STATE OF WEST VIRGINIA

Report

of the

Court of Claims

For the Period from July 1, 1985

to June 30, 1987

By

CHERYLE M. HALL

Clerk

VOLUME XVI

(Published by authority code 12-2-25)

Personnel

of the

State Court of Claims

HONORABLE GEORGE S. WALLACE, JR. . . . . Presiding Judge

HONORABLE WILLIAM W. GRACEY . . . . . Judge

HONORABLE DAVID G. HANLON . . . . . Judge

CHERYLE M. HALL . . . . . Clerk

CHARLIE BROWN . . . . . Attorney General

FORMER JUDGES

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

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

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

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

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

LETTER OF TRANSMITTAL

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To His Excellency

The Honorable Arch A. Moore, Jr.

Governor of West Virginia

Sir:

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

Respectfully submitted,

CHERYLE M. HALL,

Clerk

TERMS OF COURT

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

OPINIONS

TABLE OF CASES REPORTED

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

OPINION ISSUED - AUGUST 6, 1985

AMERICAN OFFICE SYSTEMS, INC.
VS.
DIVISION OF VOCATIONAL REHABILITATION

(CC-85-226)

No appearance for claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

On June 13, 1985, claimant American Office Systems, Inc. filed its Notice of Claim seeking an award of $500.00 replacement cost for destruction of its 3M Copier, Model 215BG, in a flood at Williamson, West Virginia, on May 7 and 8, 1984. On August 2, 1985, the Division of Vocational Rehabilitation, as the respondent agency, filed its Answer thereto admitting the validity of the claim and requesting the Court to issue an "advisory opinion' with reference to the claim. Under West Virginia Code 14-2-8, a state agency may request an advisory determination. Attached to respondent's Answer is an 'Exhibit A" consisting of Copier Lease/Maintenance Agreement dated June 1, 1983, between claimant and respondent, pertaining to the lease of numerous copiers at numerous locations for the period from July 1, 1983 to June 30, 1984, which includes the subject copier at Williamson. Paragraph numbered 8 of said Agreement reads as follows:

> "8. LOSS AND DAMAGE. LESSEE hereby assumes and shall bear the entire risk of loss and damage to the EQUIPMENT from any and every cause whatsoever. No loss or damage to the EQUIPMENT or any part thereof shall impair any obligation of LESSEE under this Agreement which shall continue in full force and effect. In the event of loss or damage of any kind whatsoever to any item of EQUIPMENT, LESSEE, at the option of LESSOR, shall: (a) place the same in good repair, condition and working order; or (b) replace the same with like equipment in good repair, condition and working order; or (c) pay to LESSOR the replacement cost of EQUIPMENT less depreciation."

Accordingly, the Court is of the opinion, and issues this advisory determination, that the respondent is legally obligated to the claimant, upon this claim, in the amount of $500.00.

Award $500.00.

OPINION ISSUED OCTOBER 4, 1985

CHARLES EDWARD ALLEN
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-32)

Claimant's wife appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the name of Trish Allen, but when testimony established that the vehicle, a 1982 Oldsmobile, was titled in the name of Charles Edward Allen, the Court amended the style of the claim to reflect that fact.

On January 8, 1985, claimant's wife, Patricia Ann Allen, was driving on State Route 152 near Proctorville, West Virginia, at about 8:00 in the evening when she struck a pothole. The pothole damaged the right front wheel and tire of the vehicle, and the amount of $157.45 was claimed. Mrs. Allen testified that she did not see the pothole before or after striking it. Mrs. Allen had no knowledge of how long the pothole had been in existence.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. Adkins vs. Sims, 130 W.Va 645, 46 S.E. 2d 81 (1947). For respondent to be held liable for defects of this type, the claimant must prove that respondent had actual or constructive notice of the defect. As there was no evidence of such notice, the claim must be denied.

Claim disallowed.

OPINION ISSUED OCTOBER 4, 1985

PHIL CALISE
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-28)

James A. Matish, Attorney at Law, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

Claimant is a bicycle enthusiast and claims $3,000 for bicycle damage and personal injury. On August 18, 1984, he was riding his bicycle northerly on U.S. Route 19 beneath a U.S. Route 50 overpass at Clarksburg, Harrison County. The weather was clear and dry and his view unobstructed, but he failed to see a sewer grate which extended about five feet out into the highway from the right edge of the pavement. The parallel openings of the grate were parallel to the edge of the pavement. The front wheel of his bicycle dropped into the grate opening furthest from the right edge of the pavement. The bicycle was damaged, and he suffered a separated shoulder and chipped tooth as a result of falling from the bicycle. His explanation, of failing to see the grating, was that he was coming down a hill, approaching a traffic light and watching for cars on his left.

In the presentation of his case, it was intimated, but not proven, that the sewer grating was incorrectly installed; that it should have been installed with the grate openings perpendicular to the edge of the highway.

The Court has consistently held that the State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. Adkins vs. Sims, 130 W.Va. 645 (1947). The Court perceives no negligence on the part of the respondent in this case, and the claim must be denied.

Claim disallowed.

OPINION ISSUED OCTOBER 4, 1985

WILLIAM H. CLAY
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-219)

Claimant appeared on its own behalf.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On June 6, 1984, William H. Clay was operating his 1976 Buick Limited north on Route 52 from Kermit to Huntington, West Virginia at approximately 4:00 p.m. He came upon a rock extending from the berm onto the edge of the road. He attempted to keep from hitting the rock, but in so doing, the vehicle swerved, damaging the right rear quarter panel and fender skirt int he amount of $101.82.

Mr. Clay testified that he had observed rock slides in the area of Route 52 on prior occasions when it rained. He further testified that he talked to the Wayne County Maintenance Superintendent after this accident.

There is no evidence that the respondent knew or should have known of an unusually dangerous condition. Prom the record, there is no showing of negligence on the part of the respondent, and accordingly, the Court disallows this claim. See Bolyard vs. Department of Highways, 12 Ct. Cl. 344

(1979), and Ashley vs. Department of Highways, 14 Ct. Cl. 174 (1982).

Claim disallowed.

OPINION ISSUED OCTOBER 4, 1985

REXELL C. FREEMAN AND JOYCE FREEMAN
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-244)

Claimant appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant was operating his 1979 Plymouth Horizon on Route 92 near Montsville, Barbour County, West Virginia, on August 24, 1984, at approximately 11:30 in the morning. Earlier that day, a hole developed in the floor of the bridge at that location. A steel plate had been placed over the hole. Claimant was following a truck and the truck passed over the plate on the bridge. The plate whirled in the air and spun up underneath claimant's vehicle. This resulted in damage to the claimant's vehicle, and injury to the claimant's by insurance. Claimant further testified that he was not denied any employment income as a result of the accident, but that it took him a month to repair the Horizon. He purchased a Volkswagen worth $800.00 for transportation during this period. His vehicle was repaired within a month at which time the Volkswagen still had a market value of $800.00.

After carefully reviewing the record, this Court is of the opinion that the placing of an unsecured plate on the bridge was negligence on the part of the respondent. The claimant has been reimbursed by his insurance company for the estimated repair costs of the vehicle. Claimant repaired the vehicle himself and, in actuality, experienced no monetary loss as a result of the accident. As no claim has been established by the claimant, the Court must deny the claim.

Claim disallowed.

OPINION ISSUED OCTOBER 4, 1985

STEVEN D. GOOD
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-283)

Claimant appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant alleges in his Notice of Claim that on October 19, 1984, at approximately 7:00 p.m., he was travelling east on Route 64 near Barboursville, West Virginia, when his vehicle struck a pothole. Damage to a wheel and tire amounted to $92.35.

At the hearing, claimant testified that construction was being done on the bridge. Cement barriers had been erected on both sides of the single lane. As claimant crossed the bridge, his 1980 Toyota Celica struck the hole. Claimant testified that he did not see the pothole until he struck it. He had travelled the same route a week before the accident, and had not observed the pothole at that time.

In order for liability to exist on the part of the respondent, it must be shown that the respondent had actual or constructive notice of the hazard which caused the damage. Davis vs. Dept. of Highways, 11 Ct. Cl. 150 (1976). No evidence of notice was presented in the record of this case;

therefore, negligence has not been established, and the claim must be denied.

Claim disallowed.

OPINION ISSUED OCTOBER 4, 1985

ANDREW CHIMEZIE IMEGI
VS.
BOARD OF REGENTS

(CC-85-6)

Claimant appeared in person.

Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant was a student resident of Arnold Apartments of West Virginia University from June 1983 to May of 1984. He resided in apartment 704 and was assigned use of a storage cubicle number 803 on the ground floor. Although the building design included a storage cubicle for each apartment unit, some of the storage cubicles were being used by the University, and some had items in them belonging to residents who had vacated apartments. Thus, the available storage cubicles were assigned, upon request for same, on a basis of availability. The resident, to whom a storage cubicle was assigned, was expected to secure his property with his own lock. No lease contract or other item was placed in evidence to show any imposition of responsibility upon the University, or apartment management, for the safekeeping of property stored in the storage cubicles.

At some time in March or May of 1984, claimant found that his assigned storage cubicle had been taken over by another student resident and that his previously stored belongings were missing. Upon inquiry, he was advised that the cubicle had been found empty and unsecured and had been reassigned. In May of 1984, finding a storage cubicle empty and unsecured, he had placed some of his belongings in that cubicle, without having it assigned to him, and later he found that those belongings were gone.

His testimony proved nothing but his suspicions that his property, on both occasions, had been disposed of by apartment management personnel.

There being no evidence of responsibility of the University for safekeeping of claimant's property, nor of any negligence or willful misconduct on the part of the University, this claim for $1,000 is disallowed.

Claim disallowed.

OPINION ISSUED OCTOBER 4, 1985

PAULINE R. KAPLAN AND ALLEN KAPLAN
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-339)

Claimant appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally titled in the name of Allen Kaplan, but when the evidence established that the

vehicle, a 1984 BMW 318i, was titled in the joint names of Allen Kaplan and Pauline Ruth Kaplan, the Court amended the style to reflect that fact.

Claimant alleged in his Notice of Claim that on December 10, 1984, at approximately 7:00 p.m., he was travelling east on Route 60 in Huntington, West Virginia, when his vehicle struck a pothole. Damage to the tire, tire rim and the cost of alignment was estimated at $420.00, but claimant did not produce any receipts or other proof of damages.

At the hearing, the claimant testified that there was water standing on the highway, and that he did not see the pothole before he struck it. The claimant did not have any personal knowledge of how long the pothole had been in existence.

In order for liability to exist on the part of the respondent, it must be shown that the respondent had actual or constructive notice of the hazard which caused the damage. Davis vs. Dept. of Highways, 11 Ct. Cl. 150 (1976). No evidence of notice was presented in the record of this case;
therefore no negligence has been established, and the claim must be denied.

Claim disallowed.

OPINION ISSUED OCTOBER 4, 1985

KENNETH AND JANET MOUNTS
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-40)

Claimant's daughter, Jana Lynn Mounts, appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the name of Jana Lynn Mounts, but when the testimony established that the vehicle was titled in the names of her parents, Kenneth and Janet Mounts, the Court amended the style of the claim to reflect that fact.

On December 22, 1984, claimant's daughter, Jana Lynn Mounts, was driving on Route 60 East near Barboursville, in Cabell County, West Virginia, at about 8:00 p.m., when the right front wheel ran through three potholes. Replacement of a damaged tire cost $58.60, the amount claimed. Ms. Mounts testified that she did not see the potholes before striking them. Ms. Mounts had no knowledge of how long the potholes had been in existence.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. Adkins vs. Sims, 130 W.Va. 645, 46 S.E. 2d 81 (1947). For respondent to be held liable for defects of this type, the claimant must prove that respondent had actual or constructive notice of the defect. As there was no evidence of notice, the claim must be denied.

Claim disallowed.

OPINION ISSUED OCTOBER 4, 1985

SHARON L. NICKELS
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-317)

J. Timothy Poore, Attorney at Law, appeared for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant was travelling east on I-64 in Huntington, Cabell County, West Virginia, on November 13, 1984. The road was under construction, and traffic came to a stop causing Ms. Nickels to apply her brakes and lose control of her car. As a result, she hit another vehicle, and sustained damage to herself and to her car in the amount of $4,650.00. Claimant testified that she was unaware that 1-64 was under construction, and that she did not drive that highway very often.

Charles A. Shaver of the West Virginia Department of Highways testified that the accident location had been under construction for resurfacing work by State Construction, Inc., an independent contractor. This Court has held previously that the respondent cannot be held liable for the negligence, if any, of an independent contractor. See Paul vs. Department of Highways, 14 Ct. Cl. 479 (1983); Harper vs. Department of Highways, 13 Ct. Cl. 274 (1980); Safeco Insurance Company vs. Department of Highways, 9 Ct. Cl. 28 (1971). Accordingly, the Court disallows this claim.

Claim disallowed.

OPINION ISSUED OCTOBER 4, 1985

RONALD G. PRITT AND PEGGY J. PRITT
VS.

DEPARTMENT OF HIGHWAYS

(CC-85-76)

Ronald G. Pritt appeared for claimants.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the name of Ronald G. Pritt, but when testimony established that the vehicle, a 1984 Dodge Dart, was titled in the names of both Ronald G. and Peggy J. Pritt, the Court amended the style of the claim to reflect that fact.

On February 7, 1985, claimant was driving on Route 60 East in Rand, West Virginia, at about 6:45 a.m. when he struck a pothole. The pothole damaged the tire in the amount of $129.53. Mr. Pritt testified that he drove the same route every day. He had not noticed the pothole, and had no knowledge of how long it had been in existence.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. Adkins vs. Sims, 130 W.Va 645, 46 S.E. 2d 81 (1947). For respondent to be held liable for defects of this type, the claimant must prove that respondent had actual or constructive notice of the defect. As there was no evidence of notice, the claim must be denied.

Claim disallowed.

OPINION ISSUED OCTOBER 4, 1985

UNITED STATES FIDELITY AND GUARANTY COMPANY, AS SUBROGEE OF CHALMER HARLESS
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-337)

K. Paul Davis, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On October 17, 1984, at about 10:00 p.m., a son was driving the 1980 Oldsmobile Cutlass of Chalmer Harless on Route 60/2 near St. Albans in Kanawha County, West Virginia. The driver observed a "Road Narrow" sign. The vehicle struck a rock in the road and incurred damages in the amount of $2,819.52.

The driver testified that he did not see the rock before hitting it. He had travelled the same route earlier that day. He thought he had observed the rock, but could not be sure, and he had no personal knowledge of how long it had been in existence. Susan Cress, a neighbor, testified that she had observed the rock prior to the accident, but she had not notified the respondent.

The State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. Adkins vs. Sims, 130 W.Va. 645 (1947). For the State to be found liable, it must first have had either actual or constructive notice of the defect in the roadway. Since there was no proof in this case that the State had notice of the defect, the claim must be denied.

Claim disallowed.

OPINION ISSUED OCTOBER 25, 1985

WALTER J. DAVIS
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-30)

Claimant appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Walter Jasper Davis, alleges in his Notice of Claim that on January 25, 1985, at approximately 5:45 p.m., claimant's son, Walter Jay Davis, was travelling on Pennsylvania Avenue in Fairmont, West Virginia. The vehicle, a 1985 Ford Escort, driven by claimant's son, was damaged by cinders and chips of limestone from a truck. Damage to the paint and the fenders of the vehicle amounted to $246.75.

At the hearing, claimant's son testified that at the time of the incident, it was snowing, the road was slick, and traffic had halted as a result of the inclement weather. Claimant's son stated that the truck passed him three times, dispensing cinders, and that on the third time the cinders struck his vehicle. Claimant's son ascertained that the truck was respondent's vehicle, as he observed that there was a logo on the truck which identified it as a vehicle of the Department of Highways.

The Court is of the opinion that the claimant has established that the truck was owned and operated by the respondent, and that its driver was operating it negligently under the prevailing conditions, and therefore makes an award to the claimant in the amount of $246.75. Sage v. Dept. of Highways, 14 Ct.Cl. 68 (1981).

Award of $246.75.

OPINION ISSUED OCTOBER 25, 1985

LAWRENCE D. JENKINS
VS.
DEPARTMENT OF CORRECTIONS

(CC-84-192)

Claimant appeared in person.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

On May 6, 1984, a 1971 Ford LTD Sedan belonging to the claimant, Lawrence D. Jenkins, was stolen from his residence in Salem, West Virginia, by two escapees from the West Virginia Industrial Home for Youth. At the time of the theft, the vehicle was unlocked and the keys were in the car. Claimant seeks $800.00, the value of the vehicle.

In order for the claimants to recover in this case, negligence on the part of the respondent must be shown to be the proximate cause of the loss suffered by the claimants. Lepera v. Dept. of Corrections, 13 Ct.Cl. 49 (1979).

No evidence has been presented to show that the respondent acted in a negligent manner. Claimant has asserted that respondent was negligent in permitting the escape of the youths to occur; however, there is no support of that assertion in the record.

The Court is of the opinion that negligence on the part of the respondent has not been proven. Even if such negligence had been shown, it would not be considered the proximate cause of the loss of claimant's vehicle. Claimant testified that the keys had been left in the vehicle. As this negligent act was the proximate cause of the loss of the vehicle, the claim must be denied.

Claim disallowed.

OPINION ISSUED OCTOBER 25, 1985

THEODORE D. MOORE, III
VS.
SUPREME COURT

(CC-84-242)

Claimant appeared in person.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant filed this action to recover a witness fee and mileage costs for his appearance in Magistrate Court in Cabell County, West Virginia, on June 13, 1984. Claimant appeared for the defendant, Tony Cook, and travelled from Fayetteville, North Carolina, for said appearance.

Claimant testified that the defendant, Tony Cook, called him as a witness. He further testified that Mr. Margolin, the defense attorney, handed him the subpoena. Mr. Alvie Qualls, the Presiding Magistrate in the Tony Cook case, testified that a defendant may supply the Court with a financial affidavit verifying the defendant's inability to pay Court costs. The State of West Virginia will then pay mileage and attendance fees to a witness for the defendant.

With regards to the issue of jurisdiction, the law is quite clear concerning claims which cannot be brought before the Court. West Virginia Code §14-2-14 provides:

"The jurisdiction of the Court shall not extend to any claim.... With respect to which a proceeding may be maintained against the State, by or on behalf of the claimant in the Courts of the State."

As Mr. Moore is able to pursue payment of witness fees and mileage costs through a financial affidavit filed in Magistrate Court, the claim is disallowed.

Claim disallowed.

OPINION ISSUED OCTOBER 25, 1985

TRI-CITY WELDING SUPPLY COMPANY
VS.
DEPARTMENT OF CORRECTIONS

(CC-84-335)

David C. Simmons appeared on behalf of claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant company has supplied cylinders to the West Virginia Industrial School for Boys at Grafton over a twenty-year period. Claimant company is alleging a loss of $1,368.00 as a result of eight cylinders which were loaned to the school between 7/18/73 and 2/2/83, and never returned to Tri-City.

Claimant company's representative, Daniel C. Simmons, testified that he could not establish by date or serial number the time of delivery of the eight missing cylinders to the school by Tri-City. Claimant company's representative agreed that he could not provide proof of the age of each missing cylinder. Mr. Simmons provided the Court with the replacement costs only of the cylinders, and was not aware of the actual cost of the eight missing cylinders, nor could he document the date when the missing cylinders were lost. Furthermore, the record shows that the balance of missing cylinders was created in 1975. Mr. Simmons lacks signed receipts showing delivery of cylinders for the 1975 time period.

Mr. Paul Gabel, Deputy Superintendent of the school testified that in closing out accounts, he discovered that there were in existence neither delivery slips nor serial numbers for the missing tanks.

It is the Court's opinion that the facts as presented do not support the claimant's claim by a preponderance of the evidence. Accordingly, the Court disallows the claim.

Claim disallowed.

OPINION ISSUED OCTOBER 25, 1985

R. MIKE VERES
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-80)

Claimant appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

Claimant was operating his Ford van, pulling his boat on a trailer on Route 44 in the direction of Logan, West Virginia. There was a large section of unrepaired road approximately three miles from Switzer, West Virginia. Claimant's trailer hit a hole in the unrepaired section of road. He proceeded another mile to the upper end of Williamson, West Virginia, and hit another hole. As a result, the trailer was totalled. The estimated replacement cost of the trailer is $1,953.00. Claimant testified that his insurance company paid him $1,400.00 for the loss. Claimant was unable to provide the Court with the amount of the deductible, if any.

At the hearing, claimant testified that he did not see the holes before he struck them. He had travelled the same route 'daily, and said, "I probably have seen them but not to recall them being there."

In order for liability to exist on the part of the respondent, it must be shown that the respondent had actual or constructive notice of the hazard which caused the damage. Davis v. Dept. of Highways, 11 Ct.Cl 150 (1976). No evidence of notice was presented in the record of this case; therefore, negligence has not been established, and the claim must be denied.

Claim disallowed.

OPINION ISSUED OCTOBER 30, 1985

TERESA R. ALTOMARE AND SAMUEL ALTOMARE
VS.
DEPARTMENT OF HIGHWAYS

(CC-77-111)

William B. Carey, Attorney at Law, for claimant.
Henry C. Bias, Deputy Attorney General, for respondent.

WALLACE, JUDGE:

On July 7, 1975, claimant, Teresa R. Altomare, accompanied by her daughter-in-law and sister-in-law, was driving a 1969 Oldsmobile station wagon belonging to both claimants in a northerly direction on W.Va. Route 7, also known as South Fork Road, entering the town of Moorefield, West Virginia. At a point near the intersection of South Fork Road and Paskell Drive, claimant Teresa R. Altomare suddenly lost control of the vehicle, veered to the right across the berm into a drainage ditch and the vehicle flipped over and landed on its wheels. In explaining what happened, Mrs. Altomare testified:

I started driving and drove down on this beautiful highway and all of a sudden I felt a quiver in the steering wheel like, you know, and I had power brakes and I just tried to tap them a little bit so I could come to a safe stop but what happened was that I pulled over and the car veered to the right and the ditch was there and I just went over and I thought I went over, I don't know how cars, how things happen. I'm not familiar with that but I went over and landed on.the wheels straight up.

Claimant sustained permanent injuries from the accident and seeks an award of $750,000.00. Claimant alleged that the respondent was negligent for failing to maintain the drainage ditch in proper condition and for failing to install a guard rail between the road and drainage ditch.

Eugene Brand, County Supervisor for the respondent at the time of the accident, testified that the basic character of the ditch had not changed over the years and had been maintained in the same manner as other

like drainage ditches. Mr. Brand also testified that respondent used the guard rail standards recommended in guidelines established by the Federal Highway Administration and under such guidelines, guard rails would never have been erected at the scene of this accident.

From the record, there was no evidence of negligence on the part of the respondent presented which was the proximate cause of the accident. Neither the maintenance of the drainage ditch nor the lack of a guard rail caused the accident. The drainage ditch was maintained as any other in this State, and the guard rail standards were followed. Accordingly, the Court is of the opinion to and does disallow the claim.

Claim disallowed.

OPINION ISSUED NOVEMBER 14, 1985

JACK D. PORTER AND JACQUELINE L. PORTER CAUDILL
VS.
DEPARTMENT OF HIGHWAYS

(CC-82-305)

Claimant, Jacqueline L. Porter Caudill, appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

The claimants, father and daughter, seek an award of $10,020.00. This is the total amount of a project proposed by a contractor and includes:

Block wall construction	$6,870.00
Existing Driveway Drain Relocation	550.00
Excess Dirt Removal on the Lawn	420.00
Compacted Asphalt Gutter Between the Existing Road and the New Wall	1,500.00
Cleanup and Stone Placement for the Gutter and Wall	680.00

Their property is located on County Route 7, also known as Spring Valley Drive, in Wayne County. Jacqueline L. Porter Caudill is the owner of the property. Her father, Jack D. Porter, has a dower interest. The property consists of two lots, and a house which was built around 1936 or 1937. The house faces to the South, onto Spring Valley Drive. To the west and north of the property lies Spring Valley Circle, also known as County Route 7/9, which circles up the hillside behind claimant's property. The claimants allege water damage to their property due to the failure of respondent to maintain adequate ditching and drainage

in the area.

Claimant, Jacqueline L. Porter Caudill, testified that there is water runoff from Spring Valley Circle which crosses the property during hard rains. A storm sewer runs from the north side of Spring Valley Circle, across the property and connects with another drainpipe which crosses under Spring Valley Drive. Claimant testified that the sewer is inadequate, causing water to flow over the road and onto her land. Claimant testified that she does not know who constructed the existing drainage system.

Jonathan M. Fowler, a professional engineer, examined the property in question for the claimants. He testified that in his opinion, the inadequate storm sewer was the major cause of the damage to claimants' property. He also stated that inadequate ditch lines on Spring Valley Circle aggravated the problem. He stated that the owner of the lot across Spring Valley Circle from the claimants had graded his lot to the edge of the pavement, and that there was no ditch line there. Other factors contributing to the problem included increased development in the area of claimants' property and the land's location in a natural drainage area.

James Robert Campbell, an engineer employed by respondent, testified that while the ditch lines were not well maintained, the primary causes of claimants' water problems were the location of the land in a natural drainage area, and the inadequately designed storm sewer on claimants' property. He stated that he could find no record as to when or by whom the sewer was installed.

In view of the evidence presented, the Court can find no basis to hold the respondent liable for claimants' damages. The expert witnesses testified that the primary cause of the water flowing onto the land, the low point of some eleven acres, was the inability of the storm sewer to carry the surface water away. No evidence was presented to establish that the sewer was either designed or maintained by respondent.

It is not the function of this Court to make an award for such a proposed project. Rather, this Court considers damages incurred, and if incurred by reason of some act or omission of a State agency, then an appropriate award may be made. This is not a claim for such damages. Although evidence was presented that flowing surface water had damaged claimants' yard and had flooded the basement of claimants' dwelling house, no evidence was presented of the amount of monetary damages to the claimants' property. Accordingly, the Court is of opinion to disallow the claim.

Claim disallowed.

OPINION ISSUED NOVEMBER 19, 1985

TAMMY JO HALL-ARTHUR
VS.
DEPARTMENT OF HIGHWAYS

(CC-79-568)

John R. Glenn, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

On December 9, 1978, the claimant was a passenger in a Chevrolet Luv truck operated by Robert Gene Wallace. It was snowing, and as they drove at approximately 20 mph over the Water Street Bridge on US Route 119 in Logan, West Virginia, the vehicle struck ice and the driver lost control. The truck slid and collided with another truck. The claimant sustained severe and permanent injuries including the amputation of her right leg.

The claimant alleges that the failure of the respondent to remove the snow and ice from the bridge was negligence and that this negligence was the proximate cause of her injuries. She seeks an award of $100,000.00.

The respondent alleges that the Water Street Bridge was not, at the time of the accident, part of the highway system under its jurisdiction.

During the course of the hearing it developed that the claimant had settled with Robert Wallace's insurance company for $50,000.00. The Court requested that the release be filed with the Court, which was done. There were actually two releases executed, each for the consideration of $25,000.00, releasing the owner and operators of the truck. The releases provided among other things that the claimant '...released and discharged... all other persons, firms, and corporations, both known and unknown, of and from any and all claims, demands, damages, actions, causes of action, or suits at law or in equity, of whatsoever kind or nature, for or because of any matter or thing done, omitted or suffered to be done by anyone prior to and including the date hereof on account of all injuries both to person or property resulting, or to result, from an accident which occurred on or about the 9th day of December, 1978, at Logan, W. Va.

The releases did not exempt the respondent.

After the releases were filed with the Court, the respondent filed its Motion to Dismiss. The Motion was heard on January 17, 1983, after which the parties requested time to file briefs in support of their respective positions.

The Court after consideration of the record, finds that the releases do in fact release the respondent and sustains respondent's Motion to Dismiss. Drema Gail Hopson, et al. v. Dept. of Natural Resources, 10 Ct.Cl. 8 (1973). See also Doganieri v. United States, 520 F. Supp. 1093, (N.D.W.Va. 1981).

Motion sustained.

OPINION ISSUED NOVEMBER 19, 1985

OLIVE CRADDOCK
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-286)

Claimant appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On October 11, 1984 at about 11:00 a.m. claimant olive Craddock was operating her 1977 Chevrolet west on Route 10, Logan County, in Henlawson, West Virginia. It was one-lane traffic, and a flagman waived claimant through. To avoid hitting the flagman, claimant hit the bridge, and incurred damage to her vehicle in the amount of $565.63.

Charles Shaver, construction engineer for respondent on the project, testified for respondent. Mr. Shaver stated that an independent contractor, Barboursville Bridge Company, was responsible for the work on the project. The only employees of the respondent at the site were a supervisor and an inspector.

The record in this case does not establish any negligence on the part of the respondent. Barboursville Bridge Company was an independent contractor. This Court has previously held that the respondent cannot be held liable for the negligence, if any, of an independent contractor. Paul v. Dept. of Highways 14 Ct.Cl. 479 (1983); Harper v. Dept. of Highways 13 Ct.Cl. 274 (1980); Safeco Insurance Co. v. Dept. of Highways 9 Ct.Cl. 28 (1971). Accordingly, this claim must be disallowed.

Claim disallowed.

OPINION ISSUED NOVEMBER 19, 1985

EUGENE R. EDWARDS, JR. AND MARTHA E. EDWARDS
VS.
DEPARTMENT OF HIGHWAYS

(CC-80-298)

H. Truman Chafin, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant Eugene R. Edwards, Jr. was involved in an automobile accident on Route 44 pear Sara

Ann, Logan County, Went Virginia on January 22, 1980. A vehicle, driven by Ada B. Blackburn, was travelling north on Route 44. She encountered a break in the pavement and, in order to avoid going off an embankment, drove over into the southbound lane. As the claimant rounded a curve, he saw Mrs. Blackburn's vehicle in his lane, forcing his off the road. He suffered multiple injuries. The claimant's allege that the respondent was negligent in failing to maintain Route 44. Claimant Eugene R. Edwards, Jr. seeks an award of $652,000.00 for medical expenses, lost wagon, pain and suffering. His wife Martha E. Edwards seeks an award of $25,000.00.

At the pre-trial hearing held on May 27, 1981, it was disclosed that the claimants had brought suit against Ada B. Blackburn and Jerry Lee Blackburn which was settled and a release had been executed by the claimants. The Court requested that the release be filed with the Court, which was not done. The case was heard on June 24, 1982, after which the Court again requested that it be furnished the release. The release was furnished subsequent to the hearing and on September 17, 1982, respondent filed a Motion to Dismiss on the grounds that the claimants executed a release of all claims for a valuable consideration of $50,000.00. The release stated in part, that the claimants forever released Jerry Lee Blackburn and Ada B. Blackburn and any other person, partnership, firm or corporation charged or chargeable with responsibility or liability, ...from any and all claims, demands, damages, costs, expenses, loss of services, actions and causes of actions arising from any act or occurrence, up to the present time, and particularly on account of all personal injury, disability, property damage, lose of services and loss or damages of any kind sustained or that we or either of us hereafter may sustain in consequence of an accident that occurred on or about the 22 day of January 1980, at or near Junction of Rt. 44 and U.S. 52 Sara Ann, W. Va.

The respondent alleged that the release failed to exempt the State of West Virginia, and therefore, by its terms, released the respondent.

The claimant's filed a Motion Contra to Respondent's Motion to Dismiss on September 28, 1982.

The Court held a hearing on the Motion to Dismiss on January 17, 1983, after which a briefing schedule was established in which respondent was given thirty days to file its brief, then the claimants had twenty days to file their reply brief, after which respondent had an additional ten days to reply to claimants. Respondent's brief in support of its motion was filed on February 23, 1983. Claimant's opposition memorandum was filed with the Court on February 5, 1985, followed by respondent's reply brief on March 5, 1985.

The claimants contend, among other things, that respondent's Motion to Dismiss was not timely filed and further that the release executed by the claimants did not release the respondent.

After consideration of the record and the briefs and memorandum filed on behalf of both parties, the Court is of the opinion that claimant's contention that respondent's Motion to Dismiss was not timely filed, is without merit and that the release executed by the claimants did not exempt the respondent. The broadly worded release not only released the Blackburns, but extended to any other person, partnership, firm or corporation.' Drema Gail Hopson, et al. v. Dept. of Natural Resources, 10 Ct.Cl. 8 (1973). See also Doganieri v. United States, 520 F. Supp. 1093, (N.D.W.Va. 1981).
Accordingly, the Court finds that the release releases the respondent and sustains the Motion to Dismiss.

Motion sustained.

OPINION ISSUED NOVEMBER 19, 1985

TOMMY C. MILLER
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-12)

Claimant appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On December 26, 1984, the claimant was driving his 1985 Dodge Ram pickup truck on Route 85 on Bull Creek Mountain, Boone County, when the truck hit a pothole. The truck sustained damages to the tires and tire rims in the amount of $216.55. The claimant testified that he estimated the pothole to be 10 to 12 inches deep, 10 to 14 inches wide, and two feet long. He had travelled the same route a week prior to the accident, but had not observed the pothole at that time.

While the respondent is not an insurer of the safety of motorists using the highways of the State, it does have the affirmative duty of using reasonable care for their safety. Although there was no direct evidence that the respondent had actual knowledge of the existence of this defect, the Court is of the opinion that it did have constructive notice. The size of the pothole is indicative of its presence for a substantial period of time prior to the date of this incident. See Stone v. Dept. of Highways, 12 Ct.Cl. 259 (1979). The Court hereby makes an award to the claimants in the amount of $216.55.

Award of $216.55.

OPINION ISSUED NOVEMBER 19, 1985

JOE SCARDINA
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-250)

Nancy Jane Scardina, appeared on behalf of claimants.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in both the names of Joe Scardina and Nancy Jane Scardina, but when testimony established that the damaged vehicle, a 1973 Plymouth, was titled solely in the name of Joe Scardina, the Court amended the style of the claim to reflect that fact.

Nancy Jane Scardina, claimant's wife, was operating the vehicle in a northerly direction on Route 19, in Morgantown, Monongalia County, on August 16, 1984, at about 11:45 a.m., when her mother, seated in the right front seat, pulled the ashtray out and it dropped to the floor. There was a lighted cigarette in it. Mrs. Scardina pulled off to the berm on her right, opposite the Coliseum, and stopped to retrieve the ashtray and lighted cigarette. While doing this, her mother suggested walking the children to a fruit stand some distance behind them. Instead, Mrs. Scardina elected to back the car, on the berm, to the fruit stand. In so doing, she backed the car into a growth of weeds three to four feet tall. As she did so, she backed over the stump remains of a metal light pole, hidden by the weeds. The car was hung up. A wrecker removed it. The car seemed to Mrs. Scardina to be driveable, and she drove to a restaurant' nearby, at Star City, and stopped for coffee. Returning to the car, she saw a puddle of oil but thought it might be from a car previously parked there. As she drove to Clarksburg, her home, a noise grew louder. She took her mother and granddaughter to their respective homes and then drove to the Department of Highways garage for Harrison County where her husband, the claimant, was employed. He heard his car arriving. He had her drive it to some office, and then on home, barely making it. Inspection later revealed leaking transmission seals and damage to the new bumper, floor pan, muffler, tail pipe, etc. Estimates of repair and the wrecker bill were in the total amount of $747.94, the amount claimed.

James M. Beer, II, respondent's Area Maintenance Engineer for Monongalia, Preston and Taylor counties, testified that the object which she struck was what was left of a 30-foot light pole owned by the City of Morgantown; that Monongahela Power Company had the responsibility for its maintenance.

The Court perceives no negligence on the part of the respondent. It is the opinion of the Court that when Mrs. Scardina voluntarily backed the car into the patch of weeds three or four feet tall, she assumed the risk that something, hidden from her view by the weeds, might be there.

Claim disallowed.

OPINION ISSUED NOVEMBER 19, 1985

VICTOR SOLOMON
VS.
DEPARTMENT OF HEALTH

(D-736)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General; J. Bradley Russell, Assistant Attorney General; and Edgar Bibb, Assistant Attorney General; for Respondent.

GRACEY, JUDGE:

The notice of claim was filed on March 11, 1974, by Victor Solomon, claiming damages of $36,000 incident to refusal of the respondent to grant him a permit for a landfill in Monongalia County. Claimant alleged a loss of income of $21,000 from July 1972 to the date of filing and a loss of future income of $15,000.

The claim was set for hearing on five occasions from 1974 to 1977. Each time, the hearing was continued upon claimant's request or by mutual agreement. At the conclusion of the hearing at Morgantown on July 21, 1982, the parties agreed that the case was 'submitted". On October 18, 1982, claimant filed a motion for an additional hearing. The motion was granted, and another hearing was held in Morgantown on July 18, 1983. Several witnesses not being present, the claimant was granted the privilege of deposing them by written interrogatories. This was done.

For several years prior to the filing of his claim, Victor Solomon, by permit, had operated a landfill in the area known as Laurel Point. A roadway problem developed there in July of 1972, and, without a permit, he began to operate an area known as Martin Hollow as a landfill. Upon discovery, the respondent issued a cease and desist order on or about July 27, 1972. Claimant then agreed to submit an application for a permit to operate the Martin Hollow area. Claimant states, but offered little evidence to prove, that his previous customers, consisting of local municipalities, businesses and individuals, were contacted by respondent and advised to take their garbage and trash elsewhere, to some other landfill; that he thus lost the business of those customers. Many months passed as the claimant got his application into proper form for consideration by respondent. Respondent was represented by a succession of lawyers and engineers. The permit was finally issued September 26, 1973. However, the permit then issued would have required the claimant to begin at a different elevation than the claimant desired, thus limiting the usable area. Infractions of respondent's landfill regulations were reported to the claimant after an inspection of July 29, 1974. By letter dated August 12, 1974, claimant's legal counsel advised respondent that claimant was not operating a sanitary landfill because of "present restrictions"; that his operations were being conducted under his salvage yard permit; that claimant " . . . would consent to the revocation of his sanitary landfill approval as of August 16, 1974, or prior to that time, with the understanding that he would have the right to reapply should conditions warrant."

Subsequently, in 1976, the land in question appears to have been leased to the Monongalia County Commission for five years. In September of 1981, it appears that Solo Enterprises, a West Virginia corporation, by Victor Solomon as its agent, made application for a landfill permit, and the permit was not granted. Solo Enterprises is not a party to the action before this Court, and it is a different entity than Victor Solomon, the individual claimant who is a party to the action before this Court.

During the years, from 1972 to 1983, it appears that the matter of a sanitary landfill permit, for Victor Solomon or Solo Enterprises, has been the subject of litigation in the Circuit Courts of Monongalia and

Kanawha counties. Generally, the claimant, Victor Solomon, has in this action alleged and attempted to prove discrimination on the part of the respondent in several ways. For instance, he complains of the length of time taken by the respondent in processing his application of 1972. He complains that a competing landfill operation of the City of Morgantown was not required by respondent to operate under strict adherence to respondent's landfill regulations. He disagrees with respondent's engineering personnel with reference to the elevation and starting point required in the permit issued to him in September 1973. He makes other allegations of discrimination.

The Court is of the opinion that the claimant has not proven such discrimination by a preponderance of the evidence, and must deny the claim.

Claim disallowed.

OPINION ISSUED NOVEMBER 19, 1985

O. L. WESTFALL AND REBECCA WESTFALL
VS.
DEPARTMENT OF HIGHWAYS

(CC-80-144)

Mary Blasingim, Attorney at Law, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

LYONS, JUDGE:

The claimants are the owners of a house and lot which are adjacent to Star Route (Route 31), Poca, Putnam County, West Virginia. A West Virginia landslide study establishes that this property is in a landslide prone area. There is a hill in back of the house, and the house is at the base of the slope of the hill. A river borders the downhill side of the house. The house is a two-story structure with cinder block foundation. Claimants allege that as a result of respondent's reconstruction of a portion of Route 31 in 1977, the land began to slide, causing severe damage to the foundation and other parts of the residence, and claimants are seeking $80,000.

Ray Kesling, a building contractor, testified that he entered into a contract with 0. L. Westfall in mid 1974 to construct the residence. He stated that he placed reinforcing bars in the cinder block wall that was on the side of the house which faced the slope. He put french drains around the back wall, and down both sides. He waterproofed the areas of the house which were underground. To facilitate the building process, Mr. Kesling excavated an area four feet in height at the back of the house. He complied with the FHA regulation requiring at least a 5 percent minimum slope of all ground fill around any house. He did not see the house again until 1978, after the slide had occurred. He found the house to be a "disaster.' He recommended tearing it down.

Claimant, O. L. Westfall, testified that he had lived in the area where his house was built for approximately fortyfive years. He further testified that the house was completed in October, 1974. After completion of the house, he did not experience any problems as to the movement of earth around the house. He said that there was water standing consistently in the ditch on the upper side of Route 31. In 1977 he made a request that Ray Brewer, the Road Commissioner of Putnam County, rectify the matter, but no action was taken at this time.

Within six months of the request, respondent sent a crew to perform work on Route 31. For a period of four or five days the crew pulverized the surface of the road. In March of 1978, claimant observed a crack in the wall of the carport of his home. He also noticed that the hill was moving. He solicited the aid of a friend who worked with a bulldozer in an attempt to make repairs for a 12 hour period. At this time, the doors of the house were beginning to stick, and the carport wall had fallen in. The slide continued for approximately forty-eight hours. Photographic evidence shows the trees which slid toward the residence, the slippage of the road, and other damage to the property.

Sam Mayberry, a real estate appraiser, estimated the value of claimants' property currently to be $12,500. He estimated that the value of the property prior to the slippage was $55,000 to $60,000.

Craig Lyle, a civil engineer, testified that the damage to the property was the result of a slide. He stated that the primary cause of the slide was the improper maintenance of the drain along Route 31, but that there were other factors involved including the amount of rainfall in the area. The location of the house with regard to the slope movement indicated that the excavation for the construction of the house was not the primary cause of the landslide. The fact that the soil was very soft indicated that the water had not dissipated out of the soil which condition contributed to the slide.

Marlin Davis, a maintenance assistant with respondent, testified that in 1977 the respondent scarified the blacktop of Route 31, and established a reasonable grade. He explained that scarifying entailed taking the existing asphalt, the base, using scarifier blades on the grader, breaking it up into smaller pieces and using that as the existing base. He stated that this scarifying process should have protected the property below the road. He admitted that, "Like I say slide areas, normally water creates them."

Barney Stinnet, a soils engineer with respondent, testified that he was familiar with the topography of claimants' property. He stated that he believed the primary cause of the slide to be the construction which took place on the lower part of the slope. He explained that because claimants' property is in a landslide area, it does not take much to retrigger a landslide. Water stood in the ditch line year round. The construction of the house at the toe of the slope added weight to that particular area. This could have caused a rerouting of the flow of the surface water. As a result, the soil strength could have been reduced which would cause the lateral stability of the entire hillside to be reduced.

After careful review of all the evidence presented, the Court is of the opinion that the damage to claimants' property resulted from several factors. Water stood in the ditch line rather than draining away from the road. Rainfall increased the level of water in the ditch line. It is evident that the respondent's actions further aggravated the condition. It is the opinion of the Court that respondent was negligent in its maintenance of Route 31 in the vicinity of claimants' property. Claimants evidence indicates that the value

of the property today is $12,500.00, and immediately before the slide the value was estimated to be between $55,000.00 and $60,000.00. After deducting the $12,500.00 from the $55,000.00, the lower estimate of value, the Court finds damages to the claimant in the amount of $42,500.00.

The Court makes an award to the claimant in the amount of $42,500.00.

Award of $42,500.00.

OPINION ISSUED NOVEMBER 19, 1985

DOROTHY WORRELL, SERVING AS NEXT FRIEND FOR JOHN WORRELL, HER NATURAL SON
VS.
DEPARTMENT OF HEALTH

(CC-85-49)

Claimant appeared in person.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was originally filed in the name of John Worrell, but when the testimony established that John worrell was seventeen years of age, the Court amended the style of the claim to include the name of Dorothy Worrell, his mother, as next friend for John Worrell.

John Worrell was confined to Lakin State Hospital on January 1, 1984. He had with him articles of clothing and cassette tapes which were stored in a locked storage area at the hospital. Worrell sanctioned the storage of the aforementioned items by his signature on a Lakin Hospital Personal Possession Inventory Form. This form states the following:

> "I authorize storage of the following items during my residency at Adolescent Services and understand that the facility is not responsible for any damage and/or loss of my personal property."

Worrell eloped from the hospital in May, 1984, and he did not return until December 19, 1984, when he came to recover his personal possessions. Robert Schacht, a social worker at Lakin Hospital, testified that some of John's clothing and 48 cassette tapes and plastic containers are missing. By his own testimony, John admitted that neither he nor his parents had contacted the hospital regarding his personal possessions in the interim between May and December, 1984.

The Court is of the opinion that the bailment agreement signed by worrell specifically absolved the Lakin facility of liability. Accordingly, the Court disallows the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 3, 1985

CARL M. GEUPEL CONSTRUCTION COMPANY, INC
VS.
DEPARTMENT OF HIGHWAYS

(CC-82-200)

Wayne A. Sinclair, Attorney at Law, for claimant.
Robert F. Bible, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Carl M. Geupel Construction Company, Inc. entered into a contract with the respondent, West Virginia Department of Highways, designated as Project I-79-1(14)21, for the construction of a section of I-79 in Roane County, West Virginia. Notice to proceed was given to the claimant on May 7, 1970, and the scheduled completion date was September 30, 1972. Claimant experienced several delays during construction when slides occurred on the project. The delays resulted in an actual completion date for the project in October, 1974. This two-year delay resulted in alleged damages to claimant in the amount of $577,068.35, for which this claim was filed.

The first major delay occurred during the summer of 1970 when a partially completed embankment section suddenly slid as a result of a foundation failure. Several months elapsed before respondent instructed claimant as to required correction work which could not be done in the winter months. Further foundation failures occurred throughout the construction of the embankment which was not completed until March, 1972.

The respondent was required to redesign the foundation undercut in another area of the project resulting in further delay to claimant.

The longest delay on the project occurred when the project supervisor for the respondent ordered claimant to cease work in an area where bedrock was not encountered at the elevation shown on the plans. Various circumstances delayed the preparation of the revised drawings by the respondent. Once the change order for the work was prepared, an additional delay was experienced because the respondent had not acquired the right-of-way needed for the revisions. As a result of these delays, the corrective work could not begin until January of 1973.

The claimant and respondent stipulated that there were numerous slides which had an impact on the time required for the construction of the project. Also the original plans on which claimant based its bid were

inadequate as to design. The major reason for the inadequate design was the inadequate and erroneous sub-surface investigation of the foundations upon which the design was based. The parties also stipulated that claimant and its subcontractors incurred increased costs in the form of labor, materials, equipment, and overhead as follows:

CARL M. GEUPEL CONSTRUCTION	
Labor:	
Foreman	$ 3,675.41
Superintendent and Time Keeper	8,713.32
Direct Labor & Fringe Benefits	126,992.33
Total Labor	$139,381.06
Material & Supply:	
Ready Mix Cement	$ 1,228.94
Field Office and Utilities	10,994.21
DOH Field Office	5,961.17
Total Material & Supply	$ 18,184.32
Total Increase-Prime Contractor	$157,565.38
B&O Tax 2.2%	3,466.44
PRIME CONTRACTORS SUBTOTAL	$161,031.82
HIGHWAY PAVING-SUBCONTRACTOR	
Direct Labor Cost	$ 22,377.22
Payroll Tax and Insurance	2,613.66
Fringe Benefits	2,089.68
B & 0 Tax 2.2%	595.68
	$ 27,676.24
GRC CONSTRUCTION COMPANY	
Payroll Increases	$ 5,005.05
Material Increase	4,538.06
	$ 9,543.11
BLACK ROCK CONTRACTING	
Labor Cost Increase	$ 22,294.81
Total Increase Subcontractors	$ 59,514.16
Prime Contractor B & 0	

Tax 2.2%	1,309.31
TOTAL SUBCONTRACTOR	$ 60,823.47
TOTAL PRIME CONTRACTOR	$161,031.82
TOTAL JOB INCREASE	$221,855.29

The Court, having considered the facts and damages, as stipulated, is of the opinion to make an award to the claimant in the amount of $221,855.29.

Award of $221,855.29.

OPINION ISSUED DECEMBER 19, 1985

JIMMIE A. AND EULA R. CURRENCE AND LOREN AND RELLA CURRENCE
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-116 & CC-84-117)

Richard W. Cardot, Attorney at Law, for claimants.
Nancy J. Aliff, Attorney at Law, for respondent.

LYONS, JUDGE:

The claims of Jimmie A. and Eula R. Currence and Loren and Rella Currence were consolidated for the purpose of hearing. A motion to bifurcate the hearing was sustained by the Court. The claims were heard as to the matter of liability only. On June 13, 1982, claimants Jimmie Currence and Loren Currence were traveling in a 1978 Dodge van from their home in Mabie, West Virginia, toward Buckhannon, West Virginia, on U.S. Route 33. At Excelsior, West Virginia, the claimants were involved in an accident when another van, traveling eastbound on U.S. Route 33, hydroplaned on a large accumulation of water on the highway, crossing the water into the westbound lane of traffic into the van in which claimants were traveling. In the ensuing accident, the van in which claimants were riding was knocked on its side and slid down the highway, resulting in the injuries out of which these claims arose.

Claimant, Loren Currence, testified that he was the operator of the Dodge van on the date of the accident. He indicated that the sun was shining and that the road was dry. He and his brother, Jimmie Currence, who was seated in the right front passenger seat, were traveling to Buckhannon, West Virginia, to perform gospel music at a church. He testified that he had observed water in the road at the accident site on previous occasions. He stated that when he came around a slight curve, the van "came and hydroplaned in the water and struck us head-on... I was coming in my lane and he crossed, when he hit the water he lost control of his van and hit us head-on." It was later determined that Truman H. Daniels was the operator of the van which hydroplaned and struck the van operated by Loren Currence.

Marvin G. Murphy, a civil engineer with the respondent, testified that the respondent had performed work in the area in which the accident occurred. A property owner, Mr. Baxa, had complained about water flowing onto his property from U.S. Route 33. In response to his claim, the respondent re-ditched the under side, or westbound side, of U.S. Route 33, cleaned the ditch and installed a pipe through a driveway, and constructed a ditch into a natural drain below or next to Mr. Baxa's barn. This work was performed to solve a problem of drainage or water on the Baxa property. This work was performed in September 1980. Mr. Murphy also testified that there were no further water problems at this location (the Baxa property) until the date of the accident involving the claimants. Upon questioning as to the reason for the water remaining on the highway on the date of the accident, Mr. Murphy stated that "(T)he water should not have remained on the highway unless there was an obstruction or something that blocked the pipe.' He also testified that there was no particular schedule for inspecting and cleaning drainage structures for a particular area.

Wayne J. Simmons, a former U.S. Postal Service Rural Route Carrier, testified that he carried the mail through the area of Excelsior, Upshur County, for twelve years. He was carrying the mail prior to June 13, 1982, the date of the accident. He testified that water on the road was so bad that the U. S. Postal Service had to have three people move their mail boxes approximately fifty feet from where they had been. He placed the area of the water problem on photographs as being the area of the pooled water which is the subject of this claim. He also testified that "there would be it looked like three to four inches of water there every time you had a hard rain.' He also testified that he had reported, to the respondent, water on the road in the area on two occasions prior to the accident, and on one of these he called the Department of Highways office in Buckhannon, West Virginia.

Truman H. Daniels, the driver of the van which struck the van in which the claimants were traveling, was not present at the hearing, nor did either party offer his testimony at the hearing.

A careful review of the evidence reveals that U.S. Route 33 experienced other drainage problems at the site of the accident. Although the respondent had performed maintenance for water problems, the problem corrected was to solve excess water on the property of an adjacent land owner. As the pool of water which caused the accident, which is the subject of this claim, created a hazard for the traveling public, the Court is disposed to find that the respondent is liable to the claimants for the injuries which they each sustained as a result of the accident. The preponderance of the evidence is in favor of the claimants.

The Court directs the parties to inform the clerk when these claims may be scheduled for a hearing on the question of damages.

OPINION ISSUED JANUARY 17, 1986

JIMMIE A. AND EULA R. CURRENCE AND LOREN AND RELLA CURRENCE
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-116 and CC-84-117)

Richard W. Cardot, Attorney at Law, for claimants.
Andrew Lopez, Attorney at Law, for respondent.

GRACEY, JUDGE:

These claims were consolidated and then bifurcated for separate hearings upon the issues of liability and damages. On December 19, 1985, the Court issued its opinion, upon the liability issue, finding that the respondent is liable to the claimants for the injuries which they each sustained as a result of the motor vehicle accident of June 13, 1982.

At the hearing on the issue of damages on January 14, 1986, an Agreement, between counsel for claimants and respondent, was admitted into evidence. The Agreement sets out in detail the medical expenses and other items of damages suffered by each party claimant. The Court finds the amounts therein stated to be fair and reasonable. Settlements had been made by the claimants with the liability insurer of another vehicle involved in the accident, and in the Agreements, the amounts of those settlements were subtracted from the total damages. By counsel, Jimmie A. Currence and Eula R. Currence, his wife, requested that their separate claims be regarded as but one joint claim, and Loren Currence and Rella Currence, his wife, requested that their separate claims be regarded as but one joint claim.

Accordingly, the Court makes an award to Jimmie A. Currence and Eula R. Currence in the amount of $134,027.08, and the Court makes an award to Loren Currence and Rella Currence in the amount of $12,994.19.

Award of $134,027.08 to Jimmie A. Currence and Eula R. Currence.

Award of $12,994.19 to Loren Currence and Rella Currence.

OPINION ISSUED DECEMBER 19, 1985

YEAGER, INCORPORATED AND YEAGER FORD SALES, INC.
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-88)

Grover C. Goode, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

Both claimants are Went Virginia corporations, of Welch, in McDowell County, and have a common

ownership. Yeager, Incorporated owns certain real estate there which it leases to Yeager Ford Sales, Inc., a Ford dealership. Except for a sales building on the other side of McDowell County Route 7, the real estate in situated between the highway and the Tug River. over many years, occasional hard rains had caused a flooding of the highway,, about 8 to 10 times each year. The storm sever drain was inadequate. The only available bypass street, Central Avenue, is too narrow for two-way traffic. on these flooding occasions, authorities would contact Yeager Ford Sales, Inc. which would favor the public by moving care from its lot, allowing vehicles to then use its lot an a bypass route. After such a hard rain and flooding in June of 1981, renewed complaints resulted in an effort of the respondent to solve the problem. Emily W. Yeager, an officer of both corporations and wife of the principal owner, Earl Yeager, headed up the effort, addressing requests to members of the legislature and respondent's representatives in the area. It was agreed that a drain would be installed between the highway and the Tug River, passing beneath two buildings on the Yeager, Incorporated property, referred to as the parts building and the annex. Except for surveying the elevations and route,, and determining that a 24-inch drain pipe would be installed, there appears to have been little in the way of planning the construction. There were no formal plans.

Before the work was begun, a right of way instrument was prepared by respondent for execution by Earl Yeager as president of Yeager, Incorporated. This instrument contained language to the affect that the consideration for the right of way was also consideration for a release ". . . from any and all damages that have been occasioned or that may be occasioned to the residue of the property . . . by

reason of the construction to be performed." After Yeager's refusal to sign, respondent added to the instrument:

> 'It in agreed that after the pipe in installed the property will be restored to as near original condition as possible.'

The instrument was then signed and respondent, with its own men, proceeded to install the 24-inch drain during August of 1981.

Respondent apparently had expected labor help from the City of Welch for hand digging the trench, for the drain, and the buildings. When such labor help was not provided, respondent used mechanical equipment, a borrowed Bobcat loader. Instead of a narrow trench, the excavation in places was about twelve feet in width and was some six to eight feet in depth and was also along the wall of an adjacent building known an the truck garage. From the evidence, the Court is satisfied that the respondent road portions of building footers and installed wood cribbing as a permanent replacement for foundation wall support; that respondent cut through the cement floor of the annex, for access underneath, and did not properly backfill nor replace the floor; that respondent's work resulted in now cracks and enlargement of cracks existing prior to construction, and other damages to the buildings and rendered portions of the buildings unsafe or unfit for use. Respondent denied any obligation to do anything further, after completing construction of the drain, except respondent did replace some fencing and did supply two truckloads of backfill material for filling the hole in the floor of the annex.

It is respondent's position that the claimants were aware that some building damage might ultimately result from construction of the drain; that Earl Yeager's original attitude had been that getting the now drain

in was so necessary that he did not care about building damage. Respondent mad* no preconstruction investigation of the soil conditions beneath the buildings and later found the soil to be sand containing a lot of water. As one of respondent's witnesses stated, "Hindsight in better than foresight." Thomas 0. Henderson, Jr., then respondent's county supervisor for me 11 County, did not know of the added provision in the right of way agreement, the provision to the effect that the property was to be restored to an near original condition as possible. He supervised the construction under direction of William R. Bennett, respondent's engineer.

Bennett did know of the added provision and was present daily during construction, but he, too, thought that Earl Yeager did not care if there was some settlement of the buildings. No stated that Yeager had given approval to cutting the hole in the annex floor and that he, Yeager, " . . . would see that it got put back in." He conceded that the annex building was not restored as nearly as possible to its original condition. He contended that use of the wood cribbing constituted good engineering practice.

There was disagreement, between claimants' and respondent's witnesses, whether treated wood had been used. Claimants' witnesses contended that untreated wood was used. Respondent's witnesses assumed that treated wood was used for the reason that it purchases only treated lumber.

Hearing of this case was bifurcated upon the issues of liability and damages. Upon the issue of liability, the Court finds that the written right of way agreed to in the only contract between the parties; that the claimants' interpretation of the contract in correct, that it was the obligation of the respondent, upon accepting the right of way instrument it had prepared and signed and upon then constructing the drain, to restore the property, including the buildings, to as near original (preconstruction) condition as possible,

The Clerk of the Court is directed to sat this case for further hearing, upon the issue of damages.

OPINION ISSUED JANUARY 17, 1986

YEAGER, INCORPORATED AND YEAGER FORD SALES, INC.
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-88)

Grover C. Goode, Attorney at Law, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

GRACEY, JUDGE:

This claim was bifurcated for separate hearings upon the issues of liability and damages. On December

19, 1985, the Court issued its opinion, upon the liability issue, finding that it was the obligation of the respondent, upon accepting the right of way instrument it had prepared and amended, and upon then constructing a 24-inch drain under property of Yeager, Incorporated, to restore the property, including the buildings, to as near original (preconstruction) condition as possible. The respondent had failed to so restore the property, and further property damage had resulted.

The Court heard evidence on the issue of damages, the cost of property restoration and repair, on January 14, 1986. At that hearing, claimant Yeager Ford Sales, Inc. withdrew the claim it had made for damages, for business interruption.

John E. Caffrey, an engineer and consultant, testified concerning his inspection of the property and his estimate of cost in the amount of $131,500.00 dated October 6, 1983. An estimate of cost submitted by Osborne Brothers Construction, Inc., dated October 25, 1983, in the amount of $140,500.00, was also in evidence. A bid of Swope Construction Services, Inc., dated December 30, 1985, was presented. The Swope bid included an item of $2,760.00 as the cost of replacing 46 linear feet of the newly installed 24-inch storm sewer should it be found to be damaged or should it be damaged in performing the other work. This item is too speculative for the Court to consider.

After careful consideration of all of the above estimates and oral testimony concerning same, the Court makes an award in the amount of $136,211.00 to Yeager, Incorporated.

Award of $136,211.00 to Yeager, Incorporated.

OPINION ISSUED DECEMBER 20, 1985

MARY KATHYRN ESTES
VS.
DEPARTMENT OF HIGHWAYS

(CC-82-213)

Willard A. Sullivan and James Vaughan, Attorneys at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimant Mary Kathyrn Estes is the owner of residential real estate located on County Route 18 in Crab Orchard, Raleigh County, West Virginia. Her property is adjacent to a hillside. Claimant testified that she had no problem with water damage prior to the early 1970's when the respondent repaved the surface of Route 18. Claimant's husband described how the repairs had altered the character of the road and caused it to form a natural contour ditch line toward claimant's house.

On August 21, 1980, there was a rainstorm during which flooding occurred on claimant's property. The property sustained damages in the amount of approximately $29,324.55. The flow of the water at that time created a natural drainage ditch which caused the water to enter claimant's property at her mailbox and flow into the house. As a result of the flooding, certain damage occurred; the floor pulled away from the block wall and sunk on one corner of the house, cracks developed in the wall of the basement, the septic system required repair, and appliances, furniture, rugs, etc. were destroyed.

Claimants allege that the flooding which occurred on the property was caused by respondent's resurfacing of Route 18. As a result, the ditch line adjacent to the road was altered, which caused water to be diverted onto claimant's property.

Claude Blake, Claims Investigator for the respondent, testified that the distance from claimant's mailbox westward back up the hill on Route 18 was 222 feet. He further testified that there had been a rainfall of 1.3 inches in a twenty-four hour period at the time of the flooding. He also stated that there is an area from the mailbox sloping down toward the side of the house which appeared to be a potential conduit of water, and that the house is below the surface of the road.

Mr. Charles W. Bragg, an Assistant County Supervisor for respondent in Raleigh County, testified that Route 18 had been paved in the early 1970's, but only repaired, and not repaved since that time. He further testified that the terrain was too rocky to support a ditch, and any accumulation of water had to run down onto claimant's property.

After examining all the evidence submitted in this claim, the Court has determined that claimant's property is in a natural drainage area. The repairing of Route 18 occurred in the early 1970's, and from that period until August 21, 1980, claimant had no problems with her property. The unusual amount of rainfall in 1980 was instrumental in the damage to claimant's property. There is no evidence of any negligence on the part of respondent, and for that reason, the Court is of the opinion, and does, deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 20, 1985

THELMA L. JAMISON
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-255)

R. F. Gallagher, Attorney at Law, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Thelma L. Jamison, is the owner of her residential property at 960 Stewart Street, just outside the city of Morgantown in Monongalia County. Stewart Street is a State highway. Her property also borders on Wilbourne Street, which runs generally perpendicularly off Stewart Street. On the other side of Wilbourne Street, also fronting on Stewart Street, is the Seaburn property. Stewart Street is downhill as it passes the Seaburn property, then levels out somewhat as it passes the entrance of Wilbourne Street and then the Jamison property. wilbourne Street is very slightly downhill as it leaves Stewart Street. The Jamison driveway, off Wilbourne Street to the garage at basement level and at the rear of the house, is downhill. When there are hard rains, surface water runs into the Jamison garage and has caused some deterioration and damage to the driveway, yard, and garage. Jamison seeks $5,000.00, that being the total of a contractor's estimate for repairs to the garage and an appraiser's estimate of diminution in value of the property by reason of the water damage to the garage.

Claimant states that the water comes into her garage by reason of a blocked culvert, in the front of the Seaburn property, on Stewart Street; that the water is diverted in such a manner as to miss the culvert under the Wilbourne Street entrance and instead flows across the corner of the Seaburn property, down Wilbourne Street, down across her yard and driveway, and into her garage. It is obvious to the Court that at least some water finds its way into her garage, crossing Wilbourne Street from the Seaburn property, and from Wilbourne Street itself, and from her own yard and driveway. Ms. Jamison had tried keeping a small ditch open, across her driveway, to divert the water from her garage, but said such a ditch does not last long. She had also had a French drain installed across the opening into her garage.

The origin of the culvert, along the side of Stewart Street and in front of the Seaburn property, is unknown. Ms. Jamison and Ms. Mildred Charlotte Seaburn, both of whom had occupied their respective properties for some forty years, said that the culvert had been there before them. Both testified that the respondent used to respond to the requests to clean the debris from the inlet of the culvert. Ms. Seaburn said that the respondent, in recent years, had not done so, and that until he had become too ill to do it, her husband had kept it open.

Arthur Lee Ford, a Morgantown building contractor, had observed the claimant's garage in 1980 and described it as having been structurally sound at that time. It had been added to the house about twenty-five years ago. In May of 1985, he had found deterioration from water. He conceded that some deterioration was from age. He submitted a proposal in the amount of $5,000.00 for extensive repairs, practically a rebuilding of the garage.

Inasmuch as the respondent has charge of the right of way of Stewart Street, and in the past has exercised control over the culvert in question and could have removed it, the Court is of the opinion that equity and

good conscience dictate that the respondent be found liable, in part, for the damage to claimant's property. There being no accurate way to determine what amount of water entered claimant's property as a result of the culvert being blocked, and what amount of water entered claimant's property from other causes, by reason of natural drainage,
the Court arbitrarily makes an award in the amount of $2,500.00.

Award of $2,500.00.

OPINION ISSUED DECEMBER 20, 1985

NINA G. JONES
VS.
DEPARTMENT OF HIGHWAYS

(CC-83-126)

E. Joseph Buffa, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

The claimant, Nina G. Jones, born July 10, 1949, seeks damages in the amount of $125,000.00 for personal injuries. At about 5:00 a.m., on August 10, 1982, on Route 3 near Pettus, in Raleigh County, she was driving herself to work when she ran into water on the highway. She testified that the water had caused her car to hydroplane to its right; that a short stretch of highway where there was no water had allowed her to regain control and get back onto the road; that a second stretch of water on the highway had caused her car to hydroplane again, to its left; that her car went down over a bank on the left side of the road and struck a tree.

Mrs. Jones was employed at a restaurant in Whitesville and was supposed to open the restaurant for business at 5:00 a.m. each day. When she did not arrive on time, a cook there telephoned Mrs. Jones' husband, Richard Lee Jones. He immediately followed her usual westerly route to Whitesville, but did not see her car. He found it, and her, as he retraced the route. He described the location of the car as being 20 feet off the highway and almost straight across from the Graybill residence. He took his wife in his car to the restaurant in Whitesville. She was transported by ambulance to Charleston Memorial Hospital and then to the Eye and Ear Clinic in Charleston where she was confined for four days. She lost two weeks' wages at $300.00 per week. Her medical expenses were in the amount of $2,529.45 at the date of hearing. Dr. Samuel A. Strickland, her attending physician, in a letter medical report dated November 3, 1982, reported that she had sustained " ... severe trauma to her left eye with secondary marked decreased vision due to optic atrophy from the left eye with vision being hand motions only to the side and the visual loss being permanent as a result of a direct blow to the left eye... ." There was also a laceration above her left eye. In describing her vision in the left eye, as a result of her accident, Mrs. Jones said she can see "Mostly light and dark. I

can see very few big images, nothing that I could really make out." Her husband described her self consciousness and lack of coordination since her injury.

The Jones residence, from which Mrs. Jones had departed on the morning of her accident, was at Packsville, about 3 miles east of Whitesville. She had driven about a mile and a half to Pettus where she drove into the water on the highway. on several previous occasions, she had seen water on the highway in that vicinity after several days of rain. She said she had been unaware of any heavy rainfall the night before or overnight, before her accident. It was not raining as she drove west toward Pettus and Whitesville, but the highway was wet. It was dark. She had her headlights on, but did not see the water on the highway until she hit the first of it at a speed she estimated to be 40 to 45 miles per hour. In describing what happened, she said "...there was one place that didn't have water on the road there, and that's when I got my car straightened back up and just when I got back up on the road there then there was another big place with water in it. That was when like it hydroplaned, went out of control."

Mr. Jones described the highway, where he had found his wife that morning, as having been covered with water. Gary Delano Barker also testified about water on the highway when he stopped at the accident scene shortly after the accident, after Mrs. Jones had been taken away. He also described two different areas of water across the highway with a section of ten or fifteen feet of highway between them. He said the water in the first area was then about an inch deep and that the water in the second area was then about two and a half to three inches deep for a distance of about twenty feet.

Paul Raymond Doss, whose residence is at Pettus, near where a culvert passes beneath the highway, had seen the highway at about 6:20 a.m. as he was leaving home to go to work. He described the highway as having water and trash on it. He estimated the water to be six inches deep. He also described how the culvert gets clogged up, causing water to run across the road. A few days before Mrs. Jones' accident, Mr. Doss's wife, Helen Pauline Doss, had made a telephone complaint, about water on the highway and her yard, to an office of the respondent in Charleston. Also a few days before Mrs. Jones' accident, another Pettus resident, one Cecil Browning, had complained to JoAnn McCormick, a secretary at the Whitesville Detachment of the Department of Public Safety. Ms. McCormick testified that she had passed along his complaint to the Beckley Detachment which later confirmed that the respondent's Beckley office had been notified.

The witnesses frequently using the subject stretch of highway variously estimated the number of times each year when rain water overflows the culvert and covers the highway. Respondent's witnesses found no record of cleaning the inlet or outlet or the culvert itself in a number of months prior to August 10, 1982.

Charles W. Bragg, respondent's assistant county superintendent for Raleigh County, said that they have had problems constantly when there are heavy rains in the vicinity of the subject culvert at Pettus. He said that rocks and debris from the hillside stop up the culvert.

Claude Blake, an investigator employed by respondent, had twice measured the distance along the westbound lane of the highway, from the center of the subject culvert to the middle of the Graybill residence, and stated that distance to be 670 feet. Paul Raymond Doss estimated the distance from his residence, right across the road from the culvert, to where Mrs. Jones' car came to rest, as 90 to 100 feet. Photographs in evidence suggest the distance to be as measured.

While the State is neither an insurer nor a guarantor of the safety of travellers on its highways, it does owe a duty of reasonable care and diligence in the maintenance of a highway. Parsons v. State Road Comm'n., 8 Ct.Cl. 35 (1969). The evidence in this case established that respondent knew of the culvert problem, the frequent flooding of the highway, and had received recent complaints prior to claimant's accident. The Court finds respondent negligent for its failure to take satisfactory corrective action. The Court also finds the claimant guilty of negligence in her failure to keep a proper lookout ahead and for operating her vehicle at a speed in excess of a reasonable speed under the conditions then and there existing. The Court, having determined claimant's damages to be $25,000.00, and under the doctrine of comparative negligence having apportioned 70% negligence to respondent and 30% negligence to claimant, makes an award in the amount of $17,500.00 to the claimant.

Award of $17,500.00.

OPINION ISSUED DECEMBER 20, 1985

HERMAN F. LAWHORN
VS.
DEPARTMENT OF VETERANS AFFAIRS

(CC-85-389)

No appearance by claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant was apparently receiving a regular monthly benefit from the Veterans' Administration, the amount apparently being determined by several factors, including the number of his dependents.

Claimant's daughter, one of his dependents, married, and on June 18, 1984, he reported this fact to respondent's Beckley office. That office filed the report and failed to relay the information to the Veterans' Administration. Claimant, thereafter received overpayment of benefits in the amount of $544.00 and was required to make repayment after the overpayment was discovered. Claimant seeks an award in reimbursement.

In its Answer, respondent admits the validity and amount of the claim and states that it could not be paid because the fiscal year had ended. Respondent further states that sufficient funds were on hand, at the close of the fiscal year in question, to have paid the claim.

The Court finds that the claimant received a benefit sum to which he was not entitled and cannot justify an award to him for his repayment of same. The claim must be disallowed.

Claim disallowed.

OPINION ISSUED DECEMBER 20, 1985

GAIL PHILLIPS
VS.
DEPARTMENT OF PUBLIC SAFETY

(CC-85-129)

Claimant appeared in person.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

On or about October 14, 1984, the claimant was the owner of a house trailer occupied by a tenant, Veronica Taft, and her infant daughter, at Mountainview Trailer Court near Morgantown in Monongalia County. According to his testimony, he had attempted to help her by purchasing the house trailer and renting it to her. He said that her brothers were a problem; that she had said that she would be able to get along if she could stay away from them and have a place to live.

An officer of the Department of Public Safety, the respondent, testified that he had three felony warrants for one of her brothers when he and another officer went to the trailer on the previous evening, after a neighbor had reported that the brother had been going to and from the trailer and was there at that time. Getting no response to knocking on the door, the officers found the doors unlocked and entered the trailer. They found no one there. The officer witness and two others returned to the trailer on the following day after another neighbor reported that the brother was then in the trailer. They knocked on the door and asked the brother to come out. There was no response. After several hours, trying to talk him out of the trailer, "We decided to gas it." Six to eight tear gas canisters were projected through the windows, and the three officers then entered the trailer. They found no one there.

The claimant presented an estimate of repairs in the amount of $1,026.00 for damage he said had been done to the trailer by the officers. Included on the estimate were broken windows, burned sofa, carpet, broken doors, a plate glass mirror, and other items. He said he had managed to get the work done for a total of $918.00.

The Court is of the opinion that claimant sustained unprovoked damages as a result of action of members of the Department of Public Safety, the respondent herein, and makes an award to the claimant in the amount of $918.00.

Award of $918.00.

OPINION ISSUED DECEMBER 20, 1985

R. J. CAREY COMPANY, INC.
VS.
DEPARTMENT OF HEALTH

(CC-84-209)

Bernard J. Meyer, Attorney at Law, for claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

WALLACE, JUDGE:

Claimant company supplied two temporary boilers to Welch Emergency Hospital under the terms of an original lease contract with two successive one-year renewal clauses. The agreement was effective August 1, 1980, and it ended September 1, 1983. Claimant company is alleging a loss of $5,650.00 as claimant interpreted the terms of the agreement to include an additional lease of one year, which necessitated payment from respondent through September 22, 1984. Respondent, by letter dated December 23, 1983, exercised it's option to cancel the contract agreement on 15 days notice. Respondent made payment through May 20, 1984, with the exception of the $2,290.00 March payment. Claimant removed the boilers on may 20, 1984. Respondent stipulated that $2,290.00 for the March payment is owed claimant company.

The evidence indicates that a contract to lease boilers was entered into between the claimant and the respondent. The lease contained a cancellation provision which was clear in its terms. The parties to the agreement were aware of the terms of this provision. The respondent canceled the lease with the required 15 days notice. As the terms of the contract were controlling, this Court makes an award in the amount stipulated by respondent for the March payment, which is the only amount due the claimant.

Award of $2,290.00.

OPINION ISSUED JANUARY 15, 1986

HENRY BURGER AND GERALDINE BURGER
VS.
DEPARTMENT OF HIGHWAYS

(CC-82-181)

Michael W. McGuane, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

Claimants seek an award of $80,000.00 for the near total destruction of their dwelling house and real estate located at Ruth Avenue in Mozart, Marshall.County, West Virginia. Claimants allege that respondent's failure to properly design and maintain the drainage system in the area caused a landslide, which rendered the claimants' property nearly valueless. Respondent contends that the property damage resulted from a torrential rainstorm on August 17, 1980, from a separation and a break in a water line owned by the City of Wheeling, which occurred after the storm, and from the two to one hillside topography there. Claimants sued the City of Wheeling, owner of the water line, in the Circuit Court of Marshall County, and received a $50,000 settlement in about November 1983.

Except for the in open court testimony of Henry Burger, one of the claimants, the evidence was presented by depositions.

Claimants' property, listed for sale in May 1980 at $45,000.00, is on the downhill side of Ruth Avenue. On the uphill side of Ruth Avenue, and generally parallel thereto, is Carl Street which is Route 3/1. Ruth Avenue is a Delta Road, taken into the state road system in 1967. An 18-inch culvert carries surface water under Carl Street. An open drain carries the water downhill to where an 8-inch casing takes it under Ruth Avenue. There was no evidence showing when or by whom the 8-inch casing under Ruth Avenue was installed. The claimants' property is off to the side from the 8-inch casing.

Claimant, Henry Burger, testified that on August 18, 1980, the water main in Ruth Avenue broke, causing a five foot geyser of water in the street. This occurred the day after the rainstorm, following which Marshall County was declared a disaster area. Within two weeks, cracks began to appear in the foundation of claimants' home. Damage to the home progressed and claimants moved out on May 10, 1981.

Donnie L. Bensenhaver, Maintenance Assistant in District 6, testified that he first visited claimants' property on September 5, 1980. This visit was made in response to complaints by the claimants and a neighbor. Mr. Bensenhaver said that the 8-inch casing would not handle a heavy rain like the one which occurred on August 17, 1980. He said that the ground was such that a saturation of the soil could cause sliding. The addition of the water from the water main would serve to exacerbate a slide.

Several of the claimants' neighbors testified about a previous flood on Labor Day 1975, which caused slide movement in the area. The neighbors also testified that the Ruth Avenue drain would periodically become clogged with debris. one neighbor, Glenna Nelson, testified that there is a spring which flows through her basement.

After careful consideration of all the evidence presented, the Court concludes that the damage to claimants' property resulted from a combination of factors. The primary factor was the heavy rainfall on August 17, 1980. This produced a super saturation of the soil, precipitating the landslide. A separation of a water main joint and water main break under Ruth Avenue aggravated this situation as did the presence of underground springs. It is unclear whether the drain on Ruth Avenue was clogged prior to the rain or became clogged because of the rain. The Court finds that the proximate cause of, claimants' property

damage was the excessive rainfall that occurred and water from the water main, saturating the hillside and causing the slide; that there was no negligence proven on the part of the respondent. In view of this finding, the Court must disallow the claim.

Claim disallowed.

OPINION JANUARY 15, 1986

CARL A. DANIELS
VS.
DEPARTMENT OF HIGHWAYS

(CC-83-274)

Juanita Daniels Hall, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision after hearings on November 15, 1985 and December 13, 1985, respectively, and upon a written stipulation. The claim was originally filed in the names of Carl A. Daniels and Lillian R. Daniels, who had joint ownership of the property. After this action was filed, Lillian R. Daniels died. The property passed to Carl A. Daniels by right-of-survivorship. The Court amended the style of the claim to delete Lillian R. Daniels as a party claimant.

The claimant, by Juanita Daniels Hall, his attorney in fact, and respondent, by its counsel, Andrew Lopez, entered into a stipulation. The parties, in the stipulation, agreed to the following facts. A bridge was constructed by respondent over Mill Creek on U.S. Route 219, Randolph County, adjacent to the real property and retaining wall of the claimant's. After the bridge was constructed, the angle of its abutment, during periods of high flow, caused water to be directed against the claimant's property and retaining wall, resulting in damage. The parties have stipulated that $9,450.00 is a fair and equitable estimate of the damages sustained by the claimant.

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

Award of $9,450.00.

OPINION ISSUED JANUARY 15, 1986

HAMILTON BUSINESS SYSTEMS
VS.
DEPARTMENT OF HEALTH

(CC-85-175)

Templeton B. Hamilton, Jr. appeared for claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant is a West Virginia corporation which, under an equipment rental agreement with respondent, provided respondent with a Savin 880 Copier, a sorter and a console for use from July 1982 through June 26, 1984. A provision of the agreement reads as follows:

C. Customer shall use reasonable care in safeguarding the equipment, and, unless damaged or destroyed without the negligence or fault of Customer, shall return it to Hamilton Business Systems...

The copier was ruined by fire on June 26, 1984, and claimant seeks $3,029.67, for the purchase price ($2,831.50) and for interest ($198.17), as compensation for the loss of the machine.

T. B. Hamilton, Jr., testified that the position of the claimant is that respondent has a moral obligation to reimburse claimant for its loss.

There is no evidence of any negligence or wilful misconduct on the part of the respondent. Claimant and respondent follows: are bound by the language of the equipment rental agreement, and, on the basis of that agreement, the Court disallows the claim.

Claim disallowed.

OPINION ISSUED JANUARY 15, 1986

BONNIE FAYE JARRELL

VS.
DEPARTMENT OF HIGHWAYS

(CC-85-299)

Claimant's husband, James E. Jarrell, appeared for claimant.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On July 27, 1985, the claimant's husband was driving the claimant's 1982 Chevrolet Monte Carlo on Cabin Creek Road, Kanawha County, when the vehicle struck a pothole. The vehicle sustained damage to the tire and wheel in the amount of $237.25. The husband of the claimant, James E. Jarrell, originally filed this claim in his own name and that of his wife, Bonnie Faye Jarrell. However, the record reflects that his wife was the sole titled owner of the vehicle. The Court then, upon Mr. Jarrell's agreement, amended the style of the claim to delete James E. Jarrell as a party claimant. Claimant's husband testified that he estimated the pothole to be seven inches deep, twelve inches wide, and sixteen inches long. Claimant's husband had observed the pothole and believed it had been in existence for two months prior to this accident.

Claimant's husband also testified that he had notified respondent office in Charleston, by telephone, about two or three weeks prior to this incident, concerning this pothole and other potholes beyond it on the same road. He could not identify the person who took his complaint. Although the respondent may have had actual notice of the existence of the pothole in the road, the claimant's husband was operating the vehicle at an estimated speed of 40 miles per hour, an excessive rate of speed for the conditions then and there existing.

It is the opinion of the Court that although the respondent may have been negligent, the negligence of claimant's husband was equal to or greater than that of the respondent. The Court therefore denies the claim.

Claim disallowed.

OPINION ISSUED JANUARY 15, 1986

JOE L. SMITH, JR., INC., D/B/A BIGGS-JOHNSTON-WITHROW
VS.
DEPARTMENT OF EMPLOYMENT SECURITY

(CC-85-377)

Ben Preast, Sales Representative, appeared for claimant.
D. B. Daugherty, Attorney at Law, for respondent.

PER CURIAM:

Claimant was the successful bidder and was awarded a purchase order for 200,000 printed forms at a cost of $8,572.00 to respondent. As the claimant was unable to produce the necessary forms, the work was subcontracted to a company in New York. After the forms were delivered to respondent, its purchasing agent informed claimant that it intended to reject the forms. The forms were rejected due to a defective blue carbon.

Respondent used 143,000 forms as it lacked an alternative until replacement forms could be printed by a company other than the claimant. Claimant was informed by the New York subcontractor that claimant was entitled to a full refund for the forms which were returned to it. Respondent returned only 57,000 of the original 200,000 forms to claimant for which claimant received a partial credit of $3,386.09. Claimant seeks $3,727.16 for the forms not returned to it and for which it did not receive the refund.

The Court is of the opinion that to deny an award to the claimant would be unjust enrichment. The respondent used the forms. However, the forms were defective through no fault of respondent. For that reason, the Court reduces the amount claimed by 10% and makes an award to claimant in the amount of $3,354.44.

Award of $3,354.44.

OPINION ISSUED JANUARY 17, 1986

AMERICAN BRIDGE DIVISION OF UNITED STATES STEEL CORPORATION, A DELAWARE CORPORATION, AND AMERICAN BRIDGE DIVISION OF UNITED STATES STEEL CORPORATION, A CORPORATION, ON BEHALF OF JOHN B. CONOMOS, INC., A PENNSYLVANIA CORPORATION
VS.
DEPARTMENT OF HIGHWAYS

(CC-82-166)

James R. Watson, Attorney at Law,
Harry P. Waddell, Attorney at Law, and
Charles A. Rea, Attorney at Law, for claimants.
S. Reed Waters, Jr., Attorney at Law, for respondent.

GRACEY, JUDGE:

These claims arise out of construction of a new bridge crossing the Ohio River, between West Virginia and Ohio, at St. Marys, in Pleasants County. The contract for construction of the bridge was dated November 1, 1974, the parties thereto being United States Steel Corporation and the West Virginia Department of Highways, the respondent. The required completion date was November 1, 1976. As a part of the contract, the contractor, United States Steel Corporation, was required to paint the structural steel at the shop upon fabrication and in the field upon erection. The contractor awarded a subcontract, for the field painting, to John B. Conomos, Inc.

The contract documents were placed in evidence as joint exhibits, including: (as la) the West Virginia Department of Highways Standard Specifications -Roads and Bridges - Adopted 1972; (as 1b) the Contractor's Proposal in which special provisions and the signed contract are embodied; (as 1c) the West Virginia Department of, Highways Supplemental Specifications dated July 1, 1974 (To Accompany Standard Specifications Adopted 1972); and (as 1d) the Plans for Construction of the bridge.

Applicable paragraph items on page 2 of the Plans for Construction, so far as painting is concerned, include:

Governing Specifications
The West Virginia Department of Highways Standard Specifications,
Roads and Bridges Adopted 1972 as Amended By The Supplemental Specifications Of The West Virginia Department of Highways,
Adopted July 1, 1974, The Contract Documents And The Contract
Plans.

Painting
Shop And Field Painting Shall Be Done In Accordance With Section 615 Of The Standard Specifications, The Special Provisions And
Supplemental SpecificAtions.

Shop Painting
Surfaces To Be In Contact With Concrete Shall Not Be Painted.
All Structural Steel, Except Concrete Surfaces, Shall Be Painted With Four (4) Mils Of An Inorganic Zinc Shop Primer. All Contact Surfaces Will Receive A Maximum Thickness Of 1/2 Mils Of Inorganic Zinc Coating. Areas Damaged During Shipping And
Erection Shall Be Repaired With The Shop Primer In The Field.

Field Painting
Field Coat Shall Meet Requirements Of Section 711.16 Vinyl Top Coat, 3 Mils (Dry). The Total Paint Thickness Shall Be Seven (7) Mils.

John B. Conomos, of John B. Conomos, Inc., an industrial painting contractor, testified that he had been contacted by several steel fabricators, including the American Bridge Division of United States Steel Corporation, shortly after the bridge project was advertised for bids. After reviewing the plans and drawings

he had his assistant and bookkeeper, Reta, make some calls to find out what the current prices were for materials. The memo of her telephone contact with Carboline, a paint manufacturer, listed three paints, Vinyl 711.15 and 711.16 and Zinc-Carbo Zinc 11. He said that he did not know why a price had been given on Vinyl 711.15 and conceded that he had not inquired. After making up his estimates of labor, materials, etc., he had, on the night before bid opening, provided his subcontract bid to various bidders and obtained a verbal commitment from American Bridge. The subcontract between them is dated June 20, 1975. Generally, under this field painting subcontract, the subcontractor was required to accomplish the field painting required in the prime contract including (1) clean and prepare all bolts, welds and abraded surfaces as necessary and apply touch-up paint which is inorganic zinc primer and (2) apply three (3) mils dry thickness of vinyl finish paint 711.16.

In its Notice of Claim, the claimant alleges that the specification, with reference to painting, was defective; that the two types of paint, inorganic zinc as a primer and vinyl. 711.16 as a top coat, are incompatible; that the respondent then knew or had reason to know of such incompatibility and failed to so inform the claimant; that it became necessary for the subcontractor to apply an intermediate "tie coat", at the instance of the respondent, which constituted a "constructive change order" or "extra work"; that the claimant was not granted an appropriate extension of time for completion of the contract. As a result, claimant demands: (1) an award of $145,000 in compensation for its own additional costs for labor, material, equipment, overhead and other incidental costs, (2) an award of $93,600 in reimbursement of a liquidated damages delay in completion penalty of $300 per day for 312 days paid by the claimant to the respondent, and (3) an award of $350,000 on behalf of its subcontractor, John B. Conomos, Inc., for its additional costs for labor, material, equipment, overhead and other incidental costs.

In the late 1960's, paint system technology was undergoing change. Earlier, a red lead prime coat was used with an aluminum top coat. Then, a three layer vinyl system was used. And, in the early 1970's, the inorganic zinc primer with vinyl. top coat was being developed.

Conomos had little or no experience in using the vinyl over inorganic zinc paint system on a job of this magnitude. From his review of the plans and drawings, he had regarded it as a simple two-coat system, a shop coat of inorganic zinc and a field coat of 711.16 vinyl. He was unaware that an intermediate tie coat (wash coat, barrier coat) might be required to accomplish adhesion and to prevent bubbling and blistering. He attached no importance to the fact that Carboline had quoted him a price on vinyl 711.15, an intermediate vinyl paint. These numbers refer to numbered sections in the Standard Specifications. Section 711 provides the standard specifications for Paints and oils. Each of its subsections deals with a particular subject. Section 711.16 spells out the requirements of a particular vinyl top coat. Section 711.20 deals with the "Zinc-Rich System" and sets out requirements with reference to the primer, a wash coat if recommended by the paint manufacturer, and the top coat. Inorganic zinc was required as the shop coat, the primer. This subcontractor would be applying some 900 gallons of inorganic zinc in the field painting and would be applying the vinyl top coat, to meet the requirements of Section 711.16, over all. In the Special Provision appears:

"Prepainted Surfaces: All prepainted metal surfaces shall be painted with one coat of a suitable barrier coat (as recommended by the selected 2-coat paint system manufacturer), and one topcoat of the selected 2-coat system."

All of these specifications and provisions were there to be read. Surely a study of them would have forewarned the contractor and subcontractor that the intermediate coat would be necessary. The claimant's parade of expert witnesses testified that an inorganic zinc primer and a vinyl top coat meeting Section 711.16 requirements, without the intermediate coat, were incompatible, but apparently no such expert was contacted about this paint system

before bidding. It was incumbent upon the contractor and the subcontractor to be fully informed before bidding.

The bridge was not completed on November 1, 1976. It was completed on July 27, 1978. It was opened for use by the traveling public on November 18, 1977, and no liquidated damages for delays were assessed beyond that date. The delay in completion, the Court concludes from the evidence, was caused by claimant's delays in fabrication and shop painting of the structural steel. From time to time, as the contractor updated its expected work schedule, extending its expected date of completion, these were the reasons stated, no reference being made to problems in field painting.

At the conclusion of the claimant's presentation of evidence, the respondent moved to dismiss the claims. That motion is sustained.

Claim disallowed.

OPINION ISSUED JANUARY 17, 1986

BANKERS POCAHONTAS COAL LIMITED PARTNERSHIP AND W. B. SWOPE, INDIVIDUALLY
VS.
DEPARTMENT OF HIGHWAYS

(CC-83-159)

Robert M. Worrell, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was filed against the respondent by Bankers Pocahontas Coal Limited Partnership, hereinafter referred to as claimant Bankers, but when the evidence disclosed that a portion of the claim consists of certain monies expended by W. B. Swope, a partner in the limited partnership, the

Court amended the style of the claim to include W. B. Swope, individually, hereinafter referred to as claimant Swope.

By deed dated March 24, 1931 and of record in the Office of the Clerk of the County Commission of McDowell County, West Virginia, in Deed Book 119, at Page 341, Bankers Pocahontas Coal Company and its lessee, Kingston Pocahontas Coal Company conveyed to the County Court of McDowell County a parcel of land for the construction of a bridge over Tug River. The deed provided that title to the bridge and the parcel of land would revert to the grantors if the county court failed to maintain the bridge for a period of two consecutive years. Claimant Bankers is the successor to the rights of the grantors in the deed.

The bridge is the only method of vehicular access to the part of the City of Welch, West Virginia, in which the sanitary land fill and water systems are located as well as access to certain coal mines operated by claimant Bankers.

In April or May 1979, following complaints by local residents concerning the safety of the bridge, employees of the respondent inspected it and recommended that the bridge be posted for a three ton weight limit. Pursuant to the Commissioner's Order of July 17, 1979, the respondent posted the bridge for a three ton weight limit. There was some indication in the record that the county court had posted a three ton limit on the bridge sometime previous to the action by the respondent.

As a result of the 1979 posting, claimant Bankers was prohibited from driving its coal trucks across the bridge. In fact, they were stopped by law enforcement officers. Local residents continued to use the bridge, as well as trucks of the City of Welch proceeding to and from the sanitary land fill. Claimant Bankers filed suit for declaratory judgment in the Circuit Court of McDowell County against respondent to determine ownership of the bridge. The Circuit Court found that the county court had failed to maintain the bridge for at least a period of two consecutive years, and the title to the bridge had reverted to claimant Bankers. The Court further ordered the Commissioner to rescind its posting order and enjoined respondent from exercising further jurisdiction over the bridge.

During the period of time in which the coal trucks were unable to use the bridge, claimant Bankers attempted to develop and use a dirt road over the mountain to Premier, West Virginia. This effort was stopped by the Department of Natural Resources. Claimant Swope, one of the partners in the limited partnership, had a low water bridge constructed near the existing bridge to enable the coal trucks to cross the river. This low water bridge was also used by some of the local residents until it was subsequently destroyed by high water.

Claimant Bankers seeks to recover $1,544.82 expended on repairs to the bridge prior to the 1979 posting by the respondent and attorney fees and costs of $1,016.41 incurred in the declaratory judgment suit against respondent.

Claimant Swope seeks to recover $6,211.76 expended by him on behalf of claimant Bankers for materials used in the construction of the low water bridge.

The McDowell County Circuit Court ruled that the title to the bridge had vested in claimant Bankers. There can be no recovery of funds expended by claimant Bankers for repairs on its bridge prior to the posting of the weight limits by the respondent, nor is there any authority or basis for this Court to make an award for the attorney fees and costs expended by claimant Bankers in the McDowell County litigation. However, it was necessary for the claimants to provide a means of access for trucks to their mining operation, and to

do so, the low water bridge was erected. Claimant Swope, as a partner in Bankers Pocahontas Coal Limited, paid invoices of $6,211.76 for materials used in the construction of the low water bridge.

The Court finds that claimant Swope is entitled to an award for the costs expended by him on the low water bridge and makes an award of $6,211.76. The Court denies the claims of claimant Bankers Pocahontas

Coal Limited Partnership for repairs to its bridge and attorney fees and costs expended in the declaratory judgment suit against the respondent.

Award of $6,211.76 to W. B. Swope.

OPINION ISSUED JANUARY 17, 1986

VONLEY COLE, Administrator of the Estate of KAREN RENEE COLE,
VS.
DEPARTMENT OF HIGHWAYS

(CC-82-292)

David Burton, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

Following the hearing of this claim on May 8 and 9, 1985, a schedule for filing of briefs was established. Subsequently, the claimant filed a motion requesting that the brief of respondent not be considered by the Court in the determination of this claim since the brief was filed a substantial period of time after the due date set by the Court in the briefing schedule. The Court, having duly considered the motion, sustained the motion. The brief of the respondent was not considered by the Court in the determination of the claim.

Karen Renee Cole, eighteen-year-old daughter of Vonley and Cecelia Cole, was driving from her home in Midway to the place of her employment, the Human Touch, Incorporated office, in Raleigh County, at approximately 9:00 a.m. on August 9, 1982. She was operating a 1979 Plymouth automobile northerly on W.Va. Route 16 in Raleigh County. The right wheels of the vehicle left the right lane of the travel portion of the highway and went to the right onto the berm. In an attempt to steer the vehicle back onto the highway, control of the vehicle was lost. It proceeded to its left across the two northbound traffic lanes of the highway and across the concrete median into the southbound lanes and was struck by an oncoming vehicle, a 1980 Chevrolet Gruman truck. As a result of the collision, she suffered injuries from which she

died.

It is the position of the claimant that the respondent failed to properly maintain the berm of W.Va. Route 16 and allowed a rut to form between the edge of the highway pavement and the berm. Claimant also contends that the respondent should have constructed a Jersey-type median barrier between the northbound and southbound lanes rather than the type of concrete median barrier which was constructed.

W.Va. Route 16 was described by Raleigh County Deputy Sheriff Gary Lee Lively, the investigating officer of the accident, as being a four-lane highway with a concrete median between four and six feet in width and six to eight inches in height.

An eye witness to the accident, Otis Michael Horton, testified that he was driving a 1977 Ford Explorer truck behind the vehicle being driven by the decedent. He was behind her for approximately 30 seconds before her vehicle left the highway. He stated, "I came right in behind her and I believe she turned the radio on or she was changing stations. Like I say, the road was wet and the car went off the road, it came back onto the road and I seen the brake lights come on, the car started fishtailing and I would say it traveled approximately maybe 100 feet. Then it just turned sideways and when it turned sideways it hit the median and came across the road."

The testimony of several witnesses for the claimant revealed that the berm in the area of the highway where the vehicle went onto the berm was approximately four inches below the level of the paved portion of the highway. This condition was prevalent along much of W.Va. Route 16 in the area of the accident. The berm had been level with the surface of the highway at one time but had eroded over a period of time.

Herbert Hill, a professional engineer specializing in the forensic sciences, primarily in the investigation of motor vehicle accidents, testified that the proximate cause of the accident herein was that the tire of the decedent's vehicle became trapped in the rut of the berm, and, when she attempted to pull the vehicle back onto the highway, the vehicle catapulted across the highway as she no longer was able to control the vehicle. Dr. Hill also testified that had a Jersey barrier of four feet in height been constructed between the lanes of the highway, the decedent would not have gotten in the other lane but would have hit the barrier.

Alan E. Jordan, Assistant Design Director of the Roadway Design Division for the respondent, testified that W.Va. Route 16 in the area of the accident was designed in 1962 to 1963 and constructed in 1964 and 1965. He stated that the median was constructed with a semi-mountable curb which has a slight base slope. The curb starts four inches from the ground, goes up four inches, then slopes back a total of four inches which means it is approximately eight inches in height. This type of median is regularly utilized on four-lane noncontrolled access roads. The Jersey barriers have been predominantly used on controlled access facilities. These are not used on uncontrolled access roads as problems are created with the protection of the end sections and the number of cars traveling per day on W.Va. Route 16 would not have made it mandatory to use such barriers. In addition the witness explained that the berms adjacent to W.Va. Route 16 are approximately 10 feet in width. The berms have two purposes. One is to provide a recovery area for erratic vehicles and the other is to provide a disabled vehicular lane.

The testimony in the record of this claim reveals that the berm of the highway was not maintained in perfect condition. As is the situation on many of the roads in West Virginia, erosion occurs on the berm over a period of time. The berm or shoulder of a highway must be maintained in a reasonably safe condition for use when the occasion requires, and liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway. 39 Am.Jur. 2d "Highways, Streets, and Bridges," 126 W.Va. 732, 30 S.E.2d 14 (1944). Also see Sweda v. Dept. of Highways, 13 Ct.Cl. 249 (1980). Under the facts of the instant claim, the Court cannot conclude that the claimant's decedent was forced onto the berm or otherwise necessarily used it.

To require the respondent to maintain the berms adjacent to all of the highways in the State of West Virginia in perfect condition would be a burden impossible for the respondent to perform. There are areas in this State where construction of berms is literally impossible. The Court finds that the claimant's decedent was negligent in the operation of her automobile.

For these reasons the Court is disposed to and does disallow this claim.

Claim disallowed.

OPINION ISSUED JANUARY 17, 1986

C. P. FARLEY AND REBECCA L. FARLEY
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-123)

Charles P. Farley appeared for claimants.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On February 2, 1985, the claimant was driving his 1980 Plymouth Champ southbound on Route 19 one mile north of the Muddlety exit when the car hit a pothole. The car sustained damage to one tire in the amount of $32.55. The claimant testified that he estimated the pothole to be 16 to 18 inches square, and about 5 to 6 inches deep. Claimant noted that the pothole matched a piece of asphalt laying on the road in close proximity to it.

The claimant testified that there had been recent snow removal by snowplows on the section of Route 19 where the accident occurred. It was claimant's contention that the blade of the plow lifted an existing patch from a pothole, thus exposing the hole to the travelling public. The claimant further testified that he frequently travelled this road and that he had travelled the road within two weeks of the accident, and the pothole did not exist at that time.

The law of West Virginia is well established that the State neither insures nor guarantees the safety of motorists on its highways. Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be found liable for damages caused by road defects of this type, the claimants must prove that the respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. Davis v. Dept. of Highways, 12 Ct.Cl. 31 (1977); Haskins v. Dept. of Highways, 12 Ct.Cl. 60 (1977); Hicks v. Dept. of Highways, 13 Ct.Cl. 310 (1980). As there was no such evidence presented, the claim must be denied.

Claim disallowed.

OPINION ISSUED JANUARY 17, 1986

CONSTANCE KESNER, INDIVIDUALLY AND CONSTANCE KESNER, AS ADMINISTRATRIX OF THE ESTATE OF PHILIP S. KESNER, DECEASED
VS.
DEPARTMENT OF CORRECTIONS

(CC-81-188)

David N. Dittmar, Attorney at Law, for claimant.
Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

This claim was filed by Constance Kesner, individually and as a wrongful death claim under the provision of W.Va. Code 55-7-5 by Constance Kesner as the administratrix of the Estate of Philip S. Kesner, deceased, who was killed during an escape by inmates from the West Virginia State Penitentiary in Moundsville, West Virginia on November 7, 1979. At the time of his death, Philip S. Kesner was employed as a trooper by the Department of Public Safety of West Virginia and had been so employed for approximately three years. He was survived by his wife, Constance Kesner, to whom he was married on April 24, 1978. Both he and his wife were 23 years old at the time of his death. On the night of November 7, 1979, the decedent and his wife were driving past the penitentiary at the time of a prison break. Escaping prisoners forcibly stopped and commandeered the Kesner vehicle. The Kesners were thrown out of the vehicle, and Philip S. Kesner was shot and killed. When the claimant's evidence was nearly completed, the respondent conceded liability and acknowledged that there probably would not have been an escape resulting in the death and injuries had there not been negligence on the part of at least two correction officers of the respondent. only the issue of damages remained to be determined.

The decedent had no children and under the provisions of W.Va. Code §55-7-5, the widow became the sole heir of the decedent, entitled to receive any recovery by reason of the death of her husband. The respondent contends that certain sums received by the widow from State funds should be offset against any

award. Benefits received by the widow from collateral sources are not to be considered.

The Court finds that proceeds of two life insurance policies paid for by the State, one with the Aetna Life Insurance Company in the amount of $8,000.00 and one with the Public Employees Insurance in the amount of $20,000.00, both amounts paid to the widow, are not a collateral source. Additionally, the widow is entitled to receive from the Department of Public Safety Death, Disability and Retirement Fund $1,324.83 per month commencing sixty days after the decedent's death and continuing for the life of the widow or until she remarries. These payments are not a collateral source except for the contribution of approximately $2,400.00 made by the decedent during his employment as a trooper.

The Court is well aware of the shock and mental anguish suffered by the claimant, Constance Kesner. The experience of being dragged from their vehicle, resulting in her husband's death in her presence, will never be erased from her memory. After careful consideration of the record and considering the sums already received by the widow other than collateral sources, and fully realizing the possibility of her remarriage, the Court makes an award to the claimant, Constance Kesner, individually in the amount of $50,000.00.

The Court also finds that Constance Kesner, as Administratrix of the Estate of Philip S. Kesner, deceased, is entitled to an award of $150,000.00. In addition to this amount, under the provisions of the wrongful death statute, the administratrix is entitled to recover the funeral bill in the amount of $2,960.59, incidental funeral expenses in the amount of $77.25, and the cost of a tombstone in the amount of $1,270.00. Accordingly, the Court makes an award to Constance Kesner, as Administratrix of the Estate of Philip S. Kesner, deceased in the amount of $154,307.84.

The victim's automobile was heavily damaged, later repaired and sold for $3,500.00. The record is otherwise silent as to the value of the automobile prior to the escape, and the Court makes no award as to automobile damages.

Award of $50,000.00 to Constance Kesner, individually. Award of $154,307.84 to Constance Kesner, as Administratrix of the Estate of Philip S. Kesner, deceased.

OPINION ISSUED JANUARY 17, 1986

HUGHES-BECHTOL, INC.

VS.
BOARD OF REGENTS

(CC-81-450)

E. Glenn Robinson, Attorney at Law for claimant.
Donald L. Darling, Deputy Attorney General and Ann Ewart, Assistant Attorney General for respondent.

GRACEY, JUDGE:

This claim grows out of a written contract upon a printed form designated AIA Document A101, Owner-Contractor Agreement, incorporating AIA Document A201, General Conditions of the Contract for Construction, dated March 14, 1979, and duly executed by the claimant and respondent, respectively. The contract provides for the construction of a Multipurpose Physical Education Facility at Marshall University, in Huntington, for a fixed sum of $3,162,173.00. The contract was approved by: the Director of the Purchasing Division; the Commissioner of the Department of Finance & Administration; and, finally, by the Attorney General on April 9, 1979. Paragraph 7.9.1 of the General Conditions, pertaining to Arbitration, provides:

> "All claims, disputes and other matters in question between the Contractor and the arising out of, or relating to, the Contract Documents or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitratim Association then obtaining unless the parties mutually agree otherwise. * * * The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

Subsequently, a dispute arose between the parties based upon a claim by Hughes-Bechtol that the respondent, on the one hand, had caused substantial delay in performance of the contract and, on the other hand, had refused to extend the time of performance. When amicable resolution of a dispute failed, with reference to additional costs incurred after August 30, 1981, Hughes-Bechtol filed a demand for arbitration at the Cincinnati Regional Office of the American Arbitration Association. On October 26, 1982, a demand for arbitration was served upon the respondent. Arbitrators were duly appointed, and a hearing upon the merits was held on February 22, 1983. On February 28, 1983, an arbitration award was made to Hughes-Bechtol in the sum of $398,685.85 upon its claims against respondent arising after August 30, 1981, on the project.

The matter now is before this Court upon the "Claimant's Second Motion for Partial Summary Judgment" enforcing the arbitration award. The gist of the respondent's position, in opposition to that motion, is that the quoted arbitration provision of the contract is void and unenforceable because this Court has exclusive jurisdiction of claims against state agencies such as the respondent and, for that reason, the respondent had no authority to agree to arbitration. The principal authority cited for that position is the case of J. L. Simmons Company, Inc. v. Capital Development Board, 424 N.E.2d 821 (Ill. 1981), a very similar case in which enforcement of an arbitration award was denied because the Illinois Court of Claims has exclusive jurisdiction of the matter arbitrated. An examination of the Illinois Statute cited in that case, delineating the jurisdiction of its Court of Claims, Ill. Rev. Stat. 1979, Ch. 37, 439.8, and upon which the decision turned, however, discloses that it provides:

"The court shall have exclusive jurisdiction to hear and determine the following matters: (b)All claims against the State founded upon any contract entered into with the State of Illinois. * * *"

In view of that statute, that decision could not have been otherwise. West Virginia has no similar statute.

West Virginia does have substantial statutory and case law on the subject of arbitration and, if nothing else is clear, it is certain that the policy of the law of this State favors arbitration. In Board of Education v. W. Harley Miller, Inc., 160 W.Va. 473, 236 S.E.2d 439 (1977) our Supreme Court of Appeals stated:

Where parties to a contract agree to arbitrate either all disputes or particular limited disputes arising under the contract, and where the parties bargained for the arbitration provision, then, arbitration is tory, and any causes of action under the contract which upon motion for s the proper time. By the contract terms are made arbitrable are merged, in the absence of fraud, with the arbitration award and the arbitration award is enforceable upon a complaint setting forth the contract, the arbitration provision, and the award of the arbitrators judgment made at [4]. The important words in the new rule are that the agreement to arbitrate must have been 'bargained for.' * * *"

If the agreement to arbitrate in this case was not "bargained for", in view of its various approvals, it would be difficult to conceive one that was. See also Barber v. Union Carbide Corporation, 304 S.E. 2d 353 (1983).

In addition, West Virginia Code, 55-10-1, provides:

"Persons desiring to end any controversy, whether there be a suit pending therefor or not, may submit the same to arbitration, and agree that such submissions may be entered of record in any court. Upon proof of such agreement out of court, * * * it shall be entered in the proceedings of such court; and thereupon a rule shall be made that the parties shall submit to the award which shall be made in pursuance of such at. (emphasis supplied)"

The emphasized language 'any court' plainly is broad enough to include this Court and it is equally plain that the legislature could have excluded this Court from the operation of that statute had it wished to do so.

Finally, the general law appears to be to the effect that a state or its agencies may enter a valid contract with a private party providing for the arbitration of disputes that may arise under the contract. See 5 Am. Jur. 2d "Arbitration and Award" 67 and also 81A C. J. S. "Arbitration" 168c, page 636, where it is stated: "The parties to a contract for state improvements may agree to select an umpire or arbitrator to settle disputes as to the interpretation of the contract, and the rights of the parties thereunder, and his decision is binding in the absence of fraud or bad faith;"

Since there is no assertion of fraud or bad faith in this case, this Court is obliged to grant the pending motion and allow an award of $398,685.85.

Award of $398,685.85.

Judge Lyons dissents and reserves the right to file a dissenting opinion.

OPINION ISSUED JANUARY 17, 1986

HOWARD A. SNYDER
VS.
DEPARTMENT OF HIGHWAYS

(CC-80-351)

Russell Jay Guthrie, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

The claimant was injured in a fall which occurred at a roadside park owned and operated by respondent which is located on Route 55 near Wardensville, Hardy County, West Virginia. The fall occurred on Thursday, October 5, 1978. Claimant stopped at the roadside park in the early afternoon and went down a short flight of wooden stairs to a restroom. When he went down the stairs, he noticed that the handrail was down. As he went back up the stairs, he lost his balance at about the third step and fell backwards, suffering injuries including a fracture of his left wrist. He seeks $100,000.00 in damages.

Waldo Heishman, a truck driver employed by respondent, testified that in 1978 his duties included maintaining the roadside park. He stated that he visited the park on Mondays and Fridays to clean it and to perform any other maintenance that might be required. Mr. Heishman said that the handrails were occasionally knocked down by vandals, but that he would fix the rails when that occurred.

While the Court is sympathetic to the claimant, the law of West Virginia is well settled that the State is neither an insurer nor a guarantor of the safety of travellers on its highways. Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947). This principle has been extended to pedestrians. The Court has held on several occasions that where a person has travelled across an area and then been injured upon returning, failure to exercise reasonable care and to maintain a proper lookout was the proximate cause of the injury. See: Moore v. Dept. of Highways, 14 Ct.Cl. 179 (1982); Hall v. Board of Regents, 12 Ct.Cl. 232 (1978). The Court finds no negligence on the part of respondent and accordingly disallows the claim.

Claim disallowed.

OPINION ISSUED JANUARY 24, 1986

MELLON-STUART COMPANY and KIRBY ELECTRIC COMPANY
VS.
BOARD OF REGENTS

(CC-82-14)

John E. Beard, III, Attorney at Law, Carolyn L. Marchetti, Attorney at Law,
Peter J. Kalis, Attorney at Law, for claimants.
Henry C. Bias, Jr., Deputy Attorney General, Donald L. Darling, Deputy Attorney General,
Ann Ewart, Assistant Attorney General, for respondent.

LYONS, JUDGE:

This claim arises out of contracts for the construction of a multipurpose physical education facility at Marshall University, Huntington, West Virginia.

By agreement dated the 26th day of September, 1977, the West Virginia Board of Regents entered into an architectural agreement with Robert J. Bennett, A.I.A. and Associates and the Eggers Group, which formed Bennett/Eggers Architects, a joint venture to provide professional architectural service essential to the design and construction.

Article 15 of the Agreement provided a fixed limit construction cost of Sixteen Million Five Hundred Ninety Thousand Dollars.

The joint venture group designed substantially the multipurpose building as it exists today. The first bid proposals were in the range of Twenty Million Dollars, a considerable amount above the fixed limit of construction as referenced in Article 15. The Architects, after preparing an addendum to the specification which is described Addendum Bulletin Number 1, invited bids for five prime contracts. They were of the opinion that this would bring about the lowest bid possible; however, the evidence shows that this bidding would increase the construction period, administrative and cost. Prior to receiving the bids, the architects furnished to the Board of Regents a project time schedule dated November 30, 1978 in the form of a Bar Chart.

On March 1, 1979, the bid tabulations were made. The bleacher and seating work contract was awarded to American Desk Manufacturing Company. The swimming pool contract was awarded to Whitten Corporation. The electrical work was awarded to Kirby Electric Service, Inc. The mechanical work was awarded to Hughes-Bechtol, Inc., and the general construction work was awarded to Mellon-Stuart Company.

In August 1977, the Board of Regents had authorized the architects to obtain sub-surface data, both boring and laboratory testing service pertinent to the foundation design for the facility. In the same month, Mr. Robert J. Bennett, one of the architects, requested a complete survey of the project area from Lambert and Company of Huntington, West Virginia. Lambert and Company furnished to Mr. Bennett all the information requested by him and prepared the site plan, which is designated SU-1.

On December 20, 1977, Syska and Hennessy, Inc., Engineers, informed the Eggers Group, the architects, of their recommendations concerning the sanitary and storm sewers in the construction area and made a number of recommendations prior to the start of construction. In his letter of December 20, 1977, Kenneth E. Cline, P. E. was of the opinion that the estimated sewer relocation time would be approximately six

months and needed a solution to the matter as the same may interfere with the scheduling of new construction.

A Notice to proceed was issued effective as of May 9, 1979. The contract required that the base contract was to be completed within 700 consecutive calendar days from the date of the notice to proceed, and the alternates to the Gullickson Hall were to be completed within 150 calendar days after the completion of the base contract, thus making the completion date for the base contract work April 6, 1981 and the completion date for the Gullickson Hall alterations September 3, 1981.

Mellon-Stuart Company, by separate contract, was to coordinate construction by conducting progress and safety meetings by updating job progress schedules and by expediting shop drawings and correspondence.

The initial work on the project was the mass excavation and foundation work to be performed by Mellon-Stuart Company. The site plan identified certain utility lines throughout the project area. The plans specified no particular time for the relocation of the utility lines. The removal of the utilities and the relocation of the utilities and the street abandonment were obviously the first work to be performed. The party responsible for the relocation and/or removal of the 36-inch storm sewer and the 12-inch sanitary sewer was Hughes-Bechtol Company. The electric lines were the responsibility of Kirby Electric. The telephone lines were the responsibility of the telephone company. The main and service gas lines were the responsibility of the gas company.

The design provided that the excavation go to a certain grade which the architects determined would be sufficiently compact to support a concrete slab. Additional foundation work was the underpinning of Gullickson Hall and the foundation concrete work consisting of piles, pile caps, and tie beams and foundation walls.

Mellon-Stuart filed with the architect a preliminary time schedule designated on a Bar Chart. This chart designates each sequence of work and the time allocated for the work to be performed. The schedule allowed one month from the date of the notice to proceed to complete the relocation of known utilities and the abandonment of the streets. Based upon the notice to proceed of May 9, 1979, the schedule was to start relocation of the utilities on May 9, 1979 and to be completed on June 6, 1979. The mass excavation was to begin on May 22, 1979 and to be completed by September 22, 1979. The underpinning of the Gullickson Hall was to begin on June 13, 1979 and be completed by July 3, 1979. Pile Foundation work was to begin in June 1979 and be completed in October 1979. Foundation walls were to be started in August 1979 and be completed by October 24, 1979. Structural steel work was to start on October 25, 1979 and to be completed in April of 1980. The original plan was to complete the mass excavation, pile driving and contract work in summer and fall of 1979. The structural steel work was to proceed through the winter for the completion of that work in April 1980. The work did not proceed as planned. Mellon-Stuart contends there were errors and omissions in the site plan. It was discovered that a gas service line at Gullickson Hall was located approximately 35 feet from Gullickson Hall rather than immediately adjacent to the building. There was a six-inch high pressure gas line known as the Devon Gas line running along the entire length of the easterly side of the excavation, which line was not shown in the contract documents or the site plan. There were also gas lines extending from Third Avenue into the project site that were not shown on the plans. There were other lines extending into the areas of the mass excavation. Mellon-Stuart contends that

the State failed to relocate these utilities in a timely manner.

The evidence indicates that contrary to the schedule, Virginia Avenue was not abandoned until September 24, 1979. The 36-inch sewer line was not relocated until October of 1979. The 12-inch sewer line, running the length of the project along Virginia Avenue, was not relocated until July 20, 1979. The electric lines running the entire length of the project were not relocated until August of 1979. The telephone line running the entire length of the project was not relocated until August of 1979. Utility poles found along the entire length of Virginia Avenue and the project were not removed until about August of 1979. The water line, running the length of the project along Virginia Avenue, was not relocated until August of 1979. The Columbia Gas line running the length of the project was not relocated until September of 1979. The Devon Gas Line was not relocated until August of 1979. The Gullickson Hall gas line was not relocated until September of 1979. The undisclosed water line south of Gullickson Hall was not relocated until September of 1979.

Mellon-Stuart contends there was improper sub-grade design as there was not an accurate specification given on the soil conditions. The specifications called for excavation to grade and pouring of a concrete slab on grade. This was not possible as the subsoil was very wet and jellylike. Mellon-Stuart contends that an engineered sub-grade should have been specified;, that prolonged maintenance of the excavation was required by the delays in relocation and removal of the site utilities; that the entire project was thus delayed; that the plans and specifications contained numerous errors and omissions in addition to those directly affecting site access and that change orders were delayed and had a direct impact on the project schedule.

Errors and modifications affecting the schedule included the Kalwall installation, doors and windows, concession areas, ceilings and pool area. All of these, the claimant contends, had an appreciable time impact. Mellon-Stuart contends that the respondent failed to manage the project by its failure to maintain on-site personnel authorized to act for the respondent; by its failure to adopt and adhere to or require adherence by other contractors of any project schedule; by its failure to issue change orders extending the project time as required by contract; by its failure to issue change orders in a timely manner, extending the project time as to some, but not all, prime contractors; by its failure to manage the contract of Hughes-Bechtol; that Hughes-Bechtol quit the project for a month and refused to follow any reasonable project schedules or directives.

The Court is of opinion that Mellon-Stuart and Kirby fulfilled their obligations with respect to delays; that the respondent failed to fulfill its obligation to coordinate the work of the multiple prime contractors and to provide timely and reasonable site access to the claimants; that the respondent breached its obligation to fully and properly disclose site drainage conditions; that the contractor, Mellon-Stuart and Kirby, owed a duty to mitigate their damages. When Mellon-Stuart was given notice to proceed and went upon the site, it was evident that the utility lines had not been removed and should have revised its schedule to take into consideration delays to result from winter working conditions.

The Court is of the opinion that the respondent is responsible for any negligent acts and omissions of its architect, agents and representatives in connection with this project.

The Court is further of the opinion that the claimants are entitled to recover costs attributable to extra work caused by concealed conditions and design defects but not for the total amounts claimed.

Mellon-Stuart, in its presentation of its claim, seeks a recovery of $1,928,099.85 including a retention of $37,500.00 by the respondent. Kirby, in its presentation, seeks to recover $504,936.46.

On January 25, 1984, Mellon-Stuart filed with the Court a Pre-Hearing Statement which included an explanation of damages being claimed, including damages for each of several of its subcontractors. Damages claimed for subcontractors had not been mentioned, as such, in its Notice of Claim. On March 26, 1984, the opening day of hearing, the respondent filed a written Motion for Partial Summary Judgement with reference to the subcontractors' claims, and a written memorandum in support of same. The Court deferred ruling on the motion at that time. Subsequently, the construction contracts between Mellon-Stuart and certain subcontractors were admitted into evidence, as were post-construction agreements between them with reference to damage claims. Evidence was received on additional costs the subcontractors incurred and the reasons therefore. On October 23, 1984, claimant filed its brief in opposition to the motion. The Court now overrules the said motion. However, this Court has no obligation or authority to determine the rights and obligations as between Mellon-Stuart and its subcontractors.

After consideration of the record, the Court finds that Mellon-Stuart is entitled to an equitable award of $660,434.33 and the restoration of the retention held by the respondent in the amount of $37,500.00 for a total award of $697,934.33. The Court further finds that Kirby is entitled to an award of $107,835.04.

Award of $697,934.33 to Mellon-Stuart Company.
Award of $107,835.04 to Kirby Electric Company.

OPINION ISSUED ON FEBRUARY 13, 1986

B-K DYNAMICS, INC.
VS.
TAX DEPARTMENT

(CC-86-14)

No appearance by claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $237,235.77 for professional services rendered respondent in completion of the Enhanced Business Tax Computation System. The parties entered into a Memorandum of Agreement on April 4, 1984, for the one year commencing on April 9, 1984 and extending to April 9, 1985 with a renewal clause to June 30, 1986. Claimant was to be paid on a monthly basis. For the period

February through June 1985 the billing statements from the claimant were misrouted or misplaced by respondent. As a result of non-availability of fund s, the invoices were neither paid nor was the deficiency realized by respondent until the fiscal year had expired. Claimant has not been paid for the services rendered in performance of the contract during these particular months.

In its Answer; the respondent admits the allegations of fact set forth in the Notice of Claim, but further alleges that sufficient funds were not available at the close of the fiscal year in question from which the claim could have been paid.

While the Court feels that this is a claim which in equity and good conscience should be paid, we are of further opinion that an award cannot be made, based on the decision in Airkem Sales and Service, et al. vs. Department of Mental Health, 8 Ct. Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED FEBRUARY 13, 1986

JACK AND VERA MCMILLAN
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-277)

Jack McMillan appeared for claimants.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On June 30, 1985, at about 11:30 o'clock p.m., claimant Jack Mcmillan was operating the claimants' 1983 Oldsmobile Cutlass Supreme Calais on Route 61 travelling westbound from Paintsville to Charleston, when he crossed a bridge at Slaughter's Creek. His wife and adult son were with him in the automobile. The two left wheels of the vehicle struck a pothole on the bridge. Claimant did not see the pothole before he hit it. He testified that it was approximately one foot by one foot and that it went "clear through the bridge" in reference to its depth. Claimant had travelled this route frequently before this incident. The left wheels and tires of the vehicle were damaged. Claimant's actual monetary loss amounted to $267.00 as his insurance covered the balance of the cost of the damage.

Claimant's son, Frank Lee McMillan, a truck driver, testified that he had been aware of the existence of the pothole for the better part of a year prior to the accident. He stated that during that year, a steel plate had been used by respondent to cover the pothole, but that the plate was often knocked off, as on the night of this incident.

It is the opinion of the Court that respondent's negligence was the proximate cause of the damage to the claimants' car; that claimants are entitled to an award in the amount of $267.00.

Award of $267.00.

OPINION ISSUED FEBRUARY 13, 1986

MINE SAFETY APPLIANCES COMPANY
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-191)

William Blackwell, Service Representative, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On April 11, 1985, the claimant's Service Representative was driving a 1985 Chevrolet Astro Van on Route 161, McDowell County, when the vehicle struck two potholes. Claimant's Service Representative was proceeding from Pageton toward Thorpe to service the mines of U. S. Steel. The van is titled in the name of Leaseway Corporation which leases the van to the claimant. Claimant's Service Representative was unable to produce the lease agreement. The vehicle sustained damage to the tires and wheels in the amount of $209.90. Claimant's Service Representative estimated the larger hole to be 28 inches long and the smaller hole to be 16 inches long. He testified that he judged the two holes to be four inches wide and eight inches deep. He did not know how long the potholes had been in existence.

No evidence was introduced at the hearing to establish that the respondent was aware of, or had any knowledge of, the existence of these two potholes. This Court has consistently held that the State is not an insurer of the safety of motorists using its highways; thus, as there was no showing of negligence on the part of the respondent, the Court denies the claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 13, 1986

DORSEL D. PARSONS
VS.
DEPARTMENT OF HIGHWAYS

(CC-82-141)

John G. Anderson, Attorney at Law, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On June 9, 1980, at approximately 3:30 a.m., claimant was driving his father's automobile, a 1977 Chevrolet Monte Carlo, from Hurricane to Winfield, Putnam County. At a point near Shop-a-Minit on that route, claimant suddenly lost control of the vehicle, veered to the right, went off the berm over an embankment, and flipped the car onto its side. It had been raining the evening before the accident. In explaining what happened, claimant testified that there was a vehicle coming at him with its bright lights on. On cross examination, claimant testified that in a statement to the police officer he had indicated that lit looked like the other car was in my lane coming at me."

Claimant sustained physical injuries and damage to the vehicle, and seeks an award of $10,000.00. Claimant alleges that the respondent was negligent for failing to maintain the berm of the road in proper condition and for failing to install a guard rail between the road and the embankment.

From the record, there is no evidence of negligence on the part of the respondent which was the proximate cause of the accident. Neither the maintenance of the berm nor the lack of a guard rail caused the accident. Accordingly, the Court is of the opinion to and does disallow the claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 13, 1986

A. E. QUEEN AND PAULINE QUEEN
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-151)

Claimant A. E. Queen for claimants.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On February 21, 1985, claimant A. E. Queen was travelling at approximately 7:30 p.m. in his 1980 Toyota Corolla on Route 52, from Bluefield to Mount Gay, when the automobile hit a rock. His friend, Haskell Stamper, was driving the car. Claimant A. E. Queen originally filed this claim in his own name; however, the record reflects that the automobile is titled in both the name of A. E. Queen and that of his wife, Pauline Queen. The Court, on its own motion, amended the style of the claim to include Pauline Queen as a party claimant.

The claimant, A. E. Queen, testified that the rock was about two feet wide and about three and one half to four feet long. Haskell Stamper testified that they had travelled the same route on the morning of the incident and that the rock had not been present at that time.

Benny Ellis, a Sergeant with the Mingo County Sheriff's Department, testified that he notified respondent of the rock when he became aware of it, about ten minutes before the accident occurred. Ellis personally observed the removal of the rock while the claimant, A. E. Queen, and Haskell were waiting for the tow truck.

The law of West Virginia is well established that the State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. Adkins vs. Sims, 130 W.Va. 645, 46 S.E. 2d 81 (1947) . In this instance, respondent effected a remedy immediately upon notice of the road defect. The claim must be denied.

Claim disallowed.

OPINION ISSUED FEBRUARY 13, 1986

ROBERT W. RECTENWALD and JEANNE E. RECTENWALD
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-230)

Claimant Robert W. Rectenwald appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On February 23, 1985, between 7:30 and 8:00 p.m., claimant Robert Rectenwald's friend, Tom Halstead, was operating claimant's vehicle, a 1984 Cavalier Station Wagon, in a southerly direction on U.S. 19 beyond Davis Creek when the vehicle struck a pothole. Claimant Robert Rectenwald originally filed this claim in

his own name. The record reflects that the vehicle is titled in both Robert Rectenwald's name and that of his wife, Jeanne Rectenwald. The Court then, upon Mr. Rectenwald's agreement, amended the style of the claim to include Jeanne Rectenwald as a party claimant.

According to the claimant Robert Rectenwald, who was a passenger, the weather was very bad and it was raining. The vehicle hit a pothole which blew out the front tire completely. Introduced into evidence was an invoice reflecting repairs made to the automobile in the amount of $115.95.

Mr. Halstead confirmed the testimony of claimant Robert Rectenwald. He testified) though, that he estimated his speed as being not more than 30 miles per hour. He did not make a complaint to respondent.

The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. Adkins v. Sims, 130 W.Va. 645 (1947). For the State to be found liable, it must first have either actual or constructive notice of the defect in the roadway. Since there was no proof in this case that the State had notice of the defect, the claim must be denied.

Claim disallowed.

OPINION ISSUED FEBRUARY 19, 1986

ARTHUR COBURN
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-177)

Dwight Coburn, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On March 22, 1985, at approximately 3:30 or 4:00 p.m. claimant's vehicle, a 1984 Chevette, ran over a rock which had rolled out into the road. Claimant's son, driver of the vehicle, was travelling to his home from Marshall University on State Route 10 in Lincoln County. The vehicle sustained damage in the amount of $166.80. The claimant, Arthur Coburn, had originally filed this claim in his own name and that of his son, Dwight Coburn. However, the record reflects that Arthur Coburn is the titled owner of the vehicle. The Court, upon Dwight Coburn's agreement, amended the style of the claim to dismiss Dwight Coburn as a party claimant.

Claimant's son testified that he was coming out of a curve and failed to see the rock. He travelled that route three or four times weekly, but stated that it was not a rockslide prone area. He estimated the rock to be the size of a basketball.

This Court has held that the unexplained falling of a rock or boulder into 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. Hammond vs. Department of Highways, 11 Ct.Cl. 234 (1977). There was no evidence in this case of such notice to or knowledge on the part of respondent. Therefore, the Court must deny the claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 19, 1986

FRIEDA LEGGETT AND WILLIAM LEGGETT
VS.
DEPARTMENT OF HIGHWAYS

(CC-82-223)

Gregory W. Evers, Attorney at Law for claimants.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On October 1, 1981, at approximately 10:00 p.m., claimant Frieda Leggett was driving south on Interstate 77 at approximately 45-50 miles per hour near Ripley, Jackson County. I-77 is a four-lane highway. On the date in question, the right lane of the two southbound lanes was closed as employees of respondent were performing maintenance. Claimant Frieda Leggett was driving a 1976 Ford Granada titled in both her own name and that of her husband, William Leggett.

As she approached the construction area, she stated that she observed a "Keep Right" sign and black barrels placed across the right lane. Claimant Frieda Leggett then went to the left lane and drove for approximately a mile or a mile and a half. She said she saw an opening and on down, about 100 feet, a car in the right lane. She said she saw the car's tail lights and thought that this was where she was supposed to turn. She said she did not see any barrels ahead of her and saw nothing which prevented her from the switching from the left to the right lane. She straightened up in the right lane and drove into an excavated hole. She estimated this hole to be three or four feet deep. Claimants asked for an award in the amount of $75,000 incident to property damages and personal injuries.

The investigating trooper, Michael Bright, an employee of the Department of Public Safety, testified that orange-colored barrels were clearly in evidence in the construction area. However, he had measured a

distance of 282 feet between barrels where the vehicle had moved from the left lane to the right lane. He did not remember seeing any warning signs and did not observe a 'Keep Right" sign. Claude Blake, respondent's investigator, testified that he had made an error, in his answers to interrogatories, when he listed the presence of two "Keep Right' signs in the construction area; that his answer should have been that there were two 'Keep Left" signs. He was unable to provide documentation to support this correction.

Three different employees testified that they participated in placing orange and white-colored barrels at a distance of 50-60 feet apart in the area of construction on I-77 near Ripley on September 24, 1981 in accordance with the Case 20 Diagram in a Traffic Control Manual. In addition, warning signs were placed at that time. William R. Whited, an employee of respondent, testified that on October 1, 1981, he was working at patching holes on I-77 near Ripley. He did not observe either a 'Keep Right' sign nor any barrels with a distance of 282 feet between them. James Kiser, a general foreman with respondent in October, 1981, testified that he was working on the concrete patching on October 1, 1981 and 60 days prior to October 1, 1981. He did not observe barrels out of place, nor a "Keep Right' sign on I-77 near Ripley.

Testimony failed to establish negligence on the part of the respondent. The barrels and warning signs were placed in accordance with respondent's regulations.

It is the opinion of the Court that the evidence in this claim does not establish such negligence on the part of the respondent as to justify an award.

Claim disallowed.

OPINION ISSUED FEBRUARY 19, 1986

JOHN I. MOORE AND CHARLENE MOORE
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-153)

ALICE CATHERINE TAYLOR
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-167)

Claimants appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

These claims were consolidated for hearing as the factual situations in each are identical. On April 2, 1985, the claimants, while operating separate vehicles, were travelling westbound lanes near the Montrose exit on Interstate I-64, Kanawha County. Each of the vehicles struck the same hole in the pavement of the highway. Both vehicles, a 1982 Chevrolet Cavalier, and a 1980 Buick Regal, were damaged. Ms. Moore, owner of the Chevrolet, seeks an award of $379.91; Ms. Taylor, owner of the Buick seeks $384.09.

The hole struck by the vehicles was located in the center lane of the westbound lanes on Interstate 64 where the highway has three westbound lanes. Ms. Moore's accident occurred at 8:35 p.m.; Ms. Taylor's at approximately 8:15 p.m. The pavement was dry at the time of the accidents. Ms. Moore testified that she was unaware how long the hole had been in existence. Ms. Taylor testified that she had observed an indentation in the road prior to her accident, however the indentation was not a pothole at that time.

Paul Totten, a claims investigator for respondent, testified that he became aware of the pothole when he was notified of it on march 28, 1985. He notified respondent's maintenance crew on March 29, 1985.

Ray Harmon, respondent's employee, testified that on March 29, 1985, he went to the area of the Montrose exit on I-64 after work and patched a pothole. George Harris, also employed by respondent, testified that he assisted Harmon, and that they used "cold mix." Carl Young, another of respondent's employees, testified from respondent's work sheets that work was done on the potholes in the area of the Montrose exit on both March 29, 1985, and April 1, 1985. He further testified that a five-person crew worked through the night of April 2, 1985, and repaired the hole with "Quick-Crete." Herbert Boggs, Interstate Coordinator in District 1 for respondent, confirmed that he had inspected the completed work on the morning of April 3, 1985, and at that time there was no hole present.

Although the respondent's duty of reasonable care and diligence in the maintenance of a highway under all the circumstances, Parsons vs. State Road Commission, 8 Ct.Cl. 37 (1969), may require respondent to put greater effort into the maintenance of superhighways than in the maintenance of the lesser-travelled county roads, Davis Auto Parts vs. Department of Highways, 12 Ct.Cl. 31 (1977), and Bartz vs. Department of Highways, 10 Ct.Cl. 170 (1975), proof of actual or constructive notice is required in all cases. The evidence in this record indicates that the dangerous condition appeared suddenly, and that the respondent promptly moved to take safety precautions as soon as it became aware of the problem. Barnhart vs. Department of Highways, 12 Ct.Cl. 236 (1979). Adkins vs. Sims, 130 W.Va. 645, 46 S.E. 2d 81 (1947), holds that the State is neither an insurer nor a guarantor of the safety of the motorists on its highways. The Court is of the opinion that negligence on the part of the respondent has not been established and, therefore, the Court denies these claims.

Claim disallowed.

OPINION ISSUED FEBRUARY 19, 1986

FRANK SPENCE AND MARGARET E. SPENCE
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-224)

Claimants appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On May 26, 1985, claimant Frank Spence was operating his 1981 Plymouth Horizon on U.S. 52 in a southerly direction toward Crum, when he hit a pothole. Claimant, Frank Spence, originally filed the claim in his own name; however the record reflects that his wife, Margaret Spence, is also a titled owner of the vehicle. The Court, on its own Motion, amended the style of the claim to include Margaret Spence as a party claimant. The vehicle was damaged in the amount of $552.40. After claimant Frank Spence introduced evidence of damages in the aforementioned amount, the Court amended the amount of the original claim to reflect that amount. Claimant Frank Spence testified that he did not see the pothole until he hit it. Although he travelled that route frequently, he had not observed the pothole prior to this accident. Claimant Frank Spence knew of no complaints to respondent about the pothole prior to this incident.

The State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. Adkins vs. Sims, 130 W.Va. 645 (1947). For the State to be found liable, it must first have had either actual or constructive notice of the defect in the roadway. Since there was no proof in this case that the State had such notice of the defect, the claim must be denied.

Claim disallowed.

OPINION ISSUED FEBRUARY 19, 1986

LOVA M. STOUT AND M. WOOD STOUT
VS.
DEPARTMENT OF HIGHWAYS

(CC-78-29)

Gregory W. Evers, Attorney at Law, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

GRACEY, JUDGE:

The claimants seek an award of $20,000.00 for personal injuries, medical expenses, and damage to their 1966 Plymouth automobile. Claimants were travelling northbound on Route 20 at Gum Mountain near Buckhannon, Upshur County, on February 10, 1976. Claimant M. Wood Stout testified that a large boulder rolled out in front of them and their vehicle collided with it. He also testified that rocks have been falling in this particular area since the 1950's as he has lived there with his wife since that time. Claimant Lova Stout also testified "there were always rocks falling down off of that hill."

R. F. Heflin, General Foreman for respondent in Upshur County, testified that he was unaware of any rock fall signs in the area of the accident in February 1976. On the day before the accident, respondent's crew was plowing snow. He said that a crew, from time to time, would go down to Gum Mountain and pick up all of the loose rocks and ditch the road. He was unable to document, through records maintained by respondent, that any of respondent's crews had worked on Gum Mountain on February 10, 1976.

This Court has held that the unexplained falling of a rock or boulder into 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. Hammond v. Dept. of Highways, 11 Ct.Cl. 234 (1977). There was no evidence in this case of such notice to or knowledge on the part of respondent. Therefore, the Court must deny the claim.

Claim disallowed.

OPINION ISSUED APRIL 30, 1986

AMERICAN TELETRONICS CORPORATION
VS.
DEPARTMENT OF HEALTH

(CC-85-362)

Willard Sullivan, Attorney at Law, for claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

WALLACE, JUDGE:

Claimant, American Teletronics Corporation, seeks $15,769.25 in payment for repairs performed on the telephone system of the Greenbrier Center, a facility in Lewisburg operated by the West Virginia Department of Health. Claimant installed the telephone system in 1983. Thereafter, claimant and respondent entered into a Maintenance Agreement.

This Maintenance Agreement provided that American Teletronics Corporation, for a payment of $220.00 per month, would service the telephone system. Paragraph 4 provides in pertinent part:

"It is understood that this Agreement does not cover damages to or failure of the System resulting from causes other than wear and tear from normal use, including, but not limited to misuse, negligence, accident, theft, or unexplained loss, abuse, connection to direct current, fire, flood, wind, Acts of God or the public enemy, or improper wiring, installation, repair or alteration by anyone other than the NECTEL Associate."

In July of 1984, the telephone system failed and claimant was called upon to effect repairs. Claimant determined that the cause of the failure was a surge of electrical power engendered by a lightning strike and billed the respondent for the cost of labor and materials. Respondent asserts that the repairs were covered by the maintenance agreement and were not necessitated by any of the causes excepted by paragraph 4 thereof.

Jerry Ayers, a technician employed by claimant, testified that certain components of the switching mechanism were 'burned' and that, in his opinion, the cause of this burning was a power surge. There was no other admissible testimony as to the cause of the system failure.

Respondent introduced testimony that the system had failed numerous times in the year prior to the failure at issue and that, shortly after installation, certain of the grounding mechanisms were inadequate. Claimant's evidence, however, indicated that these problems had been corrected.

The Court finds that the claimant has failed to meet its burden of establishing that the cause of the system failure of July 1984 was excepted under paragraph 4 of the Maintenance Agreement. Mr. Ayers' testimony was inconclusive, and there is some question as to his qualifications as an expert in the field of electronics. Moreover, his testimony related to a number of things about which he had no firsthand knowledge. A thorough examination of the record leaves the Court with no better understanding as to the cause of the system failure.

The evidence in the record is not sufficient to establish the condition precedent to respondent's liability for breach of the Maintenance Agreement, in that no cause for the system failure has been shown. Accordingly, the Court is of the opinion to and does disallow the claim.

Claim disallowed.

OPINION ISSUED APRIL 30, 1986

NAOMI A. CLARK
VS.
DEPARTMENT OF COMMERCE

(CC-85-290)

Claimant appeared in person.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

On July 28, 1985, in a designated parking spot at Beech Fork Campground, claimant's 1977 Ford LTD was vandalized. The four tires were slashed, and the radiator and oil filter were damaged. The automobile, which is titled in Tennessee solely in claimant's name, was clearly visible from claimant's camp site. The incident occurred sometime after 12:00 midnight. The repairs to claimant's automobile amounted to $574.30.

Claimant testified that she and a friend were camping with her dog. The dog barked at one point, but neither claimant nor her companion arose at that time. The following morning claimant discovered the damage to her vehicle. The camp sites on either side of claimant's camp site were not occupied that evening.

Steven Bolar, park superintendent of Beech Fork State Park, testified that entrance to the park is gained through one central booth. The gate remains open until 10:00 p.m. After 10:00, only those people who are camping are permitted into the park. That is the only access by vehicle. There is access by means of the woods surrounding the park. At 4:00 a.m. on July 28, 1985, individuals inquired about the whereabouts of claimant and her companion's camping site. After being refused entrance to the park, they sent a note to claimant's trailer, allegedly of an emergency. Neither claimant nor her companion responded to the message. Mr. Bolar stated that park attendants had been through the area in which claimant was camping six times on July 28 and found no trouble. There are four thousand acres on the State Park.

The record in this case fails to disclose any negligence on the part of respondent. Beech Fork State Park was properly patrolled on the evening in question, and unauthorized persons were denied entry to the park area after 10:00 p.m. No negligence on the part of the respondent was established; therefore, the claim must be denied.

Claim disallowed.

OPINION ISSUED APRIL 30, 1986

ELMER PACK & JANICE DAILEY
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-130)

Thomas R. Parks, Attorney at Law, for claimants.
Andrew Lopez, Attorney at Law, for respondent.

LYONS, JUDGE:

In the evening of April 22, 1982, claimants Elmer Pack and Janice Dailey, the granddaughter of Elmer Pack, were travelling by automobile from Williamson, Mingo County, to the unincorporated community of Holden in Logan County.

Claimant Elmer Pack, who was operating the vehicle at approximately 25 miles per hour, took Route 65 to U.S. 119 into Holden. In the area of Batchelder and Trace Streets, he observed two signs. The first sign had an arrow pointing to the left. The second sign read 'One Lane Bridge." Claimant Pack had not driven this particular route since 1947. In 1947, one might have proceeded straight onto Trace Street and over the Trace Creek bridge. Since that time, the bridge over Trace Creek had been removed and a barrier erected to prevent traffic from going into the creek. Traffic had been rerouted, turning left and crossing a different bridge, one which had originally been a two-lane bridge but was later made a one-lane bridge because the sidewalk on the bridge collapsed. On this occasion, claimants proceeded onto Trace Street and drove into the creek. Claimants seek $200,000.00 for personal injuries and for damage to the vehicle.

It is the position of the claimants that the respondent was negligent for failing to erect a warning barrier and for failing to remove the "One Lane Bridge' sign.

There was conflicting evidence regarding the issue of whether Trace Street was under the maintenance and control of respondent in 1982.

Eric O'Briant, who lived on Trace Street in April 1982, testified that when he moved to that address in 1981, there was no bridge there; that there was a barricade, and on one occasion O'Briant had witnessed respondent's truck replacing the barricade.

The evidence did not clearly establish that Trace Street is a part of the State road system. Nor was there any evidence that respondent negligently erected barriers at Trace Street in the area of the Trace Street bridge.

Ralph Brown, Jr., who had previously resided next to Eric O'Briant, testified that the Island Creek Coal Company removed the bridge at the intersection of Batchelder and Trace Streets and put up barriers. He described the barriers as consisting of two or three barrels and "X" marks to prevent people from going into the creek.

Harold Ronald Simmons, a research analyst with respondent, testified that he could not say whether respondent actually 'pulled maintenance on the road," but that Trace Street has been a part of the State highway system since 1933.

Parris Preston Young, a retired employee of the Island Creek Coal Company, testified, that between 1979 and 1980, he helped remove the Trace Street bridge. He was assisted by a crew in the employ of the Island Creek Coal Company.

John Wilson Braley, District Bridge Engineer with respondent, testified that he was under the impression

that the Trace Street bridge was not included in the State system. He felt that "the Trace Street bridge was merely a public road ... and, therefore, respondent did not have possession of it."

However, the Court finds that the claimants have failed to prove, by a preponderance of the evidence, that any negligence of the respondent caused their injuries and disallows the claim.

Claim disallowed.

OPINION ISSUED APRIL 30, 1986

MAYNARD KNOTTS, INDIVIDUALLY, AND MAYNARD KNOTTS, AS GUARDIAN AND NEXT FRIEND OF TRACY KNOTTS, AND ROBERT KNOTTS, MINORS
VS.
DEPARTMENT OF HIGHWAYS

(CC-81-358a)

TONI GIANFRANCESCO, INDIVIDUALLY, AND TONI GIANFRANCESCO, AS PERSONAL REPRESENTATIVE, NEXT FRIEND, AND NATURAL PARENT OF DUANE GIANFRANCESCO, A MINOR, (DECEASED)
VS.
DEPARTMENT OF HIGHWAYS

(CC-81-358b)

DALE F. MAYS, INDIVIDUALLY
VS.
DEPARTMENT OF HIGHWAYS

(CC-81-358c)

P. Lee Clay, Attorney at Law, for claimants.
Andrew Lopez, Attorney at Law, for respondent.

WALLACE, JUDGE:

These three cases, arising out of the same event, were consolidated pursuant to the agreement of the parties' counsel. The claims arise out of an automobile accident which took place on September 21, 1979 on U. S. Route 250 near Glovers Gap, Marion County, West Virginia. Claimant Dale Mays alleges he was injured in the accident. Claimant Maynard Knotts seeks damages for the destruction of his vehicle and for the death of his spouse, Wanda Jean Knotts, the driver of the vehicle. Toni Gianfrancesco's minor child, Duane Gianfrancesco, another passenger in the vehicle, was also killed.

It is alleged that the respondent failed to repair certain potholes, failed to post adequate warning signs) and failed to maintain a guardrail at the scene of the accident. The accident occurred on September 21, 1979 at approximately 10:15 p.m. Wanda Jean Knotts was driving her husband's 1971 Oldsmobile in a southerly direction on U.S. Route 250. The passengers in the car were claimant Dale F. Mays, Duane Gianfranceso, and another minor, Daniel Smith. The vehicle approached a curve, went off the road, and landed upside down some distance from the roadway. Claimants assert that respondent's negligence, with respect to potholes, the guardrail, and the absence of a warning sign, was the proximate cause of the accident.

The action was bifurcated by leave of Court. A hearing on the issue of liability was held on January 13, 1986. Claimants presented evidence which was limited entirely to establishing the existence of the "defective" road conditions alleged.

Claimants established that there was no warning sign at the approach to the curve and that some of the posts on the guardrail showed signs of rotting. There was conflicting evidence as to the existence, size, and location of the alleged potholes.

It is not necessary in this case for the Court to make a finding with respect to the alleged road conditions, because claimants failed to produce a scintilla of evidence on the issue of proximate cause. Proximate cause is a vital and essential element of a claimant's case, and the claimant has the burden of proving it to justify recovery in any action based on negligence.

Claimants have not established that the alleged road conditions were causally related to the car's leaving the highway. The mere existence of the alleged road conditions, if proven, does not give rise to a presumption of liability, and claimant's are required to demonstrate that "but for" the conditions the accident would not have occurred.

In the present case, claimant did not treat the issue of causation. Respondent, on the other hand, suggested two theories of causation: mechanical defect in the automobile and physical defect of the driver. Moreover, the record indicates that it was raining on the night of the accident and the roads were wet. Under the circumstances, the Court is unable to infer, to the exclusion of all other reasonable inferences, that the alleged road conditions were in any wise the cause of the accident on which the claims are predicated.

Situations may arise where negligence, on the part of the respondent to eliminate unusual hazards existing over a period of years and causing injury and damages to persons and vehicles lawfully using said highway, presents a moral obligation for which a claim should be allowed. Spradling vs. State Road Commission, 5 W.Va. Ct.Cl. 77 (1949). How-ever, the claimants herein have not established that the alleged road conditions were unusually hazardous so as to warrant a finding that the State was under a duty to post a warning sign or maintain a guardrail. Generally, the State is under no such duty, since the posting of road markers and the erection of guardrails is discretionary. Cooper vs. Department of Highways, 8 W.Va. Ct.Cl. 178 (1970);
Chartrand vs. State Road Commission, 5 W.Va. Ct.Cl. 98 (1950).

Claimants have not established that respondent was under a duty to erect a warning sign or maintain a guardrail at the scene of the accident. They have not established a breach of duty with respect to the potholes since the existence, size, and duration of the alleged potholes is unclear. They have not established causation with respect to any of the three alleged road conditions.

Accordingly, no liability on the part of the respondent being found, the Court is of the opinion to and does disallow the claims.

Claims disallowed.

OPINION ISSUED APRIL 30, 1986

DONNIE LEE MCIE
VS.
DEPARTMENT OF HIGHWAYS

(CC-82-159a)

AND

BETTY J. JEFFRIES, ADMINISTRATRIX OF THE ESTATE OF EARL WILLIAM JEFFRIES, DECEASED
VS.
DEPARTMENT OF HIGHWAYS

(CC-82-159b)

W. Dale Greene and Paul Zakaib, Jr., Attorneys at Law, for claimants.
Andrew Lopez, Attorney at Law, for respondent.

WALLACE, JUDGE:

Between 12:30 p.m. and 1:00 p.m., on July 5, 1980, Earl Jeffries, accompanied by Donnie McIe, was operating his pickup truck in a southerly direction on Route 4 and 20, Rock Cave, Upshur County. A large tree fell over on top of the pickup truck, causing the death of the driver, Earl Jeffries, and causing claimant Donnie McIe to be paralyzed.

It is the claimants' position that the aforementioned tree was close enough to respondent's right of way to be a hazard. Furthermore, claimants contend that respondent had both actual and constructive notice of this hazard.

According to the testimony of Donnie McIe, he, Earl Jeffries and Mike Bond were going to French Grove to Roscoe Gregory ' s used car lot at about noon on the day of the accident. When they reached the garage, it was sprinkling and cloudy. Roscoe was not at the used car lot. Claimant McIe, Earl Jeffries and Mike Bond left Roscoe Gregory's used car lot and proceeded to the Pioneer, a bar. Claimant and Earl Jeffries stayed at the bar to have beer. When they left the Pioneer, Mike Bond did not come with them. McIe stated that it was not raining when they went into the Pioneer, nor was it raining when they came out

of the Pioneer.

McIe testified that it was no more than a mile from the Pioneer to the point where the tree fell on the truck. Route 20 is a two-lane asphalt road. At the point where the tree fell on the truck, McIe said that the road was uphill and in a curve. McIe does not remember anything about the weather other than that it was raining. He does not remember whether it was windy at the time that the tree fell on the truck.

There is conflicting evidence concerning the location of the tree in reference to respondent's right of way. Grover Cleve Withers, who had stayed at his mother's farm in the area of the accident on July 5, 1980, testified that the tree was within 10 feet, possibly a little more, off of the travel portion of Route 20. Withers also mentioned that there was 'severe wind' on July 5, 1980.

William C. Gambell, Chief of the Engineering Plans and Maps Unit of the Right of Way Division of respondent researched the 1924 plans for the vicinity near French Creek Farm Hill. Gambell testified that an order of the County Court pertaining to a road known as Buckhannon - Cleveland had been issued stating that there is a right of way so acquired in the width of 40 feet. The property was assessed in the name of C. D. Haynes in 1923, although the plans were in the name of C. E. Haines. Gambell further testified that absent any right of way obtained by a deed or by order, a statute width of 40 feet would apply to Route 20, a primary highway or Class A road. Gambell ascertained that the distance from the center line of the roadway to the stump of the tree is 32.5 feet.

Bernard Morrison, Survey Party Chief for respondent stated that he did a survey of Route 20 south of French Creek Game Farm on March 24, 1983. Morrison explained that he obtained the measurements for the tree stump by topographic controls. He set up a control point and turned an angle at a distance to the location of the stump in relation to his base line. He determined that the stump is 42 inches in diameter and is located 12 1/2 feet from the right of way and 22 1/2 feet from the base line.

Claude C. Blake, claims investigator for respondent, had indicated in his interrogatories dated November 30, 1984 that the tree in question was 5 1/2 feet off the State right of way. Blake testified that his answer was based on the survey of Bernard Morrison. At the time, Blake felt that they were assuming a 30-foot right of way instead of 20 feet.

The testimony was not conclusive in respect to whether or not the tree in question was a dead tree and therefore a hazard. Although claimant introduced some testimony that the tree which fell was a dead tree, respondent introduced evidence showing that the tree was a green and healthy one. Two employees of respondent, including an Operator II and an equipment operator, testified that the tree was dead or partly dead. Another man employed by respondent until 1977 testified that he had been part of a crew in 1973 or 1974. The crew had removed a sugar maple that was rotten. The tree in question was near the tree which had been removed. This individual felt it was as rotten as the tree that they had cut down. Mr. Oscar Friend, a longtime resident of the area stated that the tree was rotten and that he had informed Gene Powers, Assistant Maintenance Supervisor for Upshur County, of that fact. Gene Powers testified that there were green leaves on the tree and that he had not received a complaint about the tree. Richard Ralph Walton, respondent's boss of a small garage at Kanawha Head in 1976, stated that he had not heard any complaints about this particular tree.

This Court refused recovery in a claim wherein damage occurred to a vehicle when the vehicle struck the limb of a live tree growing on the State right of way when respondent lacked knowledge of the hazardous condition.

This was a live tree and there is nothing in the record to show that the respondent had knowledge of the hazardous condition, or should have known or foreseen that it might occur. Neither was there any notice to the respondent that the limb was broken until that information was furnished by the claimant. While the respondent in such a case may not unreasonably delay the removal of a hazardous obstruction upon a State highway, neither will liability arise until the respondent knows or should know that such a hazard exists. The law in West Virginia is well established that the State is not an insurer of its highways, and if there is not preponderant proof of negligence on the part of the State's employees, the user of the highway travels at his own risk. Widlan v. Dept. of Highways, 11 Ct. Cl. 149 (1976). The evidence in the instant claim consists of the testimony of several individuals. This Court cannot conclusively determine the condition of the tree. However, the Court is of the opinion that the tree was not a completely dead tree for there was evidence at the time of the incident that there were, in fact, leaves on the limbs of the tree.

There is no dispute between the parties that the tree stump of the tree is not located on the State's right of way. The stump was determined to be approximately 32 feet from the centerline of Route 20.

In Wolford v. Dept. of Highways, 13 Ct.Cl. 348 (1981), a tree case in which recovery was permitted, the distance of the tree from the middle of the highway was either 14 feet, 2 inches or 22 feet, 3 inches. The Court stated that "it is impossible...to judge whether the tree was or was not on the State right of way without resorting to speculation. In any case, the tree was close enough to the road to present a definite hazard." (Emphasis supplied.) The estimate of the distance of the stump from the centerline of the road in the case a hand is 32.5 feet. The Court is of the opinion that the tree which fell on the vehicle was not close enough to the respondent's right of way so as to pose a hazard which should have been apparent to the respondent and, therefore, denies these claims.

Claim disallowed.

OPINION ISSUED APRIL 30, 1986

RAYMOND L. SMITH
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-320)

Claimant appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

At approximately 11:00 p.m., on July 28, 1985, claimant was operating his Audi GT Coupe in a southerly direction on Interstate 79, approximately four miles from Jane Lew, Harrison County.

According to the testimony of claimant, it was dark and the road was dry. Claimant was driving at approximately 55 miles per hour and passed two signs, 'Under Construction" and "End Construction," respectively. After the last sign, claimant travelled five or six more miles, and his vehicle struck a depressed area on a bridge caused by roto-milling. As a result, three tires and four tire rims were damaged and the vehicle was knocked out of alignment. Claimant alleges damages to the vehicle in the amount of $1,449.00.

Claimant testified that there were two vehicles in front of him, a white automobile and a truck. These vehicles slowed, and claimant attempted to pass the automobile. As claimant's vehicle became even with the automobile, his vehicle hit the depression and the two front tires blew out. The truck stopped and let claimant's vehicle proceed across the road onto the berm.

After the accident, claimant contacted respondent and went to respondent's district office. He was informed that respondent's road crew had "roto-milled" part of the bridge the day before the accident. There were no warning signs posted that roto-milling was being performed on the bridge.

It is the opinion of the Court that respondent was negligent in failing to warn the travelling public of a hazardous condition on an interstate bridge. See Davis v. Dept. of Highways, 12 Ct.Cl. 31 (1977). The Court therefore makes an award to claimant in the amount of $1,449.00.

Award of $1,449.00.

OPINION ISSUED MAY 23, 1986

CODEX CORPORATION
VS.
BOARD OF REGENTS

(CC-85-159)

Kenneth E. Kincaid, Attorney at Law, for claimant.

Robert D. Pollitt, Assistant Attorney General, for respondent.

WALLACE, JUDGE:

Claimant, Codex Corporation, a Massachusetts based manufacturer of technical equipment, supplied the West Virginia Network for Educational Telecomputing (hereinafter referred to as WVNET), a State agency under the auspices of the Board of Regents, respondent herein, with twenty-three modems, devices which permit the transmission of signals between computers over telephone lines. This transaction was made under a putative lease agreement dated October 2, 1979 and executed by Gary Wenger, Assistant Director at that time of WVNET. Under the terms of the lease agreement, WVNET was supplied with modems for terms of 36 months for six of the modems and 48 months for 17. WVNET made monthly rental payments on the equipment through October 1981 when it returned the equipment to claimant's office in Mansfield, Massachusetts and indicated by letter that it was canceling the agreement.

Claimant filed its Notice of Claim alleging breach of contract and seeking $97,536.00, the balance of payments due under the unexpired leases. Prior to the hearing on the matter, claimant and respondent stipulated most of the material facts.
The only issue remaining for resolution was the respondent's contention that since the 1979 lease agreement was not executed pursuant to the laws and regulations governing State purchase orders and competitive bidding, it was void and of no effect.

This matter came on for hearing on November 13, 1985. The parties each stipulated that "(n)o purchase order was ever issued by the Department of Finance and Administration for the State of West Virginia approving the lease agreement." Moreover, Kathy Klein, Assistant Director of Purchasing of the Department of Finance and Administration, testified that her department had no record of a competitive bid or the issuance of a purchase order in connection with the 1979 lease of the modems from claimant. John L. Hays, Business manager of WVNET, testified that WVNET also had no record of compliance with State purchasing regulations. Finally, William Phelps, claimant's manager of corporate credit and collections, stated that his records did not show that the 1979 lease agreement was the result of a competitive bid or other procedure authorized by law.

The West Virginia Code of 1931, as amended, 5A-3-1 et seq, prescribes certain procedures for the procurement of commodities by State agencies. Contracts for commodities must be evaluated and approved by the Director of Purchasing of the Department of Finance and Administration. Moreover, contracts which exceed $2,000.00 must be awarded on the basis of competitive bidding. WV Code of 1931, as amended, 5A-3-12. Finally, contracts must be signed by the commissioner, and, if they require more than six months to fulfill, must be filed with the State Auditor. WV Code of 1931, as amended 5A-3-15.

The lease agreement in the present case involved well over $2,000.00 and would require up to four years for fulfillment. The testimony indicates that WVNET and claimant did not comply with the statutory procedures established for government procurement contracts. It appears that the modems were acquired on the open market and that the Department of Finance and Administration was bypassed altogether in a manner contrary to applicable law.

The Code of WV of 1931, as amended, 5A-3-19, provides, in pertinent part:

"If a department purchases or contracts for commodities contrary to the provisions of this article..., such purchase or contract shall be void and of no effect." (Emphasis supplied).

Since the 1979 lease agreement was void ab initio, the subsequent cancellation thereof by the State did not constitute a breach of contract. No contract had ever been formed, and claimant cannot recover damages for breach or otherwise enforce any rights against the State under a void contract.

The parties agree that the State returned the modems to claimant no later than October 1981 and that the full rental price as set forth in the lease agreement has been paid through that month. Accordingly, the Court need not consider whether equity requires that claimant be compensated for the fair rental value of the equipment for the period of actual use.

Accordingly, inasmuch as the alleged contract upon which claimant brings this action for breach was void and unenforceable, the Court is of the opinion to and does disallow the claim.

Claim disallowed.

OPINION ISSUED MAY 23, 1986

COMMERCIAL UNION INSURANCE CO., AS SUBROGEE OF CHARLES WILLIAM MOONEY, AND CHARLES WILLIAM MOONEY, INDIVIDUALLY
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-355)

Claimant, Charles William Mooney, appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On February 12, 1983, in the afternoon hours, claimant Charles William Mooney's vehicle, a 1982 Chevrolet Cavalier, was struck by several pieces of cement while proceeding under a bridge on Route 60 at Cedar Grove, Kanawha County. Claimant Mooney testified that the weather was fair. He further testified that several pieces of cement hit his vehicle. One piece hit the top of the car, and one came through the windshield. Claimant Mooney submitted photographic evidence showing the damage to the vehicle. The vehicle sustained damage in the amount of $947.57. Claimant Mooney incurred the first $50.00 of the damages in accordance with the deductible provision in his insurance policy.

It is the claimant's contention that the concrete which hit his vehicle came from the bridge. However, claimant did not introduce proof to support this allegation. A finding of negligence by respondent would

require speculation, and the Court cannot speculate. Arthur, Adm'r. vs. Dept. of Mental Health, 12 Ct.Cl. 124 (1978). There being no basis for presumption of negligence on the part of the respondent, the claim is denied.

Claim disallowed.

OPINION ISSUED MAY 23, 1986

FARMERS INSURANCE GROUP COMPANY, AS SUBROGEE OF MARGARET GERRITSEN AND ADRIAN GERRITSEN
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-216)

Margaret Gerritsen appeared for the claimant.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

Claimant's subrogor, at about 4:00 p.m., on April 4, 1985, was driving her 200SX Datsun on Oakwood Road in the vicinity of the South Hills Bank. She was accompanied by Phyllis Turley. It was raining and the wind was blowing. A tree limb hit the top of her vehicle. The vehicle sustained damage in the amount of $231.84.

The record reflects that the vehicle involved is titled in both claimant's subrogor's name and that of her son, Adrian Gerritsen. The Court amended the style of the claim to include the insurer, Farmers Insurance Group, as subrogee, and Adrian Gerritsen.

Claimant's subrogor testified that the tree was located on respondent's right of way. She had not driven on that route prior to this accident. She alleged that the tree from which the limb fell was a dead tree. However, no evidence was introduced to support her allegations. Phyllis Turley confirmed claimant's subrogor's testimony.

The evidence is convincing that the storm, consisting of high winds and rain, blew severely enough to break the tree limbs. However, the accident was not the result of any negligence on the part of respondent. Shortridge v. Dept. of Highways, 11 Ct.Cl. 45 (1975). Accordingly, this claim must be denied.

Claim disallowed.

OPINION ISSUED MAY 23, 1986

SHELBY B. MELVIN
VS.
BOARD OF REGENTS

(CC-82-308)

Randall L. Veneri, Attorney at Law, for claimant.
Robert D. Pollitt and John Polak, Assistant Attorneys General, for respondent.

GRACEY, JUDGE:

Claimant, in her capacity as Chairman of the Business Education Department at Watoga High School, was attending a competition for Future Business Leaders of America on April 24, 1982. She had accompanied a number of students to West Virginia Tech in Montgomery. The competition was a single-day function, and claimant was compensated for her attendance in her capacity as a grader for a Shorthand II Competition. According to the testimony of claimant, it was a sunny day and normal sediment only covered the sidewalk. At approximately 1:00 p.m., claimant, accompanied by four students, travelled upon a sidewalk on campus from the student center where they had eaten lunch to another area of the campus. Sandra Moye was walking with Lisa Corner approximately five feet in front of claimant. Gaylon Akers was walking behind those two, and Michelle Akel was walking across from claimant on the lower side of the sidewalk. Claimant fell and fractured her left ankle. Claimant alleges that this section of the walkway was improperly maintained and is therefore unsafe. She seeks damages in the amount of $100,000.00 for pain and suffering.

The testimony revealed that claimant incurred medical expenses as a result of this accident. She did not have to expend any money for these bills. Claimant's insurance carrier covered her medical costs. Worker's Compensation reimbursed claimant's insurance carrier. In addition, claimant received temporary total disability benefits and a 2% permanent partial disability award from Worker's Compensation.

Claimant testified that the two sections of sidewalk were of uneven levels, and this fact caused her fall. There was a space between two sections of sidewalk. Claimant was walking on the right side or higher level of the sidewalk parallel to the space between the two sections of the sidewalk. It was estimated that one section of the sidewalk was approximately one inch higher than the other section.

The Court finds that respondent failed to maintain the sidewalk in a proper manner. However, it appears that the claimant herself was negligent in failing to maintain an adequate lookout upon the sidewalk where she was walking. Under the doctrine of comparative negligence, the Court is of the opinion that the negligence of the claimant was equal to or greater than the respondent's and disallows claim.

Claim disallowed.

OPINION ISSUED JULY 3, 1986

ROBERT B. MORRISON
VS.
DEPARTMENT OF MOTOR VEHICLES

(CC-85-206)

Claimant appeared in person.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant Robert B. Morrison alleges that the sum of $2,989.50, plus interest, is owing to him with reference to his employment by the respondent, the Department of Motor Vehicles. On November 1, 1980, then Commissioner Joseph Condry had advised him of a salary increase of $43.00 per month. The salary increase was processed and reflected in the payroll and in a check issued for the November 1 to November 15, 1980 pay period. However, the salary increase had been, in the meantime, disapproved. The check was not given to the claimant but was redeposited. A supplementary payroll was prepared for the period, and a payroll check given to the claimant for a salary which did not include the salary increase. Nor did his subsequent salary checks include any increase until salary increases of July 1, 1981 and July 1, 1984. His employment by respondent was terminated, by his resignation, effective October 16, 1984.

Claimant contends that the salary increase in question was not properly taken away from him; that he is entitled to the additional $43.00 per month for the months of his continued employment from November 1, 1980, plus interest.

The evidence disclosed that on or about November 12, 1980, Virginia L. Roberts replaced Joseph Condry as Commissioner of the Department of Motor Vehicles. She testified that, upon assuming office, she had found on her desk an envelope containing forms which indicated a disapproval, by the Department of Finance and Administration, of personnel actions pertaining to three employees, one being the salary increase of the claimant; that she then caused the supplementary payroll to be prepared; that she was not the person who disapproved the salary increase of the claimant.

Lowell D. Basford, acting director of the West Virginia Civil Service System, testified that in November of 1980 the claimant was an exempt employee, not covered under the civil service regulations, simply serving at the will and pleasure of the Commissioner since claimant's rehiring and reclassification in 1977.

It appears to the Court that the issue, as to the manner in which the claimant was denied the salary increase, is moot. At the conclusion of claimant's evidence, the respondent moved the Court to dismiss the action upon several grounds, one of which was to the effect that a two-year statute of limitations barred the action. Claimant's Notice of Claim was filed May 22, 1985, about four and a half years after November 16, 1980, the date when the wrong, if in fact there was a wrong, was committed. The two-year statute of limitations, stated in West Virginia Code 55-2-12, is applicable. (Shillingburg v. Railroad Maintenance

Authority, CC-85-104, Order entered November 15, 1985) This Court is prohibited from taking jurisdiction of any claim barred by such a limitation (W.Va. Code 14-2-21). Accordingly, respondent's motion to dismiss is sustained.

This claim is dismissed.

OPINION ISSUED JULY 3, 1986

DOMINIC & MARY L. STAFFILENO
VS.
DEPARTMENT OF HIGHWAYS

(CC-83-212)

David N. Dittmar and James T. Steele, Attorneys at Law, for claimants.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On August 30, 1982, at about 2:20 p.m., claimant Mary L. Staffileno, age 20, was operating a 1978 Chevette titled in the name of her father, claimant Dominic Staffileno, in a northerly direction on State Route 88, from West Liberty to Bethany, in Brooke County, on her way home to Wellsburg. She was then a commuting student at West Liberty State College and held part-time employment as a clerk in a dress shop at Steubenville, Ohio. The weather was clear and dry. The highway was two-lane asphalt with many hills and curves. Descending a hill, and after rounding a sharp curve to her left, and approaching a right turn into a one-lane bridge, at a speed she estimated at 20 to 25 miles per hour, she encountered gravel on the highway as she was passing an oncoming vehicle. Her further account of the incident was that her car skidded on the gravel, went completely off the paved surface to the berm on her right, then back across the highway and nosed into a ditch and embankment on her left. She suffered no serious or permanent injury, suffering only headaches and pain in her right arm for several weeks. The automobile, recently purchased for $2,500.00, was damaged beyond economical repair. Claimant Dominic Staffileno seeks an award of $3,000.00. Claimant Mary L. Staffileno seeks an award of $2,000.00. Claimants alleged that respondent Department of Highways was responsible for the presence of the gravel on the highway and failed to warn the claimants, thus causing the accident.

The evidence showed that a crew of respondent was cleaning the ditch on the right side of the highway on that day; that the work had been done, in the area where the gravel was, earlier that same day. The work is known as "pulling ditches". Accumulations of material in drainage ditches is pulled from the ditch, by a grader, to the berm or highway. It is then scooped up by an endloader and hauled away in trucks. The amount of residue, or debris, left on the highway surface, is ordinarily minimal, and may vary with the condition of the highway surface, skill of the endloader operator, etc.

From the evidence, it appears that the material on the highway was, in fact, placed there by respondent's ditch cleaning operation. The evidence was conflicting as to the amount of debris on the highway. Brooke County Deputy Sheriff Michael H. Allman, who made the accident investigation, recalled a shallow cut in the highway surface and described the debris as consisting of gravel and dirt half an inch to an inch deep over a distance of ten or twelve feet. John J. Eckersberg, another Deputy Sheriff who came to the accident scene, observed it with his fellow officer, and recalled, 'As I remember the gravel patch, I don't believe there was any more than - it wasn't any more than two and a half feet in diameter, roughly.' James Lawrence McCune, a Safety Inspector for respondent, coincidentally arrived at the scene shortly after the accident. He testified that 'There was a light -- some light debris on the northbound lane where some work had been performed, but it was not uncommon for that type of operation... It was just a real light, sparse material lying on the road surface."

Claimant Mary L. Staffileno testified that, before she encountered the debris, where her accident occurred, she had passed no flagman or warning sign. Generally, the function of flagmen, in such a ditch cleaning operation, is to help motorists safely pass the immediate work site where equipment in use is denying normal use of a lane of the highway. The flagmen are, therefore, just ahead of, and just behind, the equipment. At the time of the accident, the ditch-cleaning operation had progressed northerly, across the bridge, and a substantial distance out of sight of the accident scene. Signs are used to warn of a construction area being entered. Asked whether he had observed what signs were present, Safety Inspector McCune testified that to the best of his recollection there was a Men Working sign, with a Flagman Ahead sign following that approximately three to five hundred feet. However, no witness testified that any such sign was placed where it could have been seen or passed by claimant Mary L. Staffileno before encountering the debris on the highway. Respondent's flagman, William Gillies, south of the working equipment, testified that the signs, for northbound traffic, were five to six hundred feet behind him. Signs are moved, as the flagmen move, with the progress of the work.

The Court is not satisfied that, by a preponderance of the evidence, the respondent is guilty of negligence. The quantity of debris on the highway, from the ditch-cleaning operation, does not appear to have been excessive, nor such as to have imposed a duty upon the respondent to warn motorists of its presence. Geraldine May McCarthy, Admin. of the Estate of Robert Eugene McCarthy v. Dept. of Highways, 12 Ct.Cl. 139 (1978).

Claim disallowed.

OPINION ISSUED JULY 10, 1986

JOSEPH MULLINS and DORA MULLINS
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-209)

R. Lee Booten, II, Attorney at Law, for claimants.
Andrew Lopez, Attorney at Law, for respondent.

LYONS, JUDGE:

This claim arises out of an automobile accident which took place on April 9, 1984, on U.S. Route 52 near Taylorsville, Mingo County. Claimant Joseph Mullins was injured in the accident and seeks damages for his injury and the resultant medical expenses. Claimant Dora Mullins seeks damages for the loss of her Volkswagen automobile and for loss of consortium.

It is alleged that respondent failed to repair two potholes and failed to properly maintain water drainage at the scene of the accident. The accident occurred on April 9, 1984 between 9:00 and 10:00 p.m. Claimant was driving his wife's Volkswagen automobile in a northerly direction on route to meet his wife in Taylorsville. Claimant was alone in the vehicle at the time. Claimant's testimony revealed that it was dark and raining steadily on the evening of the accident. Claimant approached an S-shaped curve and swerved to the left to avoid a second pothole. The front tire of the automobile dropped into the hole. The automobile's tire blew out. After claimant's automobile struck the second pothole, he did not have the automobile under control. The automobile proceeded into an accumulation of water on the road and then veered off the road and overturned into a ditch.

Claimant crawled up to the road surface and was picked up by a friend, Robert Justice, who transported claimant to his mother's house. Claimant refused to go to the hospital that evening, but his mother took him to Logan General Hospital the next day. Claimant was then transported by ambulance to Charleston Area Medical Center where he was treated for a broken neck. Claimant remained at that facility until April 21, 1984, when he was released.

The parties submitted the deposition of Dr. Tony C. Majestro taken February 4, 1986. Dr. Majestro stated the following prognosis: "Healing of this fracture is usually satisfactory. He should be able to return to his original employment after complete healing of the fracture."

There is conflicting evidence in the record concerning the size of the potholes. The claimant described the first pothole as being 10 to 12 inches wide and approximately 6 to 8 inches deep. He indicated that the second pothole was approximately 31/2 feet in length, 16 to 18 inches in width, and 10 to 12 inches in depth.

Trooper B. R. Chafin, who investigated the accident, confirmed the fact that there was a large section of water on the road at the time. When queried by the Court, Trooper Chafin stated that he did not observe any particularly large potholes at the scene.

Claimants' witness, Mrs. Gladys Burke, testified that on December 7, 1983, she reported water "had went across the road..." at the "Andy Farley" curve which she described as an "S' curve. She also reported water on the road in two other places at the same time. She telephoned the "State road garage' and spoke to a woman who identified herself as "Tina."

It is the opinion of the Court that the record establishes that respondent was negligent in failing to maintain the drainage of water onto the road at this site. However, the record establishes that the claimant

was familiar with the existence of potholes in the road and with the propensity of water to accumulate on the surface of the road at this particular location. Under the doctrine of comparative negligence, the negligence of the claimant in traveling the road at night, in the rain, and known to him to be in disrepair, was equal to or greater than the negligence of the respondent in its failure to maintain the stretch of water. Hatfield v. Dept. of Highways, 14 Ct.Cl. 220 (1982). Accordingly, the claim is disallowed.

Claim disallowed.

OPINION ISSUED JULY 29, 1986

AETNA CASUALTY & SURETY, AS SUBROGEE OF ROBERT W. DAVIS, AND ROBERT W. DAVIS, INDIVIDUALLY
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-215)

Robert W. Davis, subrogor, appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant's subrogor testified that he was driving his vehicle, a 1980 Chevrolet Monza, on Clear Fork Road, from Beckley to Whitesville, West Virginia, at approximately 7:00 p.m., on October 24, 1984, when the vehicle hit a ditch. It was dark at the time, and he was travelling at 30-40 miles per hour.

He estimated the ditch to be between eight and ten inches deep and two feet wide. Claimant had travelled the same route several days earlier and had not observed the ditch.

The lower left control arm, a shock absorber, and a wire wheel cover were replaced at a cost of $232.94. Robert Davis paid $100.00, the amount of his deductible, and the subrogee insurance company reimbursed him for $132.94.

Claimant's subrogor further testified that he had observed respondent's equipment at this location. There was construction work in the area. There were neither warning signs nor flagmen present near the ditch.

The Court finds that the respondent was negligent in failing to properly maintain the construction area. Shirley R. Adams and Billie Adams v. Dept. of Highways, 14 Ct.Cl. 279 (1982). An award of $100.00 to claimant's subrogor and $132.94 to subrogee insurance company is accordingly made.

Award of $100.00 to Robert W. Davis.

Award of $132.94 to Aetna Casualty & Surety, as subrogee of Robert W. Davis.

OPINION ISSUED JULY 29, 1986

LARRY FARLEY AND LINDA FARLEY
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-271)

Claimants appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally styled in the name of Larry Farley, but when testimony indicated that the vehicle, a 1985 Datsun Maxima, was titled in the name of Larry Farley and Linda Farley, the Court, on its own motion, amended the style to include Linda Farley as an additional claimant.

Claimant Linda Farley testified that she was travelling north on Route 85, in the vicinity of the Well's plant, when her vehicle hit a pothole. The incident occurred on April 5, 1985, at approximately 6:50 a.m. Claimant Larry Farley testified it occurred approximately 3/10 of a mile north of a railroad crossing, at Wharton, Boone County, West Virginia. The weather conditions that day were good. Another vehicle, travelling south, cut over and crowded claimant's vehicle. For that reason, she went to the right of the pothole to avoid it. The left tire of her vehicle struck the pothole. Claimant Linda Farley testified that she was aware that the pothole was there. She described it as being, " ... about the whole lane of traffic. A tire and aluminum rim were replaced for a total cost of $346.86.

The State is neither an insurer nor a guarantor of the safety of motorists on the highways. Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for the damages incurred, proof of notice, either actual or constructive, of the defect in question must be shown. As there was no such evidence presented, the claim must be denied.

Claim disallowed.

OPINION ISSUED JULY 29, 1986

NADINE J. MATTHEW
VS.

DEPARTMENT OF HIGHWAYS

(CC-85-172)

Claimant's husband, Virgil Matthew, appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally styled in the names of Virgil Matthew and Nadine J. Matthew, but when the testimony indicated that the vehicle, a 1972 Ford LTD, was titled solely in the name of Nadine J. Matthew, the Court, on its own motion, amended the style to reflect that fact.

The claimant's husband, Virgil Matthew, testified that while operating his wife's vehicle on Route 5 at Prenter Hollow, Boone County, West Virginia, the vehicle struck a pothole. Claimant was a passenger in the vehicle at the time. The incident occurred on April 14, 1985, at approximately 7:00 p.m., or after dark. The claimant's husband was travelling 29 to 30 miles per hour and had the vehicle's lights on low beam. As a result of the incident, a tire and hubcap were damaged in the amount of $161.13.

Claimant's husband testified that he was familiar with that section of Route 5 and that he had observed the pothole previous to the incident. He also testified that he had notified respondent's office in Boone County, by telephone, a month prior to this incident. He could not identify the person who took his complaint. He complained about the general condition of Route 5 but not about this specific pothole. Although the respondent may have had actual notice of the poor condition of this road, the claimant's husband was familiar with the route and should have taken precautions necessary to avoid striking the hole in the road.

It is the opinion of the Court that . although the respondent may have been negligent, the negligence of claimant's husband was equal to or greater than that of the respondent. The Court therefore denies the claim.

Claim disallowed.

OPINION ISSUED JULY 29, 1986

CLETON E. MYERS
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-52)

Claimant appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

This claim came on for hearing on October 4, 1985, upon the facts and respondent's Motion to Dismiss.

The basis of the Motion to Dismiss is that the claim is barred by the statute of limitations. Claimant alleges that on August 19, 1981, as a mechanic employee of respondent, he had stored his work tools in respondent's shop, his place of employment in Thomas, Tucker County, in a locked tool box in a cabinet. The shop was burglarized and his tools and respondent's dump truck were stolen. Claimant submitted an evidentiary list for the lost tools. The cost of the tools offset by claimant's insurance recovery amounts to $1,441.24. Claimant originally filed the claim in the amount of $1,700.00.

Respondent moved to dismiss the claim as it is barred by the applicable statute of limitations. Under W.Va. Code 55-2-12, this claim must have been brought within two years from the date of the injury. Claimant filed this claim on February 20, 1985.

The Court, under the provisions of W.Va.Code 14-2-21, does not have jurisdiction over a claim which is not filed within the time specified by the applicable statute of limitations. Frisco vs. Department of Natural Resources, 13 Ct.Cl. 287 (1980). The claimant's failure to file this claim within a two-year period after April 19, 1981 requires this Court to dismiss the claim.

The respondent's motion to dismiss is sustained.

Claim dismissed.

OPINION ISSUED JULY 29, 1986
DENNIS W. SUTTON AND LINDA A. SUTTON
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-268)

Claimant Linda A. Sutton appeared in person,
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally styled in the name of Linda A. Sutton, but when the testimony indicated that the vehicle, a 1982 Dodge Aries, was titled in the name of Linda A. Sutton and Dennis W. Sutton, the Court,

on its own motion, amended the style to include Dennis W. Sutton as an additional claimant.

Claimant Linda A. Sutton testified that she was operating her vehicle on I-64 between the South Charleston and Kanawha Turnpike Exits, Kanawha County, West Virginia, when the vehicle struck a hole in the pavement. The incident occurred on March 27, 1985, at approximately 2:00 p.m.. The weather was clear. The Interstate is three lanes wide at the location of the incident. Linda A. Sutton was travelling west in the center lane of the Interstate when her vehicle struck a hole located in the center lane. She testified that she had travelled the road daily, but had not observed the pothole prior to this incident. To the best of her knowledge, she believed the pothole to have been present less than 24 hours. As a result of striking the hole, it was necessary to replace a tire and to have the vehicle realigned for a total cost of $162.60.

Ray Harmon, respondent's employee, testified that he was involved in the maintenance of the section of I-64 which is the subject of this claim. He testified that he thought he repaired the hole before it was struck by claimant Linda Sutton. However, Mr. Harmon was not certain of the date on which the repairs were made.

Mr. Herbert C. Boggs, Interstate Supervisor, District I, for respondent, testified that on March 27, 1985 he received a call informing him that there was "a blow up in the concrete" at the site of this incident. He then directed a crew to repair this section of the Interstate. Mr. Boggs testified that the notification to him was received after claimant Linda Sutton's incident.

The evidence in this record indicates that the defective condition of the pavement appeared suddenly and that the respondent promptly moved to repair the defect as soon as it became aware of the problem. Moore v. Dept. of Highways, CC-85-153 (February 19, 1986). Banhart v. Dept. of Highways, 12 Ct.Cl. 236 (1979). Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947), holds that the State is neither an insurer nor a guarantor of the safety of the motorists on its highways. The Court is of the opinion that negligence on the part of the respondent has not been established, and therefore, the Court denies the claim.

Claim disallowed.

OPINION ISSUED AUGUST 18, 1986

SUSAN MANN
VS.
DEPARTMENT OF HUMAN SERVICES

(CC-86-36)

Claimant appeared in person.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant Susan Mann contacted respondent agency in January, 1985, to obtain information about a program of respondent regarding delinquent child support payments. Claimant's divorce was finalized in February, 1983, in Taylor County Circuit Court. By the terms of the divorce, claimant's former husband was required to pay claimant $50.00 a month in child support. Since the divorce, he has paid claimant $330.00.

An employee of respondent, now retired, Mrs. Campolio, suggested to claimant in January, 1985 that claimant attach her former husband's federal income tax refund. At the direction of Mrs. Campolio, claimant supplied respondent agency with names and addresses of her husband's possible places of employment. She remained in contact with Mrs. Campolio as late as October 4, 1985. On that date, Mrs. Campolio advised claimant that she lacked the forms necessary to complete the federal income tax wage withholding. In the beginning of November, 1985, when claimant again contacted the respondent agency's office, she was advised by another employee that the deadline for filing the necessary form had passed. As a result of the misinformation supplied claimant by respondent's employee, claimant seeks $865.00 which is the amount her husband was required to pay in child support as of December 31, 1985.

Claimant testified that she was unable to provide respondent agency with any statement of fact supporting her former husband's entitlement to an income tax refund for the year 1985. She further testified that she was unaware whether or not her husband received an income tax refund in 1985 or 'whether he had to pay income tax for that year.

Mrs. Campolio testified that the statements of claimant were correct. She further testified that she could never locate a place of employment for claimant's former husband. She confirmed that if the respondent agency was unable to locate an individual, the agency could not provide the service in question. When queried by the Court, she stated that she never had sufficient information to file the necessary forms in the case of claimant. The possible places of employment which claimant supplied were insufficient.

On the basis of this record, the Court finds that to permit recovery in this instance would require speculation on its part. The record lacks a showing that, had the necessary forms been filed before the appropriate deadline, claimant would have received funds. The Court must, therefore, deny the claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 25, 1986

J. W. BAUER
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-358)

Claimant appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

Claimant was operating his 1981 Chevrolet automobile in a westerly direction on February 1, 1985, between 8:00 and 9:00 p.m. on MacCorkle Avenue at 58th Street, Kanawha City, when the automobile struck the concrete curb of the median. Claimant originally filed the claim with the respondent being the West Virginia Court of Claims. The Court, on its own motion, amended the style of the claim designating Department of Highways as respondent. Claimant was alone in his vehicle and proceeding west when this incident occurred. The impact with the curb resulted in damage to the tire of the vehicle in the amount of $54.38.

Claimant testified that, at the time of the incident, it was dark and the pavement was dry. He was proceeding at approximately 40 to 45 miles an hour to Kanawha City. He stated that, at this point, there is a turn lane. He inadvertently drove the vehicle into the turn lane and proceeded to drive into the curb of the median strip which was beyond the intersection. Claimant alleges negligence on the part of the respondent in failing to taper off this section of the curb of the median which has deteriorated. The corresponding curb on the alternate side of the median has been tapered off. The section of the curb which claimant's vehicle struck is missing a big chunk of concrete.

The record discloses that claimant was proceeding in the wrong lane of traffic and struck the curb of the median; and that the accident was not caused by the negligence of the respondent. Accordingly, the Court is of the opinion to, and does, disallow the claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 25, 1986

ARTHUR L. CORNETTE, JR.
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-367)

Claimant appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks $483.02 for damages to his automobile, a 1976 Honda Civic Wagon. On February 11, 1985, claimant had parked his vehicle on the third level of a multilevel municipal parking lot in Beckley. The vehicles are parked under a cement structural building. There is no artificial lighting. It was damp, moist, and cold, and there was ice present on February 11, 1985.

Claimant testified that his vehicle was between the third and second levels of the structure and proceeding down toward the exit when the vehicle slid on ice and collided with another vehicle. The other vehicle was proceeding from the lower entrance level to the upper levels. Claimant's vehicle sustained damages to its left fender, left part of the bumper, and part of the frame. Claimant was travelling at approximately 12 miles per hour and was not utilizing the vehicle's headlights when this incident occurred.

The incident occurred inside the municipal parking structure maintained by the City of Beckley. A 'municipality' is defined in W.Va. Code 8-1-2(a)(1) as including any Class I, Class II and Class III city and any Class IV town or village. The city of Beckley is included in this classification. The definition of "State agency" specifically excludes "municipalities." W.Va. Code 14-2-3. This Court lacks jurisdiction over this claim, and therefore disallows the claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 25, 1986

JAMES A. COUGHLIN, JR.
(CC-85-138)
AND ALVIN E. GARDNER
(CC-85-141)
VS.
DEPARTMENT OF HIGHWAYS

Claimants appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claims CC-85-138 and CC-85-141, filed by James A. Coughlin, Jr. and Alvin E. Gardner, were consolidated for hearing.

Each of the claimants were employed by respondent as provisional employees. As provisional employees, the claimants accumulated annual leave time for each month of employment. Their employment was terminated in 1985. At the time of their termination, they were informed that they would receive no compensation for the annual leave time which they had accrued during their employment. Claimant Coughlin seeks $170.47, and claimant Gardner seeks $87.67.

Claimants testified that respondent's district office staff completed the paperwork and calculated the amount of annual leave time for these claims. Claimant Coughlin testified that, during his provisional employment, he took some days off. The claimants agreed that their positions were classified within Civil Service. The claimants testified that they were not furnished copies of the Civil Service regulations by respondent during the period of time which is in dispute.

Section 16.03 of the Civil Service Rules and Regulations provides the following:

(d)Coverage

2. Annual leave shall be accorded

provisional, intermittent, irregular part-time and temporary (appointed from the register) employees. Such leave must be taken prior to the expiration of the period of appointment, unless immediately followed by an appointment from the register or be forfeited.

The Civil Service Rules and Regulations clearly state the policy on the issue of annual leave time for provisional employees, which policy applies to the claimants herein. For this reason, the Court is of the opinion to, and does, disallow these claims.

Claims disallowed.

OPINION ISSUED SEPTEMBER 25, 1986

HARLEY NANCE AND GENEVIEVE NANCE
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-184)

Claimant Harley Nance appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

In January or February of 1985, claimant Harley Nance was operating his 1978 Ford Fairmont on the 6th Street Bridge in Huntington, Cabell County. He was travelling from West Virginia to Ohio when his vehicle struck a hole in the bridge. Claimant Harley Nance originally filed this claim in his own name; however, the record reflects the vehicle is titled in both his name and that of his wife, Genevieve Nance. The Court, on its own motion, amended the style of the claim to include Genevieve Nance as a party claimant. Claimant stated that when he was seated in his vehicle, he was unable to see down the length of the bridge. His vehicle struck the hole in the bridge with the left front wheel. The control arm of the vehicle required replacement, and its cost, in addition to the cost of the alignment of the vehicle, amounted to $175.00.

The claimant Harley Nance was alone in the vehicle at the time of this incident. He testified that before his vehicle struck the hole, he had travelled this same route eight or ten times a week. He stated that he probably had noticed that hole before. No repairs were done on the vehicle as it was traded in for another vehicle. In the opinion of the claimant Harley Nance, the cost to repair the vehicle is approximately $175.00.

It is the opinion of the Court that, although the respondent may have been negligent, the negligence of the claimant Harley Nance was equal to or greater than that of the respondent. Claimant Nance frequently travelled this route prior to this incident. He should have been aware

of the general state of disrepair of the bridge and taken the necessary precautions. For these reasons, the Court denies the claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 25, 1986

THOMAS TREADWAY
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-11)

Claimant appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On December 30, 1985, claimant was operating a 1976 Chevrolet pickup truck, owned by him, on Witcher Creek Road, Kanawha County. The pickup truck struck a patch of ice on the roadway and spun in the road. Claimant lost control of the vehicle and it went into a ditch. Damage to the vehicle resulted for which claimant is seeking $433.00.

Claimant testified that, on December 30, 1985, the weather was clear and the roads were dry, except for the spot where this incident occurred. He said his truck struck the ice between 10:30 and 11:00 a.m. Claimant was travelling from his home to pick up a load of junk. He stated that the truck hit the ice, went into a spin, hit the bank, and went into a ditch on the left side of the road. The roadway was shaded which prevented the sun from melting the ice. The highway in question is a two-lane, blacktop highway, but it is not marked off. It is wide enough for two cars to pass. The damage to the vehicle required the replacement of four tie rods, an idle arm, a center link, and two tires. Claimant stated that he made a complaint to respondent on December 23 concerning this area. On that date, the road was fully covered with ice.

Roads in this State, in the winter months, frequently accumulate frost. An isolated patch of ice on a highway is generally insufficient to establish negligence on the part of respondent. Cole vs. Dept. of Highways, 14 Ct.Cl. 350 (1983). Although claimant did notify the respondent concerning this road, the condition of the road on the date the notice was given differed from the condition of the road on the date of this incident. On the date of this incident, in some places the road was dry, and in other places it was icy. It is well established that the State neither insures nor guarantees the safety of travelers on its highways.

Adkins vs. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947). For

these reasons, the Court is of the opinion to, and does, disallow this claim.

Claim disallowed.

OPINION ISSUED OCTOBER 1, 1986

BRENT BOGGS
VS.
DEPARTMENT OF CORRECTIONS

(CC-85-343)

Claimant appeared in person.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant was employed by Huttonsville Correctional Center, a facility of respondent, from November 16, 1983 through April 30, 1985 as a Correctional Officer I. As a requirement of his position, claimant was mandated to report 15 minutes early before each shift that he worked. As this requirement was above his 40-hour-per-week responsibility, claimant seeks $50.00, which is his estimation of the amount of compensation due him for the overtime.

Mr. Paul Gabel, the business manager at Huttonsville, testified that claimant had been an employee of the Huttonsville Correctional Center. Mr. Gabel agreed that a directive from George D. Hampton, III, Assistant Commissioner of Budget and Administration, was issued on June 26, 1985. It required Mr. Gabel to compute the overtime of employees for a period from July 1, 1984 through June 30, 1985. However, claimant was not an employee of Huttonsville on June 26, 1985. Mr. Gabel supplied the Court with copies of the directive, a Civil Service Commission ruling on a case similar to claimant's situation, a statement from the Department of Labor indicating that under the Minimum Wage and Maximum Hours Standard Act, "... an employee working over 40 hours per week must be compensated at ten(10) minutes per shift at time and one half his regular rate of pay when overtime violations occurred,' and time cards for claimant.

Claimant has proved through the various records presented that he is entitled to overtime compensation in accordance with the Civil Service regulations. For that reason, the Court makes an award of $50.00 to claimant.

Award of $50.00.

OPINION ISSUED OCTOBER 1, 1986

DELILAH LYNN CHAPMAN
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-310)

W. Jack Stevens, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

On March 7, 1984, the claimant, accompanied by her son, Chad, was operating a Ford pickup truck, owned by her husband, and was travelling southbound toward Logan, on Route 10, when the vehicle struck a hole in the road. Claimant seeks an award of $25,000.00 for personal injury and medical expenses.

Claimant testified that she was operating her vehicle and following a Columbia Gas truck which turned off of the main road. She stopped her vehicle when the truck slowed to make the turn. Claimant then proceeded approximately two tenths of a mile further when her truck struck a hole in the road. Claimant's vehicle was between Branchland and Midkiff, Lincoln County. She was travelling at a rate of approximately 45 miles per hour. It was very cold, and there was ice present. Claimant estimated the hole to be 12 feet long, 5 feet wide, and between 8 1/2 - 9 inches deep. She stated that at the time of this incident, she had been travelling this route every day and had observed the hole. It had been in existence for a couple of months.

Kyle McComas, who lives within 100 yards of the hole testified that his father erected a sign to warn people of this hole. Although Mr. McComas could not supply the Court with a specific date, he felt that the sign went up in January or February, 1984. Mr. McComas' father lives "straight across from the hole." The sign was parallel with the highway and directly across from claimant's vehicle in the northbound lane. This witness testified that the hole was repaired on several occasions by respondent in the months of January, February, and March, 1984. Mr. McComas' father removed the sign when the hole was fixed by respondent, "but not always." On the day of claimant's accident, the sign was not in place.

Deward Adkins, Assistant County Maintenance Superintendent with respondent, testified that he was familiar with the hole in question. He stated that, prior to the date of this incident, the hole had been patched with "cold mix patch." He estimated that repairs were done on this hole "three or four times" between January 1, 1984 and March 7, 1984.

James Roberts, Maintenance Assistant, District 2, for respondent, testified that "quite a bit of patching"

with both hot and cold mix was performed on the holes on Route 10 in January, February, and March, 1984. The length of Route 10, as it proceeds through Lincoln County, is 30 miles. He indicated that his records could not show whether a particular hole on Route 10 had been repaired. He checked the

records of District 2 and learned that no complaints had been made around the particular time of this accident.

The evidence in the record reveals that respondent performed maintenance on the holes in this area of Route 10, Lincoln County. Respondent repaired road defects as it became aware of them. Moore v. Dept. of Highways, CC-85-153 (1986). In the winter months of 1984, patching of the holes was done not once, but several times. Respondent lacked notice that this particular hole on Route 10 required maintenance at the time of this incident. The Court is of the opinion that negligence on the part of the respondent has not been established, and, therefore, the Court denies the claim.

Claim disallowed.

OPINION ISSUED OCTOBER 1, 1986

FONSO W. DOTSON AND SARAH E. DOTSON
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-382)

Claimant appeared in person
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On May 24, 1985, claimant Fonso Dotson was driving his vehicle in the vicinity of Chauncey, approaching the Upper Cement Bridge at Switzer, West Virginia, when his vehicle hit a hole. The vehicle sustained damage to a tire and two tie rod ends in the amount of $185.75. Mr. Dotson originally filed this claim solely in his own name. However, the record reflects that the vehicle is titled in both his name and that of his wife, Sarah E. Dotson. The Court then, upon Mr. Dotson's agreement, amended the style of the claim to include Sarah E. Dotson as a party claimant.

Claimant was travelling from Logan to his place of employment, a coal company in Chauncey. He was alone in his vehicle, and was travelling at approximately 45 miles per hour. The weather was clear. The bridge in question is a two-lane cement bridge. Mr. Dotson had travelled this route every day going to and from work and had observed the hole prior to this incident. The hole in the bridge had been covered with a steel plate approximately a week before this incident. On May 24, the steel plate was no longer covering the hole, and the hole was exposed.

Claimants' vehicle struck the hole with the two right tires. The vehicle required the installation of two tie rods, the replacement of a tire, balancing and alignment.

The State has been found negligent for failing to discover and correct a hazard on a bridge which a casual inspection would have revealed. Randall v. Department of Highways, 8 Ct.Cl. 147 (1970). More recently the Court found the State negligent for failing to warn the travelling public of a hazardous condition on an interstate bridge. Smith v. Department of Highways, CC-85-320 (1986).

From the record in this case, the Court is of the opinion that the respondent was negligent in failing to properly maintain the bridge. Although the claimant was aware of the existence of the hole, he relied upon the placement of the steel plate to protect his vehicle from the hole beneath the plate. Therefore, the Court makes an award to the claimant in the amount of $185.75.

Award of $185.75.

OPINION ISSUED OCTOBER 1, 1986

LEO DUNN AND EDITH DUNN
VS.
DEPARTMENT OF HIGHWAYS

(CC-82-257)

Henry Wood, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

On October 7, 1980, a fence along the lower portion of claimants' property was removed by respondent workers pursuant to a Notice of Removal of an Obstruction issued by respondent. The claimants had acquired two parcels of land on the bank of Beech Fork in Union District, Kanawha County, from Clayton and Lona Faye Rhodes by a deed dated March 1, 1972. The first parcel of land is the subject of this action. The Rhodes had acquired the property on March 28, 1946, from Charleston National Bank, and the bank had acquired the property in 1932 from another party.

The Notice of Removal of an Obstruction directed to the claimants stated the following:

"The obstruction is more specifically described as a fence you have placed across State local Service Route 5/3, Pring Drive, in Kanawha County."

The claimants allege that the fence was within the boundary line of their property; that the removal of the fence was within the boundary line of their property; that eh removal of the fence by respondent was an erroneous action, and constituted trespass. The claimants seek $6,900.00.

Michael Mayes, a registered professional engineer, testified that he performed a survey of the property in October 1984. He stated that his survey did not reveal any county road across claimants' property. He came to this conclusion after having reviewed the tax map, right-of-way maps, performing field examinations, and plotting the courses.

He further testified that his survey differed in nine degrees from the calls in the deed to the claimants, the Charleston National Bank deed and the prior owner's deed (Littlepage). It also differed from the adjacent land owners' deed (the Fertigs). Mr. Mayes testified that the four corners upon which he based his survey were those pointed out to him by Mrs. Dunn.

Mr. Curtis Hamilton Tilton has owned property on Pring Drive since 1951. He testified that the county road had been used "off and on" up until 1984. He stated that in July, 1980, the Dunns erected the fence. He called the fence contractor, Sears and Roebuck, to inform them that they were putting a fence across a State road. He also notified respondent.

Lawrence E. Kitts, District Right of Way agent for District One, in the summer of 1980, examined the 1933 and 1936 maps of respondent, and found evidence of an old county roadway in the vicinity of claimants' property. He determined where the county road was 'by the travel way" or, as he explained, through observation. He checked the records of the respondent to see if this road had ever been abandoned. He did not find any commissioners' orders abandoning this road.

Mr. James Robert Campbell, District Engineer in District One, testified that he issued the obstruction notice sent to the Dunns prior to October 7, 1980. He explained that in 1933 the road in question was designated as 5/3. During the 1940's, the respondent inadvertently picked up Crystal Drive as 5/3 and left the actual location of 5/3 adjacent to claimants' property off the map system of the roads. In 1952, the respondent recognized its error and again picked up Pring Drive as 5/3, but in so doing, the respondent left off the segment adjacent to the back of the Dunn property toward the road then designated as Route 5. At the present time, the road does not have a number assigned to it. However, before issuing the obstruction notice, Mr. Campbell had his staff confirm that the road had not been abandoned by respondent.

The record does not establish that respondent was guilty of trespassing. Although there is some conflicting evidence regarding whether the county road in question has been currently maintained by respondent, there is sufficient evidence to support the fact that claimants' fence was obstructing a public road. Respondent followed the required procedure of notice to claimants before removing the fence. Accordingly, the claim is disallowed.

Claim disallowed.

OPINION ISSUED OCTOBER 1, 1986

CHARLES G. PLANTZ
VS.
DEPARTMENT OF CORRECTIONS

(CC-84-271)
and
(CC-84-326)

Claimant appeared in person.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

These two claims, alleging loss of property, were consolidated and came on for hearing on January 15, 1986 upon respondent's Motion to Dismiss. The Court, at claimant's request, permitted claimant's Answer to Respondent's Motion to Dismiss filed in Claim No. CC-84-326 to serve as the Answer in Claim No. CC-84-271 also. The Court amended the style of Claim No. CC-84-271 to delete Danny R. Campbell as a respondent party, as the Court lacks jurisdiction over an individual.

Claimant has been incarcerated at West Virginia Penitentiary since December 10, 1968. He alleges that respondent was negligent in failing to safeguard his property acquired for the operation of both a radio and T.VS. repair shop and a woodworking or hobby shop. The repair shop was operated by claimant until it was closed by Deputy Superintendent Danny R. Campbell on February 1, 1979. The property in the repair shop included equipment to be repaired, tools, and books. In November 1973, claimant Plantz and fellow inmate William Creamens created the woodworking shop. On April 3, 1980, the woodworking shop's operation was terminated by officials at the penitentiary. The property in the woodworking shop included tools, wood, glue, stain and varnishes. The property of both of these enterprises was never recovered by claimant.

On March 14, 1980, claimant filed a complaint in the U. S. District Court regarding his property loss in the radio and T.VS. repair shop. On March 21, 1983, the Court entered an Order granting respondent's Motion for Summary Judgment. On February 25, 1981, claimant Plantz and William Cremeans filed a complaint in U. S. District Court regarding their property loss in the woodworking shop. On April 8, 1983, the Court entered an Order dismissing the action.

One of the contentions of the respondent's Motion to Dismiss is that both claims are barred by the statute of limitations. Claimant alleges, in his Answer to respondent's Motion to Dismiss, that "The Respondents have denied the claimant access to the court by confining him in a way which he was not allowed access to legal materials to enable him to bring his claim to the court." West Virginia Code §55-2-18 provides that after abatement, dismissal, etc. of an action commenced within due time, a new action may be brought within one year after such abatement, dismissal, or other cause . . . Claim No. CC-84-271 was filed October 11, 1984, and Claim No. CC-84-326 was filed December 11, 1984. Neither claim was timely filed

After careful review of the evidence presented, the Court finds that under the provisions of W.Va. Code 14-2-21, it does not have jurisdiction over claims which are not filed within the time specified by the applicable statute of limitations. The Court must, therefore, sustain respondent's Motion to Dismiss and dismiss the claims.

Claims dismissed.

OPINION ISSUED OCTOBER 1, 1986

TRUDY PROTZMAN
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-376)

Claimant appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

The claimant was travelling south on West Virginia Route 52 between Prichard and Hubbards Town when her 1983 Pontiac Trans Am struck a pothole. The incident occurred on September 28, 1985, at approximately 8:00 p.m. Claimant, accompanied by her sister, Penny Combs, and her brother-in-law, Roy Combs, was proceeding at approximately 55 miles per hour in a southerly direction on the two-lane concrete highway to Fort Gay, Wayne County. She seeks $250.00 for the replacement of two tires.

Claimant testified that she had her vehicle's headlights on low beam. The weather was clear and dry. Claimant was coming out of a 120 degree curve when the vehicle struck the pothole. She did not observe the pothole until her vehicle was right upon it. She estimated that the vehicle travelled 100 yards before it stopped. She and her sister exited the vehicle to examine the pothole. She stated that the hole was about two feet long and approximately four inches deep. She had travelled the same route about two weeks prior to this incident, but had not run through the pothole at that time.

The State is neither an insurer nor a guarantor of the safety of motorists on the highways. Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for the damages incurred, proof of notice, either actual or constructive, of the defect in question must be shown. As there was no such evidence presented, the claim must be denied.

Claim disallowed.

OPINION ISSUED OCTOBER 1, 1986

CONSTANCE J. TILLEY
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-246)

Paul O. Clay, Jr., Attorney at Law, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On May 13, 1985, at approximately 4:00 p.m., claimant, her husband, and their two children were in the Fayetteville area. As the weather was pleasant, they decided to take a walk. It was daylight at the time. The four of them proceeded to the walkway at the Canyon Run Park of the New River Gorge. Claimant and her family proceeded down the stairs of the boardwalk. As claimant stepped off the last step to the platform, her foot went down between two boards, causing injury to her ankle. Claimant alleges that this section of the walkway was improperly maintained. She seeks damages in the amount of $2,219.17 for personal injury and the resultant medical expenses.

Claimant testified that a tree was growing up between the two boards of the walkway on which she fell. She stated that there is a sign at this location advising the public of the number of steps there are to the bottom of the walkway. Claimant had observed other sections with boards which had been cut out to compensate for the growth of trees. Claimant testified that none of the boards in the walkway were "flush together."

Claimant's husband, Jack Lee Tilley, testified that the steps of the boardwalk are approximately four feet in width. The tree at the site of this incident was at least four feet away from where claimant was standing. He was right beside claimant as she proceeded down the steps.

The testimony revealed that claimant incurred medical expenses as a result of this accident. She lost three days and part of a fourth day of work in her employment as a part-time worker for Heck's Department Store in Oak Hill. However, claimant testified that she did not seek emergency room services until the day following the incident.

The Court finds that the claimant was negligent in failing to maintain an adequate lookout upon the boardwalk where she was walking. She was aware that due to the trees and the distance between the boards in the boardwalk, in this area, special care was required. For this reason, the Court disallows this claim.

Claim disallowed.

OPINION ISSUED OCTOBER 1, 1986

WILLIAM C. TOOLEY
(CC-85-139)
DEXTER 0. CALLEN
(CC-85-140)
ALFRED E. KINCAID
(CC-85-142)
PAUL E. THOMPSON
(CC-85-143)
CHARLES E. WALKER
(CC-85-144)
VS.
DEPARTMENT OF HIGHWAYS

Claimants appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claims CC-85-139, CC-85-140, CC-85-142, CC-85-143 and CC-85-144, filed by William C. Tooley, Dexter 0. Callen, Alfred E. Kincaid, Paul E. Thompson, and Charles E. Walker, were consolidated for hearing.

In 1984, claimants were employed by respondent as provisional employees. As such, each claimant accumulated annual leave time for each month of employment. Their employment terminated in January 1985. At the time of their termination, they were informed that they would receive no compensation for the annual leave time which they had accrued during their employment. Claimants seek compensation for their accumulated annual leave.

The claimants knew that their positions were classified within Civil Service, although they were not furnished copies of the Civil Service regulations by respondent during the period of time which is in dispute.

Perry Patrick Dotson, Assistant Director of the Personnel Division of respondent, testified that provisional employees do not automatically attain permanent status at the end of the six months of provisional status. He further testified that a provisional employee must use the annual leave before the provisional period expires. He had no knowledge of whether claimants were informed of this regulation.

Section 16.03 of the Civil Service Rules and Regulations provides the following:
(d) Coverage
2.Annual leave shall be accorded provisional, intermittent, irregular part-time and temporary (appointed from the register) employees. Such leave must be taken prior to the expiration of the period of appointment, unless immediately followed by an appointment from the register or be forfeited.

The Civil Service Rules and Regulations state the policy on the issue of annual leave time for provisional employees, which policy applies to the claimants herein. For this reason, the Court is of the opinion to, and does, disallow these claims.

Claims disallowed.

OPINION ISSUED OCTOBER 24, 1986

FARMERS & MECHANICS MUTUAL FIRE INSURANCE COMPANY OF W.VA.
AND
MUTUAL PROTECTIVE ASSOCIATION OF W.VA.
VS.
DEPARTMENT OF HUMAN SERVICES
AND
DEPARTMENT OF CORRECTIONS

(CC-79-30)

Howard E. Krauskopf, Attorney at Law, for claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

GRACEY, JUDGE:

The claimants insured the Harman Church of the Brethren located in Harman, Randolph County, West Virginia. On or about October 26, 1977, two juveniles who were being confined at the West Virginia Children's Home in Elkins, West Virginia, left the Home to run away. While travelling to Bluefield, West Virginia, they entered the Harman Church of the Brethren and allegedly started a fire which destroyed the Church. Claimants filed this claim for the loss of the Church in the amount of $30,648.11.

At the hearing, a motion to amend the style of the claim in the name of the Department of Human Services as one of the respondents was sustained by the Court. The claim was submitted upon the pleadings and two depositions.

The deposition of Robert Byrd, one of the juveniles involved in the incident, revealed that he and two other juveniles, all of whom were wards of the West Virginia Children's Home in Elkins, left the Home on the date in question riding bicycles which one of the juveniles had taken from a yard. They rode the bicycles out of Elkins. One of the juveniles separated to proceed to Huttonsville, West Virginia while Robert Byrd and the other juvenile proceeded on another road with the intentions of travelling to Bluefield, West Virginia. The two boys abandoned the bicycles and hitchhiked with a trucker who dropped them off on a road about one mile from the Church. At the time, the boys did not know where they were so they walked along the road. They came upon the Church and "went in the church for the collection money." The boys lit candles in the Church as it was dark. At this point, Robert Byrd stated that he does not remember what

happened until he was back on the road, heard fire engines, and looked back to see "black and red smoke all over the place." He could not remember the facts surrounding the cause of the fire. The boys were then picked up by a woman from the West Virginia Children's Home. She took the boys back to the Home.

Robert Byrd indicated that he had been confined at the Children's Home for approximately two and one-half weeks prior to the date of the incident. Previous to this confinement, he had been treated while a patient of Lakin State Hospital during the spring or summer, 1977. He stated that he went freely to and from the Children's Home as did the other children. The personnel at the Home did not prevent the children from coming and going.

The testimony of Audrey K. Byrd revealed that her son, Robert Byrd, was first placed in Lakin State Hospital by the Mercer County Circuit Court on Arson 1 charges. He was released to his parents and the Department of Welfare. He was then placed in the West Virginia Children's Home at Elkins. She had not visited the Home until after the Church was burned.

Claimants allege that the respondents negligently and recklessly placed Robert C. Byrd into an institution which did not have the proper facilities to prevent escape and recurrence of past conduct.

The record in this claim does not substantiate the allegation of knowledge on the part of the personnel in charge of the West Virginia Children's Home of any propensity on the part of Robert to set fires or which would alert them to any behavior different from the other children confined at the Home. There is, in fact, no proof as to how the Church burned down or who set the fire as the testimony of Robert Byrd is that he did not set the fire nor did he know how the fire started.

This Court has previously denied a claim wherein juveniles burned a barn while wards of Sugar Creek Children's Center as the record was devoid of any negligence on the part of the respondent. Stemple vs. Dept. of Welfare, 13 Ct.Cl. 94 (1979). A complete review of case law in escape claims wherein property damage resulted from acts of the escapees is provided in the opinion of Tyre vs. Dept. of Corrections, 12 Ct.Cl. 263 (1979). This opinion concludes that each claim must be taken on its own set of facts. The facts herein do not reveal a basis upon which the Court may find negligence on the part of the respondents.

In view of the above, the Court is of the opinion to and does disallow the claim.

Claim disallowed.

OPINION ISSUED NOVEMBER 24, 1986

JAMES W. BASHAM, JR.
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-59)

Claimant appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

Claimant James W. Basham, Jr. originally filed this claim against the respondent in the amount of $7,000.00 for damages to his 1977 Mazda GLC hatchback. During the hearing, the claimant amended the amount of his claim to $1,683.19. On February 15, 1984, at approximately 9:20 a.m., claimant was operating his vehicle at 35-40 miles per hour en route to Concord College, on Route 20 south of Hinton, near Pipestem, Summers County. The road is a two-lane, blacktop highway. The claimant encountered ice. His car had swerved to the left-hand side of the road, whereupon it hit the berm, flipped and skidded approximately 150-200 feet.

The claimant testified that, at the time of this incident, the temperature was between 45 and 50 degrees. He was en route to Concord College where he was a student. He described the ice as being "black ice." He travelled this route frequently and had encountered "black ice" prior to this occasion. On this particular day, the claimant had observed a couple of small patches of ice, but was unaware of the ice at the location of the accident.

The claimant alleged that the respondent had been notified of the dangerous condition of this road. However, no evidence was introduced to establish knowledge, either actual or constructive, that respondent was aware of the ice on the highway.

The law is well established in West Virginia that the State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947); Lipscomb v. Dept. of Highways, 12 Ct.Cl. 322 (1979). Before the respondent may be held liable, there must be evidence that the respondent knew or should have known of the existence of ice on the highway. Accordingly, the Court disallows this claim.

Claim disallowed.

OPINION ISSUED NOVEMBER 24, 1986

MARY ELIZABETH BINDER
VS.
DEPARTMENT OF EDUCATION

(CC-86-295)

No appearance by claimant.

Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $330.00 as reimbursement for the cost of renewing her teaching certificate. A statutory provision of the West Virginia Code mandates that the respondent will underwrite the cost of the tuition, registration, and other fees of teachers who have completed course work for the renewal of their teaching certificates. Claimant completed the necessary paperwork. Her payment receipt was lost and was not submitted within the proper fiscal year. Therefore, the claimant's tuition reimbursement request was denied.

In its Answer, the respondent admits the allegations of fact set forth in the Notice of Claim, but further alleges that sufficient funds were not available at the close of the fiscal year in question from which the claim could have been paid.

While we feel that this is a claim which in equity and good conscience should be paid, we are of further opinion that an award cannot be made based on our decision in Airkem Sales and Service, et al. v. Dept. of Mental Health, 8 Ct.Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED NOVEMBER 24, 1986

WILLIAM K. CUNNINGHAM AND TRESEA J. CUNNINGHAM
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-11-3)

Claimants appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On February 28, 1986, claimant William K. Cunningham was operating his 1984 Mercury Lynx in a westerly direction on Route 64 at the Dunbar overpass when he encountered respondent's crew patching potholes at the top of the grade. The crew was utilizing aggregate. As a result, claimant's vehicle's windshield was struck by some of the aggregate and damaged in the amount of $112.92. The claimant, William K. Cunningham, originally filed this claim in his own name; however, the record reflects that his

wife, Tresea Cunningham, is co-owner of the vehicle in question. The Court, on its own motion, amended the style of the claim to include Tresea Cunningham, as a party claimant.

The claimant testified that it was between 3:00 and 4:00 in the afternoon when this incident occurred. It was a clear day, and he was proceeding in the direction of Huntington. His vehicle was in the right lane and there were several vehicles in front of his. The vehicle two or three car lengths ahead of claimant's vehicle ran over the aggregate. The claimant assumed that gravel or some other substance from the aggregate struck the claimant's vehicle. He did not notice the damage to the windshield of the vehicle until the morning following this incident.

There is nothing in the record of the instant case to show that the respondent had notice of a dangerous condition in the highway, nor was there any evidence that the existence of the aggregate was the proximate cause of the damage to the automobile. A finding of negligence would require speculation on the part of the Court. Therefore, the claim must be denied.

Claim disallowed.

OPINION ISSUED NOVEMBER 24, 1986

HELEN HERRON
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-165)

Frank C. Mascara, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

On May 7, 1984, at about 2:00 p.m., the claimant was operating her 1970 Chevrolet Impala in a northeasterly direction on Secondary Route 27 approaching the intersection of U.S. Route 19, in Marion County. The claimant veered her vehicle to the right when a vehicle proceeding in the opposite or southwesterly direction was coming toward the claimant's vehicle. Claimant's vehicle dropped off the paved portion of the road into the ditch line at that location. Claimant then lost control of the vehicle and the vehicle hit an abutment, jumped across the roadway and landed up against the porch of a nearby residence. The claimant seeks $100,000.00 for personal injury and damage to her vehicle.

It is alleged that respondent failed to maintain the berm in a safe condition and was negligent in this regard. The lack of berm is alleged to be the proximate cause of this accident. The claimant was alone in her vehicle at the time of this incident. She had been visiting her sister in Pittsburgh and was returning to her home in Carolina, West Virginia. She was proceeding at approximatelY 30-35 miles per hour. The

claimant testified that prior to this accident, she travelled this route frequently. She stated that, at the time of this accident, she left the travel portion of the roadway, which is blacktop, to avoid the vehicle approaching her vehicle in the opposite direction. She did not regain control of the vehicle after she left the travel portion of the roadway. She did not observe any defects in the paved surface of the roadway.

James Richard Lee, who lives within a hundred feet of the accident site testified that he did not observe any defects in the paved surface of the roadway. He further stated that the lawns of the residences in this area extend to the travel portion of the roadway with the exception of the ditch line.

Charles E. Lambiotte, Marion County Maintenance Superintendent in May, 1984, testified that he was familiar with Secondary Route 27 at the intersection of U.S. Route 19. He stated that prior to May 7, 1984, he did not receive any complaints regarding the ditch line adjacent to County Route 27. He had examined his records back to 1979.

The route on which this accident occurred is a secondary road in a residential area. An examination of the photographs in the record reveal that the residents maintain their lawns close to the paved surface of the road but a narrow ditch line is apparent. This is not an uncommon condition along roads in residential areas. The Court is unable to determine negligence on the part of respondent in the maintenance of the road or the berm at the accident site. For these reasons, the Court is disposed to, and does, disallow this claim.

Claim disallowed.

OPINION ISSUED NOVEMBER 24, 1986

BUFORD E. MARKER
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-1)

Claimant appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On September 22, 1985, the claimant was proceeding up the hill next to the Gorman Shelter in Coonskin Park, Kanawha County, in his 1981 Olds 98 Regency. His vehicle dropped off the berm of the road resulting in the damage to the vehicle. The rim of the vehicle was damaged and the front end was knocked out of alignment in the amount of $47.79. The claimant had originally filed the claim with the State Road Commission as the party respondent. The Court sustained claimant's motion to amend the respondent State agency to the Department of Highways.

The claimant testified that he, his wife, and three children were proceeding in Coonskin Park to attend an Olin Company picnic at the park. It was approximately 1:00 p.m. and the weather was clear. As claimant's vehicle passed another vehicle, his vehicle dropped off the road onto the berm. There was a slight difference in elevation between the surface of the paved surface and the surface of the berm. It is a blacktop surface and is ordinarily wide enough for two vehicles to pass. There was no center line on the road. The place at which claimant's vehicle left the highway was in a straight area, and the claimant was travelling at 15-20 miles per hour.

The claimant alleges that the oncoming vehicle forced him to drive his vehicle off the travel portion of the roadway. The allegation that the berm was not even with the surface of the road does not establish negligence on the part of the respondent. The negligence, if any, may well have been the actions of the driver of the oncoming vehicle, forcing claimant onto the berm. For these reasons, the Court disallows the claim.

Claim disallowed.

OPINION ISSUED NOVEMBER 24, 1986

JERRY ALLEN TACKETT
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-86)

Claimant appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On February 18, 1986, at approximately 8:45 P.m., the claimant was operating his 1983 Shelby Charger in a southerly direction on State Route 18 a quarter of a mile south of Bias Branch. Bias Branch is about eight miles from Madison, Boone County. Claimant's vehicle, in an attempt to avoid an oncoming vehicle, struck a pothole. A tire and an aluminum wheel were damaged in the amount of $375.12.

The claimant testified that this incident occurred at dusk. It had been raining earlier, but was not raining at this time. He was travelling at a speed of approximately 40 miles per hour. He stated that there were quite a few holes in this area. He travelled this section of road every day and admitted that the hole had probably been there the day before this incident. The claimant suggested that his father had contacted respondent before this incident regarding the potholes. Although the respondent may have had actual notice of the poor condition of this road, the claimant was familiar with the route and should have taken precautions necessary to avoid striking the hole in the road [Matthew v. Dept. of Highways, CC-85-172 (1986)].

It is the opinion of the Court that although the respondent may have been negligent, the negligence of the claimant was equal to or greater than that of the respondent. The Court therefore denies the claim.

Claim disallowed.

OPINION ISSUED NOVEMBER 24, 1986

PAUL R. THOMAS
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-92)

Claimant appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On February 28, 1986, at approximately 7:30 P.M., the claimant was driving his 1972 Oldsmobile 98 on Hale Branch Road outside of Barboursville, Cabell County. There was some blacktop loose in the road at this location and as claimant's vehicle proceeded over the blacktop, the blacktop caused the vehicle to come up off the road. This impact caused damage to the vehicle. The claimant had an estimate for the necessary repairs. It was determined that the damage would exceed the cost of the vehicle. The claimant had paid $600.00 for the vehicle.

The claimant testified that he was travelling approximately 20-25 miles per hour from his job at the United Parcel Service in Huntington to his residence on Hale Branch Road. It was not raining or snowing,

and it was almost dark at the time of this incident. He stated that the front wheel of the vehicle went over the blacktop. He travelled this route daily, and had not noticed this condition in the road prior to the date of this incident. He stated that, "I caused the condition right at that moment." The record reveals that this hazardous condition appeared suddenly. No prior actual or constructive notice was given respondent. The Court is of the opinion that negligence on the part of the respondent has not been established, and, therefore, the Court denies this claim.

Claim disallowed.

OPINION ISSUED NOVEMBER 24, 1986

LARRY J. WALLEN
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-120)

Claimant appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the names of Larry J. Wallen and Iva J. Wallen, his wife. At the hearing, the Court amended the style of the claim to reflect the sole owner of the vehicle., Larry J. Wallen, as claimant.

The claimant, on January 22, 1986, was operating his vehicle, a 1976 Mercury Cougar, in a southerly direction on U.S. Route 119, also known as Logan Boulevard, at or near an intersection of State Route 10 when rocks fell from a cliff. One of these rocks struck the claimant's vehicle as it passed. The damage totalled $522.80, of which the claimant's insurance paid $138.00. The claimant testified that U.S. Route 119 is a four-lane highway with a median. On the day of this

incident, the roadway was damp. It was approximately 12:00 noon. The claimant was transporting his wife from her place of employment, the Save Rite Pharmacy, to the post office in Logan. He was proceeding at approximately 35-40 miles per hour. He was in the right lane of the two southbound lanes. The claimant observed that two rocks fell from the cliff, whereupon he switched his vehicle to the left lane to avoid these rocks. A third unobserved rock struck and damaged the vehicle in the right, rear quarter panel. The claimant testified that he passed the cliff in travelling this route, and rocks falling from the cliff were a common occurrence at this location. Three to four weeks prior to his accident, the claimant observed the respondent's crew cleaning up some rocks which had apparently come off the hill and were blocking all four lanes of the highway.

The claimant described the concrete barriers which the respondent had erected between the base of the cliff and the berm of the highway. On this particular occasion, the rock which struck the claimant's vehicle missed the barrier. The respondent was aware of the propensity of the rocks to fall from the cliff at this location as evidenced by the existence of the concrete barrier. The barriers indicate that the respondent has taken measures to remedy the dangerous condition of the falling rocks. The Court, then, is unable to find negligence on the part of the respondent, and the claim must be denied.

Claim disallowed.

OPINION ISSUED DECEMBER 12, 1986

KAREN SUE BISSETT
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-154)

Claimant appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On April 9, 1986, at about 10:00 a.m., the claimant was operating her 1979 AMC Spirit on the one-lane Everson Bridge, near Route 19, Marion County. Claimant had passed over the pothole, the existence of which was known to her. Upon seeing an oncoming vehicle on the one-lane bridge, she stopped and backed up and backed into the pothole, thus damaging her automobile. Damage to the vehicle amounted to $192.57. The claimant testified that she had travelled this bridge several times before the incident and was aware of the existence of the pothole. She was not able to state definitely that the hole had been present for the winter, but she could state that it had been in existence in March, the month before this incident.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for damages caused by

the pothole, proof of actual or constructive notice must be shown. Davis Auto Parts v. Dept. of Highways, 12 Ct.Cl. 31 (1977). Constructive notice of the pothole was present in this case, but claimant's prior knowledge of the bridge makes her likewise negligent. Under the doctrine of comparative negligence, the Court is of the opinion that the claimant's negligence was equal to the respondent's and disallows the claim. Merrill v. Dept. of Highways, 15 Ct. Cl. 196 (1984).

Claim disallowed.

OPINION ISSUED DECEMBER 12, 1986

JAY L. BOLYARD
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-195)

Claimant appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On April 19, 1986, at approximately 12:30 P.m., the claimant was operating his 1984 Honda motorcycle in a westerly direction on Kingwood Pike, at about seven miles from the intersection at Rivesville, West Virginia. The vehicle then ran through a pothole, damaging its wheels and tires in the amount of $360.00.

The claimant testified that he was travelling at approximately 40-45 miles per hour, and that on the day of this incident, it was clear. He estimated the pothole to be 31 112 inches wide, 51 inches long, and approximately 7 inches deep. The claimant rarely travels this route. He did not notice this hole until he was in it.

While the respondent is not an insurer of the safety of motorists using the highways of the State, it does have the affirmative duty of using reasonable care for their safety. Although there was no direct evidence that the respondent had actual notice of this defect, the Court is of the opinion that it did have constructive notice. The size of the pothole is indicative of its presence for a substantial period of time prior to the date of this incident. See Stone v. Dept. of Highways, 12 Ct.Cl. 259 (1979). The Court hereby makes an award to the claimants in the amount of $360.00.

Award of $360.00.

OPINION ISSUED DECEMBER 12, 1986

WILLIAM E. CARR
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-41)

Claimant appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On March 15, 1985, at approximately 6:30 a.m., claimant was operating his 1982 Concord Stationwagon in a westerly direction on Interstate 64 in the vicinity of the State Capitol. Claimant's vehicle and two other vehicles were involved in an accident. Respondent had been working on a wall at this location. There was "metal that crosses the crack in the road." The first vehicle struck this metal expansion Joint. The second vehicle hit the expansion joint. Claimant's vehicle was following these vehicles. Claimant's vehicle struck the second vehicle which resulted in damage to claimant's vehicle. All of the damage to claimant's vehicle was covered by his insurance with the exception of a $100 deductible. Claimant seeks the amount of the deductible.

Claimant's own testimony revealed that it was pitch dark and dry. He drove this route daily, and on the day before this incident, claimant did not notice anything unusual at this location. This incident occurred just as the first vehicle struck the expansion joint.

No evidence was introduced at the hearing to establish that the respondent was aware of, or had any knowledge of, the condition of this metal expansion joint on the subject section of I-64. This Court has consistently held that the State is not an insurer of the safety of motorists using its highways; thus, as there was no showing of negligence on the part of the respondent, the Court denies the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 12, 1986

JAMES CHARLES ADMINISTRATOR OF THE ESTATE OF BILLY R. CHARLES, DECEASED
VS.
DEPARTMENT OF HIGHWAYS
(CC-83-356)
AND
BEN H. ALLISON., ADMINISTRATOR OF THE ESTATE OF
DAVID W.
ALLISON, DECEASED
VS.
DEPARTMENT OF HIGHWAYS
(CC-84-68)

Richard E. Hardison, Attorney at Law, for claimants.
Nancy J. Aliff, Attorney at Law, for respondent.

LYONS JUDGE:

These two claims, arising out of the same accident, were consolidated for hearing pursuant to the agreement of counsel. The claims arise out of an automobile accident which took place on Route 52/6 or Nemours Road, Mercer County, on or about March 20, 1983. The decedents were riding in a 1972 Ford Mustang and were proceeding in a westerly direction. David Allison was the driver of the vehicle. He was accompanied by Billy Ray Charles. The vehicle left the travelled portion of a bridge and went into the Bluestone Creek. Both suffered death by drowning as a result of the accident. James Charles and Ben Allison, as administrators of their sons' respective estates, seek damages in the amount of $100,000.00 for each estate.

There is a narrow one-lane bridge at the location of the accident. The vehicle with the bodies of the boys was found in Bluestone Creek. The claimants allege negligence on the part of the respondent due to lack of warning and/or speed limit signs, lack of siding on the bridge other than wooden railings, lack of maintenance of the road at this site, and the failure of respondent to maintain the bridge and pavement

of the road at the same width which caused a dropoff on either side of the bridge. It is not certain at what time the accident occurred. There are no known witnesses to the accident.

On the morning of March 20, 1984, between 7:00 and 7:30 a.m., Charley W. Schultz, who has lived in Nemours for over twenty years, testified that he heard a thump from the direction of the Bluestone Creek. Upon investigation, he discovered the 1972 Ford Mustang on its roof in the water of the creek. He assumed that the vehicle had gone off the right side of the bridge over a two by six foot railing along the side of the bridge. He observed fresh scarring on the wooden railing. He estimated the length of the bridge to be between 25 and 30 feet. He testified that there have never been any signs warning of the existence of the one-lane bridge at the location in question. He further stated that there have never been any speed limit signs

at the bridge approach. There was a hole in the road at the approach to the bridge on the day of this accident.

Trooper Estill Adams received a report on March 20, 1983 that a vehicle had gone off the bridge at Nemours into the Bluestone Creek below the Nemours Dam. He stated that there were several gouge marks starting a few feet onto the bridge. The highway pavement is narrower than the bridge. In reference to a pothole at the entrance to the bridge, Trooper Adams does not remember anything large. He stated that in the three years during which he had worked at the Princeton Detachment of the Department of Public Safety, no vehicles had run off this bridge except as the result of mechanical defects.

Claimant James Charles went to the scene of the accident on March 21, 1983. He testified that the road is narrower than the bridge. He stated that there were no signs on the road previous to the bridge. He observed a hole about eight or nine feet from the bridge in the road. John Edward Charles accompanied his father, James Charles. He testified that he also observed the hole in the road.

Claimant Ben Allison visited the scene of the accident on March 24, 1983. He testified that he observed a hole, but he did not observe any warning signs.

Dr. Russell Rex Haynes, an engineer and accident reconstruction expert, visited the accident site on November 16, 1984. He also went to Lambert's Salvage Yard and located the Allison vehicle. The vehicle was stacked on the bottom of a stack of three vehicles. He removed the tie rod and the ball point stud from the 1972 Ford Mustang. Dr. Haynes gave lengthy testimony pertaining to his opinion as to the reason why the vehicle went over the bridge. He concluded that there was not a defect in the Allison vehicle. After employing professional methods of accident reconstruction, Dr. Haynes determined that either impact with a pothole at least two feet in diameter and 12 inches deep, or, alternately, impact with the east end of the bridge at the northeast corner where the pavement is short of the bridge caused the damage to the Allison vehicle.

Mr. Lawrence R. Hazelwood, a maintenance foreman with respondent, stated that he was familiar with Route 52/6 in the vicinity of Nemours. He was involved with a complete overlay paving of the road in 1980. He stated that there was no evidence of potholes or pothole patching in the vicinity of the bridge. He did not recall any complaints made prior to March., 1983 concerning the bridge.

Robert Ralph Hudson, Jr., Chief Bridge Inspector for respondent, testified that he inspected the bridge in question in March of 1982 and that he observed no structural defects.

Richard W. Boyd, District III Branch Engineer with respondent, testified that he did not remember any specific complaints prior to March 1983 regarding the bridge in question. He also stated that there are no guardrails on the bridge because "Basically because it is essentially a one-lane structure and if guardrails were placed on it you'd essentially have a problem with any type of over-width vehicles crossing the structure because of the narrow roadway width of 11 feet 6 inches."

Claimants have not established that the alleged road conditions were the proximate cause for the vehicle in which the decedents were travelling to leave the bridge. The bridge in this claim is typical of many bridges constructed on roads which are not main thoroughfares in West Virginia. For this Court to find

negligence on the part of respondent, the Court would be engaging in pure speculation. There were no eyewitnesses to the accident. It has not been determined what factors caused this accident. The Court will not make an award based upon speculation. See Eller vs. Dept. of Highways, 13 ct.cl. 402 (1981). For these reasons, the Court is of the opinion to, and does, deny these claims.

Claims disallowed.

OPINION ISSUED DECEMBER 12, 1986

KAREN COLEMAN
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-94)

Claimant appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On February 18, 1986, at approximately 8:15 a.m., the claimant was operating her 1982 Chevrolet Cavalier in a westerly direction on Route 60 below Campbells Creek, Kanawha County, when her vehicle struck a pothole. The claimant originally filed this action with the West Virginia Court of Claims as the respondent. The Court, upon Ms. Coleman's agreement, amended the style of the claim designating the Department of Highways as the proper respondent. Two tires and a hubcap were damaged in the amount of $214.47. The claimant was unable to estimate the size of the pothole. She stated that she was not aware of the pothole prior to striking it, even though she travelled this route five days a week. The claimant testified that the traffic was heavy as it was the morning rush hour. She was proceeding in the right or slow lane. Her vehicle struck the hole with the left front and rear tires. She was travelling between 35 and 40 miles per hour. There was no way of dodging the hole "because any way you moved there was pothole."

The State is neither an insurer nor a guarantor of the safety of motorists on the highways. Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for the damages incurred, proof of notice, either actual or constructive, of the defect in question must be shown. As there was no such evidence presented, the claim must be denied.

Claim disallowed.

OPINION ISSUED DECEMBER 12, 1986

KENNETH E. FRANK
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-198)

Claimant appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On April 20, 1985, at approximately 10:45 P.m., the claimant was driving his Chevrolet Impala Sedan in an easterly direction on Interstate 70 near Wheeling, Ohio County. Interstate 70 is a four-lane highway.

According to claimant's testimony, the weather was clear and the road was dry. Claimant's wife and two others were in his vehicle with him. They were returning to Pittsburgh from the Wheeling Downs Race Track. Claimant's vehicle struck a hole in the pavement of a bridge overpass which was approximately two feet by three feet. This defect was positioned in the right lane of the two eastbound lanes. Claimant seeks an award of $250.00 for damage to the automobile. Claimant alleges that the foundation of the overpass disintegrated or perhaps became dislodged and fell to the street below. Claimant went down to the street below and observed what his vehicle had hit. Claimant testified that it was approximately two feet by three feet in size. He observed one vehicle ahead of him and six or eight vehicles behind him which had hit the hole. Claimant was unable to photograph the area because a member of the West Virginia Department of Public Safety closed off the lane. Claimant testified that he did not see the defect before his vehicle hit it. Claimant had no knowledge of any complaints made to respondent concerning this defect.

Although the respondent's duty of "reasonable care and diligence in the maintenance of a highway under all the circumstances" (Parsons v. State Road Comm'n., 8 Ct-Cl- 37 [1969]) may require respondent to put greater effort into the maintenance of superhighways than in the maintenance of lesser travelled county roads (Davis Auto Parts v. Dept. of Highways, 12 Ct-Cl- 31 [1977]), proof of actual or constructive notice is required in all cases. As there was no showing of such notice

of negligence on the part of the respondent, the Court denies the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 12, 1986

RETTIE LOUISE HAMON
VS.

DEPARTMENT OF HIGHWAYS

(CC-86-31)

Claimant appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On November 11, 1985, between 7:30 and 7:45 P.m., claimant was operating her 1980 Chevrolet Camaro, coming off Route 34 onto Great Teays Boulevard, Teays Valley, Putnam County, when her vehicle struck a pothole. Claimant seeks $181.40 for damage to the tires of the Camaro.

The testimony revealed that claimant was travelling north toward Charleston. She was travelling at approximately 10-15 miles per hour. The claimant stated that the weather was bad. It was foggy and had been raining at the time this incident occurred. The left front and left rear tires of her vehicle were damaged. She estimated the hole to be three feet long, four feet wide, and two feet deep. Although claimant had driven this route before, she had not noticed this hole.

While the respondent is not an insurer of the safety of motorist using the highways of the State, it does have the affirmative duty of using reasonable care for their safety. Although there was no direct evidence of the existence of this defect, the Court is of the opinion that it did have constructive notice. The size of the pothole is indicative of its presence for a substantial period of time prior to the date of this incident. See Stone v. Dept. of Highways, 12 Ct.Cl. 259 (1979) and Miller v. Dept. of Highways, CC-85-12 (1985). The Court hereby makes an award to the claimant in the amount of $181.40.

Award of $181.40.

OPINION ISSUED DECEMBER 12, 1986

DELTA W. HARRAH AND EVA KAY HARRAH
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-85)

Claimant, Delta W. Harrah, appeared in person.

Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On February 18, 1986, at approximately 9:00 a.m., the claimant was operating his 1984 Buick Century in a westerly direction on Route 60 at the Campbells Creek intersection when the vehicle struck a pothole. The claimant originally filed the claim in his own name. The car is titled in both claimants' names, Delta W. Harrah and that of his wife, Eva K. Harrah. The Court then, upon its own motion, amended the style of the claim to include Eva K. Harrah as a party claimant.

The claimant was travelling from his home in Fayetteville to Charleston at a speed of approximately 30-35 miles per hour. The impact of the pothole damaged the left front tire and wheel, and required realignment of the vehicle for a total amount of $144.63. The claimant testified that he travelled this route only occasionally. He observed the hole before his vehicle struck it. However, there were holes in both the lane in which he was proceeding and the other lane of the two-lane road. For that reason, it was impossible to avoid the hole. The claimant estimated that the pothole is "half as big as a bathtub. He stated that he had not given respondent notice prior to this accident as that was the first time he had been "down through there for six months or even longer."

The State is neither an insurer nor a guarantor of the safety of motorists on the highways. Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for the damages incurred, proof of notice., either actual or constructive, of the defect in question must be shown. As there was no such evidence presented, the claim must be denied.

Claim disallowed.

OPINION ISSUED DECEMBER 12, 1986

DUBOIS JORDAN
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-67)

Claimant appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On February 17., 1986, claimant was operating his 1983 Dodge truck in a westerly direction on Route 60, between 9:00 and 10:00 a.m., in the vicinity of

Campbell's Creek, Kanawha County, when his vehicle struck several potholes. Damage to the vehicle resulted in the amount of $122.11.

According to the testimony of claimant, it was daylight and raining. Claimant was driving at approximately 20 miles per hour in the right lane of the four-lane highway. In an attempt to avoid hitting holes at this location, claimant drove to the left, and his vehicle struck a large, water-filled hole. He estimated the hole to be two feet long, 14 inches deep, and 18 inches wide.

Claimant testified that he travelled this route frequently. He had observed respondent's workers repairing holes in the opposite lanes of Route 60 two days before this incident occurred. He had not reported the hole to respondent.

This Court has repeatedly held that respondent is neither an insurer nor a guarantor of the safety of travellers on its highways. However, the respondent does have a duty of using reasonable care and diligence in the maintenance of its ways. In the case of a heavily travelled major highway in this State, the Court has held respondent liable for failure to repair a pothole of this size, as it cannot have developed overnight. See Lohan v. Dept. of Highways, 11 Ct.Cl. 39 (1975), Poole v. Dept. of Highways, 15 ct.cl. 65 (1983). The Court therefore makes an award to claimant in the amount of $122.11.

Award of $122.11.

OPINION ISSUED DECEMBER 12, 1986

EUGENE O. WORKMAN
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-154)

Claimant appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant is an employee of respondent agency. On January 17, 1985, he was working as an equipment operator. Claimant had backed a truck into respondent's garage to put chains on the truck. The vehicle which claimant was operating was a dump truck with a spreader box on it. Claimant's testimony revealed that the time of the incident was approximately 1:30 or 2:00 a.m.; it was snowing steadily. As claimant got out of the dump truck, he slipped on its snow-covered running board. As he fell, his glasses came into contact with a large bolt protruding from the spreader box on the dump truck. As a result, his glasses required replacement. Claimant seeks $126.00 for the cost of his glasses and $245.60 for vacation time he had to take while new glasses were being made.

Claimant testified that the bolt on the dump truck was in its normal position at the time of this incident, "although it should have been cut off a long time ago." Claimant was aware of the presence of the bolt protruding from the vehicle. He had driven this vehicle several days previous to this incident. Claimant estimated that he first noticed the protruding bolt on this particular vehicle when they first started putting the spreader boxes on during the winter." He had notified Jim Ashcraft, a mechanic of respondent, of the condition of the bolt a couple of days before the incident occurred.

Claimant further testified that the weather conditions were very poor on the night of this incident. Although he missed work while waiting for his eyeglasses to be replaced, he did not lose any wages from respondent.

On the basis of this record, the Court finds no evidence that the respondent was negligent. The Court must, therefore, deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 12, 1986

KAREN S. MURRAY AND DANIEL J. MURRAY
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-181)

Claimants appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On April 8,, 1985, claimant Karen S. Murray was operating a 1985 Buick Skylark, belonging to herself and her husband, Daniel J. Murray, on Secondary Route 50/2, at approximately 1 4/10 miles south of U.S. Route 50, when the automobile slid on mud at that location. As a result, claimant incurred damages to the automobile in the amount of $1,675.66. The claimants seek $100.00, the insurance deductible. The $100.00 is the amount of their out-of-pocket expense.

Claimant Karen S. Murray testified that, on the day of the incident, it had been cold with brief rain or snow showers. It was about 5:50 in the evening. She was travelling at approximately 25 miles per hour. A few days prior to the incident, respondent had been cleaning out the ditches. As a result, the road was completely covered with mud." Her automobile slid in the mud and collided with another vehicle. She travels this route every day going to and returning from her place of employment. She had encountered the mud on the morning of the day of the accident.

The State neither insures nor guarantees the safety of motorist travelling on its highways. Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1941). Claimant Karen S. Murray, by her own testimony, had observed respondent's crew working and was aware of the presence of mud on the road at this location. For that reason, extra precaution was necessary on her part. The Court is of the opinion to, and does disallow the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 12, 1986

RICHARD SAUNDERS, D/B/A RICK'S USED CARS
VS.

DEPARTMENT OF HIGHWAYS

(CC-85-331)

John R. Mitchell, Attorney at Law, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

The claimant alleges that respondent constructed a ditchline directly in front of claimant's property, which has made it impossible for claimant to utilize his property. As a result, the claimant seeks $20,000.00.

The claimant has operated a used car lot on his property along U. S. 119 in the area of Falling Rock since 1968. He testified that the area in front of his business was excavated for a ditchline in 1979 and in 1984, respectively. The claimant requested that respondent place a drain in the ditchline, but the drain has not been placed.

There is a house on the property which doubled as the office for the claimant's business and had an upstairs apartment which was rented. Since the excavation for the ditch, the claimant has been unable to rent the apartment. Furthermore, the location of the ditch prevents parking and access to the business. The claimant testified that "approximately 400 or 500 feet on up the road would be the closest place that you could get off the road anywhere through there." The claimant has ceased using the property for all purposes. Although the claimant stated that the used car business was a profitable one, he could not estimate the number of cars sold per year. The claimant confirmed the fact that he did receive correspondence in March 1977 from the Department of Motor Vehicles, which agency licenses used car lots. This letter stated that claimant's lot was extremely run down and there did not seem to be any business being conducted from the lot.

William Jerald Reese, a qualified appraiser of real estate in Kanawha County, stated that the property in question, at present, has no value. Mr. Reese's reasons for this evaluation are that it is impossible to get into the property, and there is no parking along the highway in front of the business due to the ditchline.

Leslie A. Putillion, an excavation contractor, testified that the cost of placing a culvert at this site would be approximately $6,870.00. Mr. Putillion could not provide the Court with the specific requirements respondent has with reference to constructing entrances and exits to State highways.

Nelson L. Fowler, Assistant District Maintenance Engineer for respondent,, testified that he is familiar with the location in question. The drainage ditch measures approximately 8-10 inches deep from roadway elevation and perhaps 14-16 inches deep from the existing ground elevation. It is approximately 100-150 feet long. Mr. Fowler spoke with the claimant on three separate occasions. He advised the claimant of the requirements for approach permits, providing the necessary information and forms for the permit. A verbal proposal concerning the ditchline was unacceptable to the respondent and was rejected. A written proposal was not made.

The record in this claim fails to establish that claimant's property is no longer usable. The ditchline was

necessary to remedy drainage of the State highway in front of claimant's property. The claimant has made no effort to submit proposals to respondent so that a mutually agreeable solution can be found to provide access to the property. For these reasons, the Court is of the opinion to, and does, deny this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 12, 1986

JOYCE PRIDDY
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-19)

Claimant appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On November 11, 1985, between approximately 8:00 and 9:00 p.m., claimant was driving her 1980 Ford Pinto on Great Teays Boulevard, from Milton, Cabell County, when her vehicle struck a pothole. Claimant had been travelling on Route 34 and had turned left onto Great Teays Boulevard. Both the front and rear tires were damaged in the total amount of $118.38. Claimant was not aware of the existence of this particular pothole, but stated that there were always holes in this road. The pothole measured approximately four feet long, three feet wide, and 24 inches deep.

Claimant testified that Great Teays Boulevard is a two-lane, asphalt road. On the night of this incident, it was misty and raining. She was travelling at approximately 10-15 miles per hour. The left front and left rear tires of claimant's vehicle struck the hole. Claimant had not driven this route for a month before the accident.

While the State does not insure the safety of travellers on its highways, respondent does owe a duty of reasonable care and diligence in the maintenance of the highways. This Court has previously held respondent liable for damages caused by large potholes, where it has been determined that respondent should have discovered and repaired the defect. Bailey v. Dept. of Highways, 13 Ct.Cl. 144 (1980). Burbridge v. Dept. of Highways, 15 Ct.Cl.. 190 (1984). The Court finds that this pothole was of sufficient size that it must have been there for some time, and makes an award to claimant.

Award of $118.38.

OPINION ISSUED DECEMBER 12, 1986

ROYAL RESOURCES CORPORATION
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-23)

Russell Clawges, Jr., Attorney at Law, for
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On December 11, 1985, Edwin T. Stitt was operating a 1984 Lincoln automobile owned by claimant company, of which he is president, at the intersection of Locust Avenue and Country Club Drive, in Fairmont, Marion County. The vehicle struck a hole and drain at this location and sustained damages. Claimant company originally sought $1,090.69 in damages. At the close of the case, claimant's counsel amended the damage amount to $2,500.00.

Albert David, part owner of the ground and the Five Star Convenience Store business, testified that respondent put the storm drain in. Prior to December 1985, barrels had been placed in the hole. He could not say whether or not respondent had placed the barrels.

Edwin T. Stitt testified that the incident occurred at approximately 9:00 p.m. It was dark at the time. He, accompanied by his son, was travelling to the Five Star Convenience Store. The vehicle ran into the hole and storm drain or grate which,is located along Country Club Drive and the parking lot to the convenience store. He stated that there were neither markings, yellow lines, nor a barrel in the vicinity of this drain and hole. lie drove this route several times a month, but he did not remember whether he noticed the hole.

Dwayne Allen Miller, County Assistant Supervisor, Marion County, for respondent testified that the drain in the vicinity of Country Club Road and U.S. Route 19 is located 15 feet from the center line of Country Club Road. He stated that to his knowledge, it is off respondent's right-of-way. Prior to December 11, 1985, he had not received, nor did he know of, any complaints with regard to this drain. He stated that respondent did place a barrel in this drain in December 1985.

The Court is unable to discern from the testimony presented who maintains control over the drain at the location of this accident. The Court is unable to grant an award based on speculation. For that reason, the Court is of the opinion to, and does, disallow the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 12, 1986

BRADY C. SINGLETON
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-25)

Mary Ann Singleton appeared for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On June 6, 1985, between approximately 3:00 and 3:30 P.m., claimant's wife was operating her husband's 1977 Monte Carlo in a southerly direction, in Twilight, between Robin Hood and Bandytown, when the vehicle struck a pothole. The left front and left rear tires and a rim of the vehicle were damaged in the amount of $ 210.55.

Claimant's wife, Mary Ann Singleton, testified that she had driven her husband to his place of employment, the Peabody Coal Co. She was accompanied in his vehicle by his mother. Claimant's wife testified that it was raining and cloudy, and the road was wet. The vehicle struck several holes which were filled with water. Claimant's wife could not, by route designation or name, identify the road on which they were travelling when this incident occurred. it is a two-lane, asphalt road. Claimant's wife was driving at approximately 20 - 25 miles per hour. Claimant's wife did not travel this route on a frequent basis.

No evidence was presented to show that the respondent had actual or constructive notice of the existence of the pothole in question. Such evidence must be established in order for the respondent to be found guilty of negligence. Furthermore, the claimant has failed to show, to the satisfaction of this Court, that the road where the incident occurred is a State-maintained highway. The Court must therefore deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 12, 1986

DEBORAH D. PADGETT
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-63)

Claimant appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On September 24, 1985, at approximately 2:45 p.m., claimant was operating her 1979 Mercury Cougar. She was leaving Mount View and proceeding north on State Route 52, known as Virginia Avenue, when her vehicle struck a grate. The grate was loose and flipped up against the vehicle. Claimant seeks $654.78 for damage to her vehicle which resulted from this incident.

The testimony of the claimant revealed that on the day on which this incident occurred, it was dry and sunny. The highway in question is a two-lane highway, but the center line is not marked. Claimant was travelling at about 15-20 miles per hour. The grate is located on the right side of the sidewalk. The grate is approximately 24 inches from the curb. The claimant was aware of the presence of the grate as she had travelled this route prior to this incident. On this occasion, though, the grate "flipped out." The right, rear quarter panel of claimant's vehicle was damaged.

The Court has consistently held that the State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. Adkins v. Sims, 130 W.Va. 645 (1947). The evidence reveals that the loose condition of the grate occurred suddenly. The record reflects no notice being given respondent of the condition of the grate prior to claimant's incident. The Court, therefore, perceives no negligence on the part of the respondent, and the claim must be denied.

Claim disallowed.

OPINION ISSUED DECEMBER 12, 1986

CHESTER LEWIS
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-81)

Claimant appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On February 19, 1986, between approximately 7:30 and 8:00 p.m., claimant's wife, Margaret Lewis, was operating claimant's company car, a 1985 Celebrity, when the vehicle struck a pothole. Claimant has an

agreement with his employer, Turnpike Chevrolet, that he is responsible for damage to the company vehicle up to $500.00. Claimant's wife was travelling on Kanawha Turnpike in South Charleston, West Virginia. She testified that the road is a two-lane highway, and the road was very dark at the time of this incident. She was travelling at approximately 30 - 35 miles per hour. The vehicle struck a pothole which measured approximately 3 112 - 4 feet long, 2 112 feet wide, and 6 - 8 inches deep. She was not aware that the hole existed prior to the vehicle striking it. The hole was on the left-hand side of her lane of the road. The vehicle's left front tire struck the hole. The vehicle was damaged in the amount of $364.52.

Claimant's wife was driving home, and she had her five-year-old daughter in the car with her at the time of this incident.

While the State does not insure the safety of travellers on its highways, respondent does owe a duty of reasonable care and diligence in the maintenance of the highways. Although there was no direct evidence that the respondent had actual notice of the existence of this defect. The Court is of the opinion that it did have constructive notice. The size of the pothole is indicative of its presence for some time prior to the date of this incident. See Stone v. Dept. of Highways, 12 Ct.Cl. 259 (1979) and Miller v. Dept. of Highways, CC-84-71 (1985). The Court hereby makes an award to the claimant in the amount of $364.52.

Award of $364.52.

OPINION ISSUED DECEMBER 12, 1986

THE LAWHEAD PRESS, INC.
VS.
GOVERNOR'S OFFICE OF COMMUNITY AND INDUSTRIAL DEVELOPMENT

(CC-86-149)

Bill Watkins appeared for the claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

In November 1984 claimant company entered into a Purchase Order dated December 3, 1984, to print a magazine, "The Get-Away Guide," for the respondent State agency. The Court, on its own motion, amended the style of the claim designating the Governor's Office of Community and Industrial Development as the proper party respondent. The cost of paper for the publication of the magazine was substantial. There were delays in printing the magazine for which the claimant alleges that it lost interest on the monies expended for the paper. The amount of the interest, $1,063.20, together with $351.90 for extra work performed in the printing of the magazine, constitutes the basis of this claim. The respondent admits the portion of the claim for the extra work in the amount of $351.90, but denies liability for the interest charges.

Bill Watkins, a representative of the claimant company, testified that he was informed that his company was to be awarded the printing job in November 1984. Shortly thereafter, he was informed by an employee of the respondent, Steve Scott, that the Governor's Office requested that the printing job be put "on hold." This request was made due to the pending changes in the administration. Mr. Watkins represented to Mr. Scott that there would be a cost for interest on the money the claimant company borrowed to purchase the necessary paper for the job. At that time, in January 1985, he estimated that the interest would be in the amount of $500.00 or $600.00.

The claimant company agreed to honor the bid rather than rebidding the job. The agreement made was for an original contract of $87,000 and a change order. There was an original purchase order issued and approved. However, the change order pertaining to the matter of the interest was not approved by the Department of Finance and Administration.

Tom Pendleton, an employee of the respondent, testified that there was a change order issued on October 1, 1985, in the amount of $1,415.10 to cover the extra work and the interest.

West Virginia Code §14-2-12 provides that .... "In determining the amount of a claim, interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest." The statutory authority is very clear regarding this matter. There is no provision for interest in the Purchase Order. Therefore the Court makes an award in the amount of $351.90, which amount has been admitted by the respondent, and disallows the amount of the claim for interest.

Award of $351.90.

OPIONION ISSUED JANUARY 6, 1987

RONALD L. HUNT

VS.

DEPARTMENT OF MOTOR VEHICLES

(CC-36-398)

Claimant appeared in person.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant seeks $184.75 for overpayment of the Privilege Tax in registering his 1981 Ford pickup truck in West Virginia. In addition, he seeks $60.00 for mileage occasioned by seven trips to and

from his home in Hurricane, West Virginia, to Charleston, West Virginia, in pursuing this claim.

Claimant had traded his Chevrolet van for the 1981 Ford pickup truck. As a result of that transaction, he ad an encumbrance which was reflected on the title of the vehicle. The Privilege Tax as assessed on an amount that was in excess of the value of the transfer of he vehicles. The claimant made trips to the respondent agency and to the Governor's Office in an attempt to resolve this matter. He stated that it is 29 and 1/2 miles one way from his home to the Capitol.

In its Answer, respondent admits the allegations regarding the overpayment of fees to respondent agency. The Court denies the claim for mileage to and from charleston but makes an award of $184.75, representing overpayment of the privilege tax.

Award of $184.75.

OPINION ISSUED JANUARY 6, 1987

KAREY LYNN WELLS

VS.

BOARD OF REGENTS

(CC-85-253)

Claimant appeared in person.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

In November, 1984, the claimant was a student at West Virginia University, Morgantown, Monongalia County. She left the University's Towers Dormitory for the Thanksgiving vacation. She returned to find a number of her personal possessions missing, and seeks $380.00 as compensation for the missing items.

The claimant contends that a master key to the dormitory was stolen, and she alleges negligence on the part of respondent for failing to safeguard her personal property. She does not have any direct personal knowledge that this master key was missing.

Communication from the state's insurance carrier, CNA, indicated that CNA has coverage for claims of this nature, but denies liability in this specific case.

West Virginia Code §14-2-14(5) provides that the Court's jurisdiction does not extend to a proceeding which may be maintained against the state, by or on behalf of the claimant in the Courts of the State. As CNA Insurance provides coverage for West Virginia University as carrier for the state of West Virginia, claimant may pursue this claim in the courts of this State. For his reason, the Court lacks jurisdiction of this claim and is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED JANUARY 30, 1987

PETER E. WU

VS.

BOARD OF REGENTS

(CC-84-318)

Claimant appeared in person.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

On October 25, 1984, the claimant was residing in the Towers Dormitory at West Virginia University, Morgantown, Monongalia County. At approximately 9:00 p.m., as a result of a surge in the power system in the building, several items of personal property of the claimant became in operative. He seeks $165.00 as compensation for same.

The claimant testified that at the time of this incident the lights in his room became brighter and then they dimmed, and that there was not an electrical storm at the time. He stated that this electrical outage might also have occurred the day before, that it occurred on October 25, 1984, and that to his knowledge, it never occurred again. Prior to this event, he did not report it to anyone at the University.

Carl Marcucci, another resident of the Towers at the time of this incident in 1984, stated that he observed this power disruption about an hour before claimant's experience in his own room. He then went to the room of the claimant. He noticed that the lights in the claimant's room became very bright. The music on the stereo was distorted. He noticed

a light which first smoked and then sent out. Marcucci did not report this either.

Thomas Dale Matthews. a building inspector for the Housing Division of the West virginia University,

said that he had no knowledge of any complaints prior to this incident. A work request was written on November 1st and at that time the maintenance person discovered that some outlets die not have power in them. The respondent introduced correspondence from Stephen Showers, Director, Housing and Residence Life at West Virginia University, to Chancellor Ginsberg. The letter explained that a failure in the building wiring, as the result of aging, causing outlets in certain rooms to receive 220 volts of electricity instead of 110.

It is the opinion of the court that the responsibility for the electrical system is that of the respondent; therefore, the claimant is entitled to an award for losses which he sustained when the electrical system went awry. For these reasons, the court makes an award to the claimant in the amount of $165.00.

Award of $165.00.

OPINION ISSUED MARCH 27, 1987

JOHN H. SUTPHIN AND NANCY SUTPHIN
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-275)

John R. Mitchell, Attorney at Law, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimants John H. and Nancy Sutphin are owners of property located on Route 4 in Julian, Boone County, which they purchased in 1957. Little Coal River is located behind the property. There are two 200-foot lots which are located between the road and the river. Claimants reside in a house on one of these lots. The property is below the road. Claimants allege that respondent failed to properly maintain the ditch lines of Route 4 which causes water to flow onto claimants' property. Claimants maintain that the lot adjacent to the lot on which the house is located is no longer usable and they seek $50,000.00 for damages to the property.

Claimant John Sutphin testified that when the property was purchased "...there wasn't any drainage, and there wasn't any bad water problems." He did state, though, that the land remained damp in the early spring as a result of the spring rains. He contacted the Department of Agriculture and had drain tile placed in the bottom field to alleviate this problem in the early 1960's. Since the construction of Corridor G, the property has experienced severe water problems. At the time, Route 4 was also widened., and rock base was placed in the ditch lines. He stated that there are three drainpipes located under the surface of Route 4 below his

property, and they are "...completely filled over and stopped completely up level with the road." Mr. Sutphin placed a ditch approximately halfway back from the edge of the road to the river. Mr. Sutphin also explained that a culvert is located under the highway just above the driveway of the claimants' house. This culvert empties onto the adjoining property which is owned by a Mr. Gillespie. Claimant John Sutphin admitted that most of the water is coming from the Gillespie property.

Claimant Nancy Sutphin testified that when they purchased the property, the lot in question was damp, but water did not stand on it. She stated that from the early 60's to approximately 1977 there were no drainage problems on the property. The problems started when the ditches along Route 4 were filled with rock. She confirmed the fact that the land is higher behind their house.

William Jearld Reese, a real estate appraiser, testified that he appraised the Sutphin property. He stated that this property is useless due to water damage. He further stated that if the proper drains were placed, the lot would be appraised at $28,000.00.

No evidence was presented by the respondent and after careful consideration of the evidence presented by the claimant, the Court concludes that the drainage on claimants' property results from a combination of factors. The property is in a natural drainage area. Respondent's failure to maintain the ditch lines of Route 4 ha,s caused an excess of water to drain onto claimants' property. Claimants' property is also subject to drainage from the adjoining property, and this water may be flowing from the surface of Route 4. Although claimants attempted to alleviate these problems, the surface water from the highway has prevented claimants from the full use of their land. For these reasons, the Court is of the opinion to make an award to the claimants in the amount of $16, 800.00.

Award of $16,800.00.

OPINION ISSUED MARCH 27, 1987

SANDRA MCELHENIE, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARVIN MCELHENIE, DECEASED
VS.
DEPARTMENT OF HIGHWAYS

` (CC-85-36)

William S. Steele and Ted Kanner, Attorneys at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

This is a wrongful death action which arises out of a truck accident which occurred on June 2, 1983.

The wife of the deceased driver of the truck, Sandra McElhenie, alleges negligence on the part of the respondent for its failure to provide warning signs at the accident site.

The claimant and respondent, by their attorneys, entered into a stipulation wherein the parties agreed to the following facts. The date upon which this accident occurred was June 2, 1983. The location of the accident was the intersection of Routes 52 and 65 in Mingo County. Sandra McElhenie is personal representative of the Estate of Marvin Earl McElhenie. Marvin Earl McElhenie died as a result of the accident. On the date of the accident, there were no signs warning drivers to use lower gears on the downgrade at the scene. Route 52, approaching the State Route 65 intersection, is an 11 percent downgrade. The claimant does not allege a defect in roadway surface or design.

The decedent was operating a semi-tractor and trailer loaded with wooden planks. He was proceeding down Buffalo Mountain which approaches the intersection of U.S. Route 52 and State Route 65, Mingo County. He apparently lost control of the vehicle at some point on the hill. The tractor-trailer rig overturned at the intersection, and Marvin McElhenie died as a result of the accident.

Randy Stepp, a deputy sheriff, investigated this accident. He described the site of the accident as being a "T intersection." He stated that it is at the bottom of the mountain. He approximated the down grade to be a mile and a half from the crest of the hill. He further revealed that, from the evidence of his investigation, he discerned that the driver of the rig lost control at the foot of the hill.

Schela Sydnor, employed by respondent in the Personnel Division, District 2, took citizens' complaints concerning roads in the spring of 1983. She identified a complaint made by Abraham R. Evans concerning the high speed of the tractor trailers at the site of the accident in question in April, 1983. The complaint letter requested a sign indicating the grade of the hill. When queried, she stated that she reviewed the complaint records from 1980 through June 2, 1983. The complaint made by Mr. Evans is the sole complaint which she discovered for that time period.

Ken Kobetsky, Director of the Traffic Engineering Division of respondent, testified that there were warning signs for down grades on less than 11 percent of the roads in West Virginia. He further stated that he assumed it is probably true that there are warning signs for stretches of down grade that are less than 8,000 feet in length. Mr. Kobetsky stated that there were no signs indicating the down grade, but

there were signs that the decedent passed coming up the hill which indicated that there was a grade.

Floyd McElhenie, brother of the deceased and a certified licensed mechanic in Michigan, stated that he is familiar with the truck involved in this accident. He testified that repairs had been done on the truck before June 2, 1983. These repairs included replacing the rear brake lining and the maxi brake system. He examined the truck after the accident and determined that the brakes were functioning when the deceased proceeded down the hill. He also stated that there was a 15 mile- per-hour speed limit sign with a curve sign attached to it at the top of the mountain before the downgrade portion of the road begins.

The contention of the claimant that the respondent was negligent in failing to properly place grade signs indicating that the grade of Route 52 required special attention to braking is a contention without merit. It is the opinion of the Court that negligence on the part of the respondent has not been established. The

principle of law that travelers travel at their own risk was enunciated by the Supreme Court of Appeals in Adkins v. Sims, 130 W.Va. 645, 46 S.E. 2d 81 (1947). This Court has adhered to that principle consistently in former opinions. See Bickerstaff v. Dept. of Highways, 11 Ct.Cl. 254 (1977) and Ct.Cl. 254 (1977) and Cassel v. Dept. of Highways, 8 Ct.Cl. 254 (1971).

The record in this claim reveals that the decedent was unfamiliar with this section of highway in West Virginia. For reasons unknown to the Court, the decedent lost control of the tractor-trailer rig which he was operating on a down-grade of Route 52. To make an award to the claimant would require speculation on the part of the Court. This Court declines to resort to speculation in the determination of a claim.

For these reasons the Court is constrained to and does disallow the claim.

Claim disallowed.

OPINION ISSUED MARCH 27, 1987

HAROLD M. STUMPP
VS.
DEPARTMENT OF CORRECTIONS

(CC-86-246)

Claimant represented self.
Robert D. Pollitt, Assistant Attorney General; for respondent.

PER CURIAM:

Claimant was employed by the West Virginia State Penitentiary at Moundsville, a facility of respondent, from March 1, 1982 to October 2, 1984, as a correctional officer. As a requirement of his position, claimant was required to report 10 minutes before each shift that he worked. As this requirement was beyond his 40-hour-per-week responsibility (West Virginia Code Chapter 21, Article 5C, Section 3A), claimant seeks $562.11 in back pay for the additional time which he worked for respondent.

Hilda L. Williams, Personnel Officer with respondent, testified that an individual named Kevin Church filed a grievance through the Civil Service Commission. The basis of Church's grievance was the same as that of the claimant's. Kevin Church was awarded overtime pay. At the time of the Order of the Civil Service Commission (November 14, 1984) all the other correctional officers to whom the Order applied were compensated for the ten minutes of overtime which they were required to work prior to the beginning of each shift.

The claimant filed his complaint on June 26, 1986. He is entitled to recover $64.54 for overtime which

he worked during the period June 26, 1984 to September 30, 1984. The Court is required to apply West Virginia Code SS14-2-21 which provides that "the Court shall not take jurisdiction of any claim . . . unless notice of such claim be filed with the clerk within such period of limitation as would be applicable under the pertinent provisions of the Code of West Virginia . . . . West Virginia Code §55-2-12 mandates that the applicable statute of limitations is two years. For that reason, the Court makes an award to the claimant of $64.54.

Award of $64.54.

OPINION ISSUED APRIL 23, 1987

CAPITOL BUSINESS EQUIPMENT, INC.
VS.
DEPARTMENT OF FINANCE AND ADMINISTRATION

(CC-87-27)

No appearance by claimant.
Robert D. Pollitt, 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 $365.60, which includes interest, for a chair which was delivered to the respondent. The invoice for the chair was submitted but never paid. In its Answer, respondent admits the validity of the claim in the amount of $355.00, but denies the amount of the interest added to the original invoice. Respondent states that the invoice could not be paid because the fiscal year in which the obligation was incurred had ended. Respondent further states that sufficient funds were on hand at the close of the fiscal year in question.

The Court is restricted by W.Va. Code §14-2-12 from awarding interest unless the claim arises on a contract specifically providing for the payment of. Based on this section, the Court concludes that the respondent is not legally liable for the payment of

accrued interest. The Court therefore grants an award to the claimant in the amount of $355.00.

Award of $355.00.

OPINION ISSUED APRIL 23, 1987

CAPITOL BUSINESS EQUIPMENT , INC.
VS.
DEPARTMENT OF PUBLIC SAFETY

(CC-87-28)

No appearance by claimant.
Robert D. Pollitt, 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 an award of $663.78, which includes, interest, for chairs which were shipped to the respondent. The invoice for these chairs was submitted, but has not been paid. In its Answer, respondent admits the validity of the claim in the amount of $660.00. Respondent denies the amount of the interest added to the original invoice. Respondent states that the invoice could not be paid because the fiscal year in which the obligation was incurred had ended. Respondent further states that sufficient funds were on hand at the close of the fiscal year in question.

The Court is restricted by W.Va. Code §14-2-12 from awarding interest unless the claim arises on a contract specifically providing for the payment of interest. Based on this section, the Court concludes that the respondent is not legally liable for the payment of accrued

interest. The Court, therefore, grants an award to the claimant in the amount of $660.00.

Award of $660.00.

OPINION ISSUED APRIL 23, 1987

JEFFREY ALAN RICHARD
VS.
DEPARTMENT OF EDUCATION

(CC-87-37)

No appearance by claimant.
Robert D. Pollitt, 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 an award of $202.50 as salary compensation for the months of January, February and March, 1986. Claimant is a certified teacher with respondent's Colin Anderson Center facility. He completed the course work for a Masters degree in August, 1985. He was granted advanced certification and salary adjustment, but he never received same. In its Answer, respondent admits the validity and amount of the claim and states that it was not paid although there is a valid nonappealable Order by the West Virginia Education Employees Grievance Board directing payment by the respondent. The respondent has no statutory authority for paying the Order as the amount represents personal services funds and respondent may not pay retroactive salary increases. Respondent further states that sufficient funds were on hand at the close of the fiscal year in question.

In view of the foregoing, the Court grants an award to the claimant in the amount of $202.50.

Award of $202.50.

OPINION ISSUED MAY 12, 1987

ROBERT KEVIN GILLISPIE AND CAROLYN KAY GILLISPIE
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-140)

Claimants appeared in person.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On February 18, 1986, at approximately 11:15 a.m. claimant Robert K. Gillispie was operating his Chevy S-10 pickup truck on Cow Creek Road, Putnam County, when his vehicle struck a pothole. The claimants seek $10,000.00 for damages to the vehicle and for physical injuries to Carolyn Kay Gillispie. The Court, on its own motion, amended the style of the claim to reflect the proper party respondent, the Department of Highways. Claimants have received $6,700.00 from their insurance carrier. The insurance policy has a $500.00 deductible. Claimants incurred $605.29 in medical bills for physical injuries sustained by claimant Carolyn Kay Gillispie.

Claimant Robert Gillispie was travelling on Cow Creek Road to pick up his cousin. He was proceeding at approximately 25 mph. It was sunny, but the road was wet due to a previous snowfall. He was accompanied in the vehicle by his wife, Carolyn Kay Gillispie.

Claimant Robert Gillispie testified that at the time of the accident his vehicle had just rounded a curve. The hole was filled with water, and when his vehicle struck the hole, it went into a small skid, landed in a ditch and tipped over. The road is wide enough for two cars to pass.

Homer Gillispie, father of Robert Gillispie, testified that he visited the scene of the accident approximately 20 minutes after it occurred. He stated that the hole was "approximately 16 to 18 inches across and

the opposite way it was close to 5 feet across." He also indicated that the hole was from 16 to 18 inches deep.

Claimant Carolyn Kay Gillispie testified that she was with her husband on the day of this incident. As a result of the accident, she sustained injuries to her back, and was treated by Dr. Curry on February 18, 1986. Dr. Curry prescribed pain pills. Subsequently, she was examined by another doctor who also checked her back on two occasions. She stated that she still experiences back pain.

Joseph Gillispie, cousin of claimant Robert Gillispie, testified that the hole had been present for over a month. He had not notified the respondent of the presence of the hole.

Zenith Porter, an employee of respondent, testified that Cow Creek Road has a Route 40 designation. Porter worked at the Hurricane Substation at the time of this accident, where he took complaints about this road. Mr. Porter stated that prior to February 18, 1986, he had not received any complaints. He said that, "We was just coming out of a snow storm," and there was a truck dispatched down in that area to plow the roads. He also stated that the truck drivers report hazards either by telephone or in person when they return to the substation.

While the State does not insure the safety of travellers on its highways, respondent does owe a duty of

reasonable care and diligence in the maintenance of the highways. Although there was no direct evidence that the respondent had actual notice of the evidence of this defect, the Court is of the opinion that it did have constructive notice. The size of the pothole is indicative of its presence for some time prior to the date of this incident. See: Stone vs. Dept. of Highways, 12 Ct.Cl. 259 (1979) and Miller vs. Dept. of Highways, CC-85-12 (1985). The Court hereby makes an award to claimant Robert Gillispie in the amount of $500.00 for the deductible and $1,200.00 to Carolyn K. Gillispie for her physical injuries.

Award of $500.00 to Robert Kevin Gillispie.
ward of $1,200.00 to Carolyn Kay Gillispie.

REFERENCES

- Bridges
- Building Contracts
- Contracts - See also Building Contracts
- Damages
- Drains and Sewers
- Falling Rocks - See also Landslides
- Independent Contractors
- Interest
- Landslides - See also Falling Rocks
- Leases
- Limitation of Actions
- Negligence - See also Streets and Highways
- Notice
- Office Equipment and Supplies
- Pedestrians
- Prisons and Prisoners
- Public Employees
- Releases
- State Agencies
- Streets and Highways - See also Falling Rocks; Landslides; Negligence
- Trees and Timber
- Trespass
- W.VA. University

BRIDGES

KAREN SUE BISSETT VS. DEPARTMENT OF HIGHWAYS (CC-86-154)

Where claimant is aware of the existence of the defect in a bridge and she backed into the hole causing damage to her vehicle, the Court denied the claim based upon the doctrine of comparative negligence **162**

JAMES CHARLES, ADMINISTRATOR OF THE ESTATE OF BILLY R. CHARLES DECEASED VS. DEPARTMENT OF HIGHWAYS AND BEN H. ALLISON, ADMINISTRATOR OF THE ESTATE OF DAVID W. ALLISON, DECEASED VS. DEPARTMENT OF HIGHWAYS (CC-83-356) & (CC-84-68)

The Court denied a claim wherein two individuals were killed when their vehicle went off a bridge and turned over into a creek as there were no eyewitnesses and the factors which caused the accident have not been determined; the Court will not make an award upon speculation. 162

COMMERCIAL UNION INSURANCE CO., AS SUBROGEE OF CHARLES WILLIAM MOONEY, INDIVIDUALLY VS. DEPARTMENT OF HIGHWAYS (CC-85-355)

The Court denied a claim for damage to the windshield of a vehicle as concrete allegedly fell from a bridge dropping onto the vehicle. The Court determined that a finding of negligence by respondent would require speculation and the Court cannot speculate. **162**

CARL A. DANIELS VS. DEPARTMENT OF HIGHWAYS (CC-83-274)

The Court made an award to claimant for damage to real property which occurred after a bridge was constructed by respondent and water was caused to be directed onto claimant's property. **162**

FONSO W. DOTSON AND SARAH E. DOTSON VS. DEPARTMENT OF HIGHWAYS (CC-85-382)

The Court made an award for damage to vehicle which struck a hole on a bridge as the respondent was negligent in failing to properly maintain the bridge. A steel plate which had covered the hole to protect the public was missing on the day of the incident.

REXELL C. FREEMAN AND JOYCE FREEMAN VS. DEPARTMENT OF HIGHWAYS (CC-84-244)

Claimants' vehicle was damaged when a steel plate that had been place over a hole on a bridge was struck by a truck and whirled into air and spun underneath claimants' vehicle damaging the same. The Court denied the claim as claimant repaired the vehicle himself and experienced no monetary loss as the result of the accident.

JACK AND VERA MCMILLAN VS. DEPARTMENT OF HIGHWAYS (CC-85-277)

The Court made an award for damage to claimants' vehicle when the vehicle struck a hole on a bridge that went clear

through the bridge. The Court determined that a steel plate which had been covering the hole was knocked off but it was the responsibility of the respondent to ascertain that the hole.

JACK AND VERA MCMILLAN VS. DEPARTMENT OF HIGHWAYS (CC-85-277)

The Court made an award for damage to claimants' vehicle when the vehicle struck a hole on a bridge that went clear through the bridge. The Court determined that a steel plate which had been covering the hole was knocked off but it was the responsibility of the respondent to ascertain that the hole remained covered by the steel plate.

PAULA H. MEREDITH VS. DEPARTMENT OF HIGHWAYS (CC-85-446)

A claim for personal injuries which occurred when a wooden plank of a bridge broke as claimant walked over the bridge was awarded by the Court as the respondent had constructive notice of the condition due to the obvious deterioration of the bridge.

ROSEMARY NICOLA VS. DEPARTMENT OF HIGHWAYS (CC-86-341)

Where the claimant sustained personal injuries when she fell on a deteriorated portion of a bridge, the Court made an award for her injuries as the State was negligent for failing to discover and correct such a hazard which a casual inspection would have revealed.

ELMER PACK & ANICE DAILEY VS. DEPARTMENT OF HIGHWAYS (CC-84-130)

The Court denied a claim for personal injuries to claimants when the vehicle left the road and went into a creek as a bridge had been removed. The Court determined that the claimants failed to prove that any negligence of the respondent caused the accident

nt.

PHILIP SKEEN VS. DEPARTMENT OF HIGHWAYS (CC-86-264)

Where two boards of a bridge broke and damaged claimant's vehicle, the Court made an award as respondent's failure to discover the condition of the bridge constituted negligence.

RAYMOND L. SMITH VS. DEPARTMENT OF HIGHWAYS (CC-85-320)

The Court made an award for damage to claimant's vehicle when the vehicle struck a depressed area on a bridge caused by roto-milling. The Court that respondent was negligent in failing to warn the travelling public of a hazardous condition on an interstate bridge.

BUILDING CONTRACTS

AMERICAN BRIDGE DIVISION OF UNITED STATES STEEL CORPORATION, A DELAWARE CORPORATION, AND AMERICAN BRIDGE DIVISION OF UNITED STATES STEEL CORPORATION, A CORPORATION, ON BEHALF OF JOHN B. CONOMOS, INC., A PENNSYLVANIA CORPORATION VS. DEPARTMENT OF HIGHWAYS (CC-82-166)

A claim for the placement of an intermediate coat of paint upon a bridge was denied by the Court as the claimant's subcontractor failed to contact an expert about the paint system prior to bidding the job, and was therefore not fully informed of the paint necessary to meet the specifications and provisions of the contract.

BANKERS POCAHONTAS COAL LIMITED PARTNERSHIP AND W. B. SWOPE, INDIVIDUALLY VS. DEPARTMENT OF HIGHWAYS (CC-83-159)

The Court made an award to claimant for the cost of materials used in the construction of a low water bridge which was necessitated by the action of the respondent in posting a bridge which it was later determined was not owned by the Department of Highways. The Court determined that the claimant was entitled to an award.

CARL M. GEUPEL CONSTRUCTION COMPANY, INC. VS. DEPARTMENT HIGHWAYS (CC-82-200)

Claimant experienced delays during construction when various slides occurred on the project and respondent was required to redesign portions of the project. The delays resulted in damages to the claimant which were stipulated by the parties and the Court made an award. . .

HUGHES BECHTOL, INC. VS. BOARD OF REGENTS (CC-81-450)

A contract which provided an agreement to arbitrate any all claims, disputes and other matters in question between the Contractor and the Owner was upheld by the Court when it sustained a motion for summary judgement based upon an award granted to the claimant through arbitration proceedings.

MELLON-STUART COMPANY AND KIRBY ELECTRIC COMPANY VS. BOARD OF REGENTS (CC-82-14)

The Court made awards to claimants in the construction of a multipurpose physical education facility at Marshall University where the Court determined that the respondent failed to fulfill its obligation to coordinate the work of multiple prime contractors.

MELLON-STUART COMPANY AND KIRBY ELECTRIC COMPANY VS. BOARD OF REGENTS (CC-82-14)

The Court held that the respondent is responsible for any negligent acts and omissions of its architect in connection with the project for the construction of a multipurpose physical education facility at Marshall University and the Court made awards to the claimants for such acts.

MELLON-STUART COMPANY AND KIRBY ELECTRIC COMPANY VS. BOARD OF REGENTS (CC-82-14)

The Court made an award to claimants in the construction of a multipurpose physical education facility at Marshall University where the Court determined that the claimants are entitled to recover costs attributal to extra work caused by concealed conditions and design defects but not in the total amounts claimed. The Court made a determination as to the awards to be made to the claimants.

MELLON-STUART COMPANY AND KIRBY ELECTRIC COMPANY VS. BOARD OF REGENTS (CC-82-14)

In a claim for delay on a project due to failure of the respondent owner of the project where utility lines were to be removed and these were not removed prior to the construction of the project, the Court determined that a delay did occur for which the claimant should be reimbursed its extra expenses.

P.R.C. ENGINEERING INC. VS. BOARD OF REGENTS (CC-83- 190)

The Court made an award in accordance with an agreement entered into by the parties for overhead cost increases which occurred in the construction of the PRT at West Virginia University, a facility of the respondent.

VECELLIO & GROGAN, INC. VS. DEPARTMENT OF HIGHWAYS (CC-83-151)

Claimant contractor was assessed a penalty for failing to comply with required embankment compaction standards on an embankment layer on a project. The Court determined that the penalty was proper and denied the claim.

CONTRACTS - See also Building Contracts

AMERICAN OFFICE SYSTEMS, INC. VS. DIVISION OF VOCATIONAL REHABILITATION (CC-85-226)

An advisory opinion was issued by the Court indicating that the respondent is legally obligated to pay the claimant for the rent due under a lease agreement between the parties.

AMERICAN TELETRONICS CORPORATION VS. DEPARTMENT OF HEALTH (CC-85-362)

The Court determined that damage to the telephone system was not the responsibility of the respondent State agency in accordance with the terms of the maintenance agreement between the parties.

B-K DYNAMICS, INC. VS. TAX DEPARTMENT (CC-86-14)

The respondent State agency failed to pay the claimant for services rendered under a contract but the respondent did not have sufficient funds within its appropriation for that particular fiscal year to pay for the services rendered. The Court denied the claim based upon Airkem Sales and Service, et al. vs. Department of Mental Health, 8 Ct. Cl. 180 (1971).

CODEX CORPORATION VS. BOARD OF REGENTS (CC-85-159)

The Court determined that no breach of contract occurred where a lease agreement between the parties was void ab initio.

YEAGER, INCORPORATED AND YEAGER FORD SALES, INC. VS. DEPARTMENT OF HIGHWAYS (CC-84-88)

The Court determined liability on the part of the respondent for damage to claimant's property. The parties had a written right of way agreement which provided for restoration of claimant's property, including the buildings, to as near original (pre-construction) condition as possible.

DAMAGES

AMERICAN BRIDGE DIVISION OF UNITED STATES STEEL CORPORATION, A DELAWARE CORPORATION, AND AMERICAN BRIDGE DIVISION OF UNITED STATES STEEL CORPORATION, A CORPORATION, ON BEHALF OF JOHN B. CONOMOS, INC., A PENNSYLVANIA CORPORATION VS. DEPARTMENT OF HIGHWAYS (CC-82-166)

A claim for liquidated damages assessed the claimant were denied by the claimant were denied by the Court as the delay was caused by claimant's delay in fabrication and shop painting of the structural steel, not due to actions of the respondent.

HUGHES-BECHTOL, INC. VS. BOARD OF REGENTS (CC-81-450)

The Court issued an opinion in accordance with a settlement between the parties for payment to the claimant for a dispute arising under a contract for construction of the Henderson Center at Marshall University, a facility of the respondent. The

Court granted an award to the claimant. The Court determined that the proceeds of two life insurance policies paid for by the State and one with the Public Employees Insurance were not collateral sources as well as the amount being right received from the disability and retirement fund. The contribution by the decedent during his employment as a trooper constitute a collateral source. The Court made an award to the claimant for shock and mental anguish which she suffered and an award to claimant as administratrix of the estate of her deceased husband.

VECELLIO & GROGAN, INC. VS. DEPARTMENT OF HIGHWAYS (CC-83-151)

The Court denied a claim for the amount of an assessed penalty against the claimant where the Court determined that the contractor did not fulfill the terms of the contract with regard to embankment compaction standards and thus upheld the penalty assessed by the respondent.

YEAGER, INCORPORATED AND YEAGER FORD SALES, INC. VS. DEPARTMENT OF HIGHWAYS (CC-84-88)

The Court did not consider an item of damage which it determined to be too speculative to be considered and the estimate of cost was reduced by this amount in the award made by the Court.

DRAINS AND SEWERS - See also Water and Watercourses

TERESA R. ALTOMARE AND SAMUEL ALTOMARE VS. DEPARTMENT OF HIGHWAYS (CC-77-111)

The Court determined that as there was no evidence of negligence on the part of the respondent which was the proximate cause of the accident the Court denied a claim based upon negligence for failing to maintain a drainage ditch in proper condition and for failing to install a guard rail between the road and the drainage ditch.

HENRY BURGER AND GERALDINE BURGER VS. DEPARTMENT OF HIGHWAYS (CC-82-181)

Where the proximate cause of property damage to claimants' property was the excessive rainfall that occurred and water from a broken water main which saturated the hillside and caused a slide, the Court denied the claim.

JIMMIE A. AND EULA R. CURRENCE AND LOREN AND RELLA CURRENCE VS. DEPARTMENT OF HIGHWAYS. (CC-84-116 & CC-84-117)

The claimants sustained personal injuries in an accident wherein a vehicle, coming in the lane opposite the claimants, hydroplaned, came across onto claimant's lane and struck their vehicle, causing an accident. The Court determined liability on the part of the respondent for the pool of water which caused the accident as it created a hazard for the travelling public.

MARY KATHRYN ESTES VS. DEPARTMENT OF HIGHWAYS (CC-82-213)

The Court denied a claim for water damage to claimant's property as the Court determined that claimant's property is in a natural drainage area and there was no evidence of any negligence on the part of the respondent.

THELMA L. JAMISON VS. DEPARTMENT OF HIGHWAYS (CC-84-255)

The Court determined that respondent was liable in part for damage to claimant's property due to a blocked culvert which caused water to enter onto claimant's property.

NINA G. JONES VS. DEPARTMENT OF HIGHWAYS (CC-83-126)

The Court made an award for personal injuries to the claimant which occurred when she ran onto water on the highway, hydroplaned on the water and her vehicle went down over a bank and struck a tree causing physical injuries and damages to the claimant. The Court finds respondent negligent for failure of the respondent to take satisfactory corrective action in the care of a culvert problem of which the respondent had knowledge).

JOSEPH MULLINS AND DORA MULLINS VS. DEPARTMENT OF HIGHWAYS (CC-85-209)

The Court denied a claim for personal injuries to the claimant which occurred in an accident on a State road where the record established that respondent was negligent in failing to maintain the drainage of water on the road but under the doctrine of comparative negligence the negligence of the claimant in travelling the road at night, in the rain, and known to him to be in disrepair was equal to or greater than the negligence of the respondent in its failure to maintain the area.

JACK D. PORTER AND JACQUELINE L. PORTER CAUDILL VS. DEPARTMENT OF HIGHWAYS (CC-82-305)

A claim for damage to real property from the flow of surface water was denied by the Court as no evidence was presented of the amount of monetary damages to the claimants' property.

JOHN H. SUTPHIN AND NANCY SUTPHIN VS. DEPARTMENT OF HIGHWAYS (CC-84-275)

An award for damage to real estate which occurred when the respondent failed to properly maintain ditch lines adjacent to claimants' property was made by the Court as the surface water from the highway prevented claimants from the full use of their land.

FALLING ROCKS - See also Landslides

WILLIAM H. CLAY VS. DEPARTMENT OF HIGHWAYS (CC-84-219)

Where there was no evidence that the respondent knew or should have known of an unusually dangerous condition, rocks extending from the berm onto the edge of the roadway, the Court denied a claim for damage to a vehicle which hit the rock slide.

ARTHUR COBURN VS. DEPARTMENT OF HIGHWAYS (CC-85-177)

The Court has held that the unexplained falling of a rock bolder 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. The Court denied a claim where the vehicle ran over a rock which had rolled out into the road.)

A.E. QUEEN AND PAULINE QUEEN VS. DEPARTMENT OF HIGHWAYS (CC-85-151)

Rock fall claim - lack of notice to respondent - claim denied.

LOVA M. STOUT AND M. WOOD STOUT VS. DEPARTMENT OF HIGHWAYS (CC-78-29)

A claim for physical injuries and property damage which resulted when claimants' vehicle collided with a large bolder which rolled out in front of them was denied by the Court as the unexplained falling of a rock or bolder 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.

UNITED STATES FIDELITY AND GUARANTY COMPANY, AS SUBROGEE OF CHALMER HARLESS VS. DEPARTMENT OF HIGHWAYS (CC-84-337)

The Court denied a claim for damage to a vehicle which struck a rock in the road where there was no proof that the State had notice of the defect in the road.

LARRY J. WALLEN VS. DEPARTMENT OF HIGHWAYS (CC-86-120)

A claim for damage to a vehicle which occurred when rocks fell from a cliff along the highway was denied by the Court as the respondent had constructed concrete barriers between the base of the cliff and the berm of the highways to remedy the dangerous condition of falling rocks. The Court was unable to find negligence on the part of the respondent.

INDEPENDENT CONTRACTORS

OLIVE CRADDOCK VS. DEPARTMENT OF HIGHWAYS (CC-84-286)

The Court denied a claim for damage to a vehicle where the record established that an independent contractor was responsible for the work on the bridge.

SHARON NICKELS VS. DEPARTMENT OF HIGHWAYS (CC-84-317)

The respondent, Department of Highways, cannot be held liable for the negligence, if any, of an independent contractor. The Court denied a claim where the claimant alleged that construction on a roadway caused her to become involved in an accident.

INTEREST

CAPITOL BUSINESS EQUIPMENT, INC. VS. DEPARTMENT OF PUBLIC SAFETY (CC-87-28)

Where claimant requested payment for an original invoice and interest on that invoice, the Court made an award for the amount of the invoice but denied the interest based upon West Virginia Code §14-2-12.

THE LAWHEAD PRESS, INC. VS. GOVERNOR'S OFFICE OF COMMUNITY AND INDUSTRIAL DEVELOPMENT (CC-86-149)

A claim for interest on a printing contract was denied by the Court based upon W.Va. Code §14-2-12 and the fact that there was no provision for interest in the purchase order awarded to the claimant.

LANDSLIDES - See also Falling Rocks

0.L. WESTFALL AND REBECCA WESTFALL VS. DEPARTMENT OF HIGHWAYS (CC-80-144)

The Court made an award to the claimant for property damage which damage was caused by a slide on the property. The Court determined that respondent's actions in the reconstruction of the road above the property aggravated the condition already existing to precipitate the slide on the property. The Court made an award to the claimants.

The Court in calculating an award to be made for property damages deducted the value of the property after the damage from the estimated value of the property prior to the damage to the property.

LEASE

R.J. CAREY COMPANY, INC. VS. DEPARTMENT OF HEALTH (CC-84-209)

Cancellation provision of lease is sufficient to deny rent beyond the period of cancellation.

LIMITATION OF ACTIONS

ROBERT B. MORRISON VS. DEPARTMENT OF MOTOR VEHICLES (CC-85-206)

The Court dismissed a claim wherein the two-year period of the statute of limitations was applicable as the claimant failed to file for loss of wages in the two-year period.

CLETON E. MYERS VS. DEPARTMENT OF HIGHWAYS (CC-85-52)

The Court dismissed claimant's action for loss of tools which were burglarized from respondent's dump truck as claimant failed to file the claim within the two-year period of statute of limitations.

CHARLES G. PLANTZ VS. DEPARTMENT OF CORRECTIONS (CC-84-271 and CC-84-326)

Two claims filed by an inmate of West Virginia Penitentiary for failure of the respondent to safeguard property acquired for the operation of a radio and T.VS. repair shop and woodworking shop were denied by the Court as it does not have jurisdiction over claims which are not filed within the time specified by the applicable statute of limitations.

HAROLD M. STUMPP VS. DEPARTMENT OF CORRECTIONS (CC-86-246)

Where the Court made an award for overtime which claimant was required to work for the respondent, the Court applied the statute of limitations to that period of time for which claimant claimed loss of pay for more than two years prior to the filing of his claim.

NEGLIGENCE - See also Motor Vehicles; Streets and Highways

CAPITOL BUSINESS EQUIPMENT, INC. VS. DEPARTMENT OF FINANCE AND ADMINISTRATION (CC-87-27)

The Court made an award for the original invoice as the respondent admitted the amount and the validity of that obligation, but the Court denied the additional amount of interest based upon West Virginia Code §

Page .)

WALLACE M. COGAR VS. DEPARTMENT OF HIGHWAYS (CC-86-22)

Claimant's tools were stolen from respondent's pickup truck while the vehicle was parked on respondent's parking lot. Claimant is required to have the tools with him at all times in his employment. The Court made an award but depreciated the value of the tools by ten percent.

WALTER J. DAVIS VS.DEPARTMENT OF HIGHWAYS (CC-85-30)

As the claimant established that the truck from which cinders chips of limestone flew onto claimant's vehicle damaging the same, was owned and operated by the respondent the Court is of the opinion that it's driver was operating the truck negligently under the prevailing conditions and made an award to the claimant for damage to his vehicle.

REXELL C. FREEMAN AND JOYCE FREEMAN VS. DEPARTMENT OF HIGHWAYS (CC-84-244)

The Court held that the placement of an unsecured plate on a bridge was negligence on the part of the respondent. However, the claimant has been reimbursed by his insurance company for the estimated repair costs of the vehicle and the Court denied the claim.

NINA G. JONES VS. DEPARTMENT OF HIGHWAYS (CC-83-126)

Although the Court determined that the respondent was negligent in its failure to correct a frequent flooding problem on a highway the Court also determined that the claimant was guilty of negligence in her failure to keep a proper look out ahead and for operating her vehicle at a speed in excess of a reasonable speed under the conditions then and there existing. Therefore, the Court reduced the damages to the claimant upon the doctrine of comparative negligence.

BUFORD E. MARKER VS. DEPARTMENT OF HIGHWAYS (CC-86-1)

The Court denied a claim for damage to a vehicle when the vehicle dropped off the berm in Coonskin Park, Kanawha County, as there was no negligence established on the part of the respondent.

NADINE J. MATTHEW VS. DEPARTMENT OF HIGHWAYS (CC-85-172)

When claimant's vehicle was damaged when it struck a pothole, the Court held that although the respondent may have been negligent, the negligence of claimant's husband was equal to or greater than that of the respondent as he had notice of the defects in the road.

SANDRA MCELHENIE. PERSONAL REPRESENTATIVE OF THE ESTATE OF MARVIN MCELHENIE, DECEASED, VS. DEPARTMENT OF HIGHWAYS (CC-85-36)

The Court denied a claim for a wrongful death wherein claimant contended that the respondent was negligent in failing to properly place grade signs indicating a downgrade on a State highway and the Court determined that negligence on the part of the respondent had not been established.

HARLEY NANCE AND GENEVIEVE NANCE VS. DEPARTMENT OF HIGHWAYS (CC-85-184)

The Court denied a claim for damage to a vehicle on the basis that although the respondent may have been negligent, the negligence of the claimant was equal to or greater than that of the respondent. The claimant frequently travelled this route prior to the incident and should have been aware of the general state of disrepair of the bridge and taken the necessary precautions.

JOE SCARDINA VS. DEPARTMENT OF HIGHWAYS (CC-84-250)

The Court denied a claim for damage to a vehicle which occurred when claimant's wife pulled the vehicle off to the berm and backed the car into a growth of weeds where the remains of a metal light pole damaged the vehicle. There was no negligence on the part of the respondent.

JERRY ALLEN TACKETT VS. DEPARTMENT OF HIGHWAYS (CC-86-86)

The Court denied a claim for damage to a vehicle which struck a pothole as the negligence of the claimant was equal to or greater than that of the respondent.

EUGENE 0. WORKMAN VS. DEPARTMENT OF HIGHWAYS (CC-85-154)

An employee of the respondent had his glasses broken when he slipped and fell on a truck while preparing to go out on snow removal work. The Court denied the claim for loss of the eyeglasses as there was no evidence that the respondent was negligent.

NOTICE

CHARLES EDWARD ALLEN VS. DEPARTMENT OF HIGHWAYS (CC-85-32)

Pothole claim - lack of notice.

KIMBERLY D. BACK VS. DEPARTMENT OF HIGHWAYS (CC-86-153)

Claimant failed to prove that the respondent had of notice of the defect in question which caused the damage to claimant's vehicle; therefore, the Court will deny the claim.

DELILAH LYNN CHAPMAN VS. DEPARTMENT OF HIGHWAYS (CC-85-310)

A claim for personal injuries and medical expenses was denied by the Court as the evidence revealed that the respondent performed maintenance on the section of road where the incident occurred and the respondent lacked notice of this particular hole which required maintenance at the time of this incident.

KAREN COLEMAN VS. DEPARTMENT OF HIGHWAYS (CC-86-94)

The Court denied a claim for damage to a vehicle as the claimant failed to prove notice, either actual or constructive, of the defect in question.

JOYCE ANN COLLINS VS. DEPARTMENT OF HIGHWAYS (CC-86-141)

A claim for damage to a vehicle which occurred when the vehicle struck a pothole was denied as there was no proof of notice, either actual or constructive, on the part of the respondent of the defect in question.

WILLIAM LEE COOGLE, JR. VS. DEPARTMENT OF HIGHWAYS (CC-86-343)

Question of actual or constructive notice - claim denied.

LARRY FARLEY AND LINDA FARLEY VS. DEPARTMENT OF HIGHWAYS (CC-85-271)

Lack of notice claim.

KENNETH E. FRANK VS. DEPARTMENT OF HIGHWAYS (CC-85-198)

A claim was denied for damages to a vehicle where the claimant failed to prove actual or constructive notice on the part of the respondent State agency.

ROBERT KEVIN GILLISPIE AND CAROLYN KAY GILLISPIE VS. DEPARTMENT OF HIGHWAYS (CC-86-14)

The size of a pothole is indicative of its presence in a highway and the Court will apply constructive notice of the defect in the highway. The Court made an award to claimants who sustained damages as the result of striking a large hole in a State road.

STEVEN D. GOOD VS. DEPARTMENT OF HIGHWAYS (CC-84-283)

Pothole claim - Lack of notice on the part of the respondent.

RETTIE LOUISE HAMON VS. DEPARTMENT OF HIGHWAYS (CC-86-31)

Where the size of the pothole in the road was indicative that it had been in existence for a substantial period of time prior to the date of the incident, the Court made an award for the damages to the vehicle which struck the hole.

CURTIS HARLESS VS. DEPARTMENT OF HIGHWAYS (CC-86-152)

A claim for damage to a vehicle which occurred when the vehicle struck a pothole was denied. The claimant failed to prove notice, either actual or constructive, of the defect in question.

DELTA W. HARRAH AND EVA KAY HARRAH VS. DEPARTMENT OF HIGHWAYS (CC-86-85)

The Court denied a claim for damage to a vehicle which struck a hole in the road where the respondent did not have proof of notice, either actual or constructive, of the defect.

DUBOIS JORDAN VS. DEPARTMENT OF HIGHWAYS (CC-86-67)

Claimant was made an award for damage to his vehicle which struck a pothole. The Court determined that the size of the pothole was indicative of the fact that it could not have developed overnight and, therefore, was a hazard to the travelling public.

PAULINE R. KAPLAN AND ALLEN KAPLAN VS. DEPARTMENT OF HIGHWAYS (CC-84-339)

Pothole claim - Lack of real or constructive notice on the part of the respondent.

MINE SAFETY APPLIANCES COMPANY VS. DEPARTMENT OF HIGHWAYS (CC-85-191)

Lack of notice on the part of the respondent claim denied.

KENNETH AND JANET MOUNTS VS. DEPARTMENT OF HIGHWAYS (CC-85-40)

Pothole claim - Lack of actual or constructive notice on the part of the respondent.

JOYCE PRIDDY VS. DEPARTMENT OF HIGHWAYS (CC-86-19)

The Court made an award for damage to a vehicle which struck a pothole where the Court determined that the pothole was of sufficient size that the respondent should have discovered and repaired the defect.

RONALD G. PRITT AND PEGGY J. PRITT VS. DEPARTMENT OF HIGHWAYS (CC-85-76)

Pothole claim - Lack of actual or constructive notice of the defect in the road.

TRUDY PROTZMAN VS. DEPARTMENT OF HIGHWAYS (CC-85-376)

Actual or constructive notice case.

ROBERT W. RECTENWALD AND JEANNE E. RECTENWALD VS. DEPARTMENT OF HIGHWAYS (CC-85-230)

Lack of notice to the respondent - claim

denied.

REUBEN E. ROBERTSON AND BRENDA G. ROBERTSON VS. DEPARTMENT OF HIGHWAYS (CC-86-156)

The Court denied a claim for damage to a vehicle which struck a pothole where the claimants failed to prove the respondent had actual or constructive notice of the defect.

BRADY C. SINGLETON VS. DEPARTMENT OF HIGHWAYS (CC-86-25)

Where no evidence was presented to show that the respondent had actual or constructive notice of the existence of the hole struck by claimant's vehicle and that the road where the incident occurred is a State maintained highway, the Court must deny the claim.

FRANK SPENCE AND MARGARET E. SPENCE VS. DEPARTMENT OF HIGHWAYS (CC-85-224)

Lack of notice on part of respondent - claim denied.

PAUL R. THOMAS VS. DEPARTMENT OF HIGHWAYS (CC-86-92)

The Court denied a claim for damage to a vehicle which occurred when the blacktop gave way with the vehicle causing it to strike the road's surface. The Court determined that the hazardous condition appeared suddenly without prior actual or constructive notice to the respondent.

R. MIKE VERES VS. DEPARTMENT OF HIGHWAYS (CC-85-80)

A claim for damage to a boat trailer was denied by the Court as no evidence of actual or constructive notice of the hazard which caused the damage was established.

OFFICE EQUIPMENT AND SUPPLIES

JOE L. SMITH, JR., INC., D/B/A BIGGS-JOHNSTON- WITHROW VS. DEPARTMENT OF EMPLOYMENT SECURITY (CC-85-377)

Claimant printing company printed forms for the respondent which were rejected. The respondent returned only a portion of the forms to the claimant for which the Claimant received credit from its subcontractor. The Court made an award to the claimant for the defective forms as the respondent used the forms. However, the Court reduced the amount claimed by 10 percent as the forms were defective.

PEDESTRIANS

SHELBY B. MELVIN VS. BOARD OF REGENTS (CC-82-308)

The doctrine of comparative negligence was applied where the Court determined that respondent failed to maintain the sidewalk in a proper manner and that the claimant herself was negligent in failing to maintain an adequate outlook on the sidewalk where she was walking.

HOWARD A. SNYDER VS. DEPARTMENT OF HIGHWAYS (CC-80-351)

The principle that the State is neither an insurer nor a guarantor of the safety of travellers on its highways has been extended to pedestrians. The Court has held that where a person has travelled across an area and then been injured upon returning, failure to exercise reasonable care and to maintain proper lookout was the proximate cause of the injury. This principle was applied in a claim where the claimant fell on steps in a roadside park.

CONSTANCE J. TILLEY VS. DEPARTMENT OF HIGHWAYS (CC-85-246)

A claim for personal injuries to the claimant which occurred when she stepped between two boards of a walkway at the New River Gorge overlook was denied by the Court as the claimant was negligent when she failed to look at the boardwalk where she was walking.

PRISONS AND PRISONERS

FARMERS & MECHANICS MUTUAL FIRE INSURANCE COMPANY OF W.VA. AND MUTUAL PROTECTIVE ASSOCIATION OF W.VA. VS. DEPARTMENT OF HUMAN SERVICES AND DEPARTMENT OF CORRECTIONS (CC-79-30)

Where claimant alleged that the respondents negligently and recklessly placed an individual into an institution which did not have the proper facilities to prevent escape and the individual did escape, the Court denied the claim as the record in the claim does not substantiate the allegation of knowledge on the part of the personnel in charge of the institution.

CONSTANCE KESNER, INDIVIDUALLY AND CONSTANCE KESNER, AS ADMINISTRATRIX OF THE ESTATE OF PHILP S. KESNER, DECEASED VS. DEPARTMENT OF CORRECTIONS (CC-81-188)

The Court made an award to the claimant individually and to the claimant as administratrix of her husband's estate where the respondent conceded liability and acknowledged that there probably would not have been death and injuries had there not been negligence on the part of at least two correction officers when an escape was made by inmates at the West Virginia Penitentiary in Moundsville, West Virginia.

LAWRENCE D. JENKINS VS. DEPARTMENT OF CORRECTIONS (CC-84-192)

The Court denied a claim for damage to a vehicle which occurred when two escapees from the West Virginia Industrial Home for Youth stole claimants unlocked vehicle which contained the keys to the car as the Court determined that no evidence had been presented to show that the respondent acted in a negligent manner.

PUBLIC EMPLOYEES

JAMES A. COGHLIN, JR. AND ALVIN E. GARDNER VS. DEPARTMENT OF HIGHWAYS (CC-85-138)

Annual leave time for provisional employees must be taken during the period of time in which the employee is employed. The Court denied several claims for annual leave time for provisional employees based upon the Civil Service Rules and Regulations.

JEFFREY ALAN RICHARD VS. DEPARTMENT OF EDUCATION (CC-87-37)

The Court made an award to claimant for salary compensation due him under an Order by the West Virginia Education Employees Grievance Board which directed payment by the respondent. Respondent was unable to pay claimant as this was considered a retroactive salary increase.

HAROLD M. STUMPP VS. DEPARTMENT OF CORRECTIONS (CC-86-246)

While employed as a correctional officer, claimant was required to report ten minutes before each shift that he worked. A grievance with the Civil Service Commission determined that claimant was entitled to overtime pay. The Court made an award for overtime to which he was entitled.

TOOLEY ET AL. VS. DEPARTMENT OF HIGHWAYS (CC-85-139)

These are provisional employee claims wherein annual leave time was denied the provisional employees and the Court upheld the Civil Service Rules and Regulations.

RELEASES

TAMMY JO HALL ARTHUR VS. DEPARTMENT OF HIGHWAYS (CC-79-568)

A general release signed by the claimant in a prior case is sufficient to release respondent.

EUGENE R. EDWARDS, JR. AND MARTHA E. EDWARDS VS. DEPARTMENT OF HIGHWAYS (CC-80-298)

A general release executed by the claimants is sufficient to release respondent.

STATE AGENCIES

MARY ELIZABETH BINDER VS. DEPARTMENT OF EDUCATION (CC-86-295)

The Court denied a claim for reimbursement of tuition for the cost of renewing a teaching certificate where the respondent did not have sufficient funds within the proper fiscal year to pay such reimbursement.

BRENT BOGGS VS. DEPARTMENT OF CORRECTIONS (CC-85-343)

Where the claimant proved through various records presented that he was entitled to overtime compensation in accordance with Civil Service regulations, the Court made an award for the overtime.

NAOMI A. CLARK VS. DEPARTMENT OF COMMERCE (CC-85-290)

Claimant alleged that respondent was negligent in its maintenance of the state park. Claimant's vehicle was vandalized when she and a companion camped overnight at the park. The Court denied the claim as there was no evidence of negligence on the part of the respondent.

ARTHUR L. CORNETTE, JR. VS. DEPARTMENT OF HIGHWAYS (CC-85-367)

The Court denied a claim for damage to a vehicle which occurred when the vehicle slid on ice in a parking structure in Beckley, West Virginia as the definition of "State agency" specifically excluded municipalities as to jurisdiction of this Court. The parking structure was maintained by the City of Beckley.

HAMILTON BUSINESS SYSTEMS VS. DEPARTMENT OF HEALTH (CC-85-175)

The Court denied a claim for loss of equipment rented by the respondent in accordance with the terms of the agreement as there was no evidence of any negligence or willful misconduct on the part of the respondent in the loss.

HERMAN F. LAWHORN VS. DEPARTMENT OF VETERANS AFFAIRS (CC-85-389)

The Court denied a claim for repayment of an overpayment of benefits to the claimant as the Court held that the claimant received a benefit sum to which he was not entitled.

THEODORE D. MOORE, III VS. SUPREME COURT (CC-84-242)

The Court denied a claim for the payment of witness fees and mileage costs incurred by the claimant as the Court of Claims does not have jurisdiction over the matter in question.

GAIL PHILLIPS VS. DEPARTMENT OF PUBLIC SAFETY (CC-85-129)

A claim for damages to claimant's mobile home which was rented to another individual was awarded by the Court when members of the Department of Public Safety damaged the mobile home with canisters of tear gas in an attempt to apprehend another individual.

VICTOR SOLOMON VS. DEPARTMENT OF HEALTH (D-736)

A claim for damages incident to the refusal of respondent to grant claimant a permit for a landfill in Monongalia County was denied by the Court as the claimant did not prove discrimination by a preponderance of the evidence.

TRI-CITY WELDING SUPPLY COMPANY VS. DEPARTMENT OF CORRECTIONS (CC-84-335)

A claim for cylinders loaned to West Virginia Industrial School for Boys at Grafton was denied as the facts presented did not support the claimant's claim for the missing cylinders.

DOROTHY WORRELL, SERVING AS NEXT FRIEND FOR JOHN WORRELL, HER NATURAL SON VS. DEPARTMENT OF HEALTH (CC-85-49)

The document which claimant signed upon his confinement at Lakin State Hospital absolving the respondent facility of liability for his personal belongings, was upheld by the Court to deny the claim for personal articles which were missing at the institution.

STREETS AND HIGHWAYS - See also Falling Rocks; Landslide; Motor Vehicles; Negligence

AETNA CASUALTY & SURETY, AS SUBROGEE OF ROBERT W. DAVIS, AND ROBERT W. DAVIS, INDIVIDUALLY VS. DEPARTMENT OF HIGHWAYS (CC-85-215)

The Court made an award for damages to claimant's insured vehicle where the Court determined that the respondent was negligent in failing to properly maintain a construction area where a ditch had been dug across the road.

JAMES W. BASHAM, JR. VS. DEPARTMENT OF HIGHWAYS (CC-84-59)

The Court denied a claim for damage to a vehicle which occurred when the claimant encountered ice and his vehicle flipped and skidded. Before the respondent may be held liable, there must be evidence that the respondent knew or should have known of the existence of ice on the highway.

J. W. BAUER VS. DEPARTMENT OF HIGHWAYS (CC-85-358)

The Court denied a claim for damage to a vehicle which occurred when claimant was proceeding in the wrong lane of traffic and struck the curb of the median. The accident was not caused by negligence on the part of respondent.

JAY L. BOLYARD VS. DEPARTMENT OF HIGHWAYS (CC-86-195)

Where the size of a pothole in the road is indicative of its presence for a substantial period of time prior to the date of the incident, the Court will make an award to the claimant for the damages sustained by claimant's vehicle.

PHIL CALISE VS. DEPARTMENT OF HIGHWAYS (CC-85-28)

Claimant sustained personal injury and property damage to his bicycle when he failed to see a sewer grate on the highway and the bicycle wheel dropped into the grate causing the claimant to fall. The Court denied the claim as it could determine no negligence on the part of the respondent.

WILLIAM E. CARR VS. DEPARTMENT OF HIGHWAYS (CC-86-41)

Where no evidence was introduced at the hearing to establish knowledge on the part of the respondent on the condition of a metal expansion joint which claimant's vehicle struck, the Court will deny the claim.

VONLEY COLE, ADMINISTRATOR OF THE ESTATE OF KAREN RENEE COLE VS. DEPARTMENT OF HIGHWAYS (CC-82-292)

The Court denied a claim for claimant's decedent where the allegation was that the respondent failed to maintain the berm of the highway in a reasonably safe condition. The Court could not conclude that claimant's decedent was forced onto the berm or otherwise necessarily used it. The claim was denied.

WILLIAM K. CUNNINGHAM AND TRESEA J. CUNNINGHAM VS. DEPARTMENT OF HIGHWAYS (CC-86-113)

The Court denied a claim for damage to a vehicle which claimant alleged occurred when aggregate being placed on the road struck his windshield. There was nothing in the record to show that respondent had notice of a dangerous condition on the highway.

C. P. FARLEY AND REBECCA L. FARLEY VS. DEPARTMENT OF HIGHWAYS (CC-85-123)

Pothole claim - lack of notice to the respondent.

FRED THOMAS GUIDI VS. BOARD OF REGENTS (CC-86-219)

The Court made an award for damage to claimant's vehicle which struck a manhole cover located on property of the respondent even though the manhole cover was to be maintained by the city of Morgantown. The award was for one half of the loss.

HELEN HERRON VS. DEPARTMENT OF HIGHWAYS (CC-85-165)

The Court denied a claim for personal injury which occurred when claimant's vehicle dropped off the paved portion of the road into the ditchline, claimant then lost control of the vehicle which landed against a porch of a nearby residence. The Court was unable to determine negligence on the part of the respondent in the maintenance of the road or the berm.

KNOTTS, GIANFRANCESCO, & MAYS VS. DEPARTMENT OF HIGHWAYS (CC-81-358a-c)

Where claimants failed to establish that respondent was under a duty to erect a warning sign or maintain a guardrail at the accident scene, the Court denied the claim. Generally, the posting of road markers and the erection of guardrails is discretionary.

FRIEDA LEGGETT AND WILLIAM LEGGETT VS. DEPARTMENT OF HIGHWAYS (CC-82-223)

Claimant alleged that barrels and warning signs placed on an interstate to indicate construction were negligently place and caused claimant to have an accident. The Court determined that the barrels and warning signs were place in accordance with respondent's regulations and denied the claim.

CHESTER LEWIS VS. DEPARTMENT OF HIGHWAYS (CC-86-81)

The Court made an award to the claimant for damage to a vehicle which occurred when it struck a large pothole. The Court held that the respondent owes a duty of reasonable care and diligence in the maintenance of the highways and the respondent had constructive notice of this defect in the road.

SANDRA MCELHENIE, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARVIN MCELHENIE, DECEASED, VS.

DEPARTMENT OF HIGHWAYS (CC-85-36)

Where the record in the claim revealed that claimant's decedent was unfamiliar with the section of highway on which the accident occurred and decedent lost control of his vehicle on a down-grade, the Court denied the claim as an award would require speculation on the part of the Court as to the cause of the accident.

TOMMY C. MILLER VS. DEPARTMENT OF HIGHWAYS (CC-85-12)

The court made an award for damages to a vehicle which occurred when the vehicle struck a pothole as the size of the pothole is indicative of its presence for a substantial period of tine prior to the date of the incident, thus establishing constructive notice of the defect.

JOHN I. MOORE AND CHARLENE MOORE VS. DEPARTMENT OF HIGHWAYS (CC-85-153)

The claimant struck a large hole in an interstate and claimed damaged to her vehicle. The Court denied the claim as the evidence in the record indicated that the dangerous condition appeared suddenly and that the respondent moved promptly to take safety precautions as soon as it became aware of the problem.

KAREN S. MURRAY AND DANIEL J. MURRAY VS. DEPARTMENT OF HIGHWAYS (CC-85-181)

The Court denied a claim for damage to a vehicle which occurred when the vehicle slid on mud in the roadway. The Court determined that the claimant had observed respondent's crew working and was aware of the presence of mud on the road.

DEBORAH D. PADGETT VS. DEPARTMENT OF HIGHWAYS (CC-86-63)

Damage to a vehicle which occurred when a loose grate flipped up against the vehicle was denied by the Court as the record reflects no notice being given respondent of the condition of the grate prior to claimant's incident.

DORSEL D. PARSONS VS. DEPARTMENT OF HIGHWAYS (CC-82-141)

Claimant alleged that he lost control of his vehicle and went off the berm over an embankment. The reason for the loss of control was that a vehicle was coming at him with its bright lights on. Claimant alleged that respondent was negligent for failing to maintain the berm in proper condition and failing to install a guard rail. The Court denied the claim as there was no evidence of negligence on the part of the respondent.

ROYAL RESOURCES CORPORATION VS. DEPARTMENT OF HIGHWAYS (CC-86-23)

Where the Court was unable to discern from the testimony presented who maintained the drain at the location of the accident, the Court was unable to grant an award.

RICHARD SAUNDERS, D/B/A RICK'S USED CARS VS. DEPARTMENT OF HIGHWAYS (CC-85-331)

The Court denied a claim wherein the claimant alleged that his property was no longer usable due to a ditch line placed by the respondent. The Court determined that the ditch line was necessary to remedy drainage and the claimant made no effort to submit proposals so that a mutual agreeable solution could be found to provide access to his property.

DOMINIC & MARY L. STAFFILENO VS. DEPARTMENT OF HIGHWAYS (CC-83-212)

A claim for personal injury and property damages which occurred when claimants' vehicle slid in gravel on the highway was denied by the Court as the quantity of debris on the highway from the ditch-cleaning operation does not appear to have been excessive nor such as to have imposed a duty upon the respondent to warn motorists of its presence.

DENISE W. SUTTON AND LINDA A. SUTTON VS. DEPARTMENT OF HIGHWAYS (CC-85-268)

The Court denied a claim for damage to a vehicle where the evidence in the record indicated that the defective condition on the interstate appeared suddenly and that respondent promptly moved to repair the defect as soon as it became award of the problem.

THOMAS TREADWAY VS. DEPARTMENT OF HIGHWAYS (CC-86-11)

A claim for damage to a vehicle which occurred when the vehicle struck a piece of ice and went into a ditch was denied by the Court even though the claimant made a complaint to the respondent. The complaint was made on a day other than the day of the incident and the road conditions were different on this particular day.

TAXATION

RONALD L. HUNT VS. DEPARTMENT OF MOTOR VEHICLES (CC-86-398)

The Court made an award for overpayment of the Privilege Tax in registering a vehicle where the error was on the part of the respondent State agency.

SUSAN MANN VS. DEPARTMENT OF HUMAN SERVICES (CC-86-36)

The Court denied a claim for failure of the Department of Human Services to process an entitlement to an income tax refund from claimant's ex-husband as there was insufficient proof that such refund was to be paid to the ex-husband.

TREES AND TIMBER

FARMERS INSURANCE GROUP COMPANY, AS SUBROGEE OF MARGARET GERRITSEN AND ADRIAN GERRITSEN VS. DEPARTMENT OF HIGHWAYS (CC-85-216)

The Court denied a claim for damage to a vehicle from a tree limb which fell onto the vehicle as the Court determined that the accident was not the result of any negligence on the part of the respondent but was due to a storm.

DONNIE LEE MCIE AND BETTY J. JEFFRIES, ADMIN. OF THE ESTATE OF EARL WILLIAM JEFFRIES, DEC. VS. DEPARTMENT OF HIGHWAYS (CC-82-159a&b)

The Court denied a claim for wrongful death and a claim for personal injuries due to an accident in which a tree fell upon claimant's vehicle as the Court determined that the tree was not close enough to respondent's right of way so as to pose a hazard which should have been apparent to the respondent.

TRESPASS

LEO DUNN AND EDITH DUNN VS. DEPARTMENT OF HIGHWAYS (CC-82-257)

The Court denied a claim for damage to a fence along claimants' property which was removed by respondent's employees pursuant to a Notice of Removal of an Obstruction issued by the respondent. The record did not establish that respondent was guilty of trespassing.

W.VA.UNIVERSITY - See Board of Regents

ANDREW CHIMEZIE IMEGI VS. BOARD OF REGENTS (CC-85-6)

A claim by a student resident at West Virginia University for his belongings was denied by the Court as there was no evidence of responsibility of the University for safe keeping of claimant's property nor of any negligence or willful misconduct on the part of the University.

KAREY LYNN WELLS VS. BOARD OF REGENTS (CC-85-253)

A claim for loss of property from a dormitory was denied as the Court lacks Jurisdiction in a proceeding which may be maintained against the State in the courts of the State. The State agency has insurance coverage for such an incident.

PETER E. WU VS. BOARD OF REGENTS (CC-84-318)

The Court made an award for loss of property which occurred due to a power surge in a dormitory of the respondent as the responsibility of the electrical system is that of the respondent.