.2d 240 (1981); see also, *Kondos v. WV Bd. of Regents*, 318 F. Supp. 394 (S.D. W. Va. 1970) *aff'd per curiam*, 411 F.2d. 1172 (4th Cir. 1971).

Dawn Warfield, Deputy Attorney General, testified that there are good reasons for the Director of Purchasing to have ultimate authority to negotiate contracts. She stated that "it is necessary to have an objective source and standard to make sure that [contracts] are being awarded in conformity with the statutes and the regulations of West Virginia." Director Tincher also testified that "[i]f we allowed vendors to increase prices after the bid opening and prior to award, we would never know who the true low bidder is."

In this regard, our case law is consistent with the aforementioned testimony and Supreme Court rulings. In *Mountain State Consultants, Inc. v. State*, 7 W. Va. Ct. Cl. 213 (1969), we held that the authority of a public officer to enter into contracts is defined by law in West Virginia, and "the legislature may not authorize the payment of a claim created against the State under any contract made without the express authority of law." Our holding was also consistent with the Constitution of West Virginia, specifically Art. VI, Section 38, which prohibits increasing compensation to a contractor beyond an amount set forth in a public contract. The Constitutional prohibitions are specific and designed to prevent inappropriate expenditures of public funds. Specifically, the Constitution states that "[n]o extra compensation shall be granted or allowed to any public . . . contractor after the services shall have been rendered or the contract made; nor shall any legislature authorize the payment of any claim or part thereof, hereafter created against the State, under any agreement or contract made, without express authority of law . . ." *Id.* Therefore, from a purely legal standpoint, it may appear that this Court is constrained to rule in favor of the State.

III.

Moral Obligation

The Court is now faced with evaluating both equity and justice. Relying on cases which specifically address not only the constitutional

provisions but also the statutes, the Court must decide what equity and justice requires given the facts in the instant case. It is not an easy decision.

The Supreme Court of Appeals of West Virginia has held that "[t]he legislature has the power to appropriate public funds in certain cases, classified as moral obligations, which are warranted by simple justice and right without violating the provisions of this section relative to unauthorized contracts." *State ex rel. Vincent v. Gainer*, 151 W. Va. 1002, 158 S.E.2d 145 (1967). Thus, this Court is uniquely authorized to make rulings based on conscience. The legislature may adopt our findings, or not, but we will always find in favor of a claimant where to hold the opposite would seem unconscionable. Indeed, we can think of no better set of facts on which to base a moral obligation award. See *State ex rel. McLaughlin v. DOT*, 209 W. Va. 412, 549 S.E.2d 286 (2001).

Brown performed a public service when the facts suggest that nobody else would. He did so based on the reasonable assurance that his work would be compensated. While Brown did not expect to earn large profits from his company's work, he did not expect to lose over $500,000.00. Nor should Brown's company be expected to incur such a loss where the State is currently benefitting from the only nursing home facility serving the veterans of our State. We see no reason to enter into a lengthy discussion on the principles of unjust enrichment or other equitable doctrines. We find that the Claimant is entitled in equity and good conscience to an award for the additional costs of VA project.

IV.

Damages

Having determined that the Claimant is entitled to damages, the remaining question is what constitutes a reasonable calculation of those damages.

A fundamental tenet of contract law is that damages should be awarded in order to place the non-breaching party in the position it would have been in but for the breach. To achieve this result, actual or compensatory damages are typically awarded. Stated broadly, "the measure of compensatory damages is such sum as will compensate the person injured for the loss sustained, with the least burden to the wrongdoer consistent with the idea of fair compensation." See *Stenger v. Hope Natural Gas Co.*, 139 W

Va. 549, 80 S.E.2d 889 (1954); see also *West Virginia Dep't of Highways v. Roda*, 177 W. Va. 383, 388, 352 S.E.2d 134 (1986). In awarding compensatory damages, courts must tailor them to be "proportionate or equal in measure or extent to the injuries . . . ." *Yates v. Crozer Coal, etc., Co.*, 76 W. Va. 50, 84 S.E. 626 (1915).

In this case, the parties have stipulated that the dollar amount at issue is $582,677.32. This amount represents the change in the contract price indicated on Change Order #11. Since work had already been performed before the submission of the change order (as is typically the case), the Claimant had already expended the funds necessary to complete the project. This being the case, it is clear that the amount of $582,677.32 is a fair and reasonable award in order to compensate the Claimant for its damages and represents the exact amount of cost increases associated with materials.

The Claimant also contends that it is entitled to the interest on the compensatory award amount that has accrued since the date of submission of Change Order #11. The Claimant uses as support for this argument the subsequently repealed section of the W. Va. Code known as the "Prompt Pay Act." The Prompt Pay Act was enacted in 1990 so that a vendor supplying services to a State agency could receive prompt payment upon presentation to that agency of a legitimate *uncontested* invoice. W. Va. Code § 5A-3-54 (repealed 2010). (Emphasis added.) This required payment to be issued to the vendor within sixty days of receiving an invoice, and any check issued after the sixty-day period must include interest at the current rate, as determined by the tax commissioner. *Id*.

We do not agree with the Claimant's argument that this Court is bound by the former Prompt Pay Act to award interest.[20] Furthermore, even if this Court were to be bound by the Prompt Pay Act of 1990, Change Order #11 was not *uncontested*, a prerequisite required for application of the Prompt Pay Act.

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[20]See *Hourly Computer Services v. Dep't of Health and Human Resources*, 24 Ct. Cl. 197, 200 (2002); see also *R. L. Banks & Associates, Inc. v. Public Service Commission*, 17 Ct. Cl. 159 (1988) (awarding interest to a vendor based on W. Va. Code § 5A-3-1, a statute separate from the Prompt Pay Act allowing for interest based on printing services and commodities).

In accordance with the findings of fact and conclusions of law as stated above, the Court is of the opinion to, and does hereby, award the Claimant damages under our equity jurisdiction. Therefore, the Court finds that the Claimant is entitled to receive, and the State of West Virginia is morally obligated to pay, an award in the amount of $582,677.32, and that such amount is fair and reasonable compensation for damages actually incurred by the Claimant.

Award of $582,677.32.

OPINION ISSUED DECEMBER 17,2012

THOMAS WILSON CASTO
V.
STATE OF WEST VIRGINIA
(CC-09-0001)*

Michael T. Clifford, Attorney at Law, for Claimant.
Harden C. Scragg Jr., Assistant Attorney General, for Respondent.

MCCARTHY, JUDGE:

Claimant, Thomas Wilson Casto, brings the instant claim seeking compensation from the Respondent, State of West Virginia, under the State's wrongful arrest statute. He alleges that he was wrongfully arrested and detained, and that the prosecution's undue delay resulted in a loss of liberty for which he is entitled to damages. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

On August 11, 2006, the Claimant was arrested by the West Virginia State Police on charges evidenced by a warrant issued by the Magistrate Court of Jackson County in connection with a suspected arson, which had occurred the month prior. The warrant for the Claimant's arrest was issued based on information provided by a police informant, Jeremy Fields, who inculpated the Claimant in return for his own prosecutorial immunity. Soon after the Claimant's arrest, Jason Baltic, Assistant State Fire Marshall, rendered an opinion that the fire was incendiary in nature. This opinion, however, was inconsistent with the forensic examiner's report of August 2, 2006, which

found that there were no ignitable liquids identified in samples submitted to the lab. On September 3, 2006, a preliminary hearing was conducted at which Trooper Marion of the West Virginia State Police testified that the only evidence tying the Claimant to the alleged arson was the statement of police informant Jeremy Fields. At that time, counsel for the Claimant provided the prosecution with a polygraph examination report, which revealed that the Claimant did not participate in the arson. Counsel for the Claimant thereafter contacted the prosecuting attorney on numerous occasions offering to have the Claimant retake the polygraph examination.

On September 21, 2006, counsel for Claimant filed a summary petition for bail in the Circuit Court of Jackson County, and again provided the court with the polygraph examination report as well as the Claimant's alibi information.

On December 18, 2006, counsel for Claimant again contacted the prosecuting attorney requesting that she consider dismissing the charges in light of the uncorroborated statement of Jeremy Fields, the alibi notices, and the polygraph examination. The State, through the prosecutor, did not respond to counsel's request. On March 20, 2007, the Claimant and his counsel appeared again before the Circuit Court of Jackson County for a hearing on a motion to be released from confinement. At this hearing it was revealed that Jeremy Fields had recanted his former statement to Trooper Marion. The State was given the opportunity at the hearing to interview Jeremy Fields to determine if he did, in fact, recant but the prosecutor declined to do so. The Claimant was subsequently released on home confinement on the same day.

On June 27, 2007, the State presented these matters to the grand jury. The Claimant asserts that Trooper Marion improperly testified to several matters including that ". . . Casto just has [the] reputation of doing nasty things, period." Trooper Marion also stated that ". . . Casto is a career, I guess what you would call criminal type . . . ." The matter was then submitted to the grand jury, and Claimant was indicted.

On July 5, 2007, counsel for the Claimant filed his initial motions for discovery and Notice of Alibi, providing names and addresses of certain alibi witnesses. The alibi witnesses were never contacted or interviewed by the State.

On November 28, 2007, on the eve of trial, and after several attempts to convince the prosecution to dismiss the charges against the Claimant in light of exculpatory evidence, the State filed its Motion to Nolle Prosequi, alleging that the physical findings of the house fire were inconsistent with Jeremy Fields' statements.

The Claimant asks this Court to make an award for wrongful arrest, claiming that the Jackson County Prosecutor's Office and the West Virginia State Police created undue delay in the prosecution of the Claimant and wrongfully pursued the charges against the Claimant despite the existence of exculpatory evidence.

The Court begins by noting that it is well aware of the concept of absolute prosecutorial immunity as well as the qualified immunity enjoyed by the West Virginia State Police. However, the West Virginia Legislature has given this Court authority to award claims for wrongful arrest, when the Court determines that the State has a moral obligation to compensate a claimant for loss of liberty. See *State ex rel. Vincent v. Gainer*, 151 W. Va. 1002, 158 S.E.2d 145 (1967).

In determining whether or not a moral obligation exists in the context of wrongful arrests or convictions this Court is guided by W. Va. Code § 14-2-13a, which states in pertinent part that "[i]n order to obtain a judgement in his favor, claimant must prove by clear and convincing evidence that . . . he did not commit any of the acts charged in the accusatory instrument . . . and [h]e did not by his own conduct cause or bring about his conviction."

Here, based on the amount of exculpatory evidence ignored by the prosecution, the Court finds that the Claimant has clearly and convincingly shown that he did not commit the act charged in the accusatory instrument, and that he did not bring about his own conviction or arrest. The police were given information by an unreliable informant that later recanted. Given that it was the informant's information that formed the whole basis for the prosecution of the Claimant, a recantation should have prompted at the least further investigation. It is alarming to this Court that the prosecution was provided with alibi information and polygraph examination reports which it apparently ignored for some time, although we are aware that polygraph results are not admissible as evidence. Confident that the Claimant has met his statutory burden, the Court determines that an award should be allowed for the Claimant's loss of liberty brought about by the Respondent's undue

delay in dismissing the charges against him. Based upon the limited evidence before the Court on the issue of damages, and Claimant's testimony concerning his work history, the Court determines that the amount of $5,000.00 is fair and reasonable to compensate Claimant.

Accordingly, based upon the above findings of fact and conclusions of law, the Court does hereby make an award to the Claimant in the amount of $5,000.00. The Claimant has met his burden under W. Va. Code § 14-2-13a, and a moral obligation exists on the part of the State to compensate the Claimant for his loss of liberty.

Award $5,000.00.

*Although the Court made an award to the Claimant, the 2013 Legislature did not declare this claim to be a moral obligation of the State. The claim was not paid and satisfied.

OPINION ISSUED DECEMBER 17,2012

DANIEL CARTER MATZDORFF
V.
STATE OF WEST VIRGINIA
(CC-11-0566)

Lonnie C. Simmons, Attorney at Law, for Claimant.
Harden C. Scragg Jr., Assistant Attorney General, for Respondent.

FORDHAM, JUDGE:

The Claimant, Daniel Carter Matzdorff, filed the instant claim seeking damages for wrongful detention and loss of liberty associated with time served over and above the sentence imposed on him by the regular courts of the State of West Virginia. Having reviewed the record in its entirety, the Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The uncontested facts are as follows: On August 5, 2003, the Claimant entered a guilty plea to an information containing two counts of attempting to commit a felony punishable by less than life imprisonment, a violation of W. Va. Code § 61-11-8(2). He was sentenced in the Circuit Court of Cabell

County, West Virginia. The sentence was suspended and, under W. Va. Code § 25-4-6, the Claimant was committed to the Anthony Correctional Center for a period of six months to two years, followed by a period of probation.

On December 15, 2004, having violated a condition of his probation, an order was entered recognizing that the Claimant had earned 602 days of credit toward the completion of his sentence, and the Claimant was placed back into the custody of the Division of Corrections. Applying the good time credit statute, W. Va. Code § 28-5-27 *et seq.*, the total amount of time to be served under the Claimant's sentence was 1152 days, of which as of December 15, 2004, the Claimant had already served 602. This left 550 days to be served by the Claimant from December 15, 2004 forward. Had the Claimant been released on the correct date, he would have been released on or about June 19, 2006. However, the Claimant was not released until December 17, 2008–a full 912 days later.[21]

The Claimant testified that since his release he has moved to Dayton, Ohio where he is gainfully employed in the construction industry while actively pursuing a degree in accounting. The Claimant testified that the extra time served resulted in a significant loss to his liberty. The Claimant asserts that such time could have spent in college, working, or celebrating birthdays with friends and family. Based upon the testimony, Claimant appears to be living an active and productive life since being released from his incarceration in West Virginia.

[21]The record indicates that the Claimant sought relief by filing a habeas petition, but by the time the Supreme Court of Appeals ruled on the petition the issue was moot.

Before the Court reaches the merits of this claim, we note that the issue in this case is distinguishable from *Galliher v. State of West Virginia*, 28 Ct. Cl. __ (2012). In *Galliher*, the Court was constrained to grant the Respondent's Motion to Dismiss because this Court lacked jurisdiction to overturn an Order of Contempt by a family court of the Judicial Branch. The claims are similar in that both the Family Court of Hampshire County and the Circuit Court of Cabell County made an obvious error.[22] However, in the instant claim jurisdiction falls squarely in this Court, because the Claimant alleges a loss of liberty for which the State may owe a moral obligation.

Claimant's counsel correctly recognizes in his supporting brief that, while at first glance the basis for awarding this claim is found in the wrongful conviction statute, W. Va. Code § 14-2-13a, the Claimant simply does not meet the required elements of this section.[23] This does not, however, bar recovery for a Claimant who clearly suffers from an unjustified loss of liberty. This Court will consider remedies based on moral obligations when the intent of the wrongful conviction statute would be served. Thus, we proceed purely on moral grounds.[24]

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[22]The Circuit Court of Cabell County erred because the original sentencing order stated that Claimant was to serve no less than three years and no more than fifteen years to Count One of the information and no less than one nor more than three (3) years to Count Two (2) of the information, to be served consecutively. The sentence imposed should have been no less than one (1) nor more than three (3) years, to be served consecutively. The Circuit Court acknowledged this error in its Amended Sentencing Order, which was entered on June 25, 2011, after Claimant had been released from prison.

[23]W. Va. Code § 14-2-13a(f)(4) requires the Claimant to prove that "[h]e did not commit any of the acts charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the State."

[24]See, e.g., *State ex rel. Vincent v. Gainer*, 151 W. Va. 1002, 158 S.E.2d 145 (1967).

There are few better examples of a moral obligation existing on the part of the State than when a Claimant has sustained an unjustified loss of liberty, and remedies at law are not availing. Here, Claimant was forced to endure approximately two and a half years (912 days) of incarceration over and above the time he had properly served in accordance with the laws of the State of West Virginia. Indeed, this Court recognizes that one day of unjustified loss of liberty is one day too many.

It is difficult to quantify how much a day of lost liberty is worth. The unique facts and circumstances of each case will guide the Court in determining the amount to fairly compensate a claimant. In the instant case, in light of the severity of the Claimant's deprivation, and after considering the unique facts and circumstances of his claim, the Court finds that an award in the amount of $92,300.00 is a fair and reasonable amount to compensate the Claimant.

Accordingly, the Court finds in equity and in good conscience that the Claimant is entitled to the relief requested in the Notice of Claim, and the amount of $92,300.00 is fair and reasonable based on the degree of deprivation to this Claimant.

Award $92,300.00.

OPINION ISSUED DECEMBER 17,2012

DISCOUNT INDUSTRIAL SUPPLY CORPORATION
V.
DEPARTMENT OF ADMINISTRATION
(CC-11-0589)

James A. Kirby III, Attorney at Law, for Claimant.

Stacy L. Nowicki, Assistant Attorney General, for Respondent.

PER CURIAM:

Claimant, Discount Industrial Supply Corporation ("DISCO"), brought this action seeking an award of attorney fees for substantially prevailing on a Writ of Mandamus filed in the Circuit Court of Kanawha County. Respondent, Department of Administration ("DOA"), denies that Claimant is entitled to attorney fees because Claimant did not prevail on the Writ of Mandamus. The

Court is of the opinion to award partial attorney fees for the reasons more fully stated below.

The Division of Purchasing, an agency of Respondent DOA, developed a Request for Quotation ("RFQ") for the purchase of supplies on a statewide contract identified as SAFETY10. Seven companies bid on the RFQ, including Airgas Inc. ("Airgas") and Claimant. Claimant was the original lowest bidder and was awarded the contract. Claimant, however, in its bid proposal, did not hold its prices firm for one year, a material alteration of the terms of the RFQ. As a result, the contract was then awarded to Airgas as the next lowest bidder. Claimant subsequently filed a formal protest of the award to Airgas and was denied relief.

On September 10, 2010, following that denial, Claimant filed a Writ of Mandamus in the Circuit Court of Kanawha County alleging that the Division of Purchasing awarded Airgas the contract in error because the Airgas bid did not contain some mandatory specifications for several products. Claimant sought to have the Airgas contract terminated, and the contract awarded back to Claimant. Claimant also sought its reasonable attorney fees.

The Division of Purchasing contacted Airgas to confirm the mandatory specifications for several products included on its bid. On September 27, 2010, after determining that several products did not contain the mandatory specifications, the Division of Purchasing immediately issued a cease and desist letter. The Airgas contract was ultimately cancelled by the Division of Purchasing on October 29, 2010.

The Circuit Court of Kanawha County denied the Claimant's Writ of Mandamus upholding the well-settled law that the State has ultimate discretion in whether or not to award a contract to vendors. The circuit court held that the Division of Purchasing was under no obligation to rebid the contract or to award the contract to Claimant, and that the issue was essentially moot because the Division of Purchasing cancelled its contract with Airgas in conformance with the West Virginia Code of State Rules. The circuit court also denied the Claimant's motion for attorney fees based on, *inter alia*, the doctrine of sovereign immunity. Claimant did not appeal the circuit court's order.

Claimant now seeks relief in the Court of Claims alleging that Claimant is entitled to its reasonable attorney fees for filing a Writ of Mandamus in the Circuit Court of Kanawha County and placing the Respondent on notice that its contract with Airgas was not compliant with the RFQ.

After a full review of the record, there is evidence with regard to the insufficiency of numerous product specifications contained in the SAFETY10 RFQ. For example, the RFQ called for a flame retardant material to be used in connection with one of the products. The winning bidder, Airgas, did not include this flame retardant material in conformance with the specification. Therefore, based upon the facts in this case and without setting precedent, this Court is of the opinion that because claimant's action forced the Division of Purchasing to comply with its own rules, compensation for Claimant's action is viewed by this Court to encourage the public to take such affirmative action to benefit the public's health and welfare. Thus, in this instance, a moral obligation exists to pay partial attorney fees to the Claimant to the extent that filing the Writ of Mandamus in the Circuit Court of Kanawha County put the Respondent on notice that its contract with Airgas contained defects that were a potential hazard to the public. In the mandamus proceeding, Claimant sought cancellation of the Airgas contract for its failure to comply with mandatory specifications for products. The Court finds that but for the Writ filed, Respondent would not have acted to cancel the Airgas contract. In addition, Claimant sought by its Writ to have the contract awarded to it. This prayer for relief was correctly denied by the Circuit Court. A review of the attorney hours for which fees are requested involve the latter issue. Since Claimant was unsuccessful on this issue, the Court awards no attorney fees.

The Court is of the opinion that the proper course in this matter was an appeal of the Circuit Court decision relating to the attorneys fees. However, in this instance the Claimant, having been directed by the Circuit Court to recover attorney fees in the Court of Claims, this Court reluctantly makes an award under this particular scenario.

The Court has reviewed, *in camera*, a detailed list of all billing transactions in connection with the Claimant's legal representation and does determine that the Claimant is entitled to an award in the amount of $5,000.00, and this amount is fair and reasonable in view of the foregoing policy concerns, and for the reasons stated herein.

Award of $5,000.00.

OPINION ISSUED DECEMBER 17,2012

MARGO LATANYA BROOKS
V.
NEW RIVER COMMUNITY AND TECHNICAL COLLEGE
(CC-11-0405)

Amy A. Osgood, Attorney at Law, for Claimant.

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

PER CURIAM:

Claimant, Margo Latanya Brooks, filed the instant claim seeking payment of $250,000.00 for services rendered pursuant to an alleged contract for employment and for the loss of future employment opportunities with the Respondent, New River Community and Technical College. The Respondent denies all allegations in the Notice of Claim. The Court is of the opinion to deny this claim for the reasons more fully stated below.

On December 15, 2008, Claimant was engaged as an independent contractor and part-time consultant performing grant work for the Respondent.[25] Claimant performed this work for a period of approximately two years. Clamant alleges that at some point during the performance of her part-time duties she was promised a three-year contract for full-time employment based on a forthcoming bid. Claimant maintains that the alleged agreement guaranteed her selection as the successful bidder on the subsequent Request for Proposal ("RFP") for the full-time employee position with Respondent.

On October 28, 2009, the RFP was issued, and Claimant submitted a proposed bid. However, the Respondent subsequently rejected all bids for this particular RFP. Claimant protested, alleging that she was entitled to the three-year contract and that the Respondent accepted her bid proposal before

[25]As part of the Claimant's claim she alleges that she was owed $3,000.00 for one unpaid invoice for work already performed under this part-time contractor agreement. The Respondent has admitted that the invoice was due and owing and has since paid the amount of the invoice to the Claimant. Thus, the Court does not discuss the merits of this claim.

all bids were rejected. The Respondent denies the existence of a prior agreement to award the Claimant a three-year contract and denies acceptance of the subsequent RFP at any point before rejection of all bids.

W. Va. Code § 18B-5-4 proscribes the sole method in which the Respondent is to issue bids for services and states in part that ". . . all bids may be rejected." § 18B-5-4(g). The bid process outlined in this statute is the sole means by which a bid may be accepted and a contract created between the State and a vendor. This statute reinforces the fundamental rule of contracts that the offeror is the master of his or her offer. More precisely, the statute proscribes the method by which an offer is to be made and also gives the Respondent the right to reject any bid.

In claims for a breach of contract, a claimant must first establish the existence of a contract. Here, the Court finds no support for the Claimant's contention that there was a contract. The Claimant asserts that a contract was formed with Dr. Ted Spring, a person whom the Claimant assumes had authority to bind the Respondent. However, even if the record revealed proof of negotiations and a meeting of the minds with regard to future full-time employment, it would not bind the State. The Supreme Court of Appeals of West Virginia has made it clear that the "[a]cts of a private agent may bind the principal where they are within the apparent scope of his authority; but not so with a public officer, as the State is bound only by authority actually vested in the officer, and his powers are limited and defined by laws." *Samsell v. State line Dev. Co. Inc.*, 154 W. Va. 48, 174 S.E.2d 318 (1970).

Finding no authority for the President of the Respondent college to bind the Higher Education Policy Commission to an employment contract, the Court cannot conclude that the Respondent should be estopped to deny the existence of a contract. The Court is constrained to deny the Claimant's breach of contract claim. The Respondent legally rejected all bids as is within its sound discretion, and thus no contract ever existed between the parties.

In accordance with the findings of fact and conclusions of law as stated above, the Court does hereby deny the Claimant's request for damages resulting from the alleged breach of contract.

Claim disallowed.

OPINION ISSUED JANUARY 17, 2013

JOSEPH RAY BURFORD
V.
DIVISION OF HIGHWAYS
(CC-12-0102)

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 Chevrolet Camaro struck a hole while he was traveling along the intersection of Hannel Road and Doc Bailey Road near Charleston, Kanawha County. Hannel Road is not a road maintained by the 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 12:30 p.m. on February 20, 2012. The Claimant testified that while he was making a left turn onto Hannel Road off of Doc Bailey Road he encountered a large hole. The Claimant attempted to avoid the hole, but his vehicle could not avoid entering the hole. The Claimant testified that he was traveling the speed limit, but the hole was unavoidable. As a result, the Claimant's vehicle sustained damage to the driver's side underbody. The estimated cost of repair to the Claimant vehicle is $2,091.00. The Claimant admitted at hearing that the road was a private road.

The position of the Respondent is that it did not have actual or constructive notice of the condition of Hannel Road on the date of the incident. Also, the Respondent argues that it does not own the road in question, and therefore does not have a duty to maintain the road.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court does not reach the issue of notice because the Claimant agrees that the Respondent does not have ownership of Hannel Road. This Court cannot make an award where the Respondent does not have a duty to maintain the road, which allegedly caused the Claimant's damages. There may be other remedies available to the Claimant available through a municipality or private owner.

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

Claim disallowed.

OPINION ISSUED JANUARY 17, 2013

ESTEL R. MIDDLETON and LYNNA I. MIDDLETON
V.
DIVISION OF HIGHWAYS
(CC-12-0290)

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

PER CURIAM:

The Claimants, Estel and Lynna Middleton, brought this action for vehicle damage which occurred when their 2010 Hyundai Sonata struck a tire as they were traveling near the I-64 and I-77 interchange in Charleston, Kanawha County. I-64 and I-77 are public roads maintained by the Respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 8:40 p.m. on May 3, 2012. The speed limit on the intestate is sixty-five miles per hour. The Claimants were traveling at a rate of speed equal to the posted speed limit. Mr. Middleton testified that while attempting to pass a vehicle he was forced to attempt to straddle a foreign object in the roadway that was later determined to be a tire. The Claimants maintain that there was not enough time to avoid hitting the tire and that attempting to straddle the tire was the only reasonable course of action. The Claimants' vehicle did not have enough

clearance. The tire damaged a carbon dioxide sensor which was valued at $424.74. The Claimants contacted the Respondent after the incident occurred in order to have the tire removed. The position of the Respondent is that it did not have actual or constructive notice of the tire (foreign object) in 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 v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that the Respondent did not have actual or constructive notice of the tire. In fact, the Claimants admitted at hearing that they contacted the Respondent only after they came into contact with it. This Court is constrained to follow its previous decisions strictly requiring notice, actual or constructive, to the Division of Highways.

Based on the foregoing, the Court is of the opinion to, and does hereby, deny the Claimants' claim.

Claim disallowed.

OPINION ISSUED JANUARY 17, 2013

MICHAEL K. KERNS
V.
DIVISION OF HIGHWAYS
(CC-09-0235)

Claimant appeared *pro se*.

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

PER CURIAM:

The Claimant, Michael K. Kerns, brought this action for property damage to his residence which he alleges occurred as a result of the Respondent's negligent maintenance of a drainage system along Second Street

and Center Street in Morgantown, Monongalia County. The Claimant's residence is located at 56 East Second Street and he alleges that water flows down Center Street, across Second Street, and onto his property following every major rain event. The Claimant contends that the water has caused extensive damage to his home and the surrounding property. Center Street and Second Street are public roads maintained by the Respondent.[26] Having considered all of the issues presented at a full hearing of this matter, the Court is of the opinion to deny this claim for the reasons more fully stated below.

The Claimant testified that numerous rain events have caused damage to the Claimant's yard and porch. The Claimant's property is located downhill and parallel to Second Street. The Claimant testified that a third party property owner, whose property is located on the opposite side and uphill from Second Street, built an apartment building which reduced the width of the original ditch line and has since caused more water to drain off of Center Street. The Claimant alleges that the runoff from the increased watershed then flows into pipes that cannot contain that volume of water. Since this ditch is no longer large enough to hold the run-off and the natural lay of the land has been altered by third party property owners, the water now flows across Second Street and onto the Claimant's property. The Claimant stated that his neighbors have also sustained damage to their properties. However, the Claimant contends that his property has incurred the most damage. The Claimant alleges that the Respondent is responsible for controlling the increased water flow caused by the third party apartment building.

The Claimant has not filed suit against the third party property owner for diverting water onto his property. The Claimant asserts that the Respondent is responsible for failing to prevent the water from flowing across Second Street and onto his property. Therefore, the Claimant seeks to recover $1,500.00 for the cost of repairing the damage to his property and asks the Court to order the Respondent to alleviate the drainage issue.

The Respondent contends that the water drainage problems were caused by a third party property owner who has re-directed the water onto the Claimant's property, but disagrees with the Claimant's theory that the

[26]These roads were not built by the Respondent but were taken into the system.

apartment building is the culprit. Testifying as the Respondent's expert witness was Darrin Andrew Holmes, a professional civil engineer for the Respondent. Holmes visited the Claimant's property and reviewed aerial photographs, mapping data, and the Claimant's photographs in reaching his opinions regarding the cause of the water flow problems onto the Claimant's property.

Holmes opined, to a reasonable degree of engineering certainty, that the cause of the water problems was the re-routing of the natural drainage course to a point alongside Second Street. Holmes explained that a natural drainage course is the path that run-off would take from the highest point in the watershed to the lowest point or its outlet. Holmes stated that the two natural drainage sources are located uphill from Second Street and across from the Claimant's property. Holmes was able to deduce from all of the data that the natural watershed was interrupted by a property owner farther uphill in the natural drainage course–not by the builder of the apartment complex along Center Street.

In addition, Holmes testified that the drainage ditches and culverts are more than adequate to manage the natural drainage before the interruption occurred. According to Holmes, the Respondent is unable to resolve the problem because it would require placing culverts under private property farther uphill in the watershed.

This Court has held in similar claims that the 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. Dep't of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether Respondent negligently failed to protect a Claimant's property from foreseeable damage. *Rogers v. Div. of Highways*, 21 Ct. Cl. 97 (1996).

Bryant v. Div. of Highways, 25 Ct. Cl. 235 (2005) involved facts similar to those in the instant case. In *Bryant,* water flowed onto Claimant's property not only from State maintained roadways but also from private property located across the street from Claimant's property on the hillside. *Id.* at 237. The Court held as follows:

> Claimants have failed to establish that Respondent maintained the drainage structures on Sidney Street in Raleigh County in a negligent manner. The evidence establishes that water flows onto Claimants' property not only from the State maintained

> roadways but also from a private property located across the street from Claimants' property on the hillside where new construction is ongoing. There are more sources of the water flowing on Sidney Street than just that from the road itself. Consequently, there is no evidence of negligence on the part of Respondent upon which to base an award. *Id.*

As in *Bryant,* the Court finds in the instant claim that the water problems were caused by the actions of a third party property owner and not the Respondent. The evidence established that the third party property owner disturbed the natural flow of the water in this area which caused water run-off to overflow onto Second Street and onto the Claimant's property. The Court cannot find the Respondent liable when the third party property owner created the water problems by construction on his own property which then constricted the natural flow of run-off, and altered the original lay of the land. As Mr. Holmes indicated, the Respondent cannot remedy the problem when it originates on private property. Thus, there is insufficient evidence of negligence on the part of the Respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 17, 2013

ANTHONY S. VIOLA
V.
DIVISION OF HIGHWAYS
(CC-08-0312)

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

PER CURIAM:

The Claimant, Anthony S. Viola, brought this action for vehicle damage which occurred when his 2002 Pontiac Grand Am struck a hole while he was

turning onto Hideaway Lane from State Route 27 near Wellsburg, Brooke County. State Route 27 and Hideaway Lane are both maintained by the 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 the evening of June 7, 2008, while the Claimant and a passenger were traveling to a friend's high school graduation party located at a residence on Hideaway Lane. While traveling along State Route 27, and while searching for the left turn onto Hideaway Lane, the Claimant was forced to take a sharp left turn onto Hideaway Lane to avoid missing the road. While attempting to negotiate the turn, the Claimant's vehicle struck a hole on the edge of the roadway, and the vehicle was forced off of Hideaway Lane and into a ditch. The Claimant testified that his passenger had startled him, which caused him to take the immediate left turn and go into the ditch. The Claimant's vehicle sustained damage to the left-front bumper and fender well in an amount totaling $1,336.24. The Claimant carried only liability insurance on the vehicle.

The position of the Respondent is that the hole in question was on the berm of the road–not in the travel portion; therefore, the Claimant was negligent in negotiating the turn and assumed the risk. Furthermore, the Respondent argues that it did not have notice of the hole on the berm of Hideaway Lane. Howard Snodgrass, Highway Administrator for Brooke County, testified on behalf of the 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 v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold the 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. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, even if the Court assumes that the Respondent had, at least, constructive notice of the hole, which the Claimant's vehicle struck, and should have known that the hole could potentially present a hazard to the traveling public, the evidence clearly established that the Claimant attempted to negotiate the turn onto Hideaway Lane at a high rate of speed and without reasonable ordinary caution. Consequently, the Court is of the opinion that the Claimant is at least fifty percent negligent in this claim. Therefore, the

Claimant may not make a recovery for his loss in this claim based on West Virginia's comparative negligence law.

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

Claim disallowed.

OPINION ISSUED JANUARY 17, 2013

DRENA J. GRAVES
V.
DIVISION OF HIGHWAYS
(CC-11-0518)

Claimant appeared *pro se*.
Travis Ellison III, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2009 Dodge Dakota struck an unknown metal object as she was driving on an unidentified road at the intersection of W. Va. Route 39 in Gauley Bridge, Fayette County. It was determined that the road 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 at approximately 3:00 p.m. on July 13, 2011. The speed limit on the road in question is twenty-five miles per hour. At the time of the incident, Claimant testified that she had just turned off of W. Va. Route 39 and was heading up the unidentified road. As she continued up the hill she met an oncoming vehicle which she alleges caused her to veer off of the road and onto a metal object. As a result of this incident, Claimant's vehicle sustained damage to its tire in the amount of $217.92.

The position of Respondent is that it did not have actual or constructive notice of the condition along the road. Danny Hypes, Fayette County Administrator for Respondent, testified that he is familiar with the area where Claimant's incident occurred. Mr. Hypes testified that he was not aware of any problems on this portion of the road on or before July 13, 2011. Respondent

did not receive any complaints regarding metal objects or other hazards at this location.

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. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent did not have notice of the object which Claimant's vehicle struck. It is the Claimant's burden to prove that Respondent had notice of the object in the roadway and that they failed to take corrective action. The Court cannot resort to speculation in determining what caused the damage to the Claimant's vehicle. In any case, it is more likely than not that the Claimant's vehicle struck a foreign object in the roadway for which Respondent did not have notice. Therefore, there is insufficient evidence of negligence on the part of Respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 17, 2013

RONALD G. MARKLE
V.
DIVISION OF HIGHWAYS
(CC-09-0155)

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

MCCARTHY, JUDGE.

Claimant brought this action for property damage to his residence which he alleges occurred as a result of Respondent's negligent maintenance of

a drainage system along State Route 921 near Wheeling, Ohio County. Claimant asserts that water flows across State Route 921 and onto his property and contends that the water has caused damage to a retaining wall and driveway, and this damage has allowed certain portions of Claimant's property to slip and accumulate near the entry of his residence. State Route 921 is a public road maintained by Respondent. The Court is of the opinion to award this claim for the reasons more fully stated below.

The incidents giving rise to this claim occurred repeatedly over a period of a decade. State Route 921 abuts Claimant's residence and is classified as a Homeowner Access Road Project Road (HARP Road), which is the lowest priority road for the Respondent to maintain. Claimant states that after every substantial rain the water flows down State Route 921 through an inadequate ditch line and crosses over the road and onto his land, and it causes substantial damage to his property. Claimant maintains that the water has caused mud to accumulate near the entrance of his home, and in the winter months, the water causes damage to his driveway due to constant freezing and thawing.

Claimant notified Respondent on numerous occasions in 2008 concerning the situation, and Respondent made at least two attempts to correct the problem by first installing an eighteen inch, smooth-bore culvert at the upper portion of the road near Claimant's residence, and secondly, by grading the road so as to slope it away from the Claimant's residence. However, both Claimant and Respondent testified that this did not solve the problem due to the large volume of water that flows down the hill. It was not until further attempts were made to slope the road in the opposite direction that the problem was actually corrected. Claimant now seeks damages in the amount of $8,000.00 in order to build a new retaining wall and driveway. Claimant does maintain homeowners insurance, however, Claimant's insurance coverage does not cover the type of damage alleged in this claim.

This Court has held that Respondent has a duty to provide adequate drainage of surface water on State maintained roads, and drainage devices must be maintained in a reasonable state of repair. *Haught v. Dep't of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether Respondent negligently failed to protect a Claimant's property from foreseeable damage. *Rogers v. Div. of Highways*, 21 Ct. Cl. 97 (1996).

Bryant v. Div. of Highways, 25 Ct. Cl. 235 (2005) involved facts similar to those in the instant case. In *Bryant,* water flowed onto Claimant's property not only from State maintained roadways, but also from private property located across the street from Claimant's property on the hillside. *Id.* at 237. The Court held as follows:

> Claimants have failed to establish that Respondent maintained the drainage structures on Sidney Street in Raleigh County in a negligent manner. The evidence establishes that water flows onto Claimants' property not only from the State maintained roadways but also from a private property located across the street from Claimants' property on the hillside where new construction is ongoing. There are more sources of the water flowing on Sidney Street than just that from the road itself. Consequently, there is no evidence of negligence on the part of Respondent upon which to base an award.

In this case, the situation is distinguishable from *Bryant* because no third party is causing or contributing to the damage to Claimant's property. In the hearing in this matter, the State has admitted that it has a duty to maintain the road in question, and also admits that the installation of the culvert did not correct the problem. Claimant notified the Respondent at least four times concerning the damage. Furthermore, Claimant has not contributed to the damage to his property. Based on the foregoing, the Court is of the opinion that the Respondent was negligent in its maintenance of State Route 921, and had actual notice of the condition giving rise to the Claimant's claim.

In accordance with the findings of fact and conclusions of law as stated herein, the Court is of the opinion to, and does hereby, made an award in this claim in the amount of $7,306.00. The Court believes that this amount is fair and reasonable compensation in light of the facts presented.

Award $7,306.00.

OPINION ISSUED JANUARY 17, 2013

PATRICIA HART ADAMS
V.

DIVISION OF HIGHWAYS
(CC-10-0590)

Claimant appeared *pro se*. Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

The Claimant, Patricia Hart Adams, brought this action for vehicle damage which occurred when her 2007 Cadillac CTS struck a tailgate while the Claimant was driving along I-64 near Huntington, Cabell County. I-64 is a public highway maintained by the Respondent agency. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 9:15 a.m. on September 10, 2010. The Claimant was traveling at a rate of sixty miles per hour in the right lane. While attempting to pass a vehicle the Claimant proceeded into the left-hand passing lane where her vehicle struck a tailgate that had become dislodged from another unknown vehicle. As a result, the Claimant's vehicle sustained damage to its tire and rim in the amount of $1,256.98. Claimant's insurance at the time of the incident provided for a $1,000.00 deductible; therefore, any award in this claim would be limited to the amount of the deduction.

The position of the Respondent is that it did not have actual or constructive notice of the foreign object lying in the travel portion of I-64. The Respondent agency did not present testimony of a witness at 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 v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that the Respondent did not have notice of the tailgate. In cases where foreign objects lying in the roadway cause damage to a claimant's vehicle the State must have prior actual or constructive notice of the foreign object (defect) and a reasonable amount of

time to take corrective action before liability is imposed upon the State. Therefore, the Claimant's claim must be, and is hereby, denied.

Claim disallowed.

OPINION ISSUED JANUARY 17, 2013

CHARLES C. RABER JR.
V.
DIVISION OF HIGHWAYS
(CC-10-0269)

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

PER CURIAM:

The Claimant brought this action for vehicle damage which occurred when his 2008 Dodge Avenger struck a hole while he was traveling along I-79. The Claimant is unable to determine the county in which the incident took place. I-79 is a road maintained by the 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 5:15 p.m. on April 10, 2010. I-79 is a four-lane interstate highway. The Claimant testified that while driving along I-79 somewhere north of Summersville, either in Braxton or Clay County, his vehicle struck a hole near an overpass bridge. The Claimant testified that the impact caused his vehicle to vibrate and when he arrived home he realized that the vehicles tire had a large bulge and the rim was bent. The cost of repair to the Claimant's vehicle totaled $674.48. The position of the Respondent is that it did not have actual or constructive notice of the condition on I-79 at the time of the incident. Furthermore, the Respondent maintains that since the Claimant did not allege a more precise location of the alleged hole that the Respondent cannot adequately investigate the claim.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins 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. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that the Respondent did not have notice of the alleged hole along I-79. The Claimant cannot testify as to a more precise location, except to say that it occurred north of Summersville and in either Braxton or Clay County. The Court does not expect the Respondent to be able to investigate an alleged hazard on the interstate if the Claimant cannot recall where the incident even occurred.

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

Claim disallowed.

OPINION ISSUED JANUARY 17, 2013

ROBERT W. MOATS
V.
REGIONAL JAIL AUTHORITY
(CC-09-0057)

Claimant appeared *pro se*.
Doren C. Burrell, Assistant Attorney General, for Respondent.

PER CURIAM:

An inmate of Respondent, Robert W. Moats, brings the instant claim seeking compensation totaling the value of certain personal property, which he alleges was lost by Respondent. Specifically, Claimant seeks to recover $1,200.00 for articles of clothing, a ring, and for other personal property.

Claimant testified that his property was placed in the care and custody of Respondent while Claimant was being transported to another facility located at Huttonsville. The facility at Huttonsville, Huttonsville Correctional Center, is owned and maintained by the Division of Corrections. Claimant alleges that Respondent has either lost his property, or is refusing to return it, and argues that the State has a moral obligation to pay the full value for Claimant's property. However, Claimant also filed a claim against the Division of Corrections for the same property which was lost during his transfer from Respondent's facility to a facility of the Division of Corrections.

This Court has held in prior claims that where a bailment situation is created, Respondent assumes responsibility for property that is not returned to the inmate.

However, in the instant claim, Claimant has failed to meet his burden as Claimant failed to establish a bailment relationship existed with Respondent since the property was lost in transit to Huttonsville Correctional Center, a facility of the Division of Corrections.

Accordingly, the Court is of the opinion to deny this claim since the same facts and lost property are being considered by the Court in a claim against the Division of Corrections.

Claim disallowed.

OPINION ISSUED FEBRUARY 14, 2013

CHARLES A. TYREE
V.
DIVISION OF HIGHWAYS
(CC-12-0280)

Claimant appeared *pro se*.
Michael J. Folio, 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 8, 2012, the Claimant, Charles Tyree, was traveling along W. Va. Route 50 near Ellenboro, Ritchie County, when his 2001 Subaru Forester struck a rock in the travel portion of the road.

2. Respondent was responsible for the maintenance of W. Va. Route 50, 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 $1,452.11. The Claimant carried only liability insurance on the date of the incident; therefore, no limitation applies to the Claimant's award.

4. The Court finds that the amount of $1,452.11 is fair and reasonable compensation for Claimant's damage.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of W. Va. Route 50 on the date of this incident; that the negligence of Respondent was the proximate cause of the

damages sustained to Claimant's vehicle; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the damage.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $1,452.11 in this claim.

Award of $1,452.11.

OPINION ISSUED FEBRUARY 14, 2013

TRISTAN MATHEWS
V.
DIVISION OF HIGHWAYS
(CC-12-0073)

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

PER CURIAM:

Claimant, Tristan Mathews, brought this action for vehicle damage which occurred when his 2008 Chevrolet Malibu was struck by a series of small rocks while traveling along Interstate 79 near Clendenin, Kanawha County. Interstate 79 is a public 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 1:00 p.m. on September 20, 2011. Claimant testified that while he was driving to a job interview in Charleston his vehicle was suddenly struck by falling rocks near mile marker 22 in the southbound lane of Interstate 79. Claimant stated that he did not see the rocks fall and had no notice that there was any potential for the rocks to fall in the area. After Claimant pulled to the side of road to inspect the damage, employees of Respondent arrived to check on the Claimant. Respondent's employees advised Claimant that they were in the area because they were notified of rock falls prior his incident. As a result of its contact with the rocks, Claimant's vehicle sustained damage to its transmission and wheel assembly in the amount of $2,246.60. Claimant had only liability insurance at the time of the incident.

The position of Respondent is that it did not have actual or constructive notice of the rock falls along Interstate 79 on the date of the incident. Respondent's witness, Rick Light, testified that rock falls were common in the area of the incident and that Respondent has placed guardrails along the more dangerous areas of Interstate 79 to prevent the frequency of such incidents.

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 the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the rocks which struck the Claimant's vehicle and that the rocks presented a hazard to the traveling public. Since there were numerous known rock falls along this stretch of road, and since Respondent has attempted to place guardrails in adjoining areas in order to prevent such occurrences, the Court finds that Respondent is liable for Claimant's damage. Thus, Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $2,246.60.

Award of $2,246.60.

OPINION ISSUED FEBRUARY 14, 2013

BENJAMIN MAYNARD
V.
DIVISION OF HIGHWAYS
(CC-11-0247)

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

PER CURIAM:

Claimant, Benjamin Maynard, brought this action for vehicle damage which occurred when his 2000 Ford F-150 struck a hole while performing a legal U-turn along U.S. Route 60 in Milton, Cabell County. U.S. Route 60 is a public road maintained by Respondent. The Court is of the opinion to make a partial 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 April 12, 2011. Claimant testified that on a clear and dry day while traveling eastbound on U.S. Route 60 near Milton Elementary School he made a U-turn and struck a sunken drainage hole. Claimant admittedly did not negotiate the turn without entering the parking area along the side of the roadway; however, he did state that it is impossible to negotiate a U-turn without entering the area designated for parked vehicles. Claimant testified that there were no visible warnings in the area and no cones along the sunken drain. As a result of its contact with the hole, Claimant's vehicle sustained damage to its rim and tire in the amount of $569.78. Claimant had liability insurance only.

The position of Respondent is that it did not have actual or constructive notice of the hole. In the alternative, Respondent argues that it is not liable for damage incurred as a result of a U-turn, that when negotiated, led a claimant to exit the travel portion of the roadway and onto a designated parking area.

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 the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the hole which the Claimants' vehicle struck and that the hole presented a hazard to the traveling public. Given the size of the depression in the parking area along the roadway, Respondent should have been aware of the possibility of a member of the traveling public making

contact with the hole. Nevertheless, the Court agrees that Claimant is at least partially responsible for failing to adequately negotiate the U-turn. In a comparative negligence jurisdiction such as West Virginia, a claimant's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that the Claimant's negligence equals twenty-five percent (25%) of his loss. Since the negligence of the Claimant is not greater than or equal to the negligence of the Respondent, Claimant may recover seventy-five percent (75%) of the loss sustained.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $427.34.

Award of $427.34.

OPINION ISSUED FEBRUARY 14, 2013

FRANK LARSON
V.
DIVISION OF HIGHWAYS
(CC-11-0578)

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

PER CURIAM:

Claimant, Frank Larson, brought this action for vehicle damage which occurred when his 1997 Ford Ranger was allegedly subjected to road conditions which caused his tires to rapidly wear. The road in question is designated W. Va. Route 14, which is located in Slate, Wood County. W. Va. Route 14 is a public 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 over a period of three months beginning on June 6, 2011, when Claimant purchased a new set of tires containing a 50,000 mile warranty. Claimant testified that he is meticulous about maintaining his vehicle and regularly rotates his tires every 3,000 miles to ensure that the tire warranty is not voided. Claimant stated that months of traveling over a section of road which contained an old slip has caused his tires

to wear at a rate approximately double that of wear incurred while traveling normal road conditions. In fact, over a three month period, traveling approximately 2,000 miles a month, his tires have a tread life of approximately 25,000 miles remaining on the tires. As a result of the wear and tear on Claimant's vehicle, Claimant was forced to pay for an alignment and a new set of tires, which are the subject of this claim. The total cost of the alignment and tires totals $474.98.

The position of Respondent is that Route 14 is a high priority roadway which does contain a slip that has been patched over a number of years. Respondent did not perceive the area to be a risk to the traveling public.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice that the stretch of roadway containing an old and uncorrected slip could cause unnatural wear and tear to vehicles. Given the accelerated rate of wear on Claimant's tires, the Court finds that the road condition was the cause of the damage; therefore, Claimant may make a recovery in the amount claimed.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $474.98.

Award of $474.98.

OPINION ISSUED FEBRUARY 14, 2013

AMOS BUNNER
V.
DIVISION OF HIGHWAYS
(CC-12-0275)

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

PER CURIAM:

Claimant, Amos Bunner, brought this action for vehicle damage which occurred when his 2003 Chevrolet Silverado was struck by a tree while traveling along Cunningham Road in Pennsboro, Ritchie County. Cunningham Road is a public 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 6:15 a.m. on January 27, 2012. Claimant testified that while traveling to work along Cunningham Road he noticed that a tree along the side of the roadway was leaning onto the roadway. Realizing that the tree was going to fall, Claimant stated that he pressed the brakes and came to a stop; however, Claimant was unable to avoid contact with the tree. Claimant stated that two other people had contacted Respondent concerning the tree before the date of the incident. As a result of its contact with the tree, Claimant's vehicle sustained a total loss in the amount of $9,500.00. Claimant had liability insurance only on the date of the incident.

The position of Respondent is that it did not have actual or constructive notice of the tree along Cunningham Road on the date of the incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had actual notice of the tree which struck Claimant's vehicle and that the tree presented a hazard to the traveling public. The Court is satisfied with the testimony that other people had previously notified the Respondent, including a bus driver, that the tree was close to falling. Based upon the testimony, the Court finds that the negligence of Respondent was the proximate cause of the

damage to Claimant's vehicle, and Claimant may make a recovery for the damage.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $9,500.00.

Award of $9,500.00.

OPINION ISSUED FEBRUARY 14, 2013

KEITH CHRISTIAN and FELICIA CHRISTIAN ROBERTS
V.
DIVISION OF HIGHWAYS
(CC-09-0433)

Cecil C. Varney, 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, Keith Christian and Felicia Christian Roberts, and Respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. Respondent is responsible for the maintenance of the portion of U.S. Route 52 in Mingo County, West Virginia, where Felicia Christian Roberts' (formerly known as Felicia Christian) accident occurred.

2. On or around May 10, 2009, Felicia Christian Roberts was driving her motor vehicle north on U.S. Route 52 in or near the community of Pie in Mingo County, West Virginia, when she drove into a mudslide that covered both sides of the road.

3. Claimants allege that Respondent had placed no warning lights, caution lights or any other form of notice concerning the mudslide even though the slide had occurred several hours prior to the Claimant's accident.

4. Under the specific facts and circumstances of this claim and for purposes of settlement of said claim, Respondent does not dispute the allegations contained in Paragraph 3 of this stipulation.

5. As a result of the accident, Felicia Christian Roberts suffered injuries requiring medical treatment and suffered the loss of her motor vehicle.

6. Keith Christian, who is the father of Felicia Christian Roberts, waives any claim for damages arising out of the accident in this case.

7. All settlement money to be awarded in this claim is to be awarded to Felicia Christian Roberts.

8. Both the Claimants and Respondent agree that in this particular incident and under these particular circumstances that an award of Eighteen Thousand Dollars ($18,000.00) would be a fair and reasonable amount to settle this claim.

9. The parties to this claim agree that the total sum of Eighteen Thousand Dollars ($18,000.00) to be paid by Respondent to Felicia Christian Roberts in Claim No. CC-09-0433 will be a full and complete settlement, compromise and resolution of all matters in controversy in said claim and full and complete satisfaction of any and all past and future claims Claimants may have against Respondent arising from the matters described in said claim.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of U.S. Route 52 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, Claimant Felicia Christian Roberts may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award to the Claimant Felicia Christian Roberts in the amount of $18,000.00.

Award of $18,000.00 to Felicia Christian Roberts.

OPINION ISSUED FEBRUARY 14, 2013

AARON C. YANUZO
V.
DIVISION OF HIGHWAYS
(CC-10-0305)

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

PER CURIAM:

Claimant, Aaron C. Yanuzo, brought this action for vehicle damage which occurred when his 2008 Ford Fusion struck a hole while traveling along Collins Ferry Road in Star City, Monongalia County. Collins Ferry Road is a public 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 a.m. on September 6, 2009. Claimant testified that while traveling to Timberland Apartments on Collins Ferry Road, approximately a half mile from the entrance, his vehicle struck a manhole cover in the travel portion of the roadway. When the vehicle made contact with the hole it caused the manhole cover to raise up and cause damage under the passenger side door. As a result, Claimant's vehicle sustained damage in the amount of $1,500.00. Claimant's collision insurance required a $1,000.00 deductible at the time of the incident. The position of Respondent is that it did not have actual or constructive notice of a defective manhole cover on the date of the incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, based upon the testimony and evidence presented, the Court is of the opinion that the Respondent had, at the least, constructive notice of the hole which the Claimant's vehicle struck and that the hole presented a hazard to the traveling public. Since the defective manhole cover was in the travel portion of the roadway, and based on the weight of evidence, the Court finds that Respondent was negligent. Thus, Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $1,000.00.

Award of $1,000.00.

OPINION ISSUED FEBRUARY 14, 2013

MARK D. PANEPINTO
V.
DIVISION OF HIGHWAYS
(CC-12-0099)

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

PER CURIAM:

Claimant, Mark D. Panepinto, brought this action for vehicle damage which occurred when his 2008 Mercedes S550 struck a hole while traveling along GC&P Road in Wheeling, Ohio County. GC&P Road is a public 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 6:00 p.m. on November 21, 2011. Claimant testified that he was traveling home from work along GC&P Road at a speed of approximately twenty-five to thirty miles per hour, when his vehicle struck a hole in the roadway that appeared to be the result of excavation work performed by Respondent. The Claimant's testimony was supported by photographic evidence. Claimant stated that the excavated area was compacted so that the edge of the hole was the equivalent to a three inch sharp asphalt curb. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $6,123.34. Claimant had liability insurance only.

The position of Respondent is that it did not have actual or constructive notice of the condition along GC&P Road on the date of the incident. Mark Griffith, County Administrator for the Respondent in Ohio County, testified that he is familiar with the roadway . Mr. Griffith further stated that maintenance work had been conducted at the location, but he had no notice of a condition that would pose a hazard to the traveling public.

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

Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the excavated hole which Claimant's vehicle struck and that the hole presented a hazard to the traveling public. Therefore, the Court finds that Respondent was negligent. Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $6,123.34.

Award of $6,123.34.

OPINION ISSUED FEBRUARY 14, 2013

JOHN W. BITTINGER and NORMA BARNETT
V.
DIVISION OF HIGHWAYS
(CC-06-0374)

Brent Robinson, 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. Respondent is responsible for the maintenance of a public roadway known as Harmon Creek Road in Brooke County, West Virginia.

2. On or around December 14, 2004, John W. Bittinger was operating his motor vehicle on Harmon Creek Road in or near Colliers in Brooke County, West Virginia.

3. Claimants allege that the proximate cause of John W. Bittinger's accident was that the portion of Harmon Creek Road in Colliers where the

accident occurred was uneven and in an unsafe, hazardous and defective condition on the day of the accident. 4. Under the specific facts and circumstances of this claim and for purposes of settlement of said claim, Respondent does not dispute the allegations contained in Paragraph 3 of this stipulation.

5. John W. Bittinger was injured as a result of the accident and required medical treatment for his injuries.

6. Norma Barnett (formally known as Norma Bittinger and former wife of John W. Bittinger) contends that she suffered a loss of spousal consortium as a result of the injuries suffered by John W. Bittinger in the accident that occurred on December 14, 2004.

7. Both the Claimants and Respondent believe that in this particualr incident and under these particular circumstances that a total award of Ninety Thousand Dollars ($90,000.00) would be a fair and reasonable amount to settle this claim.

8. John W. Bittinger and Norma Barnett have agreed that John W. Bittinger should receive Eighty-One Thousand Dollars ($81,000.00) out of the total award of Ninety Thousand Dollars ($90,000.00) as compensation for his injuries.

9. Norma Barnett and John W. Bittinger have agreed that Norma Barnett should receive Nine Thousand Dollars ($9,000.00) out of the total award of Ninety Thousand Dollars ($90,000.00) as compensation for her loss of spousal consortium.

10. The parties to this claim agree that the total sum of Eighty-One Thousand Dollars ($81,000.00) to be paid by Respondent to Claimant John W. Bittinger and the total sum of Nine Thousand Dollars ($9,000.00) to be paid by Respondent to Claimant Norma Barnett in Claim No. CC-06-0374 will be a full and complete satisfaction of any and all past and future claims Claimants may have against Respondent, for any reason, arising from the matters described in said claim.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Harmon Creek Road on the date of this incident; that the negligence of Respondent was the proximate cause of the damages sustained to Claimant John W. Bittinger's person; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, Claimants may make a recovery for their respective losses.

Accordingly, the Court is of the opinion to and does make an award to the Claimants in the amount of $81,000.00 and $9,000.00, respectively.

Award of $81,000.00 to John W. Bittinger.

Award of $9,000.00 to Norma Barnett.

OPINION ISSUED FEBRUARY 14, 2013

ELLA WATSON
V.
DIVISION OF HIGHWAYS
(CC-10-0669)

Claimant appeared *pro se*.

Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant, Ella Watson, brought this action for vehicle damage which occurred when her 2002 Ford Escort struck ice while traveling along W. Va. Route 10 in Salt Rock, Cabell County, which resulted in her vehicle leaving the roadway and rolling down an embankment. W. Va. Route 10 is a public 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 6:30 a.m. on December 1, 2009. Claimant testified that while she was driving from her home to work she encountered a sharp turn and recalled that ice had built up so badly that it was impossible to avoid sliding uncontrollably. Claimant stated that in her opinion the ice had accumulated because trash and other debris in the ditch line impeded the flow of water from the night before and had frozen along the roadway. Claimant testified that Respondent had been notified on prior occasions that the condition along the ditch line presented a potential hazard to the public. As a result of coming into contact with the ice, Claimant's vehicle exited the roadway and rolled down an embankment. Claimant testified that there was no guardrail present along the stretch of roadway. Claimant carried only liability insurance at the time of the incident. As proof of her

damages, Claimant submitted, and the Court took notice of the NADA vehicle value totaling. $4,325.00. Claimant now seeks the total value of her vehicle.

The position of Respondent is that it did not have actual or constructive notice of the icy condition along W. Va. Route 10 on the date of the incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't 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 ditch line prior to the build of ice along the roadway. Given the location of the incident, the Court finds that Respondent had a duty to adequately maintain the ditch line so as to prevent unnatural ice buildup. This is especially true since Respondent has not installed guardrails along the stretch of roadway in question.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $4,325.00.

Award of $4,325.00.

OPINION ISSUED FEBRUARY 14, 2013

DANNY A. WALKER
V.
DIVISION OF HIGHWAYS
(CC-10-0680)

Claimant appeared *pro se*. Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1997 Ford Mustang struck a sunken portion of blacktop while traveling

along Lower Mud River Road near Milton, Cabell County. Lower Mud River Road is a public 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 8:00 p.m. on December 6, 2010. The speed limit on Lower Mud River Road is thirty-five (35) miles per hour. Claimant was traveling west on Lower Mud River Road at between thirty-five (35) and forty (40) miles per hour when his vehicle struck a sunken portion of the roadway that spanned a small bridge. Claimant testified that the weather had been cold and icy and it was dark. Claimant also stated that there is a "rough road" sign before the sunken portion of the roadway, but Claimant asserts that he did not have enough time to prepare for the impact. As a result, Claimant's vehicle sustained damage to the oil pan and engine in the amount of $1,700.00. Claimant carried liability insurance only on the vehicle. Respondent's position is that it did not have actual or constructive notice of the condition along the roadway, but if it had, there was a sign in place to warn drivers that there was rough road ahead.

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 the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the sunken roadway that Claimant's vehicle struck and that the condition of the roadway presented a hazard to the traveling public. Given the size of the depression and its location along a bridge span, there was no other means for the traveling public to avoid the condition. The Court finds that the sign was an inadequate warning of road conditions along the bridge. Thus, Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $1,700.00.

Award of $1,700.00.

OPINION ISSUED FEBRUARY 14, 2013

ROGER A. HAYNES
V.
DIVISION OF HIGHWAYS
(CC-10-0555)

Claimants appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1997 Lincoln Town Car struck a construction barrel while he was traveling along Interstate 64 in Huntington, Cabell County. Interstate 64 is a public 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 12:40 a.m. on August 19, 2010. Claimant was traveling westbound in the right lane, because the left lane was undergoing construction by Respondent. Respondent had placed construction barrels between the two lanes in order to create a barrier. However, Claimant maintains that Respondent placed at least one barrel too far in the right lane. As a result, the Claimant's vehicle made contact with a barrel and damaged his driver side mirror, which required repair in the amount of $214.12. Claimant had liability insurance only. The position of the Respondent is that it did not have actual or constructive notice of the location of the barrel along Interstate 64.

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 the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the barrel which Claimant's vehicle struck and that the condition presented a hazard to the traveling public. Since the barrel was placed at a location that impeded the travel portion of the roadway, the Court finds that Respondent was negligent. Thus, Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $214.12.

Award of $214.12.

OPINION ISSUED FEBRUARY 14, 2013

DESIGN & PRODUCTION INC.,
V.
DEPARTMENT OF ADMINISTRATION
(CC-10-0494)

Paul Stroebel and Edward J. Tolchin, Attorneys at Law, for Claimant.
Katherine A. Schultz, Senior Deputy Attorney General, for Respondent.

PER CURIAM:

Design & Production Inc. ("Claimant"), a corporation, brings this claim for damages arising from an alleged breach of contract by the West Virginia Department of Administration ("Respondent"). Claimant asserts that certain taxes were paid beyond the rate represented by Respondent's agents, and Respondent is responsible for the full reimbursement of said additional taxes already paid to the State, as well as for taxes, interest and penalties still due and owing to the City of Charleston. Respondent denies the allegations in Claimant's Notice of Claim, asserts that Claimant failed to engage in due diligence, and that the contract terms were clear and unambiguous; therefore, Claimant, as a sophisticated party, had a duty to determine the tax consequences of doing business in the State of West Virginia.

In early 2008, the Procurement Officer for the West Virginia Division of Culture and History, Gloria Anderson, requested approval from the Director of Purchasing, David Tincher, for the use of a Request for Proposal ("RFP") format

for evaluating and contracting with a specialty contract or for what was known as the Museum Renovation Project ("Project"). Upon approval, the RFP was announced and bids were solicited for specialty fabrication work to be performed by *manufacturers*.[27]

On February 14, 2008, Claimant's Vice President, Dan Moalli, attended a mandatory bid conference in Charleston, West Virginia. The goal of this conference was to clarify all aspects of the RFP and to evaluate the pool of potential bidders. Moalli testified that Respondent's agents stated at this conference that the project was to be performed by manufacturers, and that the only license needed to perform the work would be a manufacturers license. Moalli also sought clarification on the potential tax liability for performing work as a manufacturer in the State of West Virginia. Moalli left the conference believing that the City of Charleston's lower 0.3 per cent manufacturers tax rate would apply to the winning bidder–not the 2 per cent contractors rate.[28] Moalli testified that he was told by Respondent's agents that taxes were to be included in the total bid amount and not separately listed. Moalli stated he was not concerned about other State taxes as it would be provided a tax exempt certificate for Claimant's use throughout the project.

[27]In the past, this Court has dealt extensively with Request for Quotations (RFQ). RFPs are distinct because this type of proposal allows the State to accept a bid based on the "best value"– not solely the lowest bid. The distinction is important to this claim because construction contractor work cannot be procured through the use of an RFP. *See* W. Va. Code §5A-3-10b(e).

[28]Mr. Moalli formed this belief even though it was never established that a representative of the City of Charleston was present at the conference to make such a representation.

Claimant submitted its bid on March 27, 2008. Complying with Respondent's directions, Claimant included $27,000.00 for anticipated State taxes. Respondent accepted Claimant's proposal and awarded it a contract in May 2008 for "museum, specialty fabrication" services for the Commodity Code "49565," which is the code for "Museum Preparations and Supplies: Labels, Etc." The Attorney General approved the form of this contract.[29]

Shortly after the contract was awarded, the West Virginia Department of Labor ("DOL"), based on an anonymous complaint, determined that despite the fact that Respondent awarded Claimant a contract for manufacturing work, Claimant was actually a construction contractor by DOL's statutory definition of a contractor. Claimant immediately contacted Respondent to determine what action it should take with regard to DOL's position. Respondent apparently attempted to intervene, but eventually informed Claimant it would have to deal with DOL on its own. Nancy Arnold, Administrator for Claimant, testified that DOL told her that Respondent had improperly solicited and awarded the contract as a manufacturing contract. DOL also insisted that in order to continue with the project Claimant would have to obtain a contractor license.

In order to comply with DOL's ruling and save the project, Claimant attempted to obtain certification as a contractor; however, these efforts proved futile given Claimant's inexperience in the construction field. Eventually, DOL permitted Claimant to obtain a carpentry license rather than a contractor's license. This license substitution allowed the project to continue; however, Claimant's tax exempt certificate was revoked due to DOL's directive to obtain a contractor's license. Claimant asserts that these actions resulted in increased taxes due the State, and it further alleges that it resulted in the City of Charleston's taxing at a higher rate.

Claimant represented to the Court that it had attempted to reconcile the price difference in taxes through the use of a change order. Respondent,

[29]Not only was Claimant's bid considered the "best value" given Claimant's extensive experience in museum display fabrication, it was also the lowest bid with a total bid price of approximately $2,000,000.00 less than the next lowest bidder.

through Director Tincher, testified that no change was ever submitted to it by Claimant.[30]

Claimants now seek damages in the amount of $253,858.00 for extra costs incurred through the alleged breach of contract by Respondent in the amount of $80,296.00 for the alleged damages. This amount, Claimant maintains, was paid to the State for taxes improperly levied due to forced reclassification from manufacturer to construction contractor. The remaining $173,562.00 of alleged damages are sought to account for the consequent alleged higher tax rate levied by the City of Charleston. The Court is of the opinion to award this claim, in part, and deny, in part, for the reasons more fully stated below.

In this State, the procedures for awarding public contracts can be divided into four steps: (1) advertisement of the fact that the agency will accept bids for a public works contract; (2) a written "invitation for bids" that provides information about the project and the procedures for submitting bids; (3) the preparation and submission of bids; and (4) the consideration of bids and the award of the contract by the public entity. The first two activities are informational in nature–that is, they concern the information that the government *must provide* to potentially interested bidders. The latter two have to do with the actual process by which bids are submitted and the successful bidder is selected. These four steps apply whether the bid is for a RFQ or a RFP.

[30]While Claimant maintains that it submitted a change order to Respondent, the record does not contain a change order or correspondence relating to the attempted use of a change order.

The written and oral representations made by Respondent were incomplete and misleading as to critical terms of the bid that were established and in existence at the time the representations were made; Claimant relied upon the unqualified written representations made by Respondent in the bid information and instructions, in formulating and submitting its initial sealed bid.[31]

We are particularly concerned by these unique circumstances because, at the time of bid opening, Claimant's bid incorporated the manufacturing tax rate, which was consistent with written representations in Respondent's bid documents. The governmental body's invitation for bids for a public contract is not an offer that a bidder has the power to accept through a responsive bid; it is, instead, the solicitation of an offer.

A public contract awarded pursuant to competitive bidding procedures must be substantially in accordance with the terms of the invitation to bid. Yet, it is the bid for a public contract that constitutes an offer to contract. There is no contract until the offer is accepted. The Respondent accepted Claimant's bid in May 2008. The accepted bid changed when the DOL determined that the Claimant was required to obtain a contractor's license, which was clearly a requirement neither of the parties contemplated at the time of the bid. This change adversely affected Claimant's bid specifically as to the anticipated tax rate it would be assessed. Since the bid documents were the sole source of Claimant's bid information and estimates, this change was also a material change to the accepted bid. More importantly, the change occasioned by requiring a contractor's license occurred after the Claimant had already begun performance of the contract.

Thus, where intent is complete, clear and unambiguous as evidenced by the plain meaning of the language the parties chose to employ in the contract, it should be enforced as written. There is no need to look further. The Court

[31]The contract states under section 1.6 that "[o]nly the information issued in writing and added to the Request for Proposal specifications file by an official written addendum are binding." Furthermore, section 1.8.2 of the contracts states that "[t]his Request for Proposal contains all the contractual terms and conditions under which the State of West Virginia will enter into a contract."

finds that the information provided the Claimant by DOA was the guide used to determine the amount of Claimant's bid and the subsequent change was neither contemplated nor considered. Given these circumstances, the Court is of the opinion and finds that the increased costs incurred by an increased (different) state tax rate–which in this instance is $80,296.00–should be reimbursed.

Claimant also seeks reimbursement from this Court for what it alleges was an increased tax rate assessed by the City of Charleston. The Court is of the opinion that issues between the Claimant and the City of Charleston relating to tax rates and assessments are issues that, if resolved, should be resolved under the procedures provided by the city.

Based on the foregoing, the Court is of the opinion to grant the Claimant's claim, in part, and deny, in part.

Award $80,296.00.

OPINION ISSUED FEBRUARY 14, 2013

DANNY PLYBON and LINDA PLYBON
V.
DIVISION OF HIGHWAYS
(CC-11-0430)

Claimants appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimants, Danny and Linda Plybon, brought this action for property damage which occurred when their home of twenty-seven years flooded as a result of a collapsed culvert along Whites Creek Road near Prichard, Wayne County. Whites Creek Road is a public 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 the hours of 7:00 p.m. and 8:00 p.m on May 10, 2011. At this time, a large rain event caused water to accumulate along a creek on the boundary of Claimants'

property and rise three feet to Claimants' basement. Mr. Plybon testified that the culvert collapsed approximately eight months before the rain event that flooded his basement, and that the collapsed culvert impeded the flow of rain water and caused it to pool. Mr. Plybon stated that prior to the flooding event he had contacted Respondent on numerous occasions so that maintenance crews may survey the damage and make necessary repairs to the culvert. On one occasion before the flood, but after the culvert collapse, Respondent placed gabion stones along the sunken portion of the roadway above the culvert as a temporary measure, but Mr. Plybon stated that he pleaded with Respondent's crew to quickly replace the culvert as a flood was likely imminent. As a result of the May 10, 2011 flood, numerous items of personal property were destroyed in Claimants' basement. Claimants now ask this Court to make an award in the amount of $6,761.96 for the cost to replace certain items of personal property and a furnace unit. Claimants did not maintain flood insurance on their property at the time of the incident.

The position of Respondent is that it did not have actual or constructive notice of the condition along the roadway that allegedly caused Claimants' basement to flood. Furthermore, Respondent asserts that creeks are prone to flooding, and Claimant assumed the risk by living in a home situated next to a creek.

This Court has held that Respondent Division of Highways has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught v. Dep't of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether Respondent negligently failed to protect a Claimant's property from foreseeable damage. *Rogers v. Div. of Highways*, 21 Ct. Cl. 97 (1996).

In the instant case, the Court is finds that Respondent not only had notice of the collapsed culvert, it should have been foreseeable that a large rain event would cause flooding to occur along Claimants' property. Claimants lived on the same property for twenty-seven years and had never sustained flooding of this magnitude until the culvert at issue collapsed. Therefore, Respondent was negligent in failing to adequately maintain the culvert. At a hearing on this matter, the Court reduced the amount of damages to reflect a total of $5,159.44, because Claimants had inadvertently added the cost of replacing a furnace twice. The Court finds that the reduced amount is fair and reasonable compensation to Claimants.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $5,159.44.

Award of $5,159.44.

OPINION ISSUED FEBRUARY 14, 2013

TRI-STAR MOTORS INC.
V.
DIVISION OF MOTOR VEHICLES
(CC-12-0469)

Nathan Markee, Attorney at Law, for Claimant.
Gretchen A. Murphy, 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 to recover $2,509.00 for damages associated with the improper issuance of a vehicle title, which properly belonged to Claimant.

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

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $2,509.00.

Award of $2,509.00.

OPINION ISSUED FEBRUARY 14, 2013

VERNON NEXSEN
V.
DIVISION OF MOTOR VEHICLES
(CC-12-0419)

Claimant appeared *pro se*.
Gretchen A. Murphy, 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 to recover $190.00 for the cost to release his vehicle from impoundment.

In its Answer, Respondent admits the validity of the claim as well as the amount alleged with respect to the improper impoundment of Claimant's vehicle in the sum of $190.00. The Court is aware that Respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

Based on Respondent's admission, it is the opinion of the Court of Claims that Claimant should be awarded the sum of $190.00.

Award of $190.00.

OPINION ISSUED FEBRUARY 14, 2013

EVELYN L. HARRIS
V.
DIVISION OF HIGHWAYS
(CC-12-0001)

Claimant appeared *pro se*.

Travis E. Ellison III, Attorney at Law, for Respondent.

PER CURIAM:

Claimant, Dr. Evelyn L. Harris, brought this action for vehicle damage which occurred when her 2010 Volvo C30 struck an iron stake holder while traveling along Kanawha Boulevard in Charleston, Kanawha County. Kanawha Boulevard is a public 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 9:30 p.m. on December 9, 2011. Claimant testified that while traveling home from a theatrical performance her vehicle struck iron holders embedded in the roadway at the intersection of Kanawha Boulevard and Greenbrier Street. Claimant further stated that these iron holders are common along Kanawha

Boulevard; however, Claimant maintains that they are usually covered by a plastic cap so as to avoid damage to the traveling public. Claimant stated that due to the darkness and lack of reflective covering, she could not avoid contact with the holders. As a result of its contact with the holders, Claimant's vehicle sustained damage to its tire and rim in the amount of $1,275.89. Claimant carried collision insurance at the time of the incident and was reimbursed the cost over and above the $1,000.00 deductible. Claimant now seeks the cost of her deductible. The position of Respondent is that it did not have actual or constructive notice of the exposed condition of the holders along Kanawha Boulevard on the date of the incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the holders which the Claimants' vehicle struck and that the exposed condition presented a hazard to the traveling public. Given the numerous examples along Kanawha Boulevard of properly covered holders and the location's proximity to the capitol, the Court finds that Respondent should have been aware of the condition. Thus, Claimant may make a recovery for the amount of her deductible.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $1,000.00.

Award of $1,000.00.

OPINION ISSUED FEBRUARY 14, 2013

WANDA GOODWIN
V.
BOARD OF VETERINARY MEDICINE

(CC-13-0004)

Claimant appeared *pro se*.
Mary Downey, 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 to recover $6,564.00 for annual incremental pay for the years 1985 through 1995, which was not paid to Claimant while serving in her capacity as Executive Director of Respondent agency.

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

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $6,564.00.

Award of $6,564.00.

OPINION ISSUED FEBRUARY 14, 2013

BRIDGET A. MCDONIE and GABRIELLE COCHRAN
V.
DIVISION OF HIGHWAYS
(CC-13-0027)

L. Lee Javins II, Attorney at Law, for Claimants.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

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

1. On March 7, 2009, the Claimant, Bridget A. McDonie, and her daughter, Gabrielle Cochran, were traveling westbound on Route 61 in a 2007 Mazda MX 5 owned by the Claimant, Bridget A. McDonie. While driving on Route 61, in Kanawha County, a mature, rotten tree that was situated on the

southern roadway hillside broke off at the stump and struck the top of the vehicle driven by the Claimant.

2. As a result of the rotten tree striking Claimant's vehicle, the Claimant Bridget A. McDonie sustained severe and debilitating permanent injuries to her spine, torso, and body. She also sustained severe and extreme emotional distress.

3. As a direct and proximate result of the Claimant's injuries, the Claimant, Bridget A. McDonie, has sustained damages in excess of $2 million.

4. The hillside on which the tree was located is owned by Law River Company, LLC.

5. The Claimants have identified potential evidence to suggest that the Respondent maintained a portion of the land that abuts and /or encompasses the subject tree that fell onto the vehicle driven by the Claimant Bridget A. McDonie.

6. Given Claimant Bridget A. McDonie's extreme injuries and significant damages, coupled with the mutual uncertainty of the outcome of any trial, the parties agree that it is in their best interests and in the interest of judicial economy to resolve this matter for the total sum of Two Hundred Thousand Dollars ($200,000.00) to be paid by Respondent to the Claimant Bridget A. McDonie in the above-captioned claim and that such payment shall be a full and complete settlement; Claimant Gabrielle Cochran has provided an express waiver of her individual interest in this claim; a compromise and resolution of all matters in controversy among the parties; and a full and complete satisfaction of any and all past and future claims that the Claimants may have against Respondent arising from the matters described in said claim, inclusive of all claims or demands that any heirs, beneficiaries, distributees, representatives, devisees, interested persons, wards, and the like (whether known or unknown) could assert or could have asserted against the Respondent.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Route 61 on the date of this incident; that the negligence of Respondent was the proximate cause of the damages sustained by Claimants; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, Claimants may make a recovery in accordance with this stipulation.

Accordingly, the Court is of the opinion to and does make an award to the Claimant in the amount of $200,000.00.

Award of $200,000.00 to Bridget A. McDonie.

OPINION ISSUED FEBRUARY 14, 2013

RICKEY DEAN LAMBERT and DONNA D. LAMBERT
V.
DIVISION OF HIGHWAYS
(CC-10-0388)

Nicola Smith, 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. Respondent is responsible for the maintenance of West Virginia County Route 707 in or near the City of Bridgeport, which is located in Harrison County, West Virginia. 2. Claimants allege that a ten (10) foot diameter drainage culvert maintained by Respondent that ran underneath County Route 707 collapsed prior to heavy rains that affected Harrison County on June 4, 2008. According to the Claimants, the collapse of the culvert under County Route 707 resulted in the flooding of the basement of Claimants' residence on June 4, 2008.

3. The flooding damaged Claimants' fully furnished basement and resulted in the loss of various items of personal property belonging to the Claimants.

4. A contractor estimate provided by Claimants indicates that the cost to repair the damage to Claimants' property is Sixty-Seven Thousand One Hundred Fifty-Three Dollars ($67,153.00).

5. Claimants have received Twenty-Three Thousand Fifty Dollars and Fifty-Four Cents ($23,050.54) from Nationwide Insurance and the Federal

Emergency Management Agency (FEMA) as partial compensation for their damages.

6. Under the specific facts and circumstances of this claim and for purposes of settlement of said claim, Respondent does not dispute the allegations contained in Paragraph 2 of this stipulation.

7. Both the Claimants and Respondent agree that in this particular incident and under these particular circumstances that an award of Forty Thousand Dollars ($40,000.00) would be a fair and reasonable amount to settle this claim.

8. The parties to this claim agree that the total sum of Forty Thousand Dollars ($40,000.00) to be paid by Respondent to the Claimants in Claim No. CC-10-0388 will be a full and complete settlement, compromise and resolution of all matters in controversy in said claim and full and complete satisfaction of any and all past and future claims Claimants may have against Respondent arising from the matters described in said claim.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of County Route 707 on the date of this incident; that the negligence of Respondent was the proximate cause of the damages sustained to Claimants' property; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, Claimants may make a recovery for their loss.

It is the opinion of the Court of Claims that Claimants should be awarded the sum of $40,000.00 on this claim.

Award of $40,000.00.

OPINION ISSUED FEBRUARY 14, 2013

WESLEY PARMER
V.
DIVISION OF HIGHWAYS
(CC-10-0271)

Macel E. Rhodes, 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. Respondent is responsible for the maintenance of West Virginia Route 55 in Hardy County, West Virginia.

2. On or around September 14, 2008, Wesley Parmer was operating his motorcycle on West Virginia Route 55 in Hardy County, West Virginia, when he lost control of his vehicle because of loose gravel on the roadway in an area of the road where Respondent had recently performed berm work.

3. Claimant alleges on the day of the accident that Respondent had at least constructive notice of the loose gravel in the road, that Respondent had failed to remove the loose gravel from the road and that Respondent had failed to provide appropriate signage close enough to the location of the accident to advise the traveling public of the condition of the road at that location.

4. Under specific facts and circumstances of this claim and for purposes of settlement of said claim, Respondent does not dispute the allegations contained in Paragraph 3 of this stipulation.

5. Wesley Parmer was injured as a result of the accident and required medical treatment for his injuries.

6. Both the Claimant and Respondent believe that in this particular incident and under these particular circumstances that an award of One Hundred Twenty-Five Thousand Dollars ($125,000.00) would be a fair and reasonable amount to settle this claim.

7. The parties to this claim agree that the total sum of One Hundred Twenty-Five Thousand Dollars ($125,000.00) to be paid by Respondent to the Claimant in Claim No. CC-10-0271 will be a full and complete settlement, compromise and resolution of all matters in controversy in said claim and full and complete satisfaction of any and all past and future claims Claimant may have against Respondent arising from the matters described in said claim.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of West Virginia Route 55 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $125,000.00 on this claim.

Award of $125,000.00.

OPINION ISSUED FEBRUARY 14, 2013

EVELYN MONEYPENNY
V.
DIVISION OF HIGHWAYS
(CC-11-0583)

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

PER CURIAM:

Claimant, Evelyn Moneypenny, brought this action for vehicle damage which occurred when her 2008 Chevrolet Impala struck a foreign object while traveling along Sycamore Road in Clarksburg, Harrison County. Sycamore Road is a public 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 4:00 p.m. on September 3, 2011. Claimant testified that while she was driving along Sycamore Road she encountered a large truck and was forced to the berm of the road. As Claimant entered the berm of the roadway, her vehicle struck a concrete block. Claimant stated that Sycamore Road is in a state of bad disrepair, because of the increased truck traffic associated with oil and gas extraction in the area. As a result of its contact with the concrete block, Claimant's vehicle sustained damage to its wheel alignment in the amount of $230.04. Claimant carried only liability insurance at the time of the incident.

The position of Respondent is that it did not have actual or constructive notice of the concrete block along Sycamore Road on the date of the incident.

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

the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the concrete block which the Claimant's vehicle struck and that the object presented a hazard to the traveling public. Since Respondent has admitted to this Court that it is aware of the deleterious effect that increased oil and gas production has on our State's roads, the Court finds that Respondent was negligent. Thus, Claimant may make a recovery for the damage to her vehicle.

It is the opinion of the Court of Claims Claimant should be awarded the sum of $230.04.

Award of $230.04.

OPINION ISSUED FEBRUARY 14, 2013

NANCY CAMP
V.
WEST VIRGINIA RACING COMMISSION
(CC-12-0624)

Claimant appeared *pro se*.
Anthony D. Eates II, Assistant Attorney General, for Respondent.

PER CURIAM:

This claim was submitted for decision without a hearing based upon the allegations in the Notice of Claim and Respondent's Answer.

Claimant seeks to recover $660.00 for purse supplement claims that have not been paid by Respondent. Respondent, in its Answer, admits the validity of the claim and further states that there were insufficient funds in the purse supplement fund 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. v. Dep't of Mental Health*, 8 Ct. Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED FEBRUARY 14, 2013

LINDA S. SING
V.
DIVISION OF HIGHWAYS
(CC-12-0114)

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 Ford Explorer struck a series of large holes while traveling along Roberts Ridge Road near Moundsville, Marshall County. Roberts Ridge Road is a public 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 10:30 p.m. on January 24, 2012. Claimant testified that Roberts Ridge Road is the only means of ingress and egress from her home. Claimant stated that she had contacted Respondent on numerous occasions to fix the roadway, but to no avail. As a result of Claimant's contact with the hole, Claimant's vehicle sustained damage to its ball joints, wheel bearing, and rotors in the amount of $656.53. Claimant's insurance policy, at the time of the incident, only provided liability insurance on her vehicle.

The position of Respondent is that it did not have actual or constructive notice of the holes along Roberts Ridge Ridge on the date of the incident. However, James A. Mitcham, Assistant County Administrator for Ohio County, testified that there are numerous oil and gas wells in the area, and the trucks associated with these oil and gas installations are causing a lot of damage to the roadways.

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 the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the holes in the roadway, which the Claimant's vehicle struck, and that the holes presented a hazard to the traveling public. Since there were numerous holes on this road, and since Respondent has admitted to this Court that it was aware of the deleterious effect caused by the heavy truck hauling linked to the increased oil and gas production has had on the State's roads, the Court finds that Respondent was negligent. Thus, Claimant may make a recovery for the damage to her vehicle.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $656.53.

Award of $656.53.

OPINION ISSUED FEBRUARY 14, 2013

SHEILA D. ANDERSON
V.
DIVISION OF HIGHWAYS
(CC-12-0173)

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

PER CURIAM:

Claimant, Sheila D. Anderson, brought this action for vehicle damage which occurred when her 2002 Dodge Neon struck a hole while she was traveling along the 705 bypass in Morgantwon, Monongalia County. The 705

bypass is a public 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 June 9, 2011. Claimant testified that the weather was clear on the date of the incident and that she was traveling at approximately thirty-five miles per hour. Claimant stated that she did not notice the hole before she hit it as there was traffic in front of her. As a result, the Claimant's vehicle sustained damage to its fog light cover in the amount of $193.87.

The position of the Respondent is that it did not have actual or constructive notice of the hole along the 705 bypass. Larry Weaver, County Administrator for Respondent in Monongalia County, testified that he received no complaints concerning a hole along the 705 bypass; however, he speculated that what Claimant actually hit was an expansion joint, which can cause smaller vehicle damage.

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 the Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986). In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the destructive capabilities of the expansion joints along the 705 bypass and that the condition could present a hazard to the traveling public. Despite Respondent's inability to determine if there was a hole along the roadway, the Court finds that the Respondent was negligent based on its admission that it could have been caused by an expansion joint. Thus, Claimant may make a recovery for the damage to her vehicle.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $193.87.

Award of $193.87.

OPINION ISSUED FEBRUARY 14, 2013

PEGGY J. MAYLE

V.
DIVISION OF HIGHWAYS
(CC-12-0185)

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

PER CURIAM:

Claimant, Peggy J. Mayle, brought this action for vehicle damage which occurred when her 2001 Ford Expedition struck loose gravel and she lost control while traveling along Georgetown Road in Roanoke, Lewis County. Georgetown Road is a public 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 10:05 a.m. on March 31, 2012. Claimant testified that she was driving from her home on Georgetown Road when she met an oncoming vehicle traveling in the center of the roadway which caused her to veer to the edge of the roadway. While making the maneuver, Claimant's vehicle struck loose gravel along the roadway which caused the vehicle to spin out of control and strike an embankment. As a result of its contact with the embankment, Claimant's vehicle sustained a total loss. Claimant carried only liability insurance at the time of the incident.

The position of Respondent is that it did not have actual or constructive notice of the loose gravel along Georgetown Road on the date of the incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the loose gravel which caused Claimant's vehicle to lose control and strike an embankment and that the loose gravel presented a hazard to the traveling public. The Court finds that Respondent

was aware of the frequency with which gravel in this area became washed out onto the roadway. Thus, Claimant may make a recovery for the damage to her vehicle. The Court took notice of the NADA guideline value of Claimant's vehicle and set a fair and reasonable price totaling $7,737.00.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $7,737.00.

Award of $7,737.00.

OPINION ISSUED FEBRUARY 14, 2013

THERESA M. SPANO
V.
DIVISION OF HIGHWAYS
(CC-12-0337)

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

PER CURIAM:

Claimant, Theresa M. Spano, brought this action for medical damages and lost wages springing from an incident which occurred while driving her brother's 1984 Honda motorcycle along Middle Grave Creek in Marshall County. Middle Grave Creek is a public road maintained by Respondent. The Court is of the opinion to award this claim, in part, and deny, in part, for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 6:00 p.m. on May 24, 2012. Claimant testified that while she was driving her brother's motorcycle along Middle Grave Creek she encountered a turn with three large "ruts or potholes." Claimant stated that she attempted to swerve in order to avoid the large "ruts or potholes," but Claimant's motorcycle wrecked in the process. The weather on the date of the incident was clear and dry and Claimant was traveling fifteen miles per hour (under the posted speed limit). As a result of this incident, Claimant sustained fractures to her arm, and Claimant's brother's motorcycle was totaled. Claimant testified that her brother has been reimbursed for the fair value of the motorcycle. However,

Claimant has submitted medical bills to the Court indicating that all but $50.00 was paid by Claimant's HMO. Claimant also testified to lost wages in the amount of $194.48. Claimant further seeks relief for pain and suffering in the amount of $3,500.00.

The position of Respondent is that it did not have actual or constructive notice of the holes along Middle Grave Creek on the date of the incident. Kevin Kaufman, emergency first responder in Marshall County, testified on behalf of Respondent that Claimant appeared to have been traveling at a speed greater than the suggested speed limit while negotiating the turn, which led to her accident. Mr. Kaufman did concede that in his opinion there were obvious "road deficiencies" at the place 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 v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the holes which caused Claimant's damage, and the Court finds that these holes presented a hazard to the traveling public. The Court has reviewed the record with regard to damages and has determined that Claimant is entitled to $50.00 for medical bills and the amount of $194.48 for lost wages. However, Claimant has not met her burden with regard to her claim for pain and suffering. Therefore, Claimant is entitled to a recovery in the total amount of $244.48.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $244.48.

Award of $244.48.

OPINION ISSUED FEBRUARY 14, 2013

SKOOBIE SCHNEIDER
V.

WEST VIRGINIA RACING COMMISSION
(CC-13-0002)

Claimant appeared *pro se*.
Anthony D. Eates II, Assistant Attorney General, for Respondent.

PER CURIAM:

This claim was submitted for decision without a hearing based upon the allegations in the Notice of Claim and Respondent's Answer.

Claimant seeks to recover $1,500.00 for purse supplement claims that have not been paid by Respondent. Respondent, in its Answer, admits the validity of the claim and further states that there were insufficient funds in the purse supplement fund 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. v. Dep't of Mental Health*, 8 Ct. Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED FEBRUARY 14, 2013

MS CONSULTANTS INC.
V.
REGIONAL JAIL AUTHORITY
(CC-11-0465)

Christopher A. Brumley and Keith R. Hoover, Attorneys at Law, for Claimant.
Kelli D. Talbott, Senior Deputy 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 July, 11, 2011, the Claimant filed this breach of contract claim against the West Virginia Regional Jail Authority in the amount of $275,376.75. The Claimant alleges that it is owed this sum for architectural and professional services rendered in connection with the design of the Kenneth Honey Rubenstein Juvenile Center in Davis, West Virginia.

2. This claim arises from Claimant's and Respondent's mutual agreement to create a new fee schedule associated with extra work to be undertaken by Claimant in respect to a design issue arising from the presence of wetlands at the construction site. 3. The parties desire to settle and resolve this claim in lieu of litigating this claim before the Court.

4. The Respondent stipulates and agrees that $200,000.00 is appropriate to settle and resolve this claim in full.

5. The Claimant stipulates and agrees that it accepts the amount of $200,000.00 to settle and resolve this claim in full.

The Court has reviewed the facts of the claim and finds that Respondent did breach a contractual obligation to compensate Claimant based on the agreed compensation schedule between Claimant and Respondent dated January 24, 2008. The Court further finds that the amount of damages agreed to by the parties is fair and reasonable. Therefore, Claimant may make a recovery consistent with the parties' Stipulation.

It is the opinion of the Court that the Claimant should be, and is hereby, awarded the sum of $200,000.00 on this claim.

Award of $200,000.00.

OPINION ISSUED FEBRUARY 14,2013

JOHNITHAN CLARK
V.
DIVISION OF HIGHWAYS
(CC-11-0210)

Claimant appeared *pro se*.
Michael J. Folio, 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 25, 2011, the Claimant, Johnithan Clark, was traveling along Big Lynn Road near East Lynn, Wayne County, when his 2003 Ford Mustang struck a large hole in the travel portion of the road.

2. Respondent was responsible for the maintenance of Big Lynn 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 $400.00. The Claimant carried liability insurance only at the time of the incident; therefore, no limitation applies to the Claimant's award.

4. The Court finds that the amount of $400.00 is fair and reasonable.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Big Lynn 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the damage.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $400.00 in this claim.

Award of $400.00.

OPINION ISSUED FEBRUARY 14,2013

RANDY MCMILLION and RITA MCMILLION
V.
DIVISION OF HIGHWAYS
(CC-12-0004)

Claimants appeared *pro se*.
Travis E. Ellison III, Attorney at Law, for Respondent.

PER CURIAM:

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

1. On March 25, 2011, the Claimants, Randy and Rita McMillion, were traveling along Interstate 79 near Clendenin, Kanawha County, when their 2011 Audi S5 struck a large hole in the travel portion of the road.

2. Respondent was responsible for the maintenance of Interstate 79, 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 $1,341.24. The Claimants' collision insurance requires a $1,000.00 deductible amount; therefore, Claimant is limited to an award in this amount.

4. The Court finds that the amount of $1,000.00 is fair and reasonable.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Interstate 79 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 damages agreed to by the parties is fair and reasonable. Thus, Claimants may make a recovery for the damage.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $1,000.00 in this claim.

Award of $1,000.00.

OPINION ISSUED FEBRUARY 14,2013

ALEXA TALKINGTON and MELINDA TALKINGTON
V.
DIVISION OF HIGHWAYS
(CC-11-0565)

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

PER CURIAM:

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

1. On July 11, 2011, Claimant, Alexa Talkington, was traveling along Glory Barn Road near Morgantown, Monongalia County, when her 2005 Chevrolet Cobalt struck a large asphalt mound in the travel portion of the road.

2. Respondent was responsible for the maintenance of Glory Barn Road, 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 $454.61, and Claimants incurred a tow bill in the amount of $100.00. The Claimants' insurance requires a $500.00 collision deduction; therefore, no limitation applies to Claimants' award.

4. The amount of $554.61 is fair and reasonable compensation for the damage to Claimants' vehicle and for the cost of towing.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Glory Barn Road 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 damages agreed to by the parties is fair and reasonable. Thus, Claimants may make a recovery for the damage.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $554.61 in this claim.

Award of $554.61.

OPINION ISSUED FEBRUARY 14,2013

VINCENT A GALA JR.
V.
DIVISION OF HIGHWAYS
(CC-12-0042)

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

PER CURIAM:

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

1. On January 5, 2012, Claimant, Vincent A. Gala, was traveling along Wylie Ridge Road near Weirton, Hancock County, when his 2006 Mitsubishi Eclipse was forced to swerve and in so doing struck a large hole in the berm of the road.

2. Respondent was responsible for the maintenance of Wylie Ridge 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 $765.88. Claimant's collision insurance requires a $500.00 deductible amount; therefore, an award to Claimant is limited to the amount of the deductible.

4. The amount of $500.00 is fair and reasonable.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Wylie Ridge 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the damage.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $500.00 in this claim.

Award of $500.00.

OPINION ISSUED FEBRUARY 14,2013

AUDREY ROBINETTE and PHILLIP ROBINETTE
V.
DIVISION OF HIGHWAYS
(CC-10-0679)

Claimants appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

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

1. On November 21, 2010, Claimants, Audrey and Phillip Robinette, were traveling along W. Va. Route 10 near Salt Rock, Cabell County, when their 2009 Pontiac G8 struck a negligently constructed curb in the travel portion of the road while negotiating a turn into a local business.

2. Respondent was responsible for the maintenance of W. Va. Route 10, 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 $1,000.00. The Claimants' collision insurance requires a $1,000.00 deductible amount; therefore, no limitation applies to Claimants' award.

4. The amount of $1,000.00 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 10 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 damages agreed to by the parties is fair and reasonable. Thus, Claimants may make a recovery for the damage.

It is the opinion of the Court of Claims that Claimants should be awarded the sum of $1,000.00 in this claim.

Award of $1,000.00.

OPINION ISSUED FEBRUARY 14,2013

SAM L. MAY
V.
DIVISION OF HIGHWAYS
(CC-11-0209)

Claimant appeared *pro se*.
Michael J. Folio, 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 23, 2011, the Claimant, Sam May, was traveling along Walker Branch Road in Ceredo, Wayne County, when his 2007 Dodge pickup truck struck a large hole in the travel portion of the road.

2. Respondent was responsible for the maintenance of Walker Branch 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 $768.88. The Claimant's collision insurance requires a $1,000.00 deductible amount; therefore, no limitation applies to the Claimant's award.

4. The Court finds that the amount of $768.88 is fair and reasonable.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Walker Branch 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the damage.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $768.88 in this claim.

Award of $768.88.

OPINION ISSUED FEBRUARY 14,2013

JOHN M. EFAW
V.
DIVISION OF HIGHWAYS
(CC-11-0516)

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 28, 2011, the Claimant, John Efaw, was traveling along Java Run Road near Saint Marys, Pleasants County, when his 1996 Ford Contour struck a large hole in the travel portion of the road.

2. Respondent was responsible for the maintenance of Java Run 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 $1,810.00. Claimant carried liability insurance only at the time of the incident.

4. The Court finds that theamount of $800.00 is fair and reasonable based on the mutual agreement of the parties.

The Court has reviewed the facts of the claim and finds that Respondent was negligen; that the negligence of Respondent was the proximate cause of the damages sustained to Claimant's vehicle; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the damage.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $800.00 in this claim.

Award of $800.00.

OPINION ISSUED FEBRUARY 14,2013

TARI L. BLANCHARD
V.
DIVISION OF HIGHWAYS
(CC-11-0282)

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 18, 2011, Claimant, Tari L. Blanchard, was traveling along Interstate 70 in Wheeling, Ohio County, when her 2003 Pontiac Grand Am struck a large hole in the travel portion of the roadway.

2. Respondent was responsible for the maintenance of Interstate 70, 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 $307.87. The Claimant's collision insurance requires a $1,000.00 deductible amount; therefore, no limitation applies to the Claimant's award.

4. The amount of $307.87 is fair and reasonable.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Interstate 70 on the date of this incident; that the negligence of Respondent was the proximate cause of the damages sustained to Claimant's vehicle; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the damage.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $307.87 in this claim.

Award of $307.87.

OPINION ISSUED FEBRUARY 14,2013

KEVIN E. DUNLAP
V.
DIVISION OF HIGHWAYS
(CC-12-0308)

Claimant appeared *pro se*.
Michael J. Folio, 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 17, 2012, the Claimant, Kevin Dunlap, was traveling along Coal River Road near Saint Albans, Kanawha County, when his 2008 Chevrolet HHR struck a series of drainage holes in the travel portion of the road.

2. Respondent was responsible for the maintenance of Coal River 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 $258.60. The Claimant's collision insurance requires a $500.00 deductible amount; therefore, no limitation applies to the Claimant's award.

4. The Court finds that the amount of $258.60 is fair and reasonable.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Coal River 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the damage.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $258.60 in this claim.

Award of $258.60.

OPINION ISSUED FEBRUARY 14,2013

JIMMY BENSON and JOHN GHIZ
V.
DIVISION OF HIGHWAYS
(CC-12-0283)

Claimants appeared *pro se*.
Michael J. Folio, 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 April 6, 2012, the Claimants, Jimmy Benson and John Ghiz, were traveling along W. Va. Route 2 near Glenwood, Mason County, when their 2002 Hugh TL trailer was struck by a loose piece of steel from a bridge crossing.

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, Claimants' vehicle sustained damage in the amount of $1,556.00. The Claimants carried liability insurance only; therefore, no limitation applies to the Claimants' award.

4. The Court finds that the amount of $1,556.00 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 Claimants' vehicle; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, Claimants may make a recovery for the damage.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $1,556.00 in this claim.

Award of $1,556.00.

OPINION ISSUED FEBRUARY 14,2013

CAREY MCCULLOUGH
V.
DIVISION OF HIGHWAYS
(CC-12-0255)

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 10, 2012, the Claimant, Carey McCullough, was traveling along Sun Valley Road in Clarksburg, Harrison County, when her 2012 Lexus IS-250 struck a large hole in the travel portion of the road.

2. Respondent was responsible for the maintenance of Sun Valley 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 $926.78. The Claimant's collision insurance requires a $1,000.00 deductible amount; therefore, no limitation applies to the Claimant's award.

4. The amount of $926.78 is fair and reasonable.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Sun Valley 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the damage.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $926.78 in this claim.

Award of $926.78.

OPINION ISSUED FEBRUARY 14, 2013

PETE SAUCHUCK and BENITA SAUCHUCK
V.
DIVISION OF HIGHWAYS
(CC-11-0610)

Claimants appeared *pro se*.
Michael J. Folio, 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 April 18, 2011, Claimant Benita Sauchuck was traveling along Blue Jay 6 Road near Cool Ridge, Raleigh County, when she proceeded through an intersection that did not have a stop sign in place as required. As a result, Claimant was involved in a collision with another vehicle.

2. Respondent was responsible for the maintenance of Blue Jay 6 Road and the stop sign which was missing; therefore, Respondent failed to maintain this intersection properly on the date of this incident.

3. As a result of this incident, Claimants' vehicle sustained damage in the amount of $16,064.23. Respondent has agreed to stipulate to liability and damages in the amount of $8,500.00, and Claimant has agreed to accept settlement in that amount.

4. The Court finds that the amount of $8,500.00 is fair and reasonable.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of this particular intersection of Blue Jay 6 Road 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 damages agreed to by the parties is fair and reasonable. Thus, Claimants may make a recovery for the damage.

It is the opinion of the Court of Claims that Claimants should be awarded the sum of $8,500.00 in this claim.

Award of $8,500.00.

OPINION ISSUED FEBRUARY 14, 2013

DANIEL L. HADLEY
V.
DIVISION OF HIGHWAYS
(CC-12-0039)

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, 2012, the Claimant, Daniel L. Hadley, was traveling along W. Va. Route 50 near Salem, Harrison County, when his 2000 Saturn LS2 struck a large rock in the travel portion of the road.

2. Respondent was responsible for the maintenance of W. Va. Route 50, 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 $5,735.23. Claimant carried liability insurance at the time of the incident; therefore, no limitation applies to an award in this claim.

4. The parties agree that the amount of $3,100.00 is fair and reasonable compensation for the total loss of Claimant's vehicle.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of W. Va. Route 50 on the date of this incident; that the negligence of Respondent was the proximate cause of the damages sustained to Claimant's vehicle; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the damage.

It is the opinion of the Court of Claims that Claimant should be awarded the sum of $3,100.00 in this claim.

Award of $3,100.00.

OPINION ISSUED APRIL 5, 2013

SALLY J. SAVAGE
V.
DIVISION OF HIGHWAYS
(CC-11-0645)

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

PER CURIAM:

Claimant, Sally Savage, brought this action for vehicle damage which occurred when her 2011 Cadillac CTS struck an uneven portion of asphalt while traveling along W. Va. Route 16 near Beckley, Raleigh County. W. Va. Route 16 is a public road maintained by Respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 4:00 p.m. on October 12, 2011. Claimant testified that while she was driving in the northbound lane of W. Va. Route 16 near the intersection of Dunn Street when she encountered a slight incline in the roadway. As a result of the slight incline, Claimant's vehicle made contact with the roadway. Claimant stated that the condition of the roadway on the date of the incident was clear and dry. Claimant also informed the Court that her vehicle sits low to the ground and is fitted with low profile tires. As a result of its contact with the roadway, Claimant's vehicle sustained damage to its tires and trim in the amount of $806.52. Claimant carried a $500.00 collision insurance deductible at the time of the incident.

The position of Respondent is that it did not have actual or constructive notice of the road defect along W. Va. Route 16 on the date of the incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent did not have actual or constructive notice of the road condition which led to Claimant's damage. Claimant did not submit photographic evidence of the condition. Claimant was only able to show photographs of an area that was patched, which does not prove the existence of a road defect. Therefore, the Court finds that Respondent was not negligent.

Based on the foregoing, the Court is of the opinion to, and does hereby, deny Claimant's claim.

Claim disallowed.

OPINION ISSUED APRIL 5, 2013

ELAINE FLETCHER
V.
DIVISION OF HIGHWAYS
(CC-11-0674)

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

PER CURIAM: Claimant, Elaine Fletcher, brought this action for vehicle damage which occurred when her 2003 Chevrolet Cavalier struck a rock while she was traveling along U.S. Route 50 near Parkersburg, Wood County. U.S.. Route 50 is a public road maintained by Respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 9:00 a.m. on November 9, 2011. U.S. Route 50 is a four-lane highway spanning the distance between Parkersburg and Clarksburg. Claimant testified that while transporting her friends to a doctor's appointment in Clarksburg, she encountered a large rock in the roadway. Claimant stated that she could not avoid the rock because a large truck was traveling next to her in the passing lane. The conditions on the date of the incident were clear and dry according to Claimant. As a result of its contact with the rock, Claimant's vehicle sustained damage to its undercarriage in the amount of $3,115.14. Claimant had collision automobile insurance with a $500.00 deductible amount at the time of the incident.

The position of Respondent is that it did not have actual or constructive notice of the rock along U.S. Route 50 on the date of the incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of*

Highways, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent did not have actual or constructive notice of the rock which Claimant's vehicle struck. The Court is satisfied that Respondent did not have knowledge of the condition that led to Claimant's damage, and Respondent did not have time to correct the situation before the Claimant's vehicle struck the rock. Therefore, the Court finds that Respondent was not negligent.

Based on the foregoing, the Court is of the opinion to, and does hereby, deny this claim.

Claim disallowed.

OPINION ISSUED APRIL 5, 2013

DAVID SELLERS JR. and ZANGELEIA SELLERS
V.
DIVISION OF HIGHWAYS
(CC-12-0050)

Claimants appeared *pro se*.
Travis Ellison III, Attorney at Law, for Respondent.

PER CURIAM:

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

1. On January 16, 2012, the Claimants, David and Zangeleia Sellers, were traveling along Interstate 79 near Weston, Lewis County, when their 2008 Suzuki SX4 struck a large rock in the travel portion of the road.

2. Respondent was responsible for the maintenance of Interstate 79, 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 $250.00.

4. The Court finds that the amount of $250.00 is fair and reasonable.

5. At the hearing, the Court requested a copy of Claimants' insurance declarations in order to continue processing Claimants' claim. However, Claimants have not submitted the requested documentation.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Interstate 79 on the date of this incident; and that the negligence of Respondent was the proximate cause of the damages sustained to Claimants' vehicle. However, Claimants may not make a recovery in this claim because Claimants have failed to provide the Court with a copy of their insurance declarations.

Based on the foregoing, the Court is of the opinion to, and does hereby, deny Claimants' claim.

Claim disallowed.

OPINION ISSUED APRIL 5, 2013

DAVID BROWN
V.
DIVISION OF HIGHWAYS
(CC-12-0183)

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

PER CURIAM:

Claimant, David Brown, brought this action for vehicle damage which occurred when his 2007 Ford F-150 struck a series of sharp rocks while traveling along Fields Creek Road in Independence, Preston County. Fields Creek Road is a public road maintained by Respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 7:00 a.m. on March 1, 2012. Claimant testified that while he was driving from his home to make a work related delivery of nuclear medicine he had no choice but to traverse an area of the roadway that had been washed out by a very large rain event the evening before. Claimant stated that the whole county had sustained damage from the two-day storm that caused Claimant's damage. Due to the storm, the Governor later declared the county to be in a state of

emergency. As a result of its contact with the rocks, Claimant's vehicle sustained damage to its tires in the amount of $260.76. Claimant carried collision insurance with a $1,000.00 deductible amount on the date of the incident.

The position of Respondent is that Fields Creek Road is a low priority road, and while Respondent did have constructive notice of the condition of Fields Creek Road, Respondent could not be expected to correct Fields Creek Road when the entire county was inundated with damage from a significant two-day storm.

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 the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

Here, the Court finds that Respondent did have constructive notice of the condition of Fields Creek Road on the date of the incident and would be ordinarily liable for having such notice and for failing to take corrective action to avoid damage to the traveling public. However, this claim is distinct in that a state of emergency was declared based on the aftermath of the storm which caused the damage. W. Va. Code §15-5-11 grants immunity and exemption to a "duly qualified emergency service worker." The statute states, in part, that "[n]either the State nor any political subdivision nor agency of the State or political subdivision nor, except in cases of willful misconduct, any duly qualified emergency service worker complying with or reasonably attempting to comply with this article or any order, rule, regulation or ordinance promulgated pursuant to this article, shall be liable for . . . damage to any property as a result of such activity." §15-5-11(a).

Given this limitation, the Court is of the opinion that Respondent had immunity from property damage claims due to the state of emergency immediately following the two-day storm. Therefore, the Court finds that Respondent was not negligent on the date of the incident and Claimant may not make a recovery.

Based on the foregoing, the Court is of the opinion to, and does hereby, deny this claim.

Claim disallowed.

OPINION ISSUED JUNE 3, 2013

THERESA DILLON
V.
DIVISION OF HIGHWAYS
(CC-07-0379)

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 8, 2007, the Claimant, Theresa Dillon, was traveling through the Dingess Tunnel near Williamson, Mingo County, when her vehicle struck a large hole in the travel portion of the road.

2. Respondent was responsible for the maintenance of the Dingess Tunnel, 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 $1,016.54. Claimant carried liability insurance only on the date of the incident; therefore, Claimant is entitled to the full amount of her damages.

4. The Court finds that the amount of $1,016.54 is fair and reasonable.

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

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $1,016.54 in this claim.

Award of $1,016.54.

REFERENCES

COURT OF CLAIMS

— BERMS – See also Comparative Negligence and Negligence
— BRIDGES
— COMPARATIVE NEGLIGENCE – See also Berms; Falling Rocks and Rocks; Negligence & Streets and Highways
— CONTRACTS
— DAMAGES
— DRAINS AND SEWERS - See also 000000Flooding
— FALLING ROCKS AND ROCKS – See also Comparative Negligence and Negligence
— FLOODING
— JURISDICTION
— LEASES
— MORAL OBLIGATIONS
— MOTOR VEHICLES
— NEGLIGENCE – See also Berms; Falling Rocks and Rocks & Streets and Highways
— NOTICE
— PEDESTRIANS
— PRISONS AND PRISONERS
— PUBLIC EMPLOYEES
— STATE AGENCIES
— STATUTES
— STIPULATED CLAIMS
— STREETS AND HIGHWAYS – See also Comparative Negligence and Negligence
— TREES AND TIMBER
— UNJUST CONVICTION

— VENDOR
— VENDOR – Denied because of insufficient funds

The following is a compilation of head notes representing decisions from July 1, 2009 to June 30, 2011. Due to time and space constraints, the Court has decided to exclude certain decisions, most of which involve vendors, typical road hazard claims and expense reimbursements.

BERMS – See also Comparative Negligence and Negligence

CROUSE V. DIVISION OF HIGHWAYS (CC-11-0083)

Claimant brought this action for vehicle damage which occurred while her husband was driving her 2008 Ford F–250 Super Duty. Claimant struck a protruding road sign while traveling on County Route 85 near Van, Boone County. The Court is of the opinion that Respondent had, at the least, constructive notice of the sign in question. Furthermore, Respondent's position that the property owner is to blame has no merit and amounts to speculation at best. Thus, Claimant may make a recovery for the damage to her vehicle.....p. 49.

WARE V. DIVISION OF HIGHWAYS (CC-11-0145)

Claimant brought this action for vehicle damage which occurred when her 2007 Mitsubishi Galant struck a hole in the berm on WV Route 25 near Dunbar, Kanawha County. WV Route 25 is a public road maintained by Respondent. Claimant chose to drive onto the berm and the Court cannot hold Respondent liable for failure to maintain the berm when the berm was not used in an emergency situation. Thus, there is insufficient evidence of negligence upon which to base an award. Claim disallowed.....p. 13

BRIDGES

ANDERSON V. DIVISION OF HIGHWAYS (CC-12-0173)

Claimant, Sheila D. Anderson, brought this action for vehicle damage which occurred when her 2002 Dodge Neon struck a hole while she was traveling along the 705 bypass in Morgantwon, Monongalia County. In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the destructive capabilities of the expansion joints along the 705 bypass and that the condition could

present a hazard to the traveling public. Despite Respondent's inability to determine if there was a hole along the roadway, the Court finds that the Respondent was negligent based on its admission that it could have been caused by an expansion joint. Thus, Claimant may make a recovery for the damage to her vehicle.....p. 136

BENSON AND GHIZ V. DIVISION OF HIGHWAYS (CC-12-0283)

The parties stipulated as follows: On April 6, 2012, the Claimants, Jimmy Benson and John Ghiz, were traveling along W. Va. Route 2 near Glenwood, Mason County, when their 2002 Hugh TL trailer was struck by a loose piece of steel from a bridge crossing. Respondent was responsible for the maintenance of W. Va. Route 2, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimants' vehicle sustained damage in the amount of $1,556.00. The Claimants carried liability insurance only; therefore, no limitation applies to the Claimants' award. The Court finds that the amount of $1,556.00 is fair and reasonable.....p. 147

BOOKER V. DIVISION OF HIGHWAYS (CC-10-0616)

Claimant, Robert Booker, brought this action for medical bills and pain and suffering for injuries sustained while attempting to traverse the Dunbar Bridge on foot. Despite Respondent's own negligence, the Court is also of the opinion that Mr. Booker at least knew or should have known about the dangerous condition of the sidewalk based on the frequency that he crossed the Dunbar Bridge. In a comparative negligence jurisdiction such as West Virginia, the claimant's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that the Claimant's negligence equals twenty-percent (35%) of his loss. Since the negligence of the Claimant is not greater than or equal to the negligence of the Respondent, the Claimant may recover eighty-percent (65%) of the loss sustained. Therefore, the Court agrees that an award of $10,378.03 is a fair and reasonable amount to compensate Mr. Booker for his injuries.....p. 73

PYLES V. DIVISION OF HIGHWAYS (CC-10-0650)

Claimant brought this action for vehicle damage which occurred while she was driving her 2003 Subaru Baja over a wooden bridge. Claimant struck a nail while traveling along Plum Road, designated as County Route 68/5 near Tunnelton, Preston County. The Court is of the opinion that Respondent had, at the least, constructive notice of the conditions of the wooden bridge where Claimant's vehicle incurred damage from a nail. The deteriorated condition of the bridge deck presented a hazard to the traveling

COMPARATIVE NEGLIGENCE - See also Berms: Falling Rocks and Rocks: Negligence & Streets and Highways

Claimant brought this action for vehicle damage which occurred when their 2002 Ford Escape struck a patch of ice and slid into an embankment on County Route 106 near Terra Alto, Preston County. The Court found Respondent negligent in its maintenance of the road but also determined that Claimant was negligent for twenty-five percent (25%) of her damages.....p. 46

VIOLA V. DIVISION OF HIGHWAYS (CC-08-0312)

The Claimant, Anthony S. Viola, brought this action for vehicle damage which occurred when his 2002 Pontiac Grand Am struck a hole while he was turning onto Hideaway Lane from State Route 27 near Wellsburg, Brooke County. State Route 27 and Hideaway Lane are both maintained by the Respondent. In the instant case, even if the Court assumes that the Respondent had, at least, constructive notice of the hole, which the Claimant's vehicle struck, and should have known that the hole could potentially present a hazard to the traveling public, the evidence clearly established that the Claimant attempted to negotiate the turn onto Hideaway Lane at a high rate of speed and without reasonable ordinary caution. Consequently, the Court is of the opinion that the Claimant is at least fifty percent negligent in this claim. Therefore, the Claimant may not make a recovery for his loss in this claim based on West Virginia's comparative negligence law. Claim disallowed.....p. 103

YIRBERG V. DIVISION OF HIGHWAYS (CC-09-0322)

Claimant brought this action for damages to her fence and for the loss of a Border Collie, which she alleges occurred as a result of Respondent's negligent maintenance of its boundary fence located along I-64. Claimant's residence, located at 584 Fairwood Road, in Huntington, Cabell County, abuts Respondent's boundary fence. The Court is of the opinion to make an award to Claimant in the amount of $3,175.00 reduced by Claimant's comparative negligence which the Court determined to be thirty percent (30%) for an award of $2,222.50.....p. 29

CONTRACTS

AB CONTRACTING INC. V. DEPARTMENT OF EDUCATION (CC-11-0208)

Claimant seeks payment in the amount of $20,000.00 for approved construction work performed at the request of Respondent. Respondent admits the

validity of the claim as well as the amount. The Court finds that Claimant is entitled to an award.....p. 9

AT&T V. WEST VIRGINIA STATE SENATE (CC-11-0652)

Claimant seeks to recover $526.23 for telephone calling card services provided to Respondent in prior fiscal years, but for which Claimant has not received payment. In its Answer, Respondent admits the validity of the claim as well as the amount of $526.23. Respondent states that there were sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid. Claimant agrees that the amount of $526.23 is fair and reasonable, and is willing to accept it as full satisfaction for this claim.....p. 67

BROOKS V. NEW RIVER COMMUNITY AND TECHNICAL COLLEGE (CC-11-0405)

Claimant, Margo Latanya Brooks, filed the instant claim seeking payment of $250,000.00 for services rendered pursuant to an alleged contract for employment and for the loss of future employment opportunities with the Respondent, New River Community and Technical College. The Respondent denies all allegations in the Notice of Claim. Finding no authority for the President of the Respondent college to bind the Higher Education Policy Commission to an employment contract, the Court cannot conclude that the Respondent should be estopped to deny the existence of a contract. The Court is constrained to deny the Claimant's breach of contract claim. The Respondent legally rejected all bids as is within its sound discretion, and thus no contract ever existed between the parties.....p. 98

DESIGN & PRODUCTION INC. V. DEPARTMENT OF ADMINISTRATION (CC-10-0494)

Design & Production Inc. ("Claimant"), a corporation, brings this claim for damages arising from an alleged breach of contract by the West Virginia Department of Administration ("Respondent"). Claimant entered into a contract with the Division of Culture and History for the design and manufacture of certain displays for the refurbished museum. The contract was let as a manufacturing contract but the Division of Labor later determined that it was a construction contract. This caused the taxes assessed to Claimant to be in an amount much greater than anticipated by Claimant in the bid it submitted for this project. Claimant asserts the taxes were paid beyond the rate represented by Respondent's agents, and Respondent is responsible for the full reimbursement of said additional taxes already paid to the State, as well as for taxes, interest and penalties still due and owing to the City of

Charleston. The Court made an award, in part, for taxes assessed by the State, but denied the amount assessed by the City of Charleston.....p. 122

DISCOUNT INDUSTRIAL SUPPLY CORPORATION V. DEPARTMENT OF ADMINISTRATION (CC-11-0589)

Claimant, Discount Industrial Supply Corporation ("DISCO"), brought this action seeking an award of attorney fees for substantially prevailing on a Writ of Mandamus filed in the Circuit Court of Kanawha County. Claimant attempted to have a contract awarded by Respondent to be set aside since the contractor's items did not meet the specifications in the bid. Claimant found it necessary to bring a Writ of Mandamus to enforce the provisions in the contract. Respondent did set aside the contract which was never rebid. The Court was of the opinion to award partial attorney fees.....p. 96

GREENBROOKE ASSOCIATES LLC. V. INSURANCE COMMISSION (CC-11-0085)

Claimant seeks to recover $388,488.51 from Respondents for real property taxes assessed and paid by Claimant for the years 2005, 2006, 2007, and 2008, during which time Respondents were contractually obligated to pay their portion of ad valorem taxes based upon their proportionate occupancy of Claimant's building. The Tax Department owes the Claimant $119,461.89 for the years 2005, 2006, 2007, and 2008. The Insurance Commission owes the Claimant $269,026.62 for the years 2005, 2006, 2007, and 2008. In their Answers, Respondents admit the validity of the claim as well as the amounts with respect to the property taxes paid in the total sum of $388,488.51GREENBROOKE ASSOCIATES LLC. V. TAX DEPARTMENT (CC-11-0085)

Claimant seeks to recover $388,488.51 rom Respondents for real property taxes assessed and paid by Claimant for the years 2005, 2006, 2007, and 2008, during which time Respondents were contractually obligated to pay their portion of ad valorem taxes based upon their proportionate occupancy of Claimant's building. The Tax Department owes the Claimant $119,461.89 for the years 2005, 2006, 2007, and 2008. The Insurance Commission owes the Claimant $269,026.62 for the years 2005, 2006, 2007, and 2008. In their Answers, Respondents admit the validity of the claim as well as the amounts with respect to the property taxes paid in the total sum of $388,488.51, and state that there are no funds remaining in the agencies appropriations from the appropriate fiscal years from which the obligations can be paid. The Respondents, Tax Department and Insurance Commission, admit that $119,461.89 and $269,026.62, respectively, is fair and reasonable.....p. 26

claim as well as the amount with respect to the services rendered in the sum of $12,556.00, and states that there were sufficient funds with which the invoices could have been paid.....p. 69

TEMPORARY EMPLOYMENT SERVICES INC. V. DIVISION OF TOURISM (CC-10-0600)

This claim was submitted for decision based upon the allegations in the Notice of Claim and Respondent's Answer. Claimant seeks to recover $474.15 in unpaid wages from Respondent. In its Answer, Respondent admits the validity of the claim as well as the amount, and states that Claimant was indeed not paid for 27 1/4 hours of work performed for which Claimant should have been.....p. 41

DRAINS AND SEWERS - See also Flooding

ELLINGTON V. DIVISION OF HIGHWAYS (CC-10-0422)

The parties stipulated as follows: Respondent is responsible for the maintenance of West Virginia Route 94 (Lens Creek Road) in or near the community of Hernshaw, which is located in Kanawha County, West Virginia. Claimant alleges that due to the poor maintenance of a culvert underneath West Virginia Route 94, water backed up and flooded the basement of his home on May 14, 2010. As a result of the flood on May 14, 2010, Claimant suffered the damage and loss of a hot water tank, sump pump, Christmas decorations and other items of personal property that were stored in the basement. Under the specific facts and circumstances of this claim and for purposes of settlement of said claim, Respondent does not dispute the allegations contained in Paragraph 2 of this stipulation. Both the Claimant and Respondent agree that in this particular incident and under these particular circumstances that an award of One Thousand Five Hundred Dollars ($1,500.00) would be a fair and reasonable amount to settle this claim. The parties to this claim agree that the total sum of One Thousand Five Hundred Dollars ($1,500.00) to be paid by Respondent to the Claimant will be a full and complete settlement, compromise and resolution of all matters in controversy in said claim and full and complete satisfaction of any and all past and future claims Claimant may have against Respondent arising from the matters described in said

LAMBERT V. DIVISION OF HIGHWAYS (CC-10-0388)

The parties stipulated as follows: Respondent is responsible for the maintenance of West Virginia County Route 707 in or near the City of Bridgeport, which is located in Harrison County, West Virginia. Claimants allege that a ten (10) foot diameter drainage culvert maintained by Respondent that ran underneath County Route 707 collapsed prior to heavy rains that affected Harrison County on June 4, 2008. According to the Claimants, the collapse of the culvert under County Route 707 resulted in the flooding of the basement of Claimants' residence on June 4, 2008. The flooding damaged Claimants' fully furnished basement and resulted in the loss of various items of personal property belonging to the Claimants. A contractor estimate provided by Claimants indicates that the cost to repair the damage to Claimants' property is Sixty-Seven Thousand One Hundred Fifty-Three Dollars ($67,153.00). Claimants have received Twenty-Three Thousand Fifty Dollars and Fifty-Four Cents ($23,050.54) from Nationwide Insurance and the Federal Emergency Management Agency (FEMA) as partial compensation for their damages. Under the specific facts and circumstances of this claim and for purposes of settlement of said claim, Respondent does not dispute the allegations of this stipulation. Both the Claimants and Respondent agree that in this particular incident and under these particular circumstances that an award of Forty Thousand Dollars ($40,000.00) would be a fair and reasonable amount to settle this claim. The parties to this claim agree that the total sum of Forty Thousand Dollars ($40,000.00) to be paid by Respondent to the Claimants in Claim No. CC-10-0388 will be a full and complete settlement, compromise and resolution of all matters in controversy in said claim and full and complete satisfaction of any and all past and future claims Claimants may have against Respondent arising from the matters described in said claim.....p. 131

MARKLE V. DIVISION OF HIGHWAYS (CC-09-0155)

Claimant brought this action for property damage to his residence which he alleges occurred as a result of Respondent's negligent maintenance of a drainage system along State Route 921 near Wheeling, Ohio County. Claimant asserts that water flows across State Route 921 and onto his property and contends that the water has caused damage to a retaining wall and driveway, and this damage has allowed

certain portions of Claimant's property to slip and accumulate near the entry of his residence. The Court is of the opinion to, and does hereby, make an award in this claim in the amount of $7,306.00. The Court believes that this amount is fair and reasonable compensation in light of the facts presented.....p. 106

EMERGENCY

BROWN V. DIVISION OF HIGHWAYS (CC-12-0183)

Claimant, David Brown, brought this action for vehicle damage which occurred when his 2007 Ford F-150 struck a series of sharp rocks while traveling along Fields Creek Road in Independence, Preston County. Fields Creek Road is a public road maintained by Respondent. The Court is of the opinion that Respondent had immunity from property damage claims due to the state of emergency immediately following the two-day storm. Therefore, the Court finds that Respondent was not negligent on the date of the incident and Claimant may not make a recovery.....p. 154

FALLING ROCKS AND ROCKS - See also Comparative Negligence and Negligence

CUMBERLEDGE V. DIVISION OF HIGHWAYS (CC-10-0620)

Claimants brought this action to recover damages to the tires of two vehicles that were punctured by sharp rocks on County Route 20/39, locally designated Shaw Hollow Road, in Wallace, Harrison County. County Route 20/39 is a public road maintained by Respondent. Claimants opted to replace all four tires on both vehicles for a total loss of $1,225.80. Claimants had no collision coverage on the 2001 Stratus; however, they had a collision deductible of $500.00 on the Dodge Durango. The Court limited their recovery for the damaged tires to $100.00 per tire due to the age of the tires. Claimants were made an award of $300.00.....p. 8

HADLEY V. DIVISION OF HIGHWAYS (CC-12-0039)

The parties stipulated as follows: On January 17, 2012, the Claimant, Daniel L. Hadley, was traveling along W. Va. Route 50 near Salem, Harrison

County, when his 2000 Saturn LS2 struck a large rock in the travel portion of the road. Respondent was responsible for the maintenance of W. Va. Route 50, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimant's vehicle sustained damage in the amount of $5,735.23. Claimant carried liability insurance at the time of the incident; therefore, no limitation applies to an award in this claim. The parties agree that the amount of $3,100.00 is fair and reasonable compensation for the total loss of Claimant's vehicle.....p. 150

HENDERSON TRANSFER LLC V. DIVISION OF HIGHWAYS (CC-09-0588)

Claimant brought this action for vehicle damage when a tractor-trailer owned by Claimant struck a rock while traveling in the northbound lane of W. Va. Route 340 near Harpers Ferry, Jefferson County. W. Va. Route 340 is a public road maintained by Respondent. In this case, the dangerous condition at issue is the presence of a rock in the travel portion of the roadway. Respondent's tractor-trailer was not struck by falling rocks while traveling along the road–the tractor-trailer *struck* a *stationary* rock. Respondent was given no notice of this condition and had no reason to know of the condition despite the fact that Respondent admittedly was aware of the *possibility*–no matter how remote–of a rock fall in the area.....p. 71

MATHEWS V. DIVISION OF HIGHWAYS (CC-12-0073)

Claimant, Tristan Mathews, brought this action for vehicle damage which occurred when his 2008 Chevrolet Malibu was struck by a series of small rocks while traveling along Interstate 79 near Clendenin, Kanawha County. In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the rocks which struck the Claimant's vehicle and that the rocks presented a hazard to the traveling public. Since there were numerous known rock falls along this stretch of road, and since Respondent has attempted to place guardrails in adjoining areas in order to prevent such occurrences, the Court finds that Respondent is liable for Claimant's damage. Thus, Claimant may make a recovery for the damage to his vehicle.....p. 111

PINTI V. DIVISION OF HIGHWAYS (CC-10-0163)

Claimant Kelly Pinti brought this action for vehicle damage which occurred when her 2003 Toyota Sequoia struck rocks located on the surface of Interstate-79

near Fairmont, Marion County. I-79 is a public road maintained by Respondent. Claimant has not established that Respondent failed to take adequate measures to protect the safety of the traveling public on I-79. Respondent placed "falling rock" signs to warn the traveling public of the potential for rock falls at this location. Although the rocks created a dangerous condition on the road, there is no evidence that Respondent had notice of this hazard. While the Court is sympathetic to the Claimant's plight, the fact remains that there is insufficient evidence of negligence on the part of Respondent upon which to base an award.....p. 4

HOUCK AND SEIBEL V. DIVISION OF HIGHWAYS (CC-11-0216)

Claimant John Houck brought this action for vehicle damage which occurred to Claimant Katherine Seibel's 2003 Dodge Caravan when it struck rocks near the edge of the road on County Route 4/1, locally designated Ben Speck Road, in Hedgesville, Berkeley County. The Court is of the opinion that Respondent had, at the least, constructive notice of the dangerous rocks next to road on County Route 4/1. Since the rocks were located within the Respondent's right-of-way, and dangerously near the edge of a heavily traveled road, the condition created a hazard to the traveling public. The Court determined that Respondent was negligent in its maintenance of the road...p. 27

FLOODING

KERNS V. DIVISION OF HIGHWAYS (CC-09-0235)

The Claimant, Michael K. Kerns, brought this action for property damage to his residence which he alleges occurred as a result of the Respondent's negligent maintenance of a drainage system along Second Street and Center Street in Morgantown, Monongalia County. The Claimant's residence is located at 56 East Second Street and he alleges that water flows down Center Street, across Second Street, and onto his property following every major rain event. The Claimant contends that the water has caused extensive damage to his home and the surrounding property. Center Street and Second Street are public roads maintained by the Respondent. The Court finds in the instant claim that the water problems were caused by the actions of a third party property owner and not the Respondent. The evidence established that the third party property owner disturbed the natural flow of the water in this area which caused water run-off to overflow onto Second Street and

onto the Claimant's property. The Court cannot find the Respondent liable when the third party property owner created the water problems by construction on his own property which then constricted the natural flow of run-off, and altered the original lay of the land. As Mr. Holmes indicated, the Respondent cannot remedy the problem when it originates on private property. Thus, there is insufficient evidence of negligence on the part of the Respondent upon which to base an award.....p. 101

PLYBON V. DIVISION OF HIGHWAYS (CC-11-0430)

Claimants, Danny and Linda Plybon, brought this action for property damage which occurred when their home of twenty-seven years flooded as a result of a collapsed culvert along Whites Creek Road near Prichard, Wayne County. In the instant case, the Court is finds that Respondent not only had notice of the collapsed culvert, it should have been foreseeable that a large rain event would cause flooding to occur along Claimants' property. Claimants lived on the same property for twenty-seven years and had never sustained flooding of this magnitude until the culvert at issue collapsed. Therefore, Respondent was negligent in failing to adequately maintain the culvert. At a hearing on this matter, the Court reduced the amount of damages to reflect a total of $5,159.44, because Claimants had inadvertently added the cost of replacing a furnace twice. The Court finds that the reduced amount is fair and reasonable compensation to Claimants.....p. 126

WOODSIDE, AS ADMINISTRATOR OF THE ESTATE OF TERRY J. WOODSIDE JR. V. DIVISION OF HIGHWAYS (CC-09-0603)

The parties stipulated as follows: On December 13, 2007, Harrison County and the area near WV Route 131, known as Saltwell Road, experienced a widespread rain and flood event. Water had accumulated on the roadway. Respondent attempted to clear the roadway of accumulated water, but failed to clear completely water from the roadway. Respondent is responsible for the maintenance of WV Route 131 situated near and between Bridgeport and Shinnston, Harrison County. Claimant's decedent was operating a motor vehicle in the northerly direction on WV Route 131 when he came upon accumulated water on the roadway, hydroplaned, and struck a tree. Respondent had been working in the area of the accident earlier in the day and attempted to clear a drain that was not functioning properly and causing the standing water on the road. However, Respondent was

unsuccessful in its effort to correct the problem. Claimant alleges that Respondent failed to place a warning sign alerting motorists of high water at the location where Claimant's decedent struck a tree. Respondent alleges that a warning sign was placed at the southern entrance of WV Route 131 near Bridgeport, Harrison County, just off I-79. Respondent received various communications throughout the day regarding water in the area and on the roadway. Claimant estimates that the Claimant has sustained economic losses in excess of $1,000,000.00due to the decedent's death. Based on the parties' investigation, the parties to this claim agree that the total sum of$250,000.00 to be paid by Respondent to Terry J. Woodside, Sr., as Administrator of the Estate of Terry J. Woodside, Jr., Deceased, will be a full and complete settlement of this claim.

The Court reviewed the facts and circumstances in this claim and determined that Claimant should be made an award in the amount stipulated by the parties.....p. 1

ICE AND SNOW

WATSON V. DIVISION OF HIGHWAYS (CC-10-0669)

Claimant, Ella Watson, brought this action for vehicle damage which occurred when her 2002 Ford Escort struck ice while traveling along W. Va. Route 10 in Salt Rock, Cabell County, which resulted in her vehicle leaving the roadway and rolling down an embankment. In the instant case, the Court is of the opinion that Respondent had actual notice of the condition of the ditch line prior to the icy condition on the roadway. Given the location of the incident, the Court finds that Respondent had a duty to adequately maintain the ditch line so as to prevent unnatural ice buildup. This is especially true since Respondent has not installed guardrails along the stretch of roadway in question.....p. 119

JURISDICTION

BURFORD V. DIVISION OF HIGHWAYS (CC-12-0102)

Claimant brought this action for vehicle damage which occurred when his 1997 Chevrolet Camaro struck a hole while he was traveling along the intersection of Hannel Road and Doc Bailey Road near Charleston, Kanawha County. Hannel

MORAL OBLIGATIONS

MOTOR VEHICLES

NEGLIGENCE - See also Berms; Falling Rocks and Rocks & Streets and Highways

the damages put forth by the Claimant is fair and reasonable.....p.20

CLARK V. DIVISION OF HIGHWAYS (CC-11-0210)

The parties stipulated as follows: On March 25, 2011, the Claimant, Johnithan Clark, was traveling along Big Lynn Road near East Lynn, Wayne County, when his 2003 Ford Mustang struck a large hole in the travel portion of the road. Respondent was responsible for the maintenance of Big Lynn Road, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimant's vehicle sustained damage in the amount of $400.00. The Claimant carried liability insurance only at the time of the incident; therefore, no limitation applies to the Claimant's award. The Court finds that the amount of $400.00 is fair and reasonable.....p.141

DILLON V. DIVISION OF HIGHWAYS (CC-07-0379)

The parties stipulated as follows: On December 8, 2007, the Claimant, Theresa Dillon, was traveling through the Dingess Tunnel near Williamson, Mingo County, when her vehicle struck a large hole in the travel portion of the road. Respondent was responsible for the maintenance of the Dingess Tunnel, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimant's vehicle sustained damage in the amount of $1,016.54. Claimant carried liability insurance only on the date of the incident; therefore, Claimant is entitled to the full amount of her damages. The Court finds that the amount of $1,016.54 is fair and reasonable. The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of the Dingess Tunnel on the date of this incident; that the negligence of Respondent was the proximate cause of the damages sustained to Claimant's vehicle; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the damage.....p.155

DUVALL V. DIVISION OF HIGHWAYS (CC-10-0628)

Claimants brought this action for vehicle damage which occurred while Mr. Duvall was driving their 2004 Ford F-350 Super Duty. Claimants' trailer rolled over and struck their vehicle while entering their driveway located along County Route 55 near West Liberty, Ohio County. The Court is of the opinion that Respondent had, at the least, constructive notice of the poor workmanship that led to this incident. The unusually steep grade leading from the roadway to Claimants' driveway leads the

also should have known that it presented a hazard to the traveling public. The size of the hole and its location on the travel portion of the road leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to his vehicle.....p.36

HAYNES V. DIVISION OF HIGHWAYS (CC-10-0555)

Claimant brought this action for vehicle damage which occurred when his 1997 Lincoln Town Car struck a construction barrel while he was traveling along Interstate 64 in Huntington, Cabell County. In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the barrel which Claimant's vehicle struck and that the condition presented a hazard to the traveling public. Since the barrel was placed at a location that impeded the travel portion of the roadway, the Court finds that Respondent was negligent. Thus, Claimant may make a recovery for the damage to his vehicle.....p.122

JARVIS V. DIVISION OF HIGHWAYS (CC-11-0564)

Claimant brought this action for vehicle damage which occurred while she was driving her 1998 Chevrolet Malibu. Claimant's vehicle struck two large holes while traveling along Old W. Va. Route 250 near Farmington, Marion County. The Court is of the opinion that Respondent had, at the least, constructive notice of the two holes. The size of the holes and the location on the travel portion of the road leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to her vehicle.....p. 65

LANDIS V. DIVISION OF HIGHWAYS (CC-11-0396)

Claimants brought this action for vehicle damage which occurred when Claimant Deloris Landis was driving their 2010 Honda Fit. Claimants' vehicle struck a large hole while Mrs. Landis traveling along W. Va. Route 20 in Clarksburg, Harrison County. The Court is of the opinion that Respondent had, at the least, constructive notice of the condition of the deterioration at the site of the manhole which Claimants' vehicle struck, and that the condition presented a hazard to the traveling public. The Court concludes that Respondent was negligent for its maintenance of this area of the roadway . Thus, Claimants may make a recovery for the damage to their vehicle...p. 62

MARKS V. DIVISION OF HIGHWAYS (CC-09-0364)

Claimant brought this action for vehicle damage which occurred to his 2002 Mitsubishi Galant after daily driving over a road alleged to be poorly maintained. County Route 7/5, locally designated Woodland Road, in West Columbia, Mason County, which is a public road maintained by Respondent. It is the opinion of the Court Respondent did not provide adequate maintenance for this road, and further, that Claimant should be granted an award in the sum of $870.00.....p. 19

MCDANIEL V. DIVISION OF HIGHWAYS (CC-11-0108)

Claimant brought this action for vehicle damage which occurred when his 2001 Toyota Camry XLE struck a hole on Kanawha Turnpike in South Charleston, Kanawha County. The Court is of the opinion that Respondent had, at the least, constructive notice of the condition on Kanawha Turnpike. Since a large hole in the travel portion of a heavily traversed road created a hazard to the traveling public, the Court finds Respondent negligent. However, Respondent may only be held liable for the actual damage caused by its negligence.....p. 68

MCKINNEY V. DIVISION OF HIGHWAYS (CC-11-0659)

The parties stipulated as follows: On October 30, 2011, the Claimant, Mary A. McKinney, was traveling along Clearbrook Avenue near Bud, Wyoming County, when her 2008 Buick Lacerne CXL struck a large, newly-formed ditch. There were no warning signs for the traveling public. Respondent was responsible for the maintenance of Clearbrook Avenue, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimant's vehicle sustained damage in the amount of $353.19. The Claimant's insurance requires a $1,000.00 deduction; therefore, no limitation applies to the Claimant's award. The amount of $353.19 is fair and reasonable.....p. 81

MICHAELS V. DIVISION OF HIGHWAYS (CC-10-0297)

Claimant brought this action for motorcycle damage which occurred while he was driving his 2002 Harley Davidson Low Rider. Claimant's motorcycle struck a series of deep gouges while traveling along W. Va. Route 2 near Chester, Hancock County. The Court is of the opinion that Respondent had, at the least, constructive notice of the improperly placed sign, and that the deep depressions in the road

presented a hazard to the traveling public. The size of the depressions and their location on the travel portion of the road leads the Court to conclude that Respondent was
negligent.....p
33

MONEYPENNY V. DIVISION OF HIGHWAYS (CC-11-0583)

Claimant, Evelyn Moneypenny, brought this action for vehicle damage which occurred when her 2008 Chevrolet Impala struck a foreign object while traveling along Sycamore Road in Clarksburg, Harrison County. In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the concrete block which the Claimant's vehicle struck and that the object presented a hazard to the traveling public. Since Respondent has admitted to this Court that it is aware of the deleterious effect that increased oil and gas production has on our State's roads, the Court finds that Respondent was negligent. Thus, Claimant may make a recovery for the damage to her vehicle.....p. 133

PANEPINTO V. DIVISION OF HIGHWAYS (CC-12-0099)

Claimant, Mark D. Panepinto, brought this action for vehicle damage which occurred when his 2008 Mercedes S550 struck a hole while traveling along GC&P Road in Wheeling, Ohio County. In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the excavated hole which Claimant's vehicle struck and that the hole presented a hazard to the traveling public. Therefore, the Court finds that Respondent was negligent. Claimant may make a recovery for the damage to his vehicle.....p. 117

POLAN V. DIVISION OF HIGHWAYS (CC-10-0672)

Claimant brought this action for vehicle damage which occurred while he was driving his 2006 Acura TSX. Claimant's vehicle struck a large hole while traveling on County Route 47 near West Liberty, Ohio County. The Court is of the opinion that Respondent had, at the least, constructive notice of the hole along the side of County Route 47. The size of the hole on this narrow road leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to his vehicle.....p. 45

RATCLIFFE V. DIVISION OF HIGHWAYS (CC-11-0320)

Claimants brought this action for vehicle damage which occurred while their daughter was driving their 2002 Ford Escort. Claimants' vehicle struck a massive hole when their daughter was traveling east on I-70 near Triadelphia, Ohio County. The Court is of the opinion that Respondent had, at the least, constructive notice of the large hole and that this hazardous condition on a heavily traveled interstate.....p. 58

SCHROYER V. DIVISION OF HIGHWAYS (CC-11-0349)

Claimant brought this action for vehicle damage which occurred while she was driving her 2010 Subaru Impreza. Claimant struck a large hole while traveling along Custer Hollow Road near the entrance to the FBI Complex in Harrison County. The Court is of the opinion that Respondent had, at the least, constructive notice of the hole which Claimant's vehicle struck. Thus, the Respondent was negligent.....p. 59

SELLERS V. DIVISION OF HIGHWAYS (CC-12-005)

The parties stipulated as follows: On January 16, 2012, the Claimants, David and Zangeleia Sellers, were traveling along Interstate 79 near Weston, Lewis County, when their 2008 Suzuki SX4 struck a large rock in the travel portion of the road. Respondent was responsible for the maintenance of Interstate 79, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimants' vehicle sustained damage in the amount of $250.00. The Court finds that the amount of $250.00 is fair and reasonable. At the hearing, the Court requested a copy of Claimants' insurance declarations in order to continue processing Claimants' claim. However, Claimants have not submitted the requested documentation.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Interstate 79 on the date of this incident; and that the negligence of Respondent was the proximate cause of the damages sustained to Claimants' vehicle. However, Claimants may not make a recovery in this claim because Claimants have failed to provide the Court with a copy of their insurance declarations. Claim disallowed.....p. 153

SING V. DIVISION OF HIGHWAYS (CC-12-0114)

Claimant brought this action for vehicle damage which occurred when her 1999 Ford Explorer struck a series of large holes while traveling along Roberts Ridge Road near Moundsville, Marshall County. In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the holes in the roadway, which the Claimant's vehicle struck, and that the holes presented a hazard to the traveling public. Since there were numerous holes on this road, and since Respondent has admitted to this Court that it was aware of the deleterious effect caused by the heavy truck hauling linked to the increased oil and gas production has had on the State's roads, the Court finds that Respondent was negligent. Thus, Claimant may make a recovery for the damage to her vehicle.....p. 135

SMITH V. DIVISION OF HIGHWAYS (CC-11-0515)

Claimant brought this action for vehicle damage which occurred while he was driving his 2007 Dodge Ram 1500. Claimant's vehicle struck a large hole while he was traveling on Old W. Va. Route 53, just off of W. Va. Route 100 approximately two-tenths of a mile past the railroad track near Maidsville, Monongalia County. The Court is of the opinion that Respondent had, at the least, constructive notice of the hole. This leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to his vehicle.....p. 63

SPANO V. DIVISION OF HIGHWAYS (CC-12-0337)

Claimant, Theresa M. Spano, brought this action for medical damages and lost wages springing from an incident which occurred while driving her brother's 1984 Honda motorcycle along Middle Grave Creek in Marshall County. In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the holes which caused Claimant's damage, and the Court finds that these holes presented a hazard to the traveling public. The Court has reviewed the record with regard to damages and has determined that Claimant is entitled to $50.00 for medical bills and the amount of $194.48 for lost wages. However, Claimant has not met her burden with regard to her claim for pain and suffering. Therefore, Claimant is entitled to a recovery in the total amount of $244.48.....p. 138

STEPHENS V. DIVISION OF HIGHWAYS (CC-11-0071)

Claimant Natasha Stephens brought this action for vehicle damage which occurred while she was driving her 2001 Chrysler PT Cruiser. Claimant struck a

series of holes while traveling on Camden Avenue, designated as W. Va. Route 95, near Parkersburg, Wood County. The Court is of the opinion that Respondent had, at the 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 their location on the travel portion of the road leads the Court to conclude that Respondent was negligent. Thus, Claimants may make a recovery for the damage to their vehicle.....p. 48

STEWART V. DIVISION OF HIGHWAYS (CC-09-0329)

Claimants brought this action for vehicle damage which occurred when their 2007 Hyundai Sonata struck a hole in the road on US Route 60 East in Huntington, Cabell County. The Court is of the opinion that Respondent had, at the least, constructive notice of the hole on US Route 60. Since a hole in the travel portion of a heavily travel road created a hazard to the traveling public, the Court finds Respondent
negligent.....p. 18

TURNER JR. V. DIVISION OF HIGHWAYS (CC-10-0160)

Claimant brought this action for vehicle damage which occurred while he was driving his 1997 Saturn SW2. Claimant's vehicle struck a large hole wen he was traveling on W. Va. Route 2 near Moundsville, Marshall County. The Court is of the opinion that Respondent had, at the least, constructive notice of the hole that caused damage to Claimant's vehicle. Given the apparent size of the hole and its location on the main travel portion of a heavily traveled road leads the Court to conclude that Respondent was negligent.....p. 31

BURSON AND VAUGHAN V. DIVISION OF HIGHWAYS (CC-11-0311)

Claimant brought this action for vehicle damage which occurred while he was driving his 2011 Kia Rio between the dates of March 10, 2011 and March 14, 2011, on W. Va. Route 218 near Carolina and Idamay, Marion County. The Court is of the opinion that Respondent had actual notice of the condition of the road and determined that Respondent was negligent in its maintenance of the road.....p. 57

HAMBRICK AND VINEYARD V. DIVISION OF HIGHWAYS (CC-11-0285)

Claimants brought this action for vehicle damage which occurred while claimant Ronald Hambrick was driving their 2002 Toyota Avalon. Claimants' vehicle struck a large bump on W. Va. Route 31 near Deerwalk, Wood County. The Court is of the opinion that Respondent had, at the least, constructive notice of the deep depression in the road which presented a hazard to the traveling public. The sign in place was not properly placed sign to afford notice to the traveling public. The size of the depression and its location on the travel portion of the road leads the Court to conclude that Respondent was negligent.....p. 56

WALKER AND WALKER SMITH V. DIVISION OF HIGHWAYS (CC-10-0455)

The parties stipulated as follows: On June 19, 2010, Claimants' 2006 Honda CRV encountered a rock fall in the roadway of Route 20 near Hinton in Summers County. Respondent is responsible for the maintenance of Route 20 which it failed to maintain properly on the date of this incident. As a result, Claimants' vehicle sustained damage to its windshield, hood, grill and tires in the amount of $1,000.00. Claimants insurance deductible was $1,000. 00 at the time of the incident. Respondent agrees that the amount of $1,000.00 for the damages put forth by the Claimants is fair and reasonable. The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of Route 20 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 damages agreed to by the parties is fair and reasonable. Thus, Claimants may make a recovery for the loss. It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $1,000.00 on this claim. Award of $1,000.00.....p.11

WALKER V. DIVISION OF HIGHWAYS (CC-10-0680)

Claimant brought this action for vehicle damage which occurred when his 1997 Ford Mustang struck a sunken portion of blacktop while traveling along Lower Mud River Road near Milton, Cabell County. In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the sunken roadway that Claimant's vehicle struck and that the condition of the roadway presented a hazard to the traveling public. Given the size of the depression and its location along a bridge span, there was no other means for the traveling public to avoid the condition. The Court finds that the sign was an inadequate warning of road

NOTICE

Claimant brought this action for vehicle damage which occurred when her 2009 Dodge Dakota struck an unknown metal object as she was driving on an unidentified road at the intersection of W. Va. Route 39 in Gauley Bridge, Fayette County. It was determined that the road is maintained by Respondent. The Court is of the opinion that Respondent did not have notice of the object which Claimant's vehicle struck. It is the Claimant's burden to prove that Respondent had notice of the object in the roadway and that they failed to take corrective action. The Court cannot resort to speculation in determining what caused the damage to the Claimant's vehicle. In any case, it is more likely than not that the Claimant's vehicle struck a foreign object in the roadway for which Respondent did not have notice. Therefore, there is insufficient evidence of negligence on the part of Respondent upon which to base an award.....p. 105

HANES V. DIVISION OF HIGHWAYS (CC-11-0273)

Claimant brought this action for vehicle damage which occurred while her daughter was driving her 2000 Saab 9-3 Convertible. Claimant's vehicle struck a large hole onU.S. 119 near Morgantown, Monongalia County. The Court is of the opinion that Respondent had, at the least, constructive notice of the hole that caused damage to Claimant's vehicle. The size of the depression and the fact that cold patch is a less than temporary fix leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to her vehicle.....p. 55

LARSON V. DIVISION OF HIGHWAYS (CC-11-0578)

Claimant, Frank Larson, brought this action for vehicle damage which occurred when his 1997 Ford Ranger was allegedly subjected to road conditions which caused his tires to rapidly wear. In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice that the stretch of roadway containing an old and uncorrected slip could cause unnatural wear and tear to vehicles. Given the accelerated rate of wear on Claimant's tires, the Court finds that the road condition was the cause of the damage; therefore, Claimant may make a recovery in the amount claimed...p. 113

MIDDLETON V. DIVISION OF HIGHWAYS (CC-12-0290)

The Claimants, Estel and Lynna Middleton, brought this action for vehicle damage which occurred when their 2010 Hyundai Sonata struck a tire as they were traveling near the I-64 and I-77 interchange in Charleston, Kanawha County. I-64 and I-77 are public roads maintained by the Respondent. The Court is of the

PRISONS AND PRISONERS

Therefore, the Court is of the opinion to make an award to the Claimant for the purchase price of her wedding rings in the amount of $1,571.00.....p. 16

CLEMENS V. REGIONAL JAIL AUTHORITY (CC-10-0469)

Claimant, an inmate at North Central Regional Jail at the time of the incident, seeks to recover $87.00 for lost prescription glasses that were not returned to him and an additional $87.00 for the pair purchased originally. In its Answer, Respondent admits the validity of the claim for one pair of eye glasses and that the amount of $87.00 is fair and reasonable. The Court is aware that Respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.....p. 34

COMBS V. REGIONAL JAIL AUTHORITY (CC-11-0048)

Claimant, an inmate at Potomac Highlands Regional Jail at the time of the incident, seeks to recover $15.45 for a book that was taken from his possession and never returned to him or placed with his personal property. In its Answer, Respondent admits the validity of the claim and that the amount is fair and reasonable.....p. 13

DEULEY V. REGIONAL JAIL AUTHORITY (CC-11-0242)

Claimant, an inmate at Tygart Valley Regional Jail at the time, seeks to recover $535.00 for certain articles of clothing that were confiscated by Respondent and never returned to him. In its Answer, Respondent admits the validity of the claim as well as the amount.....p. 15

MOATS V. REGIONAL JAIL AUTHORITY (CC-09-0057)

An inmate of Respondent, Robert W. Moats, brings the instant claim seeking compensation totaling the value of certain personal property, which he alleges was lost by Respondent. Specifically, Claimant seeks to recover $1,200.00 for articles of clothing, a ring, and for other personal property. Claimant has failed to meet his burden as Claimant failed to establish a bailment relationship existed with Respondent since the property was lost in transit to Huttonsville Correctional Center, a facility of the Division of Corrections. Accordingly, the Court is of the opinion to deny this claim.....p. 109

PUBLIC EMPLOYEES

GOODWIN V. BOARD OF VETERINARY MEDICINE (CC-13-0004)

Claimant seeks to recover $6,564.00 for annual incremental pay for the years 1985 through 1995, which was not paid to Claimant while serving in her capacity as Executive Director of Respondent agency. Respondent admits the validity as well as the amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal years from which the payments could have been made.....p. 129

MEANS V. DEPARTMENT OF ADMINISTRATION AND DIVISION OF REAL ESTATE (CC-12-0034)

Claimant seeks to recover $15,561.39 for wages owed upon termination of employment. Respondent admits the validity of the claim as well as the amount with respect to the services rendered in the sum of $11,534.04, and states that there were sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid. Respondent denies the claim with respect to the remaining $4,027.35. Claimant has agreed to waive her claim for the remaining $4,027.35.....p. 77

STATE AGENCIES

PUBLIC EMPLOYEES INSURANCE AGENCY V. DIVISION OF CORRECTIONS (CC-10-0671)

Claimant seeks to recover $508,958.79 for health and life insurance benefits provided to the Respondent's employees. In the Stipulation, Respondent admits the validity of the claim and the parties agree that an award in the amount of $438,129.71 is fair and reasonable to settle this claim.....p. 25

RONCEVERTE VOLUNTEER FIRE DEPARTMENT V. STATE FIRE MARSHAL (CC-11-0714)

Claimant seeks to recover $10,238.49 for its portion of state-issued funds for volunteer fire departments operating in good standing. Claimant alleges that Respondent failed to make a timely report to the State Treasurer indicating that Claimant was in good standing and that this failure kept Claimant from receiving funds for the second quarter of 2011. In its Answer, Respondent admits the validity of the claim as it was timely filed, and Respondent further agrees to the amount with

respect to the funds not dispersed, and states that there were sufficient funds expired in that appropriate fiscal year from which the funds could have been paid.....p. 67

SCHNEIDER V. WEST VIRGINIA RACING COMMISSION (CC-13-0002)

Claimant seeks to recover $1,500.00 for purse supplement claims that have not been paid by Respondent. Respondent, in its Answer, admits the validity of the claim and further states that there were insufficient funds in the purse supplement fund 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. v. Dep't of Mental Health*, 8 Ct. Cl. 180 (1971). Claim disallowed.....p. 139

STIPULATED CLAIMS

BALLARD V. DIVISION OF HIGHWAYS (CC-11-0606)

The parties stipulated as follows: On September 24, 2011, Claimant Dennis E. Ballard was traveling along Gee Lick Road near Weston, Lewis County, when his 2005 Dodge Neon struck a deteriorated portion of the roadway. Respondent was responsible for the maintenance of Gee Lick Road, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimants' vehicle sustained damage in the amount of $806.52. The Claimants only carried liability insurance on the vehicle on the date of the incident; therefore, no limitation applies to the Claimants' award. The amount of $806.52 is fair and reasonable.....p. 81

BITTINGER and BARNETT V. DIVISION OF HIGHWAYS (CC-06-0374)

The parties stipulated as follows: Respondent is responsible for the maintenance of a public roadway known as Harmon Creek Road in Brooke County, West Virginia. On or around December 14, 2004, John W. Bittinger was operating his motor vehicle on Harmon Creek Road in or near Colliers in Brooke County, West Virginia. Claimants allege that the proximate cause of John W. Bittinger's accident was that the portion of Harmon Creek Road in Colliers where the accident occurred was uneven and in an unsafe, hazardous and defective condition on the day of the accident. Under the specific facts and circumstances of this claim and for purposes of settlement of said claim, Respondent does not dispute the allegations contained in

Paragraph 3 of this stipulation. John W. Bittinger was injured as a result of the accident and required medical treatment for his injuries. Norma Barnett (formally known as Norma Bittinger and former wife of John W. Bittinger) contends that she suffered a loss of spousal consortium as a result of the injuries suffered by John W. Bittinger in the accident that occurred on December 14, 2004. Both the Claimants and Respondent believe that in this particualr incident and under these particular circumstances that a total award of Ninety Thousand Dollars ($90,000.00) would be a fair and reasonable amount to settle this claim. John W. Bittinger and Norma Barnett have agreed that John W. Bittinger should receive Eighty-One Thousand Dollars ($81,000.00) out of the total award of Ninety Thousand Dollars ($90,000.00) as compensation for his injuries. Norma Barnett and John W. Bittinger have agreed that Norma Barnett should receive Nine Thousand Dollars ($9,000.00) out of the total award of Ninety Thousand Dollars ($90,000.00) as compensation for her loss of spousal consortium. The parties to this claim agree that the total sum of Eighty-One Thousand Dollars ($81,000.00) to be paid by Respondent to Claimant John W. Bittinger and the total sum of Nine Thousand Dollars ($9,000.00) to be paid by Respondent to Claimant Norma Barnett in Claim No. CC-06-0374 will be a full and complete satisfaction of any and all past and future claims Claimants may have against Respondent, for any reason, arising from the matters described in said claim.....p. 118

BLANCHARD V. DIVISION OF HIGHWAYS (CC-11-0282)

The parties stipulated as follows: On April 18, 2011, Claimant, Tari L. Blanchard, was traveling along Interstate 70 in Wheeling, Ohio County, when her 2003 Pontiac Grand Am struck a large hole in the travel portion of the roadway. Respondent was responsible for the maintenance of Interstate 70, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimant's vehicle sustained damage in the amount of $307.87. The Claimant's collision insurance requires a $1,000.00 deductible amount; therefore, no limitation applies to the Claimant's award. The amount of $307.87 is fair and reasonable.....p. 146

BRANDENBURG V. DIVISION OF HIGHWAYS (CC-11-0500)

The parties stipulated as follows: On July 14, 2011, the Claimant, Penelope A. Brandenburg, was traveling along W. Va. Route 41 near Prince, Fayette County, when her 2006 Ford F-150 was struck by a tree limb hanging in the travel portion of the road. Respondent was responsible for the maintenance of W. Va.

Route 41, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimant's vehicle sustained damage in the amount of $291.50. The Claimant's insurance requires a $500.00 deduction; therefore, no limitation applies to the Claimant's award. The amount of $291.50 is fair and reasonable.....p. 80

CHRISTIAN AND ROBERTS V. DIVISION OF HIGHWAYS (CC-09-0433)

The parties stipulated as follows: Respondent is responsible for the maintenance of the portion of U.S. Route 52 in Mingo County, West Virginia, where Felicia Christian Roberts' (formerly known as Felicia Christian) accident occurred. On or around May 10, 2009, Felicia Christian Roberts was driving her motor vehicle north on U.S. Route 52 in or near the community of Pie in Mingo County, when she drove into a mudslide that covered both sides of the road. Claimants allege that Respondent had placed no warning lights, caution lights or any other form of notice concerning the mudslide even though the slide had occurred several hours prior to the Claimant's accident. Under the specific facts and circumstances of this claim and for purposes of settlement of said claim, Respondent does not dispute the allegations contained in Paragraph 3 of this stipulation. As a result of the accident, Felicia Christian Roberts suffered injuries requiring medical treatment and suffered the loss of her motor vehicle. Keith Christian, who is the father of Felicia Christian Roberts, waives any claim for damages arising out of the accident in this case. All settlement money to be awarded in this claim is to be awarded to Felicia Christian Roberts. Both the Claimants and Respondent agree that in this particular incident and under these particular circumstances that an award of $18,000.00 would be a fair and reasonable amount to settle this claim. The Court has determined that this amount will be fair and reasonable to the Claimant.....p. 115

CLENDENIN V. DIVISION OF HIGHWAYS (CC-11-0694)

The parties stipulated as follows: On November 26, 2011, the Claimant, Gordon Clendenin, was traveling along W. Va. Route 60 near Ansted, Fayette County, when his 1992 Dodge Dynasty came in contact with a patch of ice located in the travel portion of the road. Respondent was responsible for the drainage maintenance of W. Va. Route 60, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimant's vehicle sustained damage in the amount of $1,551.16. The Claimant only carried liability insurance on the date of the incident; therefore, an award to the Claimant is not limited. The amount of

CROSEN V. DIVISION OF HIGHWAYS (CC-10-0534)

The parties stipulated as follows: On August 5, 2010, Claimant's 1991 Harley Davidson FXSTS struck a hole in the road on Myers Street in Berkeley Springs, Morgan County. Respondent is responsible for the maintenance of Myers Street which it failed to maintain properly on the date of this incident. As a result, Claimant's motorcycle sustained damage to the front wheel and tire in the amount of $3,300.00. Claimant's insurance deductible was $250.00 Respondent agrees that the amount of $250.00 for the deductible put forth by the Claimant is fair and reasonable.....p. 24

DEAVERS V. DIVISION OF HIGHWAYS (CC-10-0303)

The parties stipulated as follows: On January 11, 2010, Claimant's 1998 Chevrolet S-10 Pickup Truck struck a hole in the roadway of North Texas Road in Augusta, Hampshire County. Respondent is responsible for the maintenance of North Texas Road which it failed to maintain properly on the date of this incident. As a result, Claimant's vehicle sustained damage to its tires in the amount of $209.82. Respondent agrees that the amount of $209.82 for the damages put forth by the Claimant is fair and reasonable.....p. 22

DUNLAP V. DIVISION OF HIGHWAYS (CC-12-0308)

The parties stipulated as follows: On May 17, 2012, the Claimant, Kevin Dunlap, was traveling along Coal River Road near Saint Albans, Kanawha County, when his 2008 Chevrolet HHR struck a series of drainage holes in the travel portion of the road. Respondent was responsible for the maintenance of Coal River Road, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimant's vehicle sustained damage in the amount of $258.60. The Claimant's collision insurance requires a $500.00 deductible amount; therefore, no limitation applies to the Claimant's award. The Court finds that the amount of $258.60 is fair and reasonable.....p. 147

EFAW V. DIVISION OF HIGHWAYS (CC-11-0516)

The parties stipulated as follows: On July 28, 2011, the Claimant, John Efaw, was traveling along Java Run Road near Saint Marys, Pleasants County, when his 1996 Ford Contour struck a large hole in the travel portion of the road. Respondent was responsible for the maintenance of Java Run Road, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimant's vehicle sustained damage in the amount of $1,810.00. Claimant carried liability insurance only at the time of the incident. The Court finds that the amount of $800.00 is fair and reasonable based on the mutual agreement of the parties.....p. 145

GALA JR. V. DIVISION OF HIGHWAYS (CC-12-0042)

The parties stipulated as follows: On January 5, 2012, Claimant, Vincent A. Gala, was traveling along Wylie Ridge Road near Weirton, Hancock County, when he was forced to swerve his 2006 Mitsubishi Eclipse and in so doing, it struck a large hole in the berm of the road. Respondent was responsible for the maintenance of Wylie Ridge Road, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimant's vehicle sustained damage in the amount of $765.88. Claimant's collision insurance requires a $500.00 deductible amount; therefore, an award to Claimant is limited to the amount of the deductible. The amount of $500.00 is fair and reasonable.....p. 143

HALL V. DIVISION OF HIGHWAYS (CC-09-0236)

The parties stipulated as follows: On April 19, 2009, Claimant's 2002 Audi struck a hole on a bridge on Route 98 near Nutter Fort, Harrison County, when a metal plate over the hole was not secured properly. Respondent is responsible for the maintenance of Route 98 which it failed to maintain properly on the date of this incident. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $1,032.20. Claimant's insurance deductible was $500.00 at the time of the incident. Respondent agrees that the amount of $500.00 for the damages put forth by the Claimant is fair and reasonable.....p. 2

JORDAN V. DIVISION OF HIGHWAYS (CC-09-0222)

The parties stipulated as follows: On or around May 24, 2007, Claimant was operating a motorcycle on WV Route 62 in or near Leon, Mason County, when he lost control of the vehicle. Respondent is responsible for the maintenance of WV Route 62 in Mason County. Claimant alleges that on the day of the accident a

portion of WV Route 62 was in disrepair, that the condition of the road caused his accident, and that Respondent either knew or should have known about the condition of the road at that location. Respondent does not dispute the allegations put forth for the purpose of settlement of this claim.....p. 4

MAY V. DIVISION OF HIGHWAYS (CC-11-0209)

The parties stipulated as follows: On March 23, 2011, the Claimant, Sam May, was traveling along Walker Branch Road in Ceredo, Wayne County, when his 2007 Dodge pickup truck struck a large hole in the travel portion of the road. Respondent was responsible for the maintenance of Walker Branch Road, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimant's vehicle sustained damage in the amount of $768.88. The Claimant's collision insurance requires a $1,000.00 deductible amount; therefore, no limitation applies to the Claimant's award. The Court finds that the amount of $768.88 is fair and reasonable.....p. 144

MCCULLOUGH V. DIVISION OF HIGHWAYS (CC-12-0255)

The parties stipulated as follows: On April 10, 2012, the Claimant, Carey McCullough, was traveling along Sun Valley Road in Clarksburg, Harrison County, when her 2012 Lexus IS-250 struck a large hole in the travel portion of the road. Respondent was responsible for the maintenance of Sun Valley Road, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimant's vehicle sustained damage in the amount of $926.78. The Claimant's collision insurance requires a $1,000.00 deductible amount; therefore, no limitation applies to the Claimant's award. The amount of $926.78 is fair and reasonable.....p. 148

MCMILLION V. DIVISION OF HIGHWAYS (CC-12-0004)

The parties stipulated as follows: On March 25, 2011, the Claimants, Randy and Rita McMillion, were traveling along Interstate 79 near Clendenin, Kanawha County, when their 2011 Audi S5 struck a large hole in the travel portion of the road. Respondent was responsible for the maintenance of Interstate 79, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimants' vehicle sustained damage in the amount of $1,341.24. The Claimants' collision insurance requires a $1,000.00 deductible amount; therefore, Claimant is limited to an award in this amount. The Court finds that the amount of $1,000.00 is fair and reasonable.....p. 141

MENENDEZ-YOUNG V. DIVISION OF HIGHWAYS (CC-10-0102)

The parties stipulated as follows: On February 22, 2010, Claimant's 2009 Chevrolet Aveo struck a hole in the roadway of Route 19 in Harrison County. Respondent is responsible for the maintenance of Route 19 which it failed to maintain properly on the date of this incident. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $623.65. Claimant's insurance deductible was $750.00 at the time of the incident. Respondent agrees that the amount of $623.65 for the damages put forth by the Claimant is fair and reasonable.....p. 3

PARMER V. DIVISION OF HIGHWAYS (CC-10-0271)

The parties stipulated as follows: Respondent is responsible for the maintenance of West Virginia Route 55 in Hardy County, West Virginia. On or around September 14, 2008, Wesley Parmer was operating his motorcycle on West Virginia Route 55 in Hardy County, when he lost control of his vehicle because of loose gravel on the roadway in an area of the road where Respondent had recently performed berm work. Claimant alleges on the day of the accident that Respondent had at least constructive notice of the loose gravel in the road, that Respondent had failed to remove the loose gravel from the road and that Respondent had failed to provide appropriate signage close enough to the location of the accident to advise the traveling public of the condition of the road at that location. Under specific facts and circumstances of this claim and for purposes of settlement of said claim, Respondent does not dispute the allegations of this stipulation. Wesley Parmer was injured as a result of the accident and required medical treatment for his injuries. Both the Claimant and Respondent believe that in this particular incident and under these particular circumstances that an award of One Hundred Twenty-Five Thousand Dollars ($125,000.00) would be a fair and reasonable amount to settle this claim. The parties to this claim agree that the total sum of One Hundred Twenty-Five Thousand Dollars ($125,000.00) to be paid by Respondent to the Claimant will be a full and complete settlement, compromise and resolution of all matters in controversy in said claim and full and complete satisfaction of any and all past and future claims Claimant may have against Respondent arising from the matters described in said claim.....p. 132

RIFFE V. DIVISION OF HIGHWAYS (CC-11-0320)

The parties stipulated as follows: On or around October 14, 2005, Christopher Riffe was a guest passenger in a motor vehicle being driven by Jeffrey

Lane north on U.S. Route 52 in or near Hanover in Wyoming County. Respondent was responsible for the maintenance of U.S. Route 52 in or near Hanover in Wyoming County which it failed to maintain properly on the date of this incident. While Mr. Lane was operating his vehicle in or near Hanover, he lost control of the vehicle which traveled off the road onto the berm, returned to the road and then collided with a vehicle traveling south on U.S. Route 52. Claimant alleges that on the day of Mr. Lane's accident, the berm at the location where the accident occurred on U.S. Route 52 was in a defective condition, that the defective condition of the berm caused or contributed to Mr. Lane's accident and that Respondent either knew or should have known of the condition of the berm at that location. Under the specific facts and circumstances of this claim and for purposes of settlement of said claim, Respondent does not dispute the allegations. Christopher Riffe was injured as a result of the accident and required medical treatment for his injuries. Both Claimant and Respondent believe that in this particular incident and under these particular circumstances that an award of $165,000.00 would be a fair and reasonable amount to settle this claim.

The Court reviewed the stipulation and agreed that Claimant may make a recovery in the amount agreed upon by the parties.....p. 65

ROBINETTE V. DIVISION OF HIGHWAYS (CC-10-0679)

The parties stipulated as follows: On November 21, 2010, Claimants, Audrey and Phillip Robinette, were traveling along W. Va. Route 10 near Salt Rock, Cabell County, when their 2009 Pontiac G8 struck a negligently constructed curb in the travel portion of the road while negotiating a turn into a local business. Respondent was responsible for the maintenance of W. Va. Route 10, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimants' vehicle sustained damage in the amount of $1,000.00. The Claimants' collision insurance requires a $1,000.00 deductible amount; therefore, no limitation applies to Claimants' award. The amount of $1,000.00 is fair and reasonable.....p. 144

SAUCHUCK V. DIVISION OF HIGHWAYS (CC-11-0610)

The parties stipulated as follows: On April 18, 2011, Claimant Benita Sauchuck was traveling along Blue Jay 6 Road near Cool Ridge, Raleigh County, when she proceeded through an intersection that did not have a stop sign in place as required. As a result, Claimant was involved in a collision with another vehicle. Respondent was responsible for the maintenance of Blue Jay 6 Road and the stop sign which was missing; therefore, Respondent failed to maintain this intersection

properly on the date of this incident. As a result of this incident, Claimants' vehicle sustained damage in the amount of $16,064.23. Respondent has agreed to stipulate to liability and damages in the amount of $8,500.00, and Claimant has agreed to accept settlement in that amount. The Court finds that the amount of $8,500.00 is fair and reasonable.....p. 149

SINER V. DIVISION OF HIGHWAYS (CC-11-0165)

The parties stipulated as follows: On February 15, 2011, Claimant's 2009 Suzuki SX4 struck a hole in the roadway of Route 19 in Mercer County. Respondent is responsible for the maintenance of Route 19, which it failed to maintain properly on the date of this incident. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $636.45. Claimant's insurance deductible was $500.00 at the time of the incident. Respondent agrees that the amount of $500.00 for the damages put forth by the Claimant is fair and reasonable.....p 26

SOUTHERN APPALACHIAN LABOR SCHOOL V. DIVISION OF HIGHWAYS (CC-11-0423)

The parties stipulated as follows: On May 10, 2011, John P. David, as an agent of the Claimant, was traveling along W. Va. Route 61 near Page, Fayette County, when the Claimant's 1999 SAAB struck a large hole and debris in the travel portion of the road. Respondent was responsible for the maintenance of W. Va. Route 61, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimant's vehicle sustained damage in the amount of $67.19. The Claimant's insurance requires a $2,500.00 deduction; therefore, no limitation applies to the Claimant's award. The amount of $67.19 is fair and reasonable.....p. 79

SPATAFORE V. DIVISION OF HIGHWAYS (CC-10-0356)

The parties stipulated as follows: On May 10, 2010, Claimant's 2009 Honda Accord struck a hole in the roadway of Darrison Run Road in Harrison County. Respondent is responsible for the maintenance of Darrison Run Road which it failed to maintain properly on the date of this incident. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $782.92. Claimant's insurance deductible was $300.00 at the time of the incident. Respondent agrees that the amount of $300.00 for the damages put forth by the Claimant is fair and reasonable.....p. 6

TALKINGTON V. DIVISION OF HIGHWAYS (CC-11-0565)

The parties stipulated as follows: On July 11, 2011, Claimant, Alexa Talkington, was traveling along Glory Barn Road near Morgantown, Monongalia County, when her 2005 Chevrolet Cobalt struck a large asphalt mound in the travel portion of the road. Respondent was responsible for the maintenance of Glory Barn Road, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimants' vehicle sustained damage in the amount of $454.61, and Claimants incurred a tow bill in the amount of $100.00. The Claimants' insurance requires a $500.00 collision deduction; therefore, no limitation applies to Claimants' award. The amount of $554.61 is fair and reasonable compensation for the damage to Claimants' vehicle and for the cost of towing.....p. 142

TYREE V. DIVISION OF HIGHWAYS (CC-12-0280)

The parties stipulated as follows: On May 8, 2012, the Claimant, Charles Tyree, was traveling along W. Va. Route 50 near Ellenboro, Ritchie County, when his 2001 Subaru Forester struck a rock in the travel portion of the road. Respondent was responsible for the maintenance of W. Va. Route 50, which it failed to maintain properly on the date of this incident. As a result of this incident, Claimant's vehicle sustained damage in the amount of $1,452.11. The Claimant carried only liability insurance on the date of the incident; therefore, no limitation applies to the Claimant's award. The Court finds that the amount of $1,452.11 is fair and reasonable compensation for Claimant's damage.....p. 110

STREETS AND HIGHWAYS - See also Comparative Negligence and Negligence

BERKLEY V. DIVISION OF HIGHWAYS (CC-11-0258)

Claimant brought this action for vehicle damage, which occurred while she was driving her 2003 Lexus ES 300. Claimant's vehicle was traveling east on Raven Drive and collided with a vehicle traveling south on Davidson Avenue. The Court is of the opinion that Respondent had, at the least, constructive notice of the missing stop sign. Given the risk created without a stop sign at an intersection on a heavily traveled road, Claimant should make a recovery for the damage to her vehicle.....p. 52

GRAHAM V. DIVISION OF HIGHWAYS (CC-10-0565)

Claimant brought this action for vehicle damage which occurred when he was driving his 2007 Jeep Compass. Claimant's vehicle struck a large hole while traveling along Coal Lick Road, also designated as County Route 22 near Albright, Preston County. The Court is of the opinion that Respondent had actual notice of the condition that caused damage to Claimant's vehicle. There may indeed be a gap in the current permitting procedures for out-of-state oil and gas producers that causes a lack of cooperation between Respondent and producers; however, this is an issue for the State agencies to resolve and not this Court. Thus, Claimant may make a recovery for the damage to his vehicle.....p. 37

GRAHAM V. DIVISION OF HIGHWAYS (CC-10-0566)

Claimants brought this action for vehicle damage, which occurred while Shelley Graham was driving their 2003 Mitsubishi Outlander on Coal Lick Road, also designated as County Route 22, near Albright, Preston County. The Court is of the opinion that Respondent had actual notice of the condition that caused damage to Claimants' vehicle. There may indeed be a gap in the current permitting procedures for out of state oil and gas producers that causes a lack of cooperation between Respondent and producers; however, this is a question for the State agencies to resolve and not this Court. Thus, Claimants may make a recovery for the damage to their vehicle.....p. 38

HARRIS V. DIVISION OF HIGHWAYS (CC-12-0001)

Claimant, Dr. Evelyn L. Harris, brought this action for vehicle damage which occurred when her 2010 Volvo C30 struck an iron stake holder while traveling along Kanawha Boulevard in Charleston, Kanawha County. In the instant case, the Court is of the opinion that Respondent had, at the least, constructive notice of the holders which the Claimants' vehicle struck and that the exposed condition presented a hazard to the traveling public. Given the numerous examples along Kanawha Boulevard of properly covered holders and the location's proximity to the capitol, the Court finds that Respondent should have been aware of the condition. Thus, Claimant may make a recovery for the amount of her deductible.....p. 128

TREES AND TIMBER

BUNNER V. DIVISION OF HIGHWAYS (CC-12-0275)

Claimant, Amos Bunner, brought this action for vehicle damage which occurred when his 2003 Chevrolet Silverado was struck by a tree while traveling along Cunningham Road in Pennsboro, Ritchie County. In the instant case, the Court is of the opinion that Respondent had actual notice of the tree which struck Claimant's vehicle and that the tree presented a hazard to the traveling public. The Court is satisfied with the testimony that other people had previously notified the Respondent, including a bus driver, that the tree was close to falling. Based upon the testimony, the Court finds that the negligence of Respondent was the proximate cause of the damage to Claimant's vehicle, and Claimant may make a recovery for the damage.....p. 114

DEMPSEY ENGINEERING COMPANY V. DIVISION OF HIGHWAYS (CC-11-0438)

Claimant brought this action for vehicle damage which occurred when his 2011 Chevrolet Silverado was struck by a falling tree along County Route 57, also designated as Collins Ferry Road, near Morgantown, Monongalia County. In the instant case, Respondent provides a memorandum that, although very old, does suggest that municipalities have a duty to maintain the curbs within city limits. However, Respondent has not provided the Court with proof of the city's assumption of maintenance responsibilities. Even if Respondent can show that there was an agreement with the city, the right of way and the tree located on it was in such a poor condition that Respondent had an affirmative duty to correct the open and obvious risk posed by it. If Respondent had corrected the condition of the right of way, it could have sought indemnification from the City of Morgantown if such an agreement actually exists.....p. 75

KECK V. DIVISION OF HIGHWAYS (CC-10-0633)

Claimant William Keck brought this action for vehicle damage which occurred when his 2005 Kia Sedona struck a tree on WV Route 61 near Montgomery, Fayette County. WV Route 61 is a public road maintained by Respondent. In cases involving falling trees or tree limbs, the Court has held that respondent is liable for dangerous trees or tree limbs on its property or rights-of-way. *Wiles v. Division of Highways*, 22 Ct. Cl.170 (1999). The

general rule is that if a tree is dead and poses an apparent risk then the respondent may be held liable.

In the instant case, the Court is of the opinion that Respondent did not have notice of the condition of the tree prior to the incident on WV Route 61. Claimant failed to demonstrate that Respondent should have been aware that the tree potentially posed a danger to the traveling public prior to its falling in the early morning hours on the date of this incident, thus, Respondent cannot be held liable for Claimant's damages.....p. 12

MCDONIE and COCHRAN V. DIVISION OF HIGHWAYS (CC-13-0027)

The parties stipulated as follows: On March 7, 2009, the Claimant, Bridget A. McDonie, and her daughter, Gabrielle Cochran, were traveling westbound on Route 61 in a 2007 Mazda MX 5 owned by the Claimant, Bridget A. McDonie. While driving on Route 61, in Kanawha County, a mature, rotten tree that was situated on the southern roadway hillside broke off at the stump and struck the top of the vehicle driven by the Claimant. As a result of the rotten tree striking Claimant's vehicle, the Claimant Bridget A. McDonie sustained severe and debilitating permanent injuries to her spine, torso, and body. She also sustained severe and extreme emotional distress. As a direct and proximate result of the Claimant's injuries, the Claimant, Bridget A. McDonie, has sustained damages in excess of two million dollars. The hillside on which the tree was located is owned by Law River Company, LLC. The Claimants have identified potential evidence to suggest that the Respondent maintained a portion of the land that abuts and /or encompasses the subject tree that fell onto the vehicle driven by the Claimant Bridget A. McDonie. Given Claimant Bridget A. McDonie's extreme injuries and significant damages, coupled with the mutual uncertainty of the outcome of any trial, the parties agree that it is in their best interests and in the interest of judicial economy to resolve this matter for the total sum of Two Hundred Thousand Dollars ($200,000.00) to be paid by Respondent to the Claimant Bridget A. McDonie in the above-captioned claim and that such payment shall be a full and complete settlement; Claimant Gabrielle Cochran has provided an express waiver of her individual interest in this claim; a compromise and resolution of all matters in controversy among the parties; and a full and complete satisfaction of any and all past and future claims that the Claimants may have against Respondent arising from the matters described in said claim, inclusive of all claims or demands that any heirs, beneficiaries, distributees, representatives, devisees, interested persons, wards, and the like (whether known or

ROTENBERRY V. DIVISION OF HIGHWAYS (CC-10-0357)

Claimants brought this action for vehicle damage which occurred when their 2006 Ford Taurus was struck by a falling tree on US Route 52 near Kimball, McDowell County. Route 52 is a public road maintained by Respondent. The Court is of the opinion that Respondent did not have actual or constructive notice of the fallen tree on Route 52 on or prior to the day in question. The evidence adduced at hearing indicated that the tree was not located within Respondent's right-of-way. The Court will not place a burden on Respondent with respect to trees surrounding its highways unless the tree poses an obvious hazard to the traveling public. While the Court is sympathetic to Claimants' loss, the Court has determined that there is insufficient evidence of negligence upon which to base an award. Claim disallowed.....p. 23

UNJUST CONVICTION

CASTO V. STATE OF WEST VIRGINIA (CC-09-0001)

Claimant, Thomas Wilson Casto, brings the instant claim seeking compensation from the Respondent, State of West Virginia, under the State's wrongful arrest statute. He alleges that he was wrongfully arrested and detained, and that the prosecution's undue delay resulted in a loss of liberty for which he is entitled to damages. Confident that the Claimant has met his statutory burden, the Court determines that an award should be allowed for the Claimant's loss of liberty brought about by the Respondent's undue delay in dismissing the charges against him. Based upon the limited evidence before the Court on the issue of damages, and Claimant's testimony concerning his work history, the Court determines that the amount of $5,000.00 is fair and reasonable to compensate Claimant.....p. 92

MATZDORFF V. STATE OF WEST VIRGINIA (CC-11-0566)

The Claimant, Daniel Carter Matzdorff, filed the instant claim seeking damages for wrongful detention and loss of liberty associated with time served over and above the sentence imposed on him by the regular courts of the State of West Virginia. It is difficult to quantify how much a day of lost liberty is worth. The unique facts and circumstances of each case will guide the Court in determining the amount to fairly compensate a claimant. In the instant case, in light of the severity of the Claimant's deprivation, and after considering the unique facts and circumstances of his claim, the Court finds that an award in the amount of $92,300.00

VENDOR

IKON MANAGEMENT SERVICES V. WEST VIRGINIA CORRECTIONAL INDUSTRIES (CC-12-0075)

This claim was submitted for decision based upon the allegations in the Notice of Claim and Respondent's Answer. Claimant seeks to recover $118,230.00 for services rendered to Respondent and documented by seven unpaid invoices sent between June and December 2011. In its Answer, Respondent admits the validity of the claim as well as the amount with respect to the services rendered in the sum of $118,230.00, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid. Respondent states that these payments were not made due to changes in the Quick Copy Operation and that the Division of Purchasing would not permit an additional extension. It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $118,230.00.....p. 76

VENDOR - Denied because of insufficient funds

CAMP V. WEST VIRGINIA RACING COMMISSION (CC-12-0624)

Claimant seeks to recover $660.00 for purse supplement claims that have not been paid by Respondent. Respondent, in its Answer, admits the validity of the claim and further states that there were insufficient funds in the purse supplement fund 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. v. Dep't of Mental Health*, 8 Ct. Cl. 180 (1971).....p. 134

ORDERS

Crime Victims Compensation Fund

TABLE OF APPEALED CASES REPORTED

Crime Victims Compensation Fund

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

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Andrew J. Lucas
(CV-10-0495)

O R D E R

Jeffry A. Pritt, Attorney at Law, for Claimant.
Gretchen A. Murphy, Assistant Attorney General, for Respondent.

CECIL, JUDGE:

An application of the Claimant, Andrew Lucas, for an award under the West Virginia Crime Victims Compensation Act, was filed July 6, 2010. The Finding of Fact and Recommendation of the Claim Investigator, filed February 9, 2011, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was issued on March 29, 2011, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant filed a request for hearing on April 25, 2011. This matter came on for hearing June 10, 2011, the Claimant appearing in person and by counsel, Jeffry A. Pritt, and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On June 13, 2010, the 23-year-old Claimant was the victim of criminally injurious conduct in a tavern in Union, Monroe County. The Claimant was accompanying the tavern owner while she closed the bar for the night, when a physical altercation occurred between the Claimant and the alleged offenders.

The Court's initial denial of an award was based on the Claim Investigator's finding that the witness statements compiled by the Monroe County Sheriff's Department failed to reveal who instigated the altercation, and thus, it was unclear if the Claimant was in fact an innocent victim of crime. W. Va. Code § 14-2A-3(l) states: "'Contributory misconduct' means any conduct of the claimant . . . that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has a causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the

use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained."

The Claimant testified at the hearing of this matter that at approximately 1:30 a.m. on June 13, 2010, he traveled with his girlfriend, Susan Moore, from her residence to the Friends & More tavern owned by Ms. Moore to close it for the night. Claimant stated that he had consumed a few alcoholic beverages earlier in the day, but that he was not intoxicated when he arrived at the bar. Lucas testified that when he entered the tavern he observed two of the alleged offenders, Brandon Eggleston and Jason Evans, lined up at the bar. Lucas stated that he walked past the alleged offenders to the pool tables, because he knew that they did not like him. According to Lucas, Eggleston and Evans approached him from behind and engaged him in an oral argument over something that had occurred in the past. Lucas testified that Eggleston punched him, and then all of the alleged offenders, including Mr. Evans, Shawn Winebrenner, Amber Evans, and Donna Bartram, jumped in and together beat the Claimant. Claimant testified that all he could do was defend himself until Moore, Bud Wilson, and the bouncer Jeff Lewis broke up the fight and moved him to the back porch. According to Lucas, after the alleged offenders exited the bar they went around the back, hopped the fence, and continued the assault against the Claimant on the back porch. As a result of this incident, Claimant suffered a broken nose requiring reconstructive surgery.

Susan Moore testified at the hearing of this matter that she was with the Claimant on the night of the incident, and that when they entered the tavern she went behind the bar, while Lucas bypassed the alleged offenders at the bar and proceeded to the pool tables. Moore testified that she heard Eggleston arguing with the Claimant, who said "just leave me alone," prior to being hit by Eggleston. Moore stated that Lucas stumbled a bit and the rest of the alleged offenders piled on top of him. Moore testified that it was impossible for the Claimant to defend himself against the five individuals who were attacking him, so she, Wilson, and Lewis began pulling people off of the Claimant and sequestered him on the back porch while they emptied the bar. The next thing Moore knew, the Claimant was banging on the back door to get back inside the tavern because the alleged offenders had jumped the fence and began beating him again on the back porch, at which point Moore called the police.

Officer Matthew Bradley, Deputy Sheriff with the Monroe County Sheriff's Department, testified that he investigated the incident. Officer Bradley stated that the fight was over before he arrived at the tavern and the only individuals left were Lucas, Moore, and Lewis. Over the next few days, Officer Bradley obtained statements from witnesses present at the bar when the fight broke out. According to

Bradley, Eggleston's name consistently came up as the one who initiated the confrontation with the Claimant and started the physical altercation. Officer Bradley testified that as a result of this incident Eggleston was charged with battery.

The Court's initial denial of an award was based on the Claim Investigator's finding that the facts surrounding the incident were unclear, and it could not be determined whether the Claimant met the statutory requirements of an innocent victim. The original Order upheld the Claim Investigator's finding, disallowing the claim. Thus, at hearing, it became the Claimant's burden to prove by a preponderance of the evidence that he was not guilty of contributory misconduct. In light of the evidence put forth by the Claimant, the Court is of the opinion that he has met his burden of proof. The evidence adduced at the hearing establishes that the Claimant was an innocent victim of crime who was surrounded and beaten by a group of offenders. The Court is of the opinion that the Claimant's participation in a verbal argument with Eggleston prior to the altercation did not rise to the level of "unlawful or intentionally tortious" conduct necessary for a finding of contributory misconduct; therefore, an award should be granted.

The Court is constrained by the evidence to reverse its previous ruling and find that the Claimant was an innocent victim of crime.

Based on the foregoing, the Claim Investigator was directed to prepare an economic loss analysis to ascertain the Claimant's unreimbursed allowable expenses relating to this incident. According to the Investigator's memorandum of August 8, 2011, the Claimant's unreimbursed allowable expenses totaled $23,322.91. Therefore, an award in that sum is hereby granted as set forth in that memorandum.

Perry C. Russell
(CV-11-0253-Y)

O R D E R

Claimant present by telephone.

Harden C. Scragg Jr., Assistant Attorney General, for the State of West Virginia.

MCCARTHY, JUDGE:

An application of the Claimant, Perry C. Russell, for an award under the West Virginia Crime Victims Compensation Act, was filed April 13, 2011. The report of the Claim Investigator, filed June 16, 2011, recommended that no award be granted.

An Order was issued on August 15, 2011, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant's request for hearing was filed September 1, 2011. This matter came on for hearing October 7, 2011, Claimant appearing *pro se* by telephone and the State of West Virginia by counsel, Harden C. Scragg Jr., Assistant Attorney General.

On November 4, 2008, Deputies with the Kanwaha County Sheriff's Department charged and arrested two alleged offenders named Christy Jacobs and Roy Canterbury for operating a clandestine drug laboratory on property owned by the Claimant. The Claimant, an innocent victim by all accounts, incurred great expense in order to demolish the dwelling in accordance with state law. The Claimant filed his claim with this Court, seeking recovery for those expenses.

The issue upon appeal was whether or not the Claimant met the two-year statute of limitations period for filing a claim with the Crime Victims Compensation Fund. W.Va. Code §14-2A-14(a) states (with emphasis added) that except as provided in subsection (b), section ten of this article, the judge or commissioner *may not* approve an award of compensation to a claimant who did not file his or her application for an award of compensation *within two years* after the date of the occurrence of the criminally injurious conduct that caused the injury or death for which he or she is seeking an award of compensation.

This Court has been clear in the past that "where there is no 'saving clause', such as 'unless the interests of justice require' . . . [and where] . . . the statute is abundantly clear, the Court will adhere to it . . . ." *In re Pittman*, CV-97-112 (1997).

In the instant case, the crime occurred on November 4, 2008. The Claimant's application was not filed until April 13, 2011. This was a full two years and five months after the conduct was known to the Claimant - well past the statutory period. This Court regrets that the Claimant has not met the filing period; however, statutes of limitations are necessary to protect persons (and the State) from claims made after evidence has been lost, memories have faded, or witnesses have disappeared. The Court is constrained by the evidence to stand by its previous ruling; therefore, this claim must be, and is hereby, denied.

Becky J. Hancock
(CV-10-0712-Y)

O R D E R

No one present for the claimant.

Harden C. Scragg Jr., Assistant Attorney General, for the State of West Virginia.

MCCARTHY, JUDGE:

An application of the claimant, Becky J. Hancock, for an award under the West Virginia Crime Victims Compensation Act, was filed September 30, 2010. The report of the Claim Investigator, filed March 23, 2011, recommended that no award be granted. An Order was issued on April 27, 2011, granting the claim for the amount of $599.58 to cover unreimbursed mileage expenses and work loss, in response to which the Claimant's request for hearing was filed September 12, 2011. This matter came on for hearing October 7, 2011, no one appearing for the Claimant and the State of West Virginia appeared by counsel, Harden C. Scragg Jr., Assistant Attorney General.

On July 2, 2010, the Claimant's daughter, age 14, was the alleged innocent victim of a sexual abuse/assault allegedly perpetrated by the alleged victim's half brother. The alleged offender has since been charged with twenty counts of sexual assault in the 3rd degree and twenty counts of incest. The criminal case is still awaiting disposition.

Based on the Claim Investigator's Finding of Fact and Recommendation this Court issued an Order on April 27, 2011, awarding $599.58 for unreimbursed mileage and expenses. The Claimant now asks this Court to consider awarding an additional amount for her work loss, sustained when she attended court proceedings and met with counsel. The West Virginia Crime Victims Compensation Act defines "work loss" as "loss of income from work that *the injured person* would have performed (emphasis supplied)... ." W.Va. Code §14-2A-3(g). The Claimant's *daughter* suffered the injury, not the Claimant.

The Crime Victims Compensation Act does, however, permit an award for work loss if the parent or legal guardian of a minor "must miss work *to take care of* the minor victim." W.Va. Code §14-2A-3(g). This Court has held that "to take care of" a minor child refers to medical care, such as when the parent stays with a child in the hospital. Claimant herein missed work for prosecutorial reasons.

Based on the foregoing, this Court is constrained by the evidence to stand by its previous ruling; therefore, this claim must be, and is hereby, denied.

Tom Wooton
(CV-09-0197-Y)

O R D E R

Claimant appeared in person.

Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

CECIL, JUDGE:

An application of Claimant, Tom Wooton, for an award under the West Virginia Crime Victims Compensation Act, was filed April 10, 2009. The report of the Claim Investigator, filed July 9, 2009, recommended that no award be granted. An Order was issued on October 8, 2009, upholding the Investigator's recommendation and denying the claim, in response to which Claimant's request for hearing was filed October 21, 2009. This matter came on for hearing June 8, 2011, Claimant appearing *pro se* and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On February 21, 2009, Claimant Tom Wooton was the alleged victim of criminally injurious conduct that occurred at his home in Raleigh County. Claimant alleges that he was at his home when the alleged offender, Erica Maynor, entered uninvited and went directly to the bathroom. (Transcript at 10) The Claimant then alleges that Erica Maynor ran from the home with a handful of unknown pills. (Transcript at 11) Claimant promptly informed the police as he began his own pursuit of the alleged offender. (Transcript at 16) After the police arrived to detain the alleged offender, the Claimant returned home where he suffered a stroke due to his pursuit of the alleged offender. (Transcript at 19) There are no court records associated with this incident.

This Court issued an Order on October 8, 2009, denying an award and adopting the Finding of Fact and Recommendation of the Claim Investigator. The

Claimant now asks this Court to reconsider that denial. This issue on appeal is wether the Claimant (1) qualifies as a victim under the Act and (2) has submitted documentation sufficient to show that charges have been filed. Each issue will be examined separately.

I. Victim Analysis

W.Va. Code §14-2A-3(k) states in part that a "victim" means "a person who suffers personal injury or death as a result of any one of the following: (A) Criminally injurious conduct; (B) The good faith effort of the person to prevent criminally injurious conduct . . . ." Futhermore, W. Va. Code §14-2A-3(c) describes "criminally injurious conduct" as ". . . conduct that occurs or is attempted in this state . . . which poses a substantial threat of personal injury or death and is punishable by fine, imprisonment or death . . . ."

In the present case, the Claimant does not meet the definition of victim as required by the Act. Mr. Wooton may have suffered a personal injury, but he has not established that he has done so by either criminally injurious conduct or the good faith effort to prevent criminally injuries conduct. The alleged offender did not pose a substantial thereat of personal injury or death to Mr. Wooton. She allegedly ran from the resident without confronting Mr. Wooton. Nor can Mr. Wooton claim that he received the injury while preventing the criminally injurious conduct because (1) there was no substantial threat of injury and, (2) if there was criminally injurious conduct, it had already occurred. The Claimant does not qualify as a victim under the meaning of the Act.

II. Failure to Submit Documentation

In prior claims, the Court has denied awards where a Claimant has failed to assist in the prosecution of the alleged offender. *See In re Dakin*, CV-97-0020 (1997). This remains the position with this Court.

In the case at hand, Mr. Wooton has failed to press charges against he alleged offender according to Mr. Wooton's own application and the magistrate court clerk in Raleigh County. Regrettably, this Court must deny Mr. Wooton's claim for this reason.

The Court is constrained by the evidence to stand by its previous ruling; therefore, this claim must be, and is hereby, denied because the Claimant has failed to established (1) that he was an innocent victim of criminally injurious conduct and (2) that the alleged offender was ever charged.

The Honorable Robert B. Sayre, Judge, heard this claim as the hearing examiner, but did not participate in the decision.

Michael Dale Tiller
(CV-05-0466)

O R D E R

Claimant appeared in person.

Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

CECIL, JUDGE:

An application of the Claimant, Michael Dale Tiller, for an award under the West Virginia Crime Victims Compensation Act, was filed September 22, 2005. The report of the Claim Investigator, filed March 17, 2006, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was issued on May 4, 2006, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant's request for hearing was filed June 5, 2006. This matter came on for hearing June 8, 2011, Claimant appearing *pro se* and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On December 7, 2001, the Claimant, then 21 years of age, was a victim of a senseless gunshot wound to the leg. This leg was later amputated, and the Claimant has since suffered periodic bouts of depression and substance abuse. The effects of this one senseless act have only now just begun to become clear to the Claimant and his family. The Claimant, after learning of the existence of the Crime Victims Compensation Fund (Fund), filed his claim on September 22, 2005.

This Court adopted the Finding of Fact and Recommendation of Claim Investigator and denied an award because the claim was barred by the two-year statute of limitations. The issue on this appeal was whether the statute could be tolled and how long the statute was in fact tolled so as to meet the statute of limitations.

W.Va. Code §14-2A-14(a) provides that this Court

> may not approve an award of compensation to a claimant who did not file his or her application for an award of compensation within two years after the date of the occurrence of the criminally injurious conduct that caused the injury or death for which he or she is seeking an award of compensation.

This Court has been clear in the past that "where there is no 'saving clause', such as 'unless the interests of justice require' . . . [and where] . . . the statute is abundantly clear, the Court will adhere to it . . . ." *In re Pittman*, CV-97-112 (1997).

In the case at hand, this Court has gone out of its way to determine what days, if any, could be used to toll the statute of limitations. The criminally injurious conduct occurred on December 7, 2001, and the claim was filed on September 22, 2005 (one year and nine months too late). To meet the statute of limitations, this claim should have been filed by December 7, 2003. The record provides us with a total of fourteen (14) days that could possibly be used to toll the statute. Therefore, the analysis stops here. Seeing no other evidence of days in which the Claimant was mentally incapacitated, this Court has no jurisdiction to allow the claim to proceed.

It is indeed regrettable that the Claimant has not met the filing period; however, statutes of limitations are necessary to protect persons (and the State) from claims made after evidence has been lost, memories have faded, or witnesses have disappeared.

The Court is constrained by the evidence to stand by its previous ruling; therefore, this claim must be, and is hereby, denied.

The Honorable Robert B. Sayre, Judge, heard this claim as the hearing examiner, but did not participate in the decision.

Tom Wooton
(CV-09-0200-Y)

O R D E R

Claimant appeared in person.

Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

CECIL, JUDGE:

An application of the Claimant, Tom Wooton, for an award under the West Virginia Crime Victims Compensation Act, was filed April 10, 2009. The report of the Claim Investigator, filed July 8, 2009, recommended that no award be granted. An Order was issued on October 21, 2009, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant's request for hearing was filed October 27, 2009. This matter came on for hearing June 8, 2011, Claimant appearing *pro se* and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On February 19, 2009, the 51-year-old Claimant was the alleged victim of criminally injurious conduct in Beckley, Raleigh County. The Claimant was visiting the home of his estranged wife to retrieve furniture when he was allegedly assaulted. The Claimant alleges that his wife slammed the front door, hitting him in the back of the head and propelling him off the porch. The Claimant was taken to Raleigh General Hospital where he was treated for a possible concussion and head trauma. According to information submitted by the magistrate court clerk, and per the Claimant's application to this Court, no charges were filed with regard to this incident. However, at the rehearing, testimony from Officer William Ray of the Beckley Police Department revealed that the Claimant did contact him at the station to pursue an investigation. (Transcript, page 24.)

On October 21, 2009, this Court denied an award to the Claimant, agreeing with the Finding of Fact and Recommendation of the Claim Investigator. On appeal, the Claimant seeks reimbursement for medical expenses. The issue on rehearing was whether the Claimant now has sufficient documentation to prove that he reported the crime in a timely manner.

W.Va. Code §14-2A-14(b) states that "[t]he judge or commissioner may not approve an award of compensation if the criminally injurious conduct upon which the claim is based was not reported to a law-enforcement officer or agency within seventy-two hours after the occurrence of the conduct . . . ." Also, in prior claims, the Court has denied awards where a Claimant has failed to assist in the prosecution of the offender. *In re Dakin*, CV-97-0020 (1997).

At the time the first Order was issued, the Claimant had not provided the Court with sufficient documentation to show that he did in fact pursue a course of prosecution against the alleged offender. In light of Officer Ray's testimony stating that he did investigate the claim, and despite the fact that Officer Ray did not personally believe that the Claimant had suffered any kind of trauma (Transcript, page 24), this Court is compelled to find in its discretion that the Claimant did meet the reporting requirement in W.Va. Code §14-2A-14(b). There is no question

that the Claimant did in fact incur medical expenses associated with the alleged incident.

The Court is persuaded by the testimony of June 8, 2011, and hereby grants an award of $140.48 to the claimant pursuant to the Claim Investigator's Memorandum prepared November 18, 2011. Should the claimant later submit documentation of any additional unreimbursed allowable expenses relating to this incident, the claim may be reconsidered by the Court in its discretion.

The Honorable Robert B. Sayre, Judge, heard this claim as the hearing examiner, but did not participate in the ORDER.

Angela Y. Smith
(CV-09-0776-Y)

O R D E R

Claimant appeared in person and by counsel, Mark McMillian, Attorney at Law.

Harden C. Scragg, Jr., Assistant Attorney General, for the State of West Virginia.

CECIL, JUDGE:

An application of the Claimant, Angela Y. Smith, for an award under the West Virginia Crime Victims Compensation Act, was filed December 7, 2009. The report of the Claim Investigator, filed July 23, 2010, recommended that an award of $7,251.38 be granted, to which the claimant filed a response in disagreement, seeking an additional award. An Order was issued on September 23, 2010, granting an award of $8,184.99 for unreimbursed medical expenses and funeral and burial costs. The Claimant's request for hearing was filed October 26, 2010. This matter came on for hearing October 7, 2011, Claimant appearing in person and by counsel, Mark McMillian, Attorney at Law, and the State of West Virginia by counsel, Harden C. Scragg, Assistant Attorney General.

On July 5, 2008, the Claimant's 25-year-old son, Donte Newsome, was the tragic victim of criminal conduct in Huntington, Cabell County. The Claimant's son was shot and killed by the offender, Jeral Garner, who was indicted for murder.

It is undisputed that the Claimant's son was an innocent victim of crime. Moreover, this Court's initial Order granted payments to medical providers and reimbursement of funeral and burial expenses which totaled $8, 184.99. At issue now is whether the reimbursement of student loans can also be made within the provisions of the Crime Victims Compensation Act.

At the hearing of this matter, counsel for the Fund argued that the statute is clear on its face, that W.Va. Code §14-2A-3(m) defines "lost scholarship" as a "scholarship, academic award, stipend or other monetary scholastic assistance which had been awarded or conferred upon a victim in conjunction with a post-secondary school educational program and which the victim is unable to receive or use, in whole or in part, due to injuries received from criminally injurious conduct." Counsel for the Fund maintains that student loans do not fall into the same category as awards for scholastic achievement. Counsel for the Claimant takes a position opposite that of the State. Claimant argues that the statute's clear intent was to allow compensation for essentially all financial assistance, including loans. (Transcript, page 5.) The Court regrettably cannot accept this interpretation of the statute.

Upon first glance, W.Va. Code §14-2A-3(m) would appear to support the Claimant's position that lost scholarship in fact does refer to student loan payments. But a closer reading of the statute shows that the intent of the legislature was to allow compensation for scholarships awarded based on merit or other award-specific factors. The key feature of these awards is that the student possesses the award and has some vested interest. Another key feature of these types of awards is that the student is not generally obligated to repay the award. Therefore, student loans or any other contractual obligations to repay a debt do not fall under the statute. The Court is of the opinion that this is the plain meaning of the statute and agrees with the State's argument.

The tragic loss of the Claimant's son, especially at such a young age, is indeed grievous. What the family has suffered is unimaginable. Nonetheless, the Court is constrained by the evidence to stand by its previous ruling; therefore, this claim must be, and is hereby, denied. *See also: State of West Virginia ex rel. Angela Y. Smith v. West Virginia Crime Victims Compensation Fund and the Court of Claims for the State of West Virginia* (May 24, 2013).[32]

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[32]The Opinion upheld the finding of the Court of Claims in this case; however, the Court interpreted the applicable statute to include student loans in the definition of "lost scholarship."

James P. Christian III
(CV-09-0214-X)

O R D E R

Brenda Waugh, Attorney at Law, for Claimant.
Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

MCCARTHY, JUDGE:

An application of the claimant, James P. Christian, III, for an award under the West Virginia Crime Victims Compensation Act, was filed April 9, 2009. The report of the Claim Investigator, filed July 28, 2009, recommended that no award be granted, to which the claimant filed a response in disagreement. An Order was issued on October 15, 2009, upholding the Investigator's recommendation and denying the claim, in response to which the claimant's request for hearing was filed November 5, 2009. This matter came on for hearing July 20, 2011, claimant appearing by counsel, Brenda Waugh, and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On April 27, 2007, the Claimant was the alleged victim of multiple batteries occurring in Inwood, Berkeley County. The Claimant and the alleged offender, Tony Hutzler, had an ongoing dispute over work undertaken by Mr. Hutzler to widen Norris Gap Road. The Claimant testified that he and Mr. Hutzler had had disputes previously concerning Mr. Hutzler's attempt to widen the road; however, no previous conversations became heated. On the date of the incident, the Claimant along with his two daughters, Kelsey and Olivia, drove over to Norris Gap Road with a video camera so that they could film Mr. Hutzler's road-widening project. The Claimant testified that he did this to protect his own land (which is adjoined by Mr. Hutzler's). Once there, the Claimant testified that he told Mr. Hutzler that he could only widen the road within the State's specified rules (though no attempt to explain those rules was ever made by the
Claimant). The Claimant further testified that the conversation turned to violence when the Claimant called Mr. Hutzler an expletive.

It was further ascertained that Mr. Hutzler exited his vehicle in response to the Claimant's insult and punched the Claimant two times while he remained seated in his car. The Claimant's daughter testified that she remembers her father's head "flying back." (Transcript at 35) After being punched, the Claimant testified that he exited his vehicle and punched Mr. Hutzler in the face, knocking him to the ground. At

that moment, the Claimant alleges that three individuals came and began assaulting him. The Claimant was transferred to Winchester Medical Center where he was treated for a broken nose.

On October 15, 2009, this Court issued an Order denying the Claimant's request for an award due to his own contributory misconduct. On appeal, the issue before the Court is whether the Claimant did in fact engage in contributory misconduct.

W. Va. Code § 14-2A-3(l) states that

> [c]ontributory misconduct means any conduct of the claimant . . . that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has a causal relationship to the criminally injurious conduct that is the basis of the claim.

Other cases have established that the causal relationship is important to the determination of contributory misconduct. *See generally In re Cleavenger*, CV-11-0211 (2011).

In the present case, the Claimant was sitting in his car when he was struck in the face by Mr. Hutzler. Should our analysis stop here, the Claimant may be entitled to an award (even if he did insult Mr. Hutzler). However, the Claimant did not stop after he was struck in his face. He decided to exit the vehicle and engage in a physical altercation with Mr. Hutzler rather than simply driving away. This action directly led to Claimant being attacked by three men, based on Claimant's testimony. The Claimant's contributory misconduct has a causal relationship to the criminally injurious conduct that is the basis of the claim, and the Claimant caused an undetermined portion of his injuries by his conduct. The Court cannot determine what percentage of the total injuries he incurred were based on the punch he received while seated in the vehicle, and what amount of injuries he received after exiting the vehicle. Therefore, this Court must conclude, absent any proffering of medically determinative evidence, that the Claimant contributed to all of his injuries.

The Court is constrained by the evidence presented to uphold its previous ruling; therefore, this claim must be, and is hereby, denied.

Kimberly L. Hardesty
(CV-07-0313)

O R D E R

Holly Turkett, Attorney at Law, for Claimant.

Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

CECIL, JUDGE:

An application of the Claimant, Kimberly L. Hardesty, for an award under the West Virginia Crime Victims Compensation Act, was filed June 11, 2007. The report of the Claim Investigator, filed December 28, 2007, recommended that no award be granted, to which the claimant filed a response in disagreement. An Order was issued on March 6, 2008, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant's request for hearing was filed March 26, 2008. This matter came on for hearing August 3, 2011, Holly Turkett, Attorney at Law, appearing for the Claimant and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On November 10, 2002, the Claimant's sister, Shawna Sawitski, age 27, was the alleged innocent victim of an alleged murder in Lewis County, West Virginia. The Lewis County Sheriff's Office kept the case open until August 27, 2004. The Claimant then hired a private investigator and an attorney to continue the investigation. Upon conclusion of the private investigator's investigation, the Claimant reported the incident to the West Virginia State Police as a cold case file on February 7, 2007. The initial report from the Lewis County Sheriff's Office determined the cause of death to be the result of a cocaine overdose. This is consistent with the EMS personnel's determination that the cause of death was acute cocaine intoxication. The Claimant argues, however, that the cause of death was due to an injection (by a third party) of cocaine into the right arm of the victim and that this injection resulted in the murder of Shawna Sawitski.

On March 6, 2008, this Court issued an Order agreeing with the Finding of Fact and Recommendation of the Claim Investigator and denied an award due to the

victim's contributory misconduct. On appeal the issue is whether or not the victim did contribute to her own death by voluntarily becoming intoxicated.

W. Va. Code §14-2A-3(*l*) defines contributory misconduct as

> any conduct of the claimant, or of the victim that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained . . . .

Furthermore, it is "unlawful for any person to knowingly or intentionally . . . acquire or obtain possession of a controlled substance . . . ." W. Va. Code §60A-4-403(a).

In the present case, Sergeant Swiger testified that Ms. Sawitski's cause of death according to the County Medical Examiner was cocaine overdose. Furthermore, Sergeant Swiger stated that while it was odd that Ms. Sawitski was right handed yet injected in the right arm, it was not evidence alone that someone else injected her with the cocaine. Also, Shawna Sawitski drove to the Wilderness Inn on her own accord. While there she engaged in drinking and recreational drug use. Her conduct was causally related to her death within the meaning of the contributory misconduct statute.

We are aware of the many years of difficult work undertaken by the Claimant in seeking recovery for her sister's death; however, the law is clear in this instance.

It is regrettable, but this Court is constrained by the evidence to stand by its previous ruling; therefore, this claim must be, and is hereby, denied.

Michael Joshua Pennington
(CV-10-0788-Z)

O R D E R

Timothy Rosinsky, Attorney at Law, for the Claimant.
Harden C. Scragg Jr., Assistant Attorney General, for the Respondent.

CECIL, JUDGE:

An application of the Claimant, Michael Joshua Pennington, for an award under the West Virginia Crime Victims Compensation Act, was filed October 22, 2010. The report of the Claim Investigator, filed March 15, 2011, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was issued on April 19, 2011, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant's request for hearing was filed May 31, 2011. This matter came on for hearing December 9, 2011, with Timothy Rosinsky, Attorney at Law, appearing oh behalf of the Claimant and the State of West Virginia by counsel, Harden C. Scragg Jr., Assistant Attorney General.

On August 13, 2010, the 32-year-old Claimant was the alleged victim of criminally injurious conduct in Huntington, Cabell County. The Claimant was at his home checking his mail when he was assaulted by the three offenders.

The Claimant testified at the hearing of this matter that he and the principle offender are both engaged in the business of tree trimming and are in fact neighbors. Due to a string of thefts involving tree-trimming equipment in the area, the Claimant was approached by the local police and questioned. In response to the officer's question concerning who the Claimant thought was responsible for the string of thefts, the Claimant told the officer that he believed his neighbor (offender) was the culprit. The Claimant offered this information only because he was informed that he would remain anonymous. On August 13, 2010, while checking his mailbox, the Claimant was approached by the offender. The Claimant testified that he attempted to avoid the situation, but was suddenly attacked by the principal offender and two coworkers. The Claimant stated that he was struck on the head with brass knuckles. The Claimant attempted to defend himself, but he was not successful. The Claimant suffered severe injuries as a result of the beating. The Claimant's medical bills totaled $4,120.31. The question now on appeal is whether the Claimant was an innocent "victim" within the plain meaning of the statute. For the reasons stated below this Court is of the opinion that the Claimant was the innocent victim of criminally injurious conduct on the day in question.

W.Va. Code §14-2A-3(k) states in part that a "victim" means "a person who suffers personal injury or death as a result of any one of the following: (A) Criminally injurious conduct; (B) The good faith effort of the person to prevent criminally injurious conduct . . . ." Futhermore, W. Va. Code §14-2A-3(c) describes "criminally injurious conduct" as "conduct that occurs or is attempted in this state . . . which poses a substantial threat of personal injury or death and is punishable by fine, imprisonment or death . . . ."

In the present case, the Claimant was struck in the head with brass knuckles. This type of blunt-force head trauma is serious and potentially deadly. Because the Claimant suffered injuries which posed a substantial threat of personal injury and death he has met the definition of innocent victim under the Act. The offenders did engage in criminally injurious conduct as defined under the statute.

Based on the forgoing, the Court hereby reverses the Order of April 19, 2011, denying this claim and orders that an award be issued for the Claimant's unreimbursed medical expenses of $4,120.31 pursuant to the Investigator's memorandum of February 6, 2012, but will allow the sum of $14,921.50 in work loss based upon estimates furnished by the Claimant at the hearing.

A total award of $19,041.81 is hereby granted.

Jimmy Eugene Huff
(CV-07-0160-X)

O R D E R

Timothy Rosinsky, Attorney at Law, for Claimant.

Harden C. Scragg Jr., Assistant Attorney General, for the State of West Virginia.

CECIL, JUDGE:

An application of the Claimant, Jimmy Eugene Huff, for an award under the West Virginia Crime Victims Compensation Act, was filed March 23, 2007. The report of the Claim Investigator, filed October 4, 2007, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was issued on July 1, 2008, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant's request for hearing was filed March 27, 2010. This matter came on for hearing December 9, 2011, Claimant appearing by counsel, Timothy Rosinsky, and the State of West Virginia by counsel, Harden C. Scragg Jr., Assistant Attorney General.

On February 26, 2007, the Claimant's son, Travis Eugene Huff, was the victim of criminally injurious conduct in Huntington, Cabell County. The Claimant's son was visiting the home of Richard Laymen when an altercation arose in which the Claimant's son suffered two fatal gunshot wounds.

The Claimant testified at hearing that he was unaware of any connection between Mr. Laymen and his son, and that the two were not friends. The Claimant also argued that his son was the innocent victim of a crime. However, the Claimant did not actually have firsthand knowledge of any of the events as they took place on the night in question. The West Virginia State Police Report of Criminal Investigation, as well as testimony given by the assailants in their criminal prosecution, suggests that Travis Eugene Huff was engaged in the act of making a drug deal when the criminal conduct occurred. The Claimant has not offered testimony to refute evidence that his son was engaged in the act of selling drugs.

W. Va. Code § 14-2A-3(l) states that "'[c]ontributory misconduct' means any conduct of the claimant or of the victim . . . that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has a causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance, when the intoxication has a causal connection or relationship to the injury sustained."

In the present case, the record is teeming with evidence that the victim was engaged in the act of selling drugs. This evidence was also presented at the trial of the assailants. It is regrettable given the loss of such a young man, but the victim's actions were unlawful and did actually and proximately cause him to suffer two gunshot wounds which led to his death. Therefore, the Claimant's son is not an innocent victim of criminally injurious conduct as is necessary for an award of compensation.

The Court is constrained by the evidence to stand by its previous ruling; therefore, this claim must be, and is hereby, denied.

Shawn B. Fore
(CV-07-0679-X)

O R D E R

Brenda Waugh, Attorney at Law, for Claimant.

Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

CECIL, JUDGE:

An application of the Claimant, Shawn B. Fore, for an award under the West Virginia Crime Victims Compensation Act, was filed December 13, 2007. The report of the Claim Investigator, filed June 6, 2008, recommended that an award of $1,000.00 be granted to the Claimant on behalf of her daughter, as an innocent "secondary victim" of a crime, to which the Claimant filed a response in disagreement. An Order was issued on August 19, 2008, upholding the Investigator's recommendation and granting the claim for that amount, in response to which the Claimant's request for hearing was filed August 29, 2008. This matter came on for hearing July 20, 2011, Claimant appearing by counsel, Brenda Waugh, and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

The facts of this claim are undisputed. On December 13, 2005, the Claimant's daughter (hereinafter referred to as "D.F.") was riding the school bus when an altercation arose between two students seated adjacent to her. As a result of the altercation, one student was stabbed in the upper torso by the offender using a pocket knife. As the fight continued to unfold, the students were physically on top of the victim. They were so close to her that the injured student's blood stained D.F.'s clothing. Furthermore, she was forced to remain drenched in the injured student's blood until the police and ambulance arrived. Adding to D.F.'s shock, she was then confined to the bus for a period of hours while an investigation ensued. As a result of the incident, D.F. has suffered severe emotional distress and has been diagnosed with post traumatic stress disorder (PTSD). She has undergone numerous evaluations and has expressed thoughts of suicide. In fact, D.F. has attempted suicide and continues to cut herself. The Claimant's out-of-pocket expenses for D.F.'s treatment total $3,566.55 for expenses not covered by a collateral source.

There can be no doubt that D.F. was an innocent victim of a crime that occurred on December 13, 2005. However, the issue for the Court is whether D.F. qualifies as a "primary" or "secondary" victim under the Crime Victims Compensation Act.

W.Va. Code §14-2A-3(a)(5) includes in the definition of "Claimant" the following: "A person who is a secondary victim in need of mental counseling due to the person's exposure to the crime committed whose award may not exceed $1,000 . . . ." Furthermore, the Legislature's intent states that the Crime Victims Compensation Fund "should be continued and retained in the legislative branch of government as an expression of a *moral obligation* of the state to provide partial compensation to the innocent victims of crime for injury suffered to their person . . . ." W. Va. Code §14-2A-2 (emphasis added).

In the present case, the issue hinges on statutory construction and legislative intent. The statute uses the term "exposure" to determine if a victim was secondary. After closely scrutinizing this section of the statute and reading it with a clear understanding of the Legislature's overall intent, it is apparent to the Court that §14-2A-3(a)(5) uses the term "exposure" to mean a victim who is merely a witness to the criminal act. The Legislature has good reason to limit awards to victims who are witnesses to criminal acts because claims can become too attenuated if a cap is not placed on them. However, D.F. was more than a mere witness to the events of December 13, 2005. D.F. was placed in contact with the student who was stabbed, and she was covered in the student's blood. She was also forced to sit in that condition while an investigation was conducted. While other students witnessed the crime, D.F. became connected to the crime; therefore, the Court is of the opinion that D.F. was an innocent primary victim of criminally injurious conduct.

Based on the foregoing, the Court hereby grants an award of $3,566.55 to the Claimant for out-of-pocket medical expenses. Should the Claimant later submit documentation of any additional unreimbursed allowable expenses relating to this incident, the claim may be reviewed again by the Court in its discretion.

Rebecca E. Stewart
(CV-11-0428)

O R D E R

Claimant appeared *pro se.*

Harden C. Scragg Jr., Assistant Attorney General, for the State of West Virginia.

FORDHAM, JUDGE:

An application was filed by Rebecca Stewart on behalf of her daughter, Courtney Kessinger, now deceased, for an award under the West Virginia Crime Victims Compensation Act, was filed June 15, 2011. The report of the Claim Investigator, filed November 22, 2011, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was issued on February 16, 2012, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant submitted a request for hearing. This matter came on for hearing March 28, 2012, Claimant appearing *pro se* and the State of West Virginia by counsel, Harden C. Scragg Jr., Assistant Attorney General.

On May 18, 2011, Courtney Kessinger (daughter of the Claimant and hereafter referred to as "Ms. Kessinger"), age twenty-eight (28), was the alleged innocent victim of criminally injurious conduct in St. Albans, Kanawha County. Police and paramedics responded to the residence of Ms. Kessinger and Charles T. Miller on the date of the incident. Once inside the residence, the police observed Charles T. Miller kneeling over Ms. Kessinger attempting to perform cardiopulmonary resuscitation. The police and paramedics then ordered Charles T. Miller to vacate the bedroom where Ms. Kessinger was shortly thereafter pronounced deceased. The State Medical Examiner's report stated that

> [i]t is our opinion that Cortney [sic] R. Kessinger, a 28 year-old woman, died as a result of a self-inflicted stab wound of the chest that incised the aorta. Potentially contributory to intentionality is marijuana intoxication. A lethal-range concentration of acetaminophen was detected in post-mortem subclavian blood; however, the time course precludes acetaminophen toxicity as contributory to death in this instance.

Because no evidence to the contrary was offered, this Court adopted the findings of the Claim Investigator and ruled that Ms. Kessinger was not a "victim" as defined by West Virginia Code because no "criminally injurious conduct" had occurred. The Claimant now appeals that Order.

At hearing, the Claimant offered new evidence in the form of numerous photographs of Ms. Kessinger's autopsy as well as photos that were taken by the Claimant. Also introduced were e-mail records of conversations between the Claimant and a friend of Ms. Kessinger. The Court has weighed the undisputed facts with the Claimant's new evidence offered at hearing. However, the Court is of the opinion to affirm its previous Order for the reasons more fully stated below.

W. Va. Code §14-2A-3(k) states in part, "Victim" means a person who suffers personal injury or death as a result of any one of the following: (A) Criminally injurious conduct; (B) the good faith effort of the person to prevent criminally injurious conduct . . . ." W. Va. Code §14-2A-3(c) states that "criminally injurious conduct" can be described as ". . . conduct that occurs or is attempted in this state . . . which by its nature poses a substantial threat of personal injury or death and is punishable by fine or imprisonment . . . ."

In the instant case, the Claimant has not met her burden of proof with regard to establishing that Ms. Kessinger was an innocent victim. The photographs and e-mails presented at hearing do not suggest to the Court that Ms. Kessinger's wounds

were anything but self-inflicted. In fact, this Court is not in a position to make such a determination without persuasive expert testimony to the contrary.

This Court is not unsympathetic to the Claimant's pain after having lost a child. However, we are confined by the strict parameters of the law to make determinations based on proven causation. It is truly unfortunate that such a young woman has lost her life and under these circumstances, but this Court must stand by its previous Order denying the claim.

The Court is constrained by the evidence to stand by its previous ruling; therefore, this claim must be, and is hereby, denied.

Thomas E. Sparks
(CV-08-0608)

O R D E R

Charles B. Mullins II, Attorney at Law, for the Claimant.

Harden C. Scragg Jr., Assistant Attorney General, for the State of West Virginia.

FORDHAM, JUDGE:

An application of the Claimant, Thomas E. Sparks, seeking an award under the West Virginia Crime Victims Compensation Act on behalf of his deceased daughter, Crystal G. Hall, was filed September 26, 2008. The report of the Claim Investigator, filed January 9, 2009, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was issued on June 10, 2009, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant's request for hearing was filed June 29, 2009. This matter came on for hearing May 16, 2012, the Claimant appearing through counsel, Charles B. Mullins II, and the State of West Virginia by counsel, Harden C. Scragg Jr., Assistant Attorney General.

The Claimant's daughter, Crystal G. Hall, was an alleged innocent victim of criminally injurious conduct which occurred on March 11, 2008, in her apartment in Oceana, Wyoming County. According to the police report, officers arrived at Oceana Apartments in response to an emergency call. After multiple attempts were made to gain entry, the victim's husband, Jason Hall, greeted the police and paramedics. Jason Hall told police that on the evening in question he and the victim had engaged in sexual intercourse and fell asleep in their bed. He then stated that at

some point in the middle of the night he awoke to what he described as a cold sensation. Jason Hall states that this is when he noticed that the victim was cold to the touch and that she appeared lifeless. According to the State Medical Examiner's Office, the immediate cause of the victim's death was "oxycodone intoxication in the setting of apparent intravenous drug abuse." There appeared to be no evidence of contributory physical injuries associated with the injection.

At hearing, extrinsic evidence was offered by the Claimant that suggests that Jason Hall had a history of abusive behavior towards the victim. In fact, at least two individuals were interviewed by Chief Barlow of the Oceana Police Department and had recounted two prior incidents in which Jason Hall verbally threatened the victim and either forced her to take a pill or forcibly injected her with oxycodone.[33] Furthermore, the Claimant testified that on numerous occasions he was forced to retrieve the victim and her daughter from her apartment because Jason Hall was present and threatening her despite the existence of a temporary restraining order. The Claimant also asserts that his daughter was deeply opposed to recreational drug use and would not have taken any prescription medication if not for the severity of her own spinal condition.

Jason Hall is now deceased due to an overdose that occurred during the course of the police investigation. The victim is survived by her daughter who is now in the full custody of the Claimant. The Claimant now seeks reimbursement of funeral expenses for which he paid out-of-pocket. The Claimant alleges that Jason Hall killed his daughter by forcibly injecting her with oxycodone and that she is an innocent victim pursuant to the statute.

This is not the first claim that this Court has heard concerning an alleged forced injection. These claims are problematic for claimants attempting to prove that the deceased was an innocent victim as defined by the statute.[34] However,

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[33]It should be noted that the victim had been diagnosed with scoliosis prior to the incident and was prescribed Lortab (hydrocodone), which she took for pain associated with that condition. Nothing in the State Medical Examiner's report suggests that the victim's death was associated with her use of that prescribed medication.

[34]*See generally*, In re Kimberly Hardesty, CV-07-0313 (denying an award based on the difficulty of ascertaining the degree to which the alleged victim contributed to her own death).

innocence may be established where there is an abundance of evidence that the victim did not contribute to the injection or cause the injection to occur in any manner.

W. Va. Code §14-2A-3(k) states in part, "Victim" means a person who suffers personal injury or death as a result of any one of the following: (A) Criminally injurious conduct; (B) The good faith effort of the person to prevent criminally injurious conduct . . . ." W. Va. Code §14-2A-3(c) states that "criminally injurious conduct" means ". . . conduct that occurs or is attempted in this state . . . which poses a substantial threat of personal injury or death and is punishable by fine, imprisonment or death . . . ." However, where an alleged victim engages in contributory misconduct, the claim may be denied under W. Va. Code §14-2A-14(f).

W. Va. Code § 14-2A-3(l) states that "'[c]ontributory misconduct' means any conduct of the claimant, or of the victim . . . that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained."

There is no question that if the Claimant's allegations are true, his daughter was an innocent victim within the meaning of the statute. It is less clear, however, whether Crystal G. Hall engaged in contributory misconduct. Resolution of this question turns on whether there was a causal connection between her action and the injection that led to her death.

Based on the Claimant's presentation of new evidence introduced at hearing, the Court is of the opinion that the Claimant's daughter in no way contributed to her own death. Therefore, she is an innocent victim within the meaning of the statute. Together with the accounts of witnesses interviewed by Chief Barlow and the testimony of the Claimant, it is more likely than not that Crystal G. Hall was injected by Jason Hall based on evidence of his previous conduct. The victim's ongoing fear of Jason Hall forced her to succumb to his wishes, and on this occasion it resulted in her untimely death.

Based on the foregoing, the Court is of the opinion to make an award in this claim. Therefore, the sum of $6,000.00 is hereby granted as set forth in the attached Investigator's Memorandum of June 22, 2012. Should any additional unreimbursed allowable expenses relating to this tragic incident be incurred by the victim's daughter, they will be reviewed by the Court at that time.

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Loraine M. Schneider
(CV-11-0560-Y)

O R D E R

Claimant appeared in person.
Harden C. Scragg Jr., Assistant Attorney General, for the State of West Virginia.

MCCARTHY, JUDGE:

An application of the Claimant, Loraine M. Schneider, for an award under the West Virginia Crime Victims Compensation Act, was filed October 6, 2011. The report of the Claim Investigator, filed October 26, 2011, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was issued on January 19, 2012, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant's request for hearing was filed February 25, 2012. This matter came on for hearing July 20, 2012, the Claimant appearing *pro se* and the State of West Virginia by counsel, Harden C. Scragg Jr., Assistant Attorney General.

The Claimant, Loraine Schneider, was the alleged innocent victim of an unprovoked battery. The facts are uncontested that on August 30, 2011, the Claimant arrived home from work at approximately 7:30 p.m. and was approached by her neighbor, Connelly Smith. The Claimant alleges that Mr. Smith struck her and that she retaliated by striking Mr. Smith in self-defense. At this time, a woman identified as Andrea Groves, the alleged offender, approached the Claimant and another altercation ensued. Both altercations allegedly arose because the Claimant directed a racial slur at Mr. Smith. The Claimant testified at the hearing that Ms. Groves head-butted her during the altercation, and the Claimant suffered a broken nose and vision problems due to the contact. The Claimant now seeks an award from the Crime Victims Compensation Fund for work loss and other expenses.

This Court has held in previous claims where the Claimant was involved in an altercation and where the facts did not conclusively prove the Claimant's innocence that "[t]he purpose of the victims compensation program is to provide partial

compensation to innocent victims of crime . . . . A victim who engages in a fight is not an 'innocent victim' of a crime; rather, such actions constitute contributory misconduct . . . ." *In re Savage*, CV-99-382 (2000). Contributory misconduct is generally defined by the Crime Victims Compensation Act as any unlawful or tortious conduct of the Claimant that has a causal relationship to the criminally injurious conduct. *See* W. Va. Code § 14-2A-3(*l*). Therefore, if a Claimant sets forth a chain of events that eventually leads to his or her own injuries, this Court cannot make an award where there was no intervening cause. Here, the Claimant was involved in an altercation with her neighbor over a racial slur she admittedly made. (Transcript at pg. 41). The record also indicates that the Claimant provoked the alleged offender. (Transcript at pg. 38). The Claimant argues that the altercation with Ms. Groves was unprovoked and separate from the altercation with Mr. Smith. However, this Court, in its discretion, is of the opinion that the Claimant's altercation with the alleged offender was a mere continuation of the altercation with Mr. Smith, and the Claimant had engaged in contributory misconduct based on her actions.

Accordingly, the Court is constrained by the evidence to stand by its previous ruling; therefore, this claim must be, and is hereby, denied.

Lisa Bragg

(CV-11-0660-Z)
O R D E R

David M. Adkins, Attorney at Law, for the Claimant.

Harden C. Scragg Jr., Assistant Attorney General, for the State of West Virginia.

CECIL, JUDGE:

An application of the Claimant, Lisa Bragg, for an award under the West Virginia Crime Victims Compensation Act, was filed September 20, 2011. The report of the Claim Investigator, filed January 12, 2012, recommended that an award be granted but recommended a denial of an award for the loss of personal property, to which the Claimant filed a response in disagreement. An Order was issued on February 7, 2012, upholding the recommendation and partially granting the claim, in response to which the Claimant's request for hearing was filed March 1, 2012. This matter came on for hearing July 20, 2012, Claimant appearing by counsel, David M.

Adkins, and the State of West Virginia by counsel, Harden C. Scragg Jr., Assistant Attorney General.

On November 3, 2010, the Claimant's neighbors were arrested for operating a clandestine methamphetamine laboratory in the same apartment building as the Claimant's residence. Authorities promptly notified the Claimant that she had to vacate the building immediately without first retrieving several items of personal property.

In December of that same year, the Claimant was notified that her apartment was deemed a complete loss due to the methamphetamine contamination in her neighbor's residence. Claimant sought an award from the Crime Victims Compensation Fund for relocation costs and for losses associated with her personal property. The Court granted Claimant's request for relocation costs but denied an award for the loss of Claimant's personal property. Claimant then appealed this Court's Order entered February 7, 2012.

Claimant's counsel admitted at the hearing that the Crime Victims Compensation Act does not permit reimbursement for personal property damage associated with the operation of a clandestine methamphetamine lab. W. Va. Code § 14-2A-3(f)(3)(A) intentionally omits personal property as an allowable expense. Therefore, this Court cannot make an award where the statute has intentionally omitted such language.

The Court is constrained by the evidence to stand by its previous ruling; therefore, this claim must be, and is hereby, denied.

Lisa Meador
(CV-10-0386-Z)

O R D E R

Keith B. Lively, Attorney at Law, for Claimant.

Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

CECIL, JUDGE:

An application of Claimant, Lisa Meador, for an award under the West Virginia Crime Victims Compensation Act, was filed May 24, 2010. The report of the Claim Investigator, October 6, 2010, recommended that no award be granted, to which Claimant filed a response in disagreement. An Order was issued on February

9, 2011, upholding the Investigator's recommendation and denying the claim, in response to Claimant's request for hearing was filed April 4, 2011. This matter came on for hearing October 19, 2012, Claimant appearing by counsel, Keith B. Lively, and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On May 25, 2008, Claimant became the alleged innocent victim of criminally injurious conduct in Nimitz, Summers County. Claimant was a passenger in a vehicle owned and operated by Sonja Flora, the alleged offender. Claimant testified that she does not have a driver's license and regularly pays individuals to transport her to various locations. On the date of the incident, Claimant paid the alleged offender a sum of money to transport her to her mother's grave site. While traveling along W. Va. Route 3, Sonja Flora lost control of the vehicle and struck a rock embankment, resulting in severe injuries to Claimant, including a sternal fracture. She was treated at Charleston Area Medical Center.

Corporal Anthony S. Reed of the West Virginia State Police was dispatched to the scene of the accident. Corporal Reed filed an accident report in which he noted that there were no visible signs of braking or steering on the roadway. Corporal Reed noted that he did check-mark a box on the accident report indicating that the alleged offender appeared to be driving under the influence, and blood work taken at the hospital later that day showed that the alleged offender tested positive for "benzos" and morphine. However, despite Corporal Reed's suspicion and the results of the blood test, no formal charges were ever brought against the alleged offender. Claimant testified that she had noticed the alleged offender and a third party exchanging prescription pain medication. Claimant believed that the alleged offender was under the influence of the pain medication before she entered the vehicle.

W.Va. Code §14-2A-3(c) states in part that "[c]riminally injurious conduct does not include conduct arising out of the ownership, maintenance or use of a motor vehicle unless the person engaging in the conduct intended to cause personal injury or death or committed negligent homicide, driving under the influence of alcohol, controlled substances or drugs, leaving the scene of the accident or reckless driving."

Here, given Corporal Reed's accident report and testimony concerning blood results, there may be strong evidence to conclude that the alleged offender was under the influence of a controlled substance on the date of the incident. Based on the weight of this evidence, the Court does agree that Claimant was a victim of criminally injurious conduct. We see no reason to disagree with Corporal Reed's testimony and the results of a blood test proving that the alleged offender was under the influence of "benzos" and morphine. However, while Claimant is no doubt a

victim of criminally injurious conduct, Claimant does not meet the statutory definition of an "innocent victim."

This Court has held in prior claims where the victim was a passenger in a vehicle driven by a driver who was under the influence, that while the victim's actions in these instances may fall without the express wording of contributory misconduct as defined in W. Va. Code § 14-2A-3(*l*), the purpose and intent of the Act are examined. The Act establishes a system of compensation for innocent citizens who are victims of crime. This purpose would be subverted if compensation were awarded to passengers injured or killed when voluntarily riding in vehicles operated by impaired drivers. This is particularly true when, as the situation is here, Claimant had been socializing with the driver for some time prior to the crash. This Court has held in these claims that to make an award under such circumstances would be contrary to public policy. See *In re Thomas*, CV-00-68 (2000); *In re Taylor*, CV-00-435 (2001). .....

The Court is sympathetic to Claimant's condition; however, given her own testimony that she was aware of Sonja Flora's drug use on the date of the incident, the Court is constrained by the evidence to stand by its previous ruling as a matter of public policy; therefore, this claim must be, and is hereby, denied.

Patrick C. Durant
(CV-09-0811-X)

O R D E R

Claimant appeared *pro se*.

Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

MCCARTHY, JUDGE:

An application of Claimant, Patrick C. Durant, for an award under the West Virginia Crime Victims Compensation Act, was filed December 31, 2009. The report of the Claim Investigator, filed May 27, 2010, recommended that an award of $1,000.00 be made to S.T., Claimant's granddaughter, as a secondary victim, to which Claimant filed a response in disagreement. An Order was issued on July 20, 2010, upholding the Investigator's recommendation and awarding the claim, in response to which Claimant's request for hearing was filed September 28, 2010. This matter came on for hearing October 26, 2012, Claimant appearing *pro se* and

the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

Between 2007 and 2008, the five-year-old granddaughter of Claimant was the innocent victim of criminally injurious conduct in Wileyville, Wetzel County. During a routine doctor's exam, it was discovered that the victim had contracted a sexually transmitted disease. There were two possible suspects listed at the time of this discovery; however, it was later determined through blood testing that neither of the two suspects was the offender. Because S.T. did not identify an offender at the time of Claimant's application, the Court made an award based purely on her status as a secondary victim. At hearing on this matter, the issue for the Court was whether or not S.T. qualifies as a primary victim.

The Court heard testimony from Corporal Roger G. Spragg, investigating officer for the criminal prosecution in Wetzel County. Corporal Spragg was qualified as an expert witness based on his extensive experience as a sexual assault investigator. In Corporal Spragg's opinion, S.T. was a primary victim of a sexual assault even though the Wetzel County Prosecutor's Office did not formally file charges. The State did not rebut Corporal Spragg's testimony.

W. Va. Code §14-2A-3(a)(5) defines a secondary victim, in part, as a person "in need of mental health counseling due to the person's exposure to the crime committed whose award may not exceed $1,000.00 . . . ."

Here, the Court finds that S.T. was more than a secondary victim and was more than merely "exposed" to criminally injurious conduct based on the weight of the new evidence presented at hearing. The Court does not question Corporal Spragg's expertise in this matter and finds that S.T. was in fact a primary innocent victim of criminally injurious conduct.

Based on the foregoing, the Court is of the opinion to make an award in the amount of $1,625.00, the difference between the amount previously awarded and the amount of unreimbursed medical expenses already submitted to the Court. Should Claimant provide more allowable unreimbursed medical expenses, the Court may make supplemental awards as the Court finds necessary in its discretion.

Award $1,625.00.

Matthew S. Roark
(CV-11-0562-X)

O R D E R

Christopher J. Sears, Attorney at Law, for Claimant.

Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

MCCARTHY, JUDGE:

An application of Claimant, Matthew S. Roark, for an award under the West Virginia Crime Victims Compensation Act, was filed August 9, 2011. The report of the Claim Investigator, filed March 12, 2012, recommended that no award be granted, to which Claimant filed a response in disagreement. An Order was issued on May 3, 2012, upholding the Investigator's recommendation and denying the claim, in response to which Claimant's request for hearing was filed May 24, 2012. This matter came on for hearing October 5, 2012, Claimant appearing by counsel, Christopher J. Sears, Esq., and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On August 9, 2009, Claimant was the alleged innocent victim of criminally injurious conduct which occurred in Morgantown, Monongalia County. Claimant testified that while he and three friends were patronizing a local pool hall, he was the target of an unprovoked battery.

At the hearing, Claimant testified that while waiting for a pool table he was approached by an unknown patron and questioned concerning a comment that was alleged to have been made by Claimant to the unknown patron's female companion. After informing the unknown patron that he did not refer to his female companion as a "bitch," Claimant recalls that a friend of the unknown patron began to shove Claimant in a very aggressive manner. Claimant then shifted his body weight, purely as a means of self-defense, which resulted in Claimant and the unknown patron's friend falling to the floor. While on the floor, Claimant was approached by the unknown alleged offender who struck him in the back of the head with a pool cue. Claimant was then carried by his friends out of the establishment where they quickly summoned a police officer. Claimant filed a report on August 22, 2009; however, during his investigation, the officer was unable to corroborate the testimony of Claimant because of various contradictory statements and the unavailability of witnesses.

As a result of the blunt force trauma, Claimant sustained severe injuries to his skull, including fractures to the maxillary sinus cavity and right orbital floor. Claimant stated that he had been consuming alcohol on the night of the incident;

however, Claimant maintains that he did nothing to contribute to his injuries and was not too inebriated to remember the events of the evening with clarity.

The State has not offered new evidence with respect to the incident except for the testimony of Officer James Williams Smith II, the responding officer and author of the police report. The State reasserts its argument that Claimant engaged in contributory misconduct by refusing to flee the pool hall and should be barred from recovery under the Crime Victims Compensation Act.

W. Va. Code §14-2A-(3)(*l*), with emphasis added, defines contributory misconduct as "[a]ny conduct of the claimant or of the victim through whom the claimant claims an award that is unlawful or intentionally tortious and that . . . has a *causal relationship* to the criminally injurious conduct that is the basis of the claim and *includes the voluntary intoxication of the claimant . . . when the intoxication has a causal connection or relationship to the injury sustained*." Thus, the question in all cases where contributory misconduct is at issue is whether the Claimant's conduct had a causal connection to the injury sustained.

In this case, the Finding of Fact and Recommendation of the Claim Investigator recommended that no award be made because the police report indicated that Claimant may have some culpability and because in similar claims this Court has held that "[t]he Court is not disposed to grant awards to victims involved in drinking and fighting, as such behavior falls within the definition of contributory misconduct." However, the Claim Investigator mistakenly cites this language as the Court's decision from *In re Keener*, 25 Ct. Cl. 285 (2004) and erroneously states that the Court in *Keener* ultimately denied that claim. However, this Court did not deny an award in *Keener* and, in fact, the *Keener* case stands for the proposition that in claims involving alcohol and bar fights an award can be made to a claimant if no causal connection exists between Claimant's voluntary intoxication and criminally injurious conduct. While drinking and fighting are perhaps indelibly connected, one does not automatically flow from the other, and so each claim must be analyzed on its own particular set of facts to determine causality.

Here, evidence was presented at hearing that Claimant had been consuming alcohol, and Claimant's testimony appeared credible with regard to how he was approached and the ensuing altercation. While the officer's report indicated that Claimant may have some culpability, neither Officer Smith nor any other witness testified or presented evidence to that effect.

Based on the foregoing, the Court is of the opinion to reverse its previous Order denying an award under the West Virginia Crime Victims Compensation Act and finds that Claimant was the innocent victim of criminally injurious conduct on the date of the incident. Therefore, an award is hereby granted in the amount of

$3,584.77 pursuant to the Claim Investigator's Memorandum dated December 4, 2012, and attached hereto. .....Award $3,584.77.

Kelly M. Favors-Powers
(CV-11-0200-Z)

O R D E R

Claimant appeared in person.

Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

CECIL, JUDGE:

An application of the Claimant, Kelly Favors-Powers, for an award under the West Virginia Crime Victims Compensation Act, was filed March 21, 2011. The report of the Claim Investigator, filed August 19, 2011, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was issued on November 23, 2011, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant's request for hearing was filed February 21, 2012. This matter came on for hearing November 30, 2012, Claimant appearing *pro se* and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On February 23, 2010, the 31-year-old Claimant was the victim of criminally injurious conduct in Huntington, Cabell County. The Claimant testified at the hearing of this matter that while walking to a local convenient store along 9th Avenue she was approached by the unidentified offender and asked to perform a sexual act. After refusing to perform the sexual act, Claimant testified that the offender punched her in the jaw and temple, which caused her to lose consciousness. Claimant stated that when she regained consciousness, she was lying in the middle of 9th Avenue where several young male and female offenders began kicking her. One of the offenders stomped on Claimant's left arm, fracturing it, which required extensive elbow surgery. Claimant then stated that a Good Samaritan retrieved her and transported her to Cabell Huntington Hospital. Claimant reported the incident to law-enforcement officials the same day.

This Court agreed with the Claim Investigator's initial findings of fact because Claimant did not cooperate with law enforcement. However, Claimant asks the Court to reconsider based on her subsequent relocation to Louisville,

Kentucky. The Court has considered the entire record, complete with new testimony provided at hearing, and is of the opinion to grant Claimant's claim for the reasons more fully stated below.

W.Va. Code §14-2A-14(d) states, in part, "A judge . . . upon finding that the Claimant . . . has not fully cooperated with the appropriate law enforcement agencies . . . may deny a claim . . . ."

In the present case, Claimant provided the Court with evidence of a prior battle with drug addiction and prostitution, which led her to seek professional help in Louisville, Kentucky. Claimant has subsequently begun to fully cooperate with law enforcement. Claimant has also performed well with counseling and is attempting to reconcile prior medical bills. Because there can be no doubt that Claimant was the innocent victim of a crime, and because the Court finds that Claimant did not intentionally fail to comply with the Claim Investigator's requests and with law enforcement, the Court does find that Claimant is entitled to an award under the Crime Victims Compensation Act in the amount determined by the Claim Investigator's memorandum dated February 1, 2013.

Based on the foregoing, the Court is of the opinion to, and does hereby, make an award to Claimant in the amount of $6,854.95. Should the Claimant submit further documentation of allowable expenses associated with her injuries, the Court will consider a supplemental award in its discretion.

Award $6,854.95.

Millard Hensley
(CV-10-0618-X)

O R D E R

Brian Abraham, Attorney at Law, for Claimant.

Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

CECIL, JUDGE:

An application of the Claimant, Millard Hensley, for an award under the West Virginia Crime Victims Compensation Act, was filed August 24, 2010. The report of the Claim Investigator, filed February 28, 2011, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was issued on April 6, 2011, upholding the Investigator's recommendation

and denying the claim, in response to which the Claimant's request for hearing was filed May 6, 2011. This matter came on for hearing March 29, 2013, Claimant appearing through counsel, Brian Abraham, Attorney at Law, and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On August 4, 2010, the Claimant, Millard Hensley, alleges that he became the innocent victim of a crime when he was struck by a motor vehicle while operating a bicycle in Chapmanville, Logan County. Claimant testified that at approximately 2:45 p.m., the alleged offender, Lisa Bryant, was driving her vehicle along County Route 5/11, locally known as White Oak Road, when she met an oncoming vehicle at an intersection. The alleged offender was unable to stop her vehicle and struck the Claimant.

According to the accident report, the alleged offender had the right-of-way, and the Claimant had been drinking at the time of the incident. Lisa Bryant was never charged with a motor vehicle violation. Claimant suffered numerous injuries as a result of the incident and was quickly transported to Logan Regional Medical Center where he was treated for multiple fractures, lacerations, and contusions. The Claim Investigator recommended against an award in this claim because the police report indicated no reckless driving or fleeing of the scene, which is a requirement in claims involving injuries caused by motor vehicles.

At a hearing conducted on March 29, 2013, Claimant introduced new evidence for the Court to consider. Claimant testified that the driver at the time of the incident, and thus the actual alleged offender, was Keith Bryant, the husband of Lisa Bryant. In support of Claimant's contention that Mr. Bryant committed criminally injurious conduct, Trooper L.T. Goldie Jr. testified as an expert in accident reconstruction and stated that it was his opinion that a vehicle was at fault in this incident. To corroborate the assertion that Mr. Bryant was the actual driver, the Court also took the testimony of Deputy Matthew Carter, the principal officer on the scene, who testified that it was his belief that Mr. Bryant was the driver but that charges were not pursued against him because an eye witness refused to provide a statement for fear that he would be "burned out" of his home if he did. Claimant did introduce the 911 recording, in which the witness can be heard describing Keith Bryant in detail as the driver who fled the scene. Claimant testified that once Keith Bryant fled the scene, Lisa Bryant took responsibility for the crash.

W.Va. Code §14-2A-3(c) states, in part, with emphasis added: ". . . Criminally injurious conduct does not include conduct arising out of the ownership, maintenance or use of a motor vehicle, except when the person engaging in the conduct intended to cause personal injury or death, or except when the person engaging in the conduct committed negligent homicide, driving under the influence

of alcohol, controlled substances or drugs, or reckless driving, *or when the person leaves the scene of the accident*." .....

In the present case, the Claim Investigator made a recommendation that the Court deny the claim based on facts known at the time of the application, which led the Investigator to determine that Lisa Bryant was the driver of the vehicle. Based on new evidence presented in this matter, the Court is satisfied that Keith Bryant, or some other unidentified driver, was the actual driver of the vehicle that struck the Claimant and fled the scene. Given the above-cited exception to the statute limiting recovery for motor vehicle violations, this Court is of the opinion to reverse its prior Order.

Based on the foregoing, the Court is of the opinion to, and does, hereby REVERSE its previous Order denying an award to Claimant, and further Orders that an award of $7,504.35 be granted in accordance with the Claim Investigator's Memorandum of June 11, 2013. Should any further allowable expenses be submitted at a later date, the claim may be reviewed again by the Court.

Don L. Johnson
(CV-09-0505-X)

O R D E R

Timothy P. Rosinsky, Attorney at Law, for Claimant.

Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

FORDHAM, JUDGE:

An application of the Claimant, Don Johnson, for an award under the West Virginia Crime Victims Compensation Act, was filed August 26, 2009. The report of the Claim Investigator, filed January 7, 2010, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was issued on March 2, 2010, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant's request for hearing was filed April 28, 2010. This matter came on for hearing June 12, 2013, Claimant appearing by counsel, Timothy

P. Rosinsky, Attorney at Law, and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On May 8, 2009, in Saint Albans, Kanawha County, the Claimant, age 52, alleges that he became the innocent victim of criminally injurious conduct committed at the hands of the alleged offender, Freeland Smith. This Court initially denied an award to the Claimant based on a finding of contributory misconduct. Following the hearing of this matter, and having considered all new testimony as it relates to the claim, this Court is of the opinion to affirm its earlier Order for the reasons more fully stated below.

The uncontroverted facts are as follows: On the date of the incident, Claimant went to a neighbor's residence to celebrate his birthday with some friends who were having a cookout. Everyone at the residence was drinking alcohol and socializing. At some point, the Claimant, along with the alleged offender and a few others, left the party to purchase more alcohol at a local convenience store. Lola Thomas, apparently the only sober eyewitness to the event, testified that while everyone was walking to the convenience store, the Claimant and Freeland Smith agreed to walk into the roadway and fight over alleged comments made by the Claimant concerning Freeland Smith's female companion. Immediately after the fight, and upon returning to his residence, Claimant noticed that the back windshield of his vehicle had been broken by a rock.

Claimant testified that after he saw the damage to his vehicle, he immediately grabbed pruning shears off his porch, in a blind fit of rage, and sought out Freeland Smith, whom the Claimant believed to have been the perpetrator. Claimant testified that he only intended to damage Freeland Smith's property, but the two quickly engaged in another fight. By all accounts, Freeland Smith had a baseball bat ready and waiting for the Claimant. Lola Thomas testified that when the Claimant arrived with the shears, Freeland Smith struck him numerous times with the baseball bat. Freeland Smith struck the Claimant so severely with the bat that Lola Thomas feared that the Claimant would be killed.

Deputy J.S. Shackleford of the Kanawha County Sherriff's Department was dispatched to the location of the fight. Deputy Shacklford testified

that Freeland Smith had a small cut on his abdomen, which he assumed was caused by the pruning sheers that the Claimant admittedly was wielding. Deputy Shackleford also noted how severely the Claimant had been beaten. In fact, the Claimant was transported to CAMC Hospital where he was treated for multiple facial, nasal, and rib fractures. Claimant ultimately lost an eye due to the incident. Deputy Shackleford arrested Freeland Smith and charged him with malicious wounding.

The Claimant argues that this Court erred in denying his original application because he did not intend to cause physical damage to Freeland Smith when he returned to the party with pruning shears. Rather, he asserts, he only intended to cause damage to Freeland Smith's vehicle in retaliation for the damages to his own vehicle. Respondent maintains that Claimant contributed to his own injuries and that this Court should not make an award to Claimants who are guilty of contributory misconduct.

W.Va. Code §14-2A-3(*l*) defines "contributory misconduct" as ". . . any conduct of the claimant or of the victim through whom the claimant claims an award that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has a causal relationship to the criminally injurious conduct that is the basis of the claim and includes the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance, when the intoxication has a causal connection or relationship to the injury sustained."

Here, the Court is not satisfied that Claimant did not put into motion a chain of events which led to his own injuries. Claimant admitted that he returned to the party with pruning shears in order to damage Freeland Smith's property. Despite the inexcusable beating that Claimant received, the Court finds that Claimant did cause Freeland Smith to use force against him by returning to the residence, which resulted in the injuries for which he claims an award. The proper response to property damage would be to call law enforcement for investigation. Therefore, we find that the Claimant did engage in contributory misconduct, a bar to recovery under the statute.

The Court is constrained by the evidence to stand by its previous ruling; therefore, this claim must be, and is hereby, denied.

_____

Shelia M. Winter

(CV-10-0921-X)

O R D E R

Michael T. Clifford and Richelle Garlow, Attorneys at Law, for Claimant.

Harden C. Scragg Jr., Assistant Attorney General, for the State of West Virginia.

FORDHAM, JUDGE:

An application of the Claimant, Sheila M. Winter, for an award under the West Virginia Crime Victims Compensation Act, was filed December 22, 2010. The report of the Claim Investigator, filed August 19, 2011, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was issued on November 7, 2011, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant's request for hearing was filed November 28, 2011. This matter came on for hearing March 28, 2012, Claimant appearing through counsel, Michael T. Clifford and Richelle Garlow, Attorneys at Law, and the State of West Virginia by counsel, Harden C. Scragg Jr., Assistant Attorney General.

Claimant alleges that she is the innocent victim of a crime that occurred on February 9, 2010, in Jefferson, Kanawha County when she was allegedly sexually assaulted by a police officer. The Claimant's attorney reported the incident to law-enforcement officials a day later; however, the Claimant filed no charges. Nor were formal charges made in connection with the sexual assault allegations. Claimant stated in her application that she has suffered emotional trauma in connection with the alleged incident; however, Claimant has not sought treatment and has provided no documentation showing any out-of-pocket expenses.

The West Virginia State Police investigated Claimant's report and found that Claimant may not have been a victim of a crime. The report did reveal that there were questions concerning the validity of the Claimant's complaint, and whether the sexual encounter was consensual. This report also revealed that Claimant stated that she did not wish to pursue any criminal actions.

The issue for the Court is whether the Claim Investigator's findings should be set aside in favor of a finding that Claimant did in fact seek to pursue charges but that she was too intimidated to formally pursue charges. The Court is of the opinion to deny Claimants motion and uphold the Claim Investigator's original Findings of Fact and Recommendation.

W. Va. Code §14-2A-14(d) states that ". . . upon a finding that the claimant or victim has not fully cooperated with appropriate law-enforcement agencies, or the claim investigator, may deny a claim . . . ." Furthermore, W. Va. Code §14-2A-10(a)(8) requires as part of the application "[t]he total amount of the economic loss that the victim has received or is entitled to receive . . . ."

The Claim Investigator's finding was that the Claimant did not cooperate with law enforcement by pursuing charges against the alleged offender. Therefore, as it is the Claimant's burden to prove that good cause existed for the failure to pursue charges against the officer, the Court is of the opinion that the Claimant has not met her burden. Claimant's counsel maintains that the Claimant could not pursue charges because she would be intimidated by the West Virginia State Police, the same governmental subdivision for whom the alleged offender was working. There may indeed be a myth in the eyes of the public that municipal and county police departments cannot investigate the state police; however, this Court cannot make awards based on the mere possibility that a Claimant did not know that. The Court is not persuaded by this argument. Had Claimant felt that she was a victim there were numerous channels to pursue.

Moreover, even if this Court did hold that the Claimant properly cooperated with law-enforcement, she has not submitted any documentation as it relates to out-of-pocket expenses. This Court takes judicial notice of the fact that there has been a settlement in the civil matter relating to the incident.

Based on the foregoing, the Court is constrained by the evidence to stand by its previous ruling; therefore, this claim must be, and is hereby, denied.

II. CRIME VICTIMS COMPENSATION FUND

West Virginia Crime Victims Compensation Fund
Reference to Opinions

- **CONTRIBUTORY MISCONDUCT/INNOCENT VICTIM**
- **COOPERATION WITH INVESTIGATION**
- **CRIMINALLY INJURIOUS CONDUCT**
- **ECONOMIC LOSS**
- **METHAMPHETAMINE**
- **STATUTE OF LIMITATIONS**
- **LOST SCHOLARSHIP**
- **SECONDARY VICTIM**

The following is a compilation of head notes representing decisions from July 1, 2011 to June 30, 2013.

CONTRIBUTORY MISCONDUCT/INNOCENT VICTIM

CV-09-0200-Y T.W. I

On February 19, 2009, Claimant T.W. was the alleged victim of criminally injurious conduct that occurred at his home in Raleigh County. Claimant alleges that he was at his home when the alleged offender, E.M., entered uninvited and went directly to the bathroom. The Claimant then alleges that E.M. ran from the home with a handful of unknown pills. Claimant promptly informed the police as he began his own pursuit of the alleged offender. After the police arrived to detain the alleged offender, the Claimant returned home where he suffered a stroke due to his pursuit of the alleged offender. There are no court records associated with this incident. The Court refused to make an award in this claim because the Claimant has not proven that he was an innocent victim as defined by the statute. Claim disallowed.....p. 203

CV-09-0197-Y T.W. II

On February 21, 2009, Claimant T.W. was the alleged victim of criminally injurious conduct that occurred at his home in Raleigh County. Claimant alleges that he was at his home when the alleged offender, E.M., entered uninvited and went directly to

the bathroom. The Claimant then alleges that E.M. ran from the home with a handful of unknown pills. Claimant promptly informed the police as he began his own pursuit of the alleged offender. After the police arrived to detain the alleged offender, the Claimant returned home where he suffered a stroke due to his pursuit of the alleged offender. There are no court records associated with this incident. The Court refused to make an award in this claim because the Claimant has not proven that he was an innocent victim as defined by the statute. Claim disallowed.....p. 201

CV-07-0160-X J.E.H.

On February 26, 2007, the Claimant's son, T.E.H., was the victim of criminally injurious conduct in Huntington, Cabell County. The Claimant's son was visiting the home of R.L. when an altercation arose in which the Claimant's son suffered two fatal gunshot wounds. The West Virginia State Police Report of Criminal Investigation, as well as testimony given by the assailants in their criminal prosecution, suggests that T.E.H. was engaged in the act of making a drug deal when the criminal conduct occurred. The Claimant did not offer testimony to refute evidence that his son was engaged in the act of selling drugs. Therefore the Court refused to make an award in this claim because the Claimant's son was found to have engaged in contributory misconduct. Claim disallowed.....p. 210

CV-07-0679-X S.B.F.

On December 13, 2005, the Claimant's daughter (hereinafter referred to as "D.F.") was riding the school bus when an altercation arose between two students seated adjacent to her. As a result of the altercation, one student was stabbed in the upper torso by the offender using a pocket knife. As the fight continued to unfold, the students were physically on top of the victim. They were so close to her that the injured student's blood stained D.F.'s clothing. Furthermore, she was forced to remain drenched in the injured student's blood until the police and ambulance arrived. Adding to D.F.'s shock, she was then confined to the bus for a period of hours while an investigation ensued. As a result of the incident, D.F. has suffered severe emotional distress and has been diagnosed with post traumatic stress disorder (PTSD). She has undergone numerous evaluations and has expressed thoughts of suicide. In fact, D.F. has attempted suicide and continues to cut herself. The Court held that the Claimant's daughter was more than just a witness to the criminally injurious conduct and, in fact, was an innocent victim. Therefore, the Court made an award to the Claimant in the amount of $3,566.55.....p. 211

CV-11-0428-Y R.E.S.

On May 18, 2011, C.K. (daughter of the Claimant), age twenty-eight, was the alleged innocent victim of criminally injurious conduct in St. Albans, Kanawha County. Police and paramedics responded to the residence of C.K. and C.T.M. on the date of the incident. Once inside the residence, the police observed C.T.M. kneeling over C.K. attempting to perform cardiopulmonary resuscitation. The police and paramedics then ordered C.T.M. to vacate the bedroom where C.K. was shortly thereafter pronounced deceased. The Court held that the Claimant did not met her burden of proof with regard to establishing that C.K. was an innocent victim as defined by the statute. Therefore, the claim was disallowed.....p. 213

CV-09-0214-X J.P.C.

On April 27, 2007, the Claimant was the alleged victim of multiple batteries occurring in Inwood, Berkeley County. Claimant became engaged in an altercation with two individuals over the building of a road. The Claimant suffered injuries as a result of the altercation, but the Court heard evidence that the Claimant had numerous opportunities to avoid the altercation. Therefore, the Court is of the opinion to deny this claim due to the Claimant's contributory misconduct. Claim disallowed....p. 206

CV-07-0313-X K.L.H.

On November 10, 2002, the Claimant's sister, Shawna Sawitski, age 27, was the alleged innocent victim of an alleged murder in Lewis County, West Virginia. The Lewis County Sheriff's Office kept the case open until August 27, 2004. The Claimant then hired a private investigator and an attorney to continue the investigation. Upon conclusion of the private investigator's investigation, the Claimant reported the incident to the West Virginia State Police as a cold case file on February 7, 2007. The initial report from the Lewis County Sheriff's Office determined the cause of death to be the result of a cocaine overdose. This is consistent with the EMS personnel's determination that the cause of death was acute cocaine intoxication. The Claimant argues, however, that the cause of death was due to an injection (by a third party) of cocaine into the right arm of the victim and that this injection resulted in the murder of Shawna Sawitski. The Court held that her conduct was causally related to her death within the meaning of the contributory misconduct statute. Claim was denied...p.207

CV-09-0505-X D.L.J.

On May 8, 2009, in Saint Albans, Kanawha County, the Claimant, age 52, alleges that he became the innocent victim of criminally injurious conduct committed at the

hands of the alleged offender. This Court initially denied an award to the Claimant based on a finding of contributory misconduct. The Court is not satisfied that Claimant did not put into motion a chain of events which led to his own injuries. Claimant admitted that he returned to the party with pruning shears in order to damage Freeland Smith's property. Claim denied.....p. 225

CV-10-0495-X A.J.L.

On June 13, 2010, the23-year-old Claimant was the victim of criminally injurious conduct ' in a tavern in Union, Monroe County. The Claimant was accompanying the tavern owner while she closed the bar for the night, when a physical altercation occurred between the Claimant and the alleged offenders. The Court is of the opinion that the Claimant's participation in a verbal argument with Eggleston prior to the altercation did not rise to the level of "unlawful or intentionally tortious" conduct necessary for a finding of contributory misconduct; therefore, an award should be granted. Claimant awarded $23,322.91.....p. 197

CV-10-0386-Z L.M.

On May 25, 2008, Claimant became the alleged innocent victim of criminally injurious conduct in Nimitz, Summers County. Claimant was a passenger in a vehicle owned and operated by Sonja Flora, the alleged offender. Claimant testified that she does not have a driver's license and regularly pays individuals to transport her to various locations. On the date of the incident, Claimant paid the alleged offender a sum of money to transport her to her mother's grave site. While traveling along W. Va. Route 3, Sonja Flora lost control of the vehicle and struck a rock embankment, resulting in severe injuries to Claimant, including a sternal fracture. She was treated at Charleston Area Medical Center. The Court is sympathetic to Claimant's condition; however, given her own testimony that she was aware of the driver's drug use on the date of the incident, the Court is constrained by the evidence to stand by its previous ruling as a matter of public policy; therefore, this claim must be, and is hereby, denied.....p. 218

CV-11-0562-X M.S.R.

Claimant testified that while waiting for a pool table he was approached by an unknown patron and questioned concerning a comment that was alleged to have been made by Claimant to the unknown patron's female companion. After informing the unknown patron that he did not refer to his female companion as a "bitch," Claimant recalls that a friend of the unknown patron began to shove Claimant in a very aggressive manner. Claimant then shifted his body weight,

purely as a means of self-defense, which resulted in Claimant and the unknown patron's friend falling to the floor. While on the floor, Claimant was approached by the unknown alleged offender who struck him in the back of the head with a pool cue. Claimant was then carried by his friends out of the establishment where they quickly summoned a police officer. Claimant filed a report on August 22, 2009; however, during his investigation, the officer was unable to corroborate the testimony of Claimant because of various contradictory statements and the unavailability of witnesses. While drinking and fighting are perhaps indelibly connected, one does not automatically flow from the other, and so each claim must be analyzed on its own particular set of facts to determine causality. The Court made in an award in the amount of $3,584.77.....p. 221

CV-11-0560-Y L.M.S.

The Claimant was the alleged innocent victim of an unprovoked battery. The facts are uncontested that on August 30, 2011, the Claimant arrived home from work at approximately 7:30 p.m. and was approached by her neighbor, C.S. The Claimant alleges that C.S. struck her and that she retaliated by striking C.S. in self-defense. At this time, a woman identified as A.G., the alleged offender, approached the Claimant and another altercation ensued. Both altercations allegedly arose because the Claimant directed a racial slur at C.S.. The Claimant testified at the hearing that A.G. head-butted her during the altercation, and the Claimant suffered a broken nose and vision problems due to the contact. Here, the Claimant was involved in an altercation with her neighbor over a racial slur she admittedly made. (Transcript at pg. 41). The record also indicates that the Claimant provoked the alleged offender. (Transcript at pg. 38). The Claimant argues that the altercation with A.G. was unprovoked and separate from the altercation with C.S.. However, this Court, in its discretion, is of the opinion that the Claimant's altercation with the alleged offender was a mere continuation of the altercation with C.S., and the Claimant had engaged in contributory misconduct based on her actions. Claim denied.....p. 216

CV-08-0608-Y T.E.S.

The Claimant's daughter, C.G.H., was an alleged innocent victim of criminally injurious conduct which occurred on March 11, 2008, in her apartment in Oceana, Wyoming County. According to the police report, officers arrived at Oceana Apartments in response to an emergency call. After multiple attempts were made to gain entry, the victim's husband, J.H., greeted the police and paramedics. J.H. told police that on the evening in question he and the victim had engaged in sexual intercourse and fell asleep in their bed. He then stated that at some point in the

middle of the night he awoke to what he described as a cold sensation. J.H. states that this is when he noticed that the victim was cold to the touch and that she appeared lifeless. According to the State Medical Examiner's Office, the immediate cause of the victim's death was "oxycodone intoxication in the setting of apparent intravenous drug abuse." There appeared to be no evidence of contributory physical injuries associated with the injection. There is no question that if the Claimant's allegations are true, his daughter was an innocent victim within the meaning of the statute. It is less clear, however, whether C.G.H. engaged in contributory misconduct. Resolution of this question turns on whether there was a causal connection between her action and the injection that led to her death. Based on the Claimant's presentation of new evidence introduced at hearing, the Court is of the opinion that the Claimant's daughter in no way contributed to her own death. Therefore, she is an innocent victim within the meaning of the statute. The Court made an award in the amount of $6,000.00.....p. 214

COOPERATION WITH INVESTIGATION

CV-11-0200-Z K.M.P.

On February 23, 2010, the 31-year-old Claimant was the victim of criminally injurious conduct in Huntington, Cabell County. The Claimant testified at the hearing of this matter that while walking to a local convenient store along 9th Avenue she was approached by the unidentified offender and asked to perform a sexual act. After refusing to perform the sexual act, Claimant testified that the offender punched her in the jaw and temple, which caused her to lose consciousness. Claimant stated that when she regained consciousness, she was lying in the middle of 9th Avenue where several young male and female offenders began kicking her. One of the offenders stomped on Claimant's left arm, fracturing it, which required extensive elbow surgery. Claimant then stated that a Good Samaritan retrieved her and transported her to Cabell Huntington Hospital. Claimant reported the incident to law-enforcement officials the same day. In the present case, Claimant provided the Court with evidence of a prior battle with drug addiction and prostitution, which led her to seek professional help in Louisville, Kentucky. Claimant has subsequently begun to fully cooperate with law enforcement. Claimant has also performed well with counseling and is attempting to reconcile prior medical bills. Therefore, Court entered an award in this claim in the amount of $6,854.95.....p. 223

CV-10-0921-X S.M.W.

Claimant alleges that she is the innocent victim of a crime that occurred on February 9, 2010, in Jefferson, Kanawha County when she was allegedly sexually assaulted

by a police officer. The Claimant's attorney reported the incident to law-enforcement officials a day later; however, the Claimant filed no charges. Nor were formal charges made in connection with the sexual assault allegations. Claimant stated in her application that she has suffered emotional trauma in connection with the alleged incident; however, Claimant has not sought treatment and has provided no documentation showing any out-of-pocket expenses. The Claim Investigator's finding was that the Claimant did not cooperate with law enforcement by pursuing charges against the alleged offender. Therefore, as it is the Claimant's burden to prove that good cause existed for the failure to pursue charges against the officer, the Court is of the opinion that the Claimant has not met her burden. Claim denied.....p. 227

CRIMINALLY INJURIOUS CONDUCT

CV-10–0618-X M.H.

On August 4, 2010, the Claimant, Millard Hensley, alleges that he became the innocent victim of a crime when he was struck by a motor vehicle while operating a bicycle in Chapmanville, Logan County. Claimant testified that at approximately 2:45 p.m., the alleged offender, Lisa Bryant, was driving her vehicle along County Route 5/11, locally known as White Oak Road, when she met an oncoming vehicle at an intersection. The alleged offender was unable to stop her vehicle and struck the Claimant. Based on new evidence presented in this matter, the Court is satisfied that Keith Bryant, or some other unidentified driver, was the actual driver of the vehicle that struck the Claimant and fled the scene. Given the above-cited exception to the statute limiting recovery for motor vehicle violations, this Court is of the opinion to reverse its prior Order. The Court granted an award in this claim in the amount of $7,504.35.....p. 224

ECONOMIC LOSS

CV-10-0788-Z M.J.P.

On August 13, 2010, the 32-year-old Claimant was the alleged victim of criminally injurious conduct in Huntington, Cabell County. The Claimant was at his home checking his mail when he was assaulted by the three offenders. The Claimant testified at the hearing of this matter that he and the principle offender are both engaged in the business of tree trimming and are in fact neighbors. Due to a string of thefts involving tree-trimming equipment in the area, the Claimant was approached by the local police and questioned. In response to the officer's question

concerning who the Claimant thought was responsible for the string of thefts, the Claimant told the officer that he believed his neighbor (offender) was the culprit. The Claimant offered this information only because he was informed that he would remain anonymous. On August 13, 2010, while checking his mailbox, the Claimant was approached by the offender. The Claimant testified that he attempted to avoid the situation, but was suddenly attacked by the principal offender and two coworkers. The Claimant stated that he was struck on the head with brass knuckles. The Claimant attempted to defend himself, but he was not successful. The Claimant suffered severe injuries as a result of the beating. The Claimant's medical bills totaled $4,120.31. The Court was of the opinion to make an award in this claim for the sum total of the Claimant's work-loss and medical bills, which together totaled $19,041.81.....p. 209

CV-10-0712-Y B.J.H.

On July 2, 2010, the Claimant's daughter, age 14, was the alleged innocent victim of a sexual abuse/assault allegedly perpetrated by the alleged victim's half brother. The alleged offender has since been charged with twenty counts of sexual assault in the 3rd degree and twenty counts of incest. The criminal case is still awaiting disposition. Based on the Claim Investigator's Finding of Fact and Recommendation this Court issued an Order on April 27, 2011, awarding $599.58 for unreimbursed mileage and expenses. The Claimant now asks this Court to consider awarding an additional amount for her work loss, sustained when she attended court proceedings and met with counsel. The Court refused to award the Claimant's claim because the Claimant was not actually the victim of the crime–her daughter was. Thus, work-loss is reserved for victims only. Claim disallowed.....p. 200

METHAMPHETAMINE

CV-11-0660-Z L.B

On November 3, 2010, the Claimant's neighbors were arrested for operating a clandestine methamphetamine laboratory in the same apartment building as the Claimant's residence. Authorities promptly notified the Claimant that she had to vacate the building immediately without first retrieving several items of personal property. Claimant's counsel admitted at the hearing that the Crime Victims Compensation Act does not permit reimbursement for personal property damage associated with the operation of a clandestine methamphetamine lab. W. Va. Code § 14-2A-3(f)(3)(A) intentionally omits personal property as an allowable expense. Therefore, this Court cannot make an award where the statute has intentionally omitted such language. Claim denied.....p. 217

STATUTE OF LIMITATIONS

CV-11-0253-Y P.C.R.

On November 4, 2008, Deputies with the Kanwaha County Sheriff's Department charged and arrested two alleged offenders named C.J. and R.C. for operating a clandestine drug laboratory on property owned by the Claimant. The Claimant, an innocent victim by all accounts, incurred great expense in order to demolish the dwelling in accordance with state law. The Claimant filed his claim with this Court, seeking recovery for those expenses. The issue for the Court in this claim was whether or not the Claimant filed this claim within the two-year statutory period. The Court held that the Claimant did not meet the statute of limitations. Claim disallowed...p. 199

CV-05-0466

On December 7, 2001, the Claimant, then 21 years of age, was a victim of a senseless gunshot wound to the leg. This leg was later amputated, and the Claimant has since suffered periodic bouts of depression and substance abuse. The effects of this one senseless act have only now just begun to become clear to the Claimant and his family. In the case at hand, this Court has gone out of its way to determine what days, if any, could be used to toll the statute of limitations. The criminally injurious conduct occurred on December 7, 2001, and the claim was filed on September 22, 2005 (one year and nine months too late). To meet the statute of limitations, this claim should have been filed by December 7, 2003. The record provides us with a total of fourteen (14) days that could possibly be used to toll the statute. Therefore, the analysis stops here. Seeing no other evidence of days in which the Claimant was mentally incapacitated, this Court has no jurisdiction to allow the claim to proceed. Claim dismissed.....p. 202

LOST SCHOLARSHIP

CV-09-0776-Y A.Y.S.

On July 5, 2008, the Claimant's 25-year-old son, D.N., was the tragic victim of criminally injurious conduct in Huntington, Cabell County. The Claimant's son was shot and killed by the offender, J.G., who was indicted for murder. It is undisputed that the Claimant's son was an innocent victim of crime. Moreover, this Court's initial Order granted payments to medical providers and reimbursement of funeral and burial expenses which totaled $8, 184.99. At issue in this claim was whether the reimbursement of student loans can also be made as "lost scholarship" within the provisions of the Crime Victims Compensation Act. The Court held that the key feature of lost scholarship awards is that the student possesses the award and

has some vested interest. Another key feature of these types of awards is that the student is not generally obligated to repay the award. The Claimant is seeking reimbursement for private student loans. The Court held that student loans do not qualify as lost scholarship under the statute. Claim disallowed.....p. 205

SECONDARY VICTIM

CV-09-0811-X P.C.D.

Between 2007 and 2008, the five-year-old granddaughter of Claimant was the innocent victim of criminally injurious conduct in Wileyville, Wetzel County. During a routine doctor's exam, it was discovered that the victim had contracted a sexually transmitted disease. There were two possible suspects listed at the time of this discovery; however, it was later determined through blood testing that neither of the two suspects was the offender. Because S.T. did not identify an offender at the time of Claimant's application, the Court made an award based purely on her status as a secondary victim. At hearing on this matter, the issue for the Court was whether or not S.T. qualifies as a primary victim. The Court finds that S.T. was more than a secondary victim and was more than merely "exposed" to criminally injurious conduct based on the weight of the new evidence presented at hearing. The Court does not question Corporal Spragg's expertise in this matter and finds that S.T. was in fact a primary innocent victim of criminally injurious conduct. The Court made an award in the amount of $1,625.00. .....p. 220