STATE OF WEST VIRGINIA

Report

of the

Court of Claims

1979-1981

Volume

13

STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the Period from July 1, 1979

to June 30, 1981

BY

CHERYLE M. HALL

CLERK

VOLUME XIII

(Published by authority Code 14-2-25)

JARRETT PRINTING CO., CHARLESTON, WV

TABLE OF CONTENTS

Claims reported, table of LXVII

Claims classified according to statute, list of XXVII

Court of Claims Law VII

Letter of transmittal V

Opinions of the Court I

Personnel of the Court IV

References 441

Rules of Practice and Procedure XIX

Terms of Court VI

PERSONNEL
OF THE
STATE COURT OF CLAIMS

HONORABLE JOHN B. GARDEN .....Presiding Judge

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

HONORABLE DANIEL A. RULEY, JR. .....Judge

CHERYLE M. HALL .....Clerk

CHAUNCEY BROWNING .....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

LETTER OF TRANSMITTAL

To His Excellency
The Honorable John D. Rockefeller, IV
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 seventy-nine to June thirty, one thousand nine hundred eighty-one.

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.

STATE COURT OF CLAIMS LAW

CHAPTER 14 CODE

Article 2. Claims Against the State.

§14-2-1. Purpose.
§14-2-2. Venue for certain suits and actions.
§14-2-3. Definitions.
§14-2-4. Creation of court of claims; appointment and terms of judges; vacancies.
§14-2-5. Court clerk and other personnel.
§14-2-6. Terms of court.
§14-2-7. Meeting place of the court.
§14-2-8. Compensation of judges; expenses.
§14-2-9. Oath of office.
§14-2-10. Qualifications of judges.
§14-2-11. Attorney general to represent State.
§14-2-12. General powers of the court.
§14-2-13. Jurisdiction of the court.
§14-2-14. Claims excluded.
§14-2-15. Rules of practice and procedure.
§14-2-16. Regular procedure.
§14-2-17. Shortened procedure.
§14-2-18. Advisory determination procedure.
§14-2-19. Claims under existing appropriations.
§14-2-20. Claims under special appropriations.
§14-2-21. Periods of limitation made applicable.
§14-2-22. Compulsory process.
§14-2-23. Inclusion of awards in budget.
§14-2-24. Records to be preserved.
§14-2-25. Reports of the court.
§14-2-26. Fraudulent claims.
§14-2-27. Conclusiveness of determination.
§14-2-28. Award as condition precedent to appropriation.
§14-2-29. Severability.

§14-2-1. Purpose.

The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the State that because of the provisions of section 35, article VI of the Constitution of the State, and of statutory restrictions, inhibitions or limitations, cannot be determined in the regular courts of the State; and to provide for proceedings in which the State has a special interest.

§14-2-2. Venue for certain suits and actions.

(a) The following proceedings shall be brought and prosecuted only in the circuit court of Kanawha county:

(1) Any suit in which the governor, any other state officer, or a state agency is made a party defendant, except as garnishee or suggestee.

(2) Any suit attempting to enjoin or otherwise suspend or affect a judgment or decree on behalf of the State obtained in any circuit court.

(b) Any proceeding for injunctive or mandamus relief involving the taking, title, or collection for or prevention of damage to real property may be brought and presented in the circuit court of the county in which the real property affected is situate.

This section shall apply only to such proceedings as are not prohibited by the constitutional immunity of the State from suit under section 35, article VI of the Constitution of the State.

§14-2-3. Definitions.

For the purpose of this article:

"Court" means the state court of claims established by section four [§14-2-4] of this article.

"Claim" means a claim authorized to be heard by the court in accordance with this article.

"Approved claim" means a claim found by the court to be one that should be paid under the provisions of this article.

"Award" means the amount recommended by the court to be paid in satisfaction of an approved claim.

"Clerk" means the clerk of the court of claims.

"State agency" means a state department, board, commission, institution, or other administrative agency of state government: Provided, that a "state agency" shall not be considered to include county courts, county boards of education, municipalities, or any other political or local subdivision of this State regardless of any state aid that might be provided.

§14-2-4. Creation of court of claims; appointment and terms of judges; vacancies.

The "court of claims" is hereby created. It shall consist of three

judges, to be appointed by the president of the senate and the speaker of the house of delegates, by and with the advice and consent of the senate, one of whom shall be appointed presiding judge. Each appointment to the court shall be made from a list of three qualified nominees furnished by the board of governors of the West Virginia State bar.

The terms of the judges of this court shall be six years, except that the first members of the court shall be appointed as follows: One judge for two years, one judge for four years and one judge for six years. As these appointments expire, all appointments shall be for six year terms. Not more than two of the judges shall be of the same political party. An appointment to fill a vacancy shall be for the unexpired term.

§14-2-5. Court clerk and other personnel.

The court shall have the authority to appoint a clerk and a deputy clerk. The salary of the clerk and the deputy clerk shall be fixed by the joint committee on government and finance, and shall be paid out of the regular appropriation for the court. The clerk shall have custody of all records and proceedings of the court, shall attend meetings and hearings of the court, shall administer oaths and affirmations, and shall issue all official summonses, subpoenas, orders, statements and awards. The deputy clerk shall act in the place and stead of the clerk in the clerk's absence.

The joint committee on government and finance may employ other persons whose services shall be necessary to the orderly transaction of the business of the court, and fix their compensation.

§14-2-6. Terms of court.

The court shall hold at least two regular terms each year, on the second Monday in April and September. So far as possible, the court shall not adjourn a regular term until all claims then upon its docket and ready for hearing or other consideration have been disposed of.

Special terms or meetings may be called by the clerk at the request of the court whenever the number of claims awaiting consideration, or any other pressing matter of official business, make such a term advisable.

§14-2-7. Meeting place of the court.

The regular meeting place of the court shall be at the state capitol, and the joint committee on government and finance shall provide adequate quarters therefor. When deemed advisable, in order to facilitate the full hearing of claims arising elsewhere in the State, the court may convene at any county seat.

§14-2-8. Compensation of judges; expenses.

Each judge of the court shall receive one hundred fifteen dollars for each day actually served, and actual expenses incurred in the performance of his duties. The number of days served by each judge shall not exceed one hundred in any fiscal year, except by authority of the joint committee on government and finance. Requisitions for compensation and expenses shall be accompanied by sworn and itemized statnhall be filed with the auditor and preserved as public records. For the purpose of this section, time served shall include time spent in the hearing of claims, in the consideration of the record, in the preparation of opinions, and in necessary travel.

§14-2-9. Oath of office.

Each judge shall before entering upon the duties of his office, take and subscribe to the oath prescribed by section 5, article IV of the Constitution of the State. The oath shall be filed with the clerk.

§14-2-10. Qualifications of judges.

Each judge appointed to the court of claims shall be an attorney at law, licensed to practice in this State and shall have been so licensed to practice law for a period of not less than ten years prior to his appointment as judge. A judge shall not be an officer or an employee of any branch of state government, except in his capacity as a member of the court and shall receive no other compensation from the State or any of its political subdivisions. A judge shall not hear or participate in the consideration of any claim in which he is interested personally, either directly or indirectly.

§14-2-11. Attorney general to represent State.

The attorney general shall represent the interests of the State in all claims coming before the court.

§14-2-12. General powers of the court.

The court shall, in accordance with this article, consider claims which, but for the constitutional immunity of the State from suit, or for some statutory restrictions, inhibitions or limitations, could

be maintained in the regular courts of the State. No liability shall be imposed upon the State or any state agency by a determination of the court of claims approving a claim and recommending an award, unless the claim is (1) made under an existing appropriation, in accordance with section nineteen [§14-2-19] of this article, or (2) a claim under a special appropriation, as provided in section twenty [§14-2-20] of this article. The court shall consider claims in accordance with the provisions of this article.

Except as is otherwise provided in this article, a claim shall be instituted by the filing of notice with the clerk. In accordance with rules promulgated by the court, each claim shall be considered by the court as a whole, or by a judge sitting individually, and if, after consideration, the court finds that a claim is just and proper, it shall so determine and shall file with the clerk a brief statement of its reasons. A claim so filed shall be an approved claim. The court shall also determine the amount that should be paid to the claimant, and shall itemize this amount as an award, with the reasons therefor, in its statement filed with the clerk. 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.

§14-2-13. Jurisdiction of the court.

The jurisdiction of the court, except for the claims excluded by section fourteen [§14-2-14], shall extend to the following matters:

1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the State or any of its agencies, which the State as a sovereign commonwealth should in equity and good conscience discharge and pay.

2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of setoff or counterclaim on the part of the State or any state agency.

3. The legal or equitable status, or both, of any claim referred to the court by the head of a state agency for an advisory determination.

§14-2-14. Claims excluded.

The jurisdiction of the court shall not extend to any claim:

1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the State.

2. For a disability or death benefit under chapter twenty-three [§23-1-1 et seq.] of this Code.

3. For unemployment compensation under chapter twenty-one-A [§21A-1-1 et seq.] of this Code.

4. For relief or public assistance under chapter nine [§9-1-1 et seq.] of this Code.

5. 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.

§14-2-15. Rules of practice and procedure.

The court shall adopt and may from time to time amend rules of procedure, in accordance with the provisions of this article, governing proceedings before the court. Rules shall be designed to assure a simple, expeditious and inexpensive consideration of claims. Rules shall permit a claimant to appear in his own behalf or be represented by counsel.

Under its rules, the court shall not be bound by the usual common law or statutory rules of evidence. The court may accept and weigh, in accordance with its evidential value, any information that will assist the court in determining the factual basis of a claim.

§14-2-16. Regular procedure.

The regular procedure for the consideration of claims shall be substantially as follows:

1. The claimant shall give notice to the clerk that he desires to maintain a claim. Notice shall be in writing and shall be in sufficient detail to identify the claimant, the circumstances giving rise to the claim, and the state agency concerned, if any. The claimant shall not otherwise be held to any formal requirment of notice.

2. The clerk shall transmit a copy of the notice to the state agency concerned. The state agency may deny the claim, or may request a postponement of proceedings to permit negotiations with the claimant. If the court finds that a claim is prima facie within its jurisdiction, it shall order the claim to be placed upon its regular docket for hearing.

3. During the period of negotiations and pending hearing, the state agency, represented by the attorney general, shall, if possible,

reach an agreement with the claimant regarding the facts upon which the claim is based so as to avoid the necessity for the introduction of evidence at the hearing. If the parties are unable to agree upon the facts an attempt shall be made to stipulate the questions of fact in issue.

4. The court shall so conduct the hearing as to disclose all material facts and issues of liability and may examine or cross-examine witnesses. The court may call witnesses or require evidence not produced by the parties; may stipulate the questions to be argued by the parties; and may continue the hearing until some subsequent time to permit a more complete presentation of the claim.

5. After the close of the hearing the court shall consider the claim and shall conclude its determination, if possible, within thirty days.

§14-2-17. Shortened procedure.

The shortened procedure authorized by this section shall apply only to a claim possessing all of the following characteristics:

1. The claim does not arise under an appropriation for the current fiscal year.

2. The state agency concerned concurs in the claim.

3. The amount claimed does not exceed one thousand dollars.

4. The claim has been approved by the attorney general as one that, in view of the purposes of this article, should be paid.

The state agency concerned shall prepare the record of the claim consisting of all papers, stipulations and evidential documents required by the rules of the court and file the same with the clerk. The court shall consider the claim informally upon the record submitted. If the court determines that the claim should be entered as an approved claim and an award made, it shall so order and shall file its statement with the clerk. If the court finds that the record is inadequate, or that the claim should not be paid, it shall reject the claim. The rejection of a claim under this section shall not bar its resubmission under the regular procedure.

§14-2-18. Advisory determination procedure.

The governor or the head of a state agency may refer to the court for an advisory determination the question of the legal or equitable

status, or both, of a claim against the State or a state agency. This procedure shall apply only to such claims as are within the jurisdiction of the court. The procedure shall be substantially as follows:

1. There shall be filed with the clerk, the record of the claim including a full statement of the facts, the contentions of the claimant, and such other materials as the rules of the court may require. The record shall submit specific questions for the court's consideration.

2. The clerk shall examine the record submitted and if he finds that it is adequate under the rules, he shall place the claim on a special docket. If he finds the record inadequate, he shall refer it back to the officer submitting it with the request that the necessary additions or changes be made.

3. When a claim is reached on the special docket, the court shall prepare a brief opinion for the information and guidance of the officer. The claim shall be considered informally and without hearing. A claimant shall not be entitled to appear in connection with the consideration of the claim.

4. The opinion shall be filed with the clerk. A copy shall be transmitted to the officer who referred the claim.

An advisory determination shall not bar the subsequent consideration of the same claim if properly submitted by, or on behalf of, the claimant. Such subsequent consideration, if undertaken, shall be de novo.

§14-2-19. Claims under existing appropriations.

A claim arising under an appropriation made by the legislature during the fiscal year to which the appropriation applies, and falling within the jurisdiction of the court, may be submitted by:

1. A claimant whose claim has been rejected by the state agency concerned or by the state auditor.

2. The head of the state agency concerned in order to obtain a determination of the matters in issue.

3. The state auditor in order to obtain a full hearing and consideration of the merits.

The regular procedure, so far as applicable, shall govern the consideration of the claim by the court. If the court finds that the

claimant should be paid, it shall certify the approved claim and award to the head of the appropriate state agency, the state auditor, and to the governor. The governor may thereupon instruct the auditor to issue his warrant in payment of the award and to charge the amount thereof to the proper appropriation. The auditor shall forthwith notify the state agency that the claim has been paid. Such an expenditure shall not be subject to further review by the auditor upon any matter determined and certified by the court.

§14-2-20. Claims under special appropriations.

Whenever the legislature makes an appropriation for the payment of claims against the State, then accrued or arising during the ensuing fiscal year, the determination of claims and the payment thereof may be made in accordance with this section. However, this section shall apply only if the legislature in making its appropriation specifically so provides.

The claim shall be considered and determined by the regular or shortened procedure, as the case may be, and the amount of the award shall be fixed by the court. The clerk shall certify each approved claim and award, and requisition relating thereto, to the auditor. The auditor thereupon shall issue his warrant to the treasurer in favor of the claimant. The auditor shall issue his warrant without further examination or review of the claim except for the question of a sufficient unexpended balance in the appropriation.

§14-2-21. Periods of limitation made applicable.

The court shall not take jurisdiction of any claim, whether accruing before or after the effective date of this article [July 1, 1967], 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, one thousand nine hundred thirty-one, as amended, if the claim were against a private person, firm or corporation and the constitutional immunity of the State from suit were not involved and such period of limitation may not be waived or extended. The foregoing provision shall not be held to limit or restrict the right of any person, firm or corporation who or which had a claim against the State or any state agency, pending before the attorney general on the effective date of this article [July 1, 1967], from presenting such claim to the court of claims, nor shall it limit or restrict the right to file such a claim which was, on the effective date of this article

§14-2-29. Severability.

If any provision of this article or the application thereof to any person or circumstance be held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.

Rules of Practice and Procedure

of the

STATE COURT OF CLAIMS

(Adopted by the Court
September 11, 1967.

Amended February 18, 1970

Amended February 23, 1972

Amended August 1, 1978.)

TABLE OF RULES

Rules of Practice and Procedure

RULE

1. Clerk, Custodian of Papers, etc.
2. Filing Papers.
3. Records.
4. Form of Claims.
5. Copy of Notice of Claims to Attorney General and State Agency.
6. Preparation of Hearing Docket.
7. Proof and Rules Governing Procedure.
8. Appearances.
9. Briefs.
10. Continuances: Dismissal For Failure to Prosecute.
11. Original Papers Not To Be Withdrawn: Exceptions.
12. Withdrawal of Claim.
13. Witnesses.
14. Depositions.
15. Re-Hearings.
16. Records of Shortened Procedure Claims Submitted by State Agencies.
17. Application of Rules of Civil Procedure.

RULES OF PRACTICE AND PROCEDURE

OF THE COURT OF CLAIMS

STATE OF WEST VIRGINIA

RULE 1. CLERK, CUSTODIAN OF PAPERS, ETC.

The Clerk shall be responsible for all papers and claims filed in his office; and will be required to properly file, in an index for that purpose, any paper, pleading, document, or other writing filed in connection with any claim. The Clerk shall also properly endorse all such papers and claims, showing the title of the claim, the number of the same, and such other data as may be necessary to properly connect and identify the document, writing, or claim.

RULE 2. FILING PAPERS.

(a) Communications addressed to the Court or Clerk and all notices, petitions, answers and other pleadings, all reports, documents received or filed in the office kept by the Clerk of this Court, shall be endorsed by him showing the date of the receipt or filing thereof.

(b) The Clerk, upon receipt of a notice of a claim, shall enter of record in the docket book indexed and kept for that purpose, the name of the claimant, whose name shall be used as the title of the case, and a case number shall be assigned accordingly.

(c) No paper, exclusive of exhibits, shall be filed in any action or proceeding or be accepted by the Clerk for filing nor any brief, deposition, pleading, order, decree, reporter's transcript or other paper to be made a part of the record in any claim be received except that the same be upon paper measuring 8½ inches in width and 11 inches in length.

RULE 3. RECORDS.

The Clerk shall keep the following record books, suitably indexed in the names of claimants and other subject matter:

(a) Order Book, in which shall be recorded at large, on the day of their filing, all orders made by the Court in each case or proceeding.

(b) Docket Book, in which shall be entered each case or claim made and filed, with a file or case number corresponding to the number of the case, together with brief chronological notations of the proceedings had in each case.

(c) Financial Ledger, in which shall be entered chronologically, all administrative expenditures of the Court under suitable classifications.

RULE 4. FORM OF CLAIMS.

Verified notice in writing of each claim must be filed with the Clerk of the Court. The notice shall be in sufficient detail to identify the claimant, the circumstances giving rise to the claim, and the state agency concerned, if any. The Court reserves the right to require further information before hearing, when, in its judgment, justice and equity may require. It is recommended that notice of claims be furnished in triplicate. A suggested form of notice of a claim may be obtained from the Clerk.

RULE 5. COPY OF NOTICE OF CLAIMS TO ATTORNEY GENERAL AND STATE AGENCY.

Upon receipt of a notice of claim to be considered by the Court, the Clerk shall forthwith transmit a copy of the notice to the State Agency concerned, if any, and a copy thereof to the office of the Attorney General of the State, and the Clerk shall make a note of the time of such delivery.

RULE 6. PREPARATION OF HEARING DOCKET.

On and after the date of the adoption of these rules by the Court, the Clerk shall prepare fifteen days previous to the regular terms of Court a docket listing all claims that are ready for hearing by the Court, and showing the respective dates, as fixed by the Court for the hearing thereof. The Court reserves the right to add to, rearrange or change said docket when in its judgment such addition, rearrangement or change would expedite the work of the term. Each claimant or his counsel of record and the Attorney General shall be notified as to the date, time, and place of the hearing.

RULE 7. PROOF AND RULES GOVERNING PROCEDURE.

(a) Claims asserted against the State, including all the allegations in a notice of claim, are treated as denied, and must be established by the claimant with satisfactory proof, or proper stipulation as hereinafter provided before an award can be made.

(b) The Court shall not be bound by the usual common law or statutory rules of evidence. The Court may accept and weigh, in accordance with its evidential value, any information that will assist the Court in determining the factual basis of the claim.

(c) The Attorney General shall within twenty days after a copy of the notice has been furnished his office file with the Clerk a notice in writing, either denying the claim, requesting postponement of proceedings to permit negotiations with the claimant, or otherwise setting forth reasons for further investigaton of the claim, and furnish the claimant or his counsel of record a copy thereof. Otherwise, after said twenty-day period, the Court may order the claim placed upon its regular docket for hearing.

(d) It shall be the duty of the claimant or his counsel in claims under the regular procedure to negotiate with the Office of the Attorney General so that the claimant and the State Agency and the Attorney General may be ready at the beginning of the hearing of a claim to read, if reduced to writing, or to dictate orally, if not reduced to writing, into the record such stipulations, if any, as the parties may have been able to agree upon.

(e) Where there is a controversy between a claimant and any State Agency, the Court may require each party to reduce the facts to writing, and if the parties are not in agreement as to the facts, the Court may stipulate the questions of fact in issue and require written answers to the said stipulated questions.

(f) Claims not exceeding the sum of $1,000.00 may be heard and considered, as provided by law, by one judge sitting individually.

RULE 8. APPEARANCES.

Any claimant may appear in his own behalf or have his claim presented by counsel, duly admitted as such to practice law in the State of West Virginia.

RULE 9. BRIEFS.

(a) Claimants or their counsel, and the Attorney General, may file with the Court for its consideration a brief on any question involved, provided a copy of said brief is also presented to and furnished the opposing party or counsel. Reply briefs shall be filed within fifteen days.

(b) All briefs filed with, and for the use of, the Court shall be in quadruplicate — original and three copies. As soon as any brief is received by the Clerk he shall file the original in the Court file and deliver the three copies, one each, to the Judges of the Court.

RULE 10. CONTINUANCES: DISMISSAL FOR FAILURE TO PROSECUTE.

(a) After claims have been set for hearing, continuances are

looked upon by the Court with disfavor, but may be allowed when good cause is shown.

(b) A party desiring a continuance should file a motion showing good cause therefor at the earliest possible date.

(c) Whenever any claim has been docketed for hearing for three regular terms of Court at which the claim might have been prosecuted, and the State shall have been ready to proceed with the trial thereof, the Court may, upon its own motion or that of the State, dismiss the claim unless good cause appear or be shown by the claimant why such claim has not been prosecuted.

(d) Whenever a claimant shall fail to appear and prosecute his claim on the day set for hearing and shall not have communicated with the Clerk prior thereto, advising of his inability to attend and the reason therefore, and if it further appear that the claimant or his counsel had sufficient notice of the docketing of the claim for hearing, the Court may, upon its own motion or that of the State, dismiss the claim.

(e) Within the discretion of the Court, no order dismissing a claim under either of the two preceding sections of this rule shall be vacated nor the hearing of such claim be reopened except by a notice in writing filed not later than the end of the next regular term of Court, supported by affidavits showing sufficient reason why the order dismissing such claim should be vacated, the claim reinstated and the trial thereof permitted.

RULE 11. ORIGINAL PAPERS NOT TO BE WITHDRAWN: EXCEPTIONS.

No original paper in any case shall be withdrawn from the Court files except upon special order of the Court or one of the Judges thereof in vacation. When an official of a State Department is testifying from an original record of his department, a certified copy of the original record of such department may be filed in the place and stead of the original.

RULE 12. WITHDRAWAL OF CLAIM.

(a) Any claimant may withdraw his claim. Should the claimant later refile the claim, the Court shall consider its former status, such as previous continuances and any other matter affecting its standing, and may re-docket or refuse to re-docket the claim as in its judgment, justice and equity may require under the circumstances.

(b) Any department or state agency, having filed a claim for the

Court's consideration, under either the advisory determination procedure or the shortened procedure provision of the Court Act, may withdraw the claim without prejudice to the right of the claimant involved to file the claim under the regular procedure.

RULE 13. WITNESSES.

(a) For the purpose of convenience and in order that proper records may be preserved, claimants and State Departments desiring to have subpoenas for witnesses shall file with the Clerk a memorandum in writing giving the style and number of the claim and setting forth the names of such witnesses, and thereupon such subpoenas shall be issued and delivered to the person calling therefor or mailed to the person designated.

(b) Request for subpoenas for witnesses should be furnished to the Clerk well in advance of the hearing date so that such subpoenas may be issued in ample time before the hearing.

(c) The payment of witness fees, and mileage where transportation is not furnished to any witness subpoenaed by or at the instance of either the claimant or the respondent state agency, shall be the responsibility of the party by whom or at whose instance such witness is subpoenaed.

RULE 14. DEPOSITIONS.

(a) Depositions may be taken when a party desires the testimony of any person, including a claimant. The deposition shall be upon oral examination or upon written interrogatory. Depositions may be taken without leave of the Court. The attendance of witnesses may be compelled by the use of subpoenas as provided in Rule 13.

(b) To take the deposition of any designated witness, reasonable notice of time and place shall be given the opposite party or counsel, and the party taking such deposition shall pay the costs thereof and file an original and three copies of such deposition with the Court. Extra copies of exhibits will not be required; however, it is suggested that where exhibits are not too lengthy and are of such a nature as to permit it, they should be read into the deposition.

(c) Depositions shall be taken in accordance with the provisions of Rule 17 of this Court.

RULE 15. RE-HEARINGS.

A re-hearing shall not be allowed except where good cause is shown. A motion for re-hearing may be entertained and considered

ex parte, unless the Court otherwise directs, upon the petition and brief filed by the party seeking the re-hearing. Such petition and brief shall be filed within thirty days after notice of the Court's determination of the claim unless good cause be shown why the time should be extended.

RULE 16. RECORDS OF SHORTENED PROCEDURE CLAIMS SUBMITTED BY STATE AGENCIES.

When a claim is submitted under the provisions of Chapter 14, Article 2, Paragraph 17 of the Code of West Virginia, concurred in by the head of the department and approved for payment by the Attorney General, the record thereof, in addition to copies of correspondence, bills, invoices, photographs, sketches or other exhibits, should contain a full, clear and accurate statement, in narrative form, of the facts upon which the claim is based. The facts in such record among other things which may be peculiar to the particular claim, should show as definitely as possible that:

(a) The claimant did not through neglect, default or lack of reasonable care, cause the damage of which he complains. It should appear he was innocent and without fault in the matter.

(b) The department, by or through neglect, default or the failure to use reasonable care under the circumstances caused the damage to claimant, so that the State in justice and equity should be held liable.

(c) The amount of the claim should be itemized and supported by a paid invoice, or other report itemizing the damages, and vouched for by the head of the department as to correctness and reasonableness.

RULE 17. APPLICATION OF RULES OF CIVIL PROCEDURE.

The Rules of Civil Procedure will apply in the Court of Claims unless the Rules of Practice and Procedure of the Court of Claims are to the contrary.

Adopted by Order of the Court
of Claims, September 11, 1967.
Amended February 18, 1970.
Amended February 23, 1972.
Amended August 1, 1978.

.....
CHERYLE M. HALL, Clerk

REPORT OF THE COURT OF CLAIMS

For the Period July 1, 1979 to June 30, 1981

(1) Approved claims and awards not satisfied but to be referred to the 1982 Legislature for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-68	Mitchell F. Adkins	Department of Highways	$ 82.47	$ 82.47	6-3-81
CC-80-327	Larry Allen Bayer	Department of Highways	131.01	104.81	5-11-81
CC-81-64	Katherine H. Boyd	Department of Highways	57.64	57.64	6-3-81
CC-80-390	Leonard A. Cerullo	Alcohol Beverage Control Commissioner	4,559.24	4,559.24	5-11-81
CC-80-383	Arley Don Dodd	Department of Highways	533.86	427.09	5-11-81
CC-79-81	Hobert Friel	Department of Highways	3,500.00	3,500.00	5-11-81
CC-81-109	Bert Kessler	Department of Highways	262.98	262.98	6-3-81
CC-78-198	Franklin D. Mullins and Sarah Y. Mullins	Department of Highways	50,000.00	1,500.00	6-3-81
CC-81-127	Daniel A. Oliver	Office of the State Auditor	1,098.50	1,098.50	5-15-81
CC-81-141	Robert J. Smith	Office of the State Auditor	125.00	125.00	5-29-81
CC-81-128	Gerard R. Stowers	Office of the State Auditor	198.50	198.50	5-15-81
CC-81-28	Charles E. Tedrow	Department of Highways	220.00	220.00	6-3-81
CC-81-115	James D. Terry	Office of the State Auditor	1,177.50	1,177.50	5-29-81
CC-81-78	United States Post Office	Department of Highways	61.30	61.30	6-3-81
CC-81-126 & CC-81-131	Raymond H. Yackel	Office of the State Auditor	1,317.50	1,317.50	5-29-81
D-1002	A. J. Baltes, Inc.	Department of Highways	$1,393,814.53	$588,271.73	9-14-79
CC-79-470	Timothy Adkins	Department of Highways	3,000.00	2,250.00	2-25-81
CC-79-300a	Stephen Jon Ahlgren	Office of the State Auditor	347.50	347.50	11-29-79
CC-79-300b	Stephen Jon Ahlgren	Office of the State Auditor	20.00	20.00	2-18-80
CC-78-297	Rose M. Allen	Department of Highways	30,000.00	15,900.00	4-1-80
CC-81-3	Allstate Construction & Roofing Co.	Department of Highways	2,068.15	2,068.15	3-5-81

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-279	David S. Alter, II	Office of the State Auditor	272.85	272.85	2-18-80
CC-79-575	American Hospital Supply	Department of Health	424.32	424.32	2-6-80
CC-81-34	American Scientific Products	Department of Health	6,626.00	6,626.00	2-25-81
D-553	Maria Caterina Anania	Department of Highways	16,103.59	9,000.00	3-6-80
CC-79-655	James G. Anderson, III	Office of the State Auditor	1,369.69	1,369.69	2-28-80
CC-80-141	James G. Anderson, III	Office of the State Auditor	87.50	87.50	7-24-80
CC-79-362	John P. Anderson	Office of the State Auditor	964.75	964.75	2-26-80
CC-79-352 & CC-79-562	Ronald E. Anderson	Office of the State Auditor	1,147.50	1,147.50	2-26-80
CC-79-602	Teresa L. Anderson	Office of the State Auditor	50.00	50.00	1-15-80
CC-79-247	William H. Ansel, Jr.	Office of the State Auditor	1,028.40	1,028.40	2-13-80
CC-79-502	Appalachian Engineers, Inc.	Department of Health	1,325.00	1,325.00	12-11-79
CC-81-4	Appalachian Homes, Inc.	Department of Health	1,908.00	1,908.00	2-13-81
CC-78-289	Appalachian Power Co.	Department of Highways	47,473.00	47,473.00	10-10-80
CC-80-321	Appalachian Power Co.	Department of Health	389.55	389.55	11-10-80
CC-80-410	Appalachian Power Co.	Department of Public Safety	272.11	272.11	1-28-81
CC-79-697	Appalachian Regional Hospital	Department of Corrections	1,243.25	1,243.25	3-6-80
CC-79-366a*	Appalachian Research and Defense Fund	Office of the State Auditor	387.95	387.95	1-25-80
CC-79-366b*	Appalachian Research and Defense Fund	Office of the State Auditor	1,002.13	1,002.13	2-26-80
CC-79-715	Carolyn H. Arnold	Board of Regents	38.00	38.00	5-2-80
CC-79-423	Roy David Arrington	Office of the State Auditor	501.75	501.75	2-27-80

*Legislature did not pass this claim as a moral obligation of the State; therefore, it has not been paid.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-80-217	Associated Radiologists, Inc.	Department of Health	6.00	6.00	7-21-80
CC-78-6	Robert S. Atkinson & Evelyn Atkinson	Department of Highways	9,343.90	4,948.90	9-20-79
CC-79-382	Lane O. Austin	Office of the State Auditor	213.15	213.15	2-27-80
CC-79-692	Jeffrey A. Bailey	Department of Highways	1,396.87	1,396.87	3-5-81
CC-79-692	Mary Jo Bailey	Department of Highways	1,690.00	1,690.00	3-5-81
CC-79-195	Ronald L. Bailey	Department of Highways	280.09	280.09	3-5-80
CC-80-234	William Frank Ball, d/b/a Ball Trucking, Inc.	Department of Highways	948.00	948.00	2-25-81
CC-78-22	Bank of Gassaway	Department of Motor Vehicles	3,061.16	3,061.16	3-6-80
CC-78-187	Russell Lee Barkley	Department of Highways	1,437.40	1,080.00	12-11-79
CC-80-273	David S. Barnett	Department of Highways	209.11	209.11	11-10-80
CC-79-53	Harry H. Barrett	Department of Highways	68.30	68.30	9-20-79
CC-80-170	Beckley Hospital, Inc.	Division of Vocational Rehabilitation	26.95	26.95	7-21-80
CC-80-23	C. Michael Bee	Office of the State Auditor	549.53	549.53	2-29-80
CC-79-544a	John W. Bennett	Office of the State Auditor	176.10	176.10	2-12-80
CC-79-544b	John W. Bennett	Office of the State Auditor	193.60	193.60	2-28-80
CC-79-503****	Norman E. Benson	Department of Highways	75,000.00	6,000.00	3-2-81
CC-79-586	George D. Beter	Office of the State Auditor	805.95	805.95	2-28-80
CC-79-333	Edgar E. Bibb, III	Office of the State Auditor	70.00	70.00	1-25-80
CC-79-507	Christine L. Bitner	Office of the State Auditor	275.00	275.00	1-15-80
CC-79-643	Robert Edward Blair	Office of the State Auditor	100.00	100.00	2-12-80
CC-79-691	Robert N. Bland	Office of the State Auditor	1,460.00	1,460.00	2-29-80
CC-80-262	Robert N. Bland	Office of the State Auditor	400.00	400.00	2-12-81

****The decision in this claim was not issued at the time this volume was published.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-76-113****	Eli Blankenship, Jr., Admin. of the Estate of Johnny Blankenship, deceased	Department of Highways	23,691.15	14,213.86	2-12-80
CC-79-593	James C. Blankenship, III	Office of the State Auditor	522.50	522.50	2-12-80
CC-79-389	Randy N. Bleigh	Department of Highways	600.00	180.00	4-1-80
CC-79-215	Board of Education of the County of Kanawha (The)	Department of Highways	1,694.81	1,694.81	11-19-79
CC-79-561	Bogarad & Robertson	Office of the State Auditor	340.30	340.30	2-28-80
CC-79-570	George P. Bohach	Office of the State Auditor	667.75	667.75	2-28-80
CC-79-689	David P. Born	Office of the State Auditor	145.84	145.84	2-12-80
CC-80-18	Henry C. Bowen	Office of the State Auditor	503.05	503.05	2-29-80
CC-78-24	Bracken Construction Company	Department of Highways	1,928.30	1,928.30	1-28-81
CC-80-4	James Bradley, Jr.	Office of the State Auditor	793.50	793.50	2-12-80
CC-80-10	John B. Breckinridge	Office of the State Auditor	200.00	200.00	2-7-80
CC-80-24	John L. Bremer	Office of the State Auditor	1,848.00	1,848.00	2-7-80
CC-79-229	F. William Brogan, Jr.	Office of the State Auditor	3,957.50	3,957.50	11-21-79
CC-79-657	Charles H. Brown	Office of the State Auditor	12.50	12.50	2-28-80
CC-80-41	Jay Montgomery Brown	Office of the State Auditor	185.00	185.00	2-12-80
CC-79-721	G. David Brumfield	Office of the State Auditor	1,114.15	1,114.15	2-29-80
CC-79-560	Michael Buchanan	Office of the State Auditor	47.50	47.50	2-12-80
CC-79-594	Kevin B. Burgess	Office of the State Auditor	534.38	534.38	2-28-80
CC-79-666	Billy E. Burkett	Office of the State Auditor	327.50	327.50	2-28-80
CC-80-102	Robert A. Burnside, Jr.	Office of the State Auditor	412.00	412.00	2-29-80
CC-79-225	Virginia Burton	Department of Highways	199.14	199.14	10-30-79
CC-79-72	Homer Bush	Department of Highways	500.00	415.00	9-20-79

****The decision for this claim was not issued at the time this volume was published.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-80-13	Richard A. Bush	Office of the State Auditor	2,447.19	2,447.19	2-29-80
CC-79-376**	R. Terry Butcher	Office of the State Auditor	102.50	102.50	2-27-80
CC-79-226a & CC-79-391	Thomas L. Butcher	Office of the State Auditor	1,542.50	1,542.50	2-12-80
CC-79-226b	Thomas L. Butcher	Office of the State Auditor	1,133.83	1,133.83	2-13-80
CC-79-711	Harley C. Butler	Department of Highways	132.16	132.16	5-2-80
CC-79-314	C. Elton Byron, Jr.	Office of the State Auditor	815.00	815.00	2-26-80
CC-80-46a	Dan O. Callaghan	Office of the State Auditor	170.00	170.00	2-12-80
CC-80-46b	Dan O. Callaghan	Office of the State Auditor	426.74	426.74	2-12-80
CC-79-530	Paul T. Camilletti	Office of the State Auditor	$ 749.50	$ 749.50	1-31-80
CC-78-273	James Earl Campbell	Department of Health	300,000.00	1,500.00	3-5-81
CC-79-702	John L. Campbell	Office of the State Auditor	150.00	150.00	1-15-80
CC-78-273	Kenneth Ray Campbell	Department of Health	300,000.00	1,500.00	3-5-80
CC-78-273	Melvin S. Campbell	Department of Health	300,000.00	1,500.00	3-5-80
CC-79-565	Merleen B. Campbell	Office of the State Auditor	415.30	415.30	1-16-80
CC-79-528a	Robin C. Capehart	Office of the State Auditor	571.50	571.50	2-28-80
CC-79-528b	Robin C. Capehart	Office of the State Auditor	460.00	460.00	1-31-80
CC-79-172****	Carl M. Geupel Construction Co., Inc.	Department of Highways	42,758.79	39,566.44	3-5-81
CC-76-41	Carmet Company	Department of Highways	1,577.61	946.57	2-5-80
CC-79-213	George Carper	Department of Highways	135.94	135.94	10-30-79
CC-79-386	Michael E. Caryl	Office of the State Auditor	450.56	450.56	1-25-80
CC-79-181	Frances Jeanette Casey	Department of Highways	217.06	217.06	3-18-80
CC-79-248	James Michael Casey	Office of the State Auditor	538.00	538.00	1-22-80
CC-80-346	James Michael Casey	Office of the State Auditor	2,148.15	2,148.15	12-23-80
CC-80-263	Janet Aultz Casto	Department of Highways	50,000.00	8,000.00	3-4-81

****The decision for this claim was not issued at the time this volume was published.

**The Office of the State Auditor paid this claim; therefore, the claim was not processed for payment.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-609	W. Ronald Denson	Office of the State Auditor	660.00	660.00	2-28-80
CC-79-454	John L. DePolo	Office of the State Auditor	347.50	347.50	1-28-80
CC-79-459	Robert DePue	Office of the State Auditor	45.00	45.00	1-28-80
CC-79-409	Cynthia L. Dettman	Office of the State Auditor	180.00	180.00	1-24-80
CC-79-555	Dennis V. DiBenedetto	Office of the State Auditor	600.00	600.00	11-29-79
CC-78-207	Melvin Dingess and Corenia Dingess	Department of Highways	5,000.00	2,500.00	3-5-80
CC-80-108	Cynthia Donahue	Board of Regents	348.00	348.00	5-11-81
CC-79-396	Ernest M. Douglass	Office of the State Auditor	182.50	182.50	2-27-80
CC-79-301b	James Wilson Douglas	Office of the State Auditor	712.50	712.50	2-29-80
CC-79-512 & CC-79-301a	James Wilson Douglas	Office of the State Auditor	437.50	437.50	2-12-80
CC-79-645	Robert E. Douglas	Office of the State Auditor	437.50	437.50	2-28-80
CC-80-83	Marvin L. Downing	Office of the State Auditor	423.00	423.00	2-29-80
CC-79-243	John J. Droppelman	Office of the State Auditor	454.25	454.25	11-21-79
CC-79-345	P. C. Duff	Office of the State Auditor	1,026.25	1,026.25	2-26-80
CC-79-670	Duling Brokerage, Inc.	Department of Highways	115.59	115.59	3-18-80
CC-79-414	Reba C. Dunlap	Department of Highways	218.44	218.44	11-10-80
CC-80-43	Randall K. Dunn	Office of the State Auditor	909.84	909.84	2-12-80
CC-79-637	Ralph C. Dusic, Jr.	Office of the State Auditor	265.00	265.00	2-28-80
CC-79-536	Jeffrey Corbin Dyer	Office of the State Auditor	233.00	233.00	1-31-80
CC-79-441	Jeffrey Corbin Dyer	Office of the State Auditor	117.50	117.50	2-27-80
CC-81-42	E. I. du Pont de Nemours & Co.	Department of Health	6,959.70	6,959.70	2-25-81
CC-79-240	Harold B. Eagle	Office of the State Auditor	115.00	115.00	1-22-80
CC-79-485	Joe B. Eller	Department of Highways	120.62	120.62	3-6-80

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-475c	Sue H. Ellis	Board of Regents	948.00	948.00	2-12-80
CC-79-447	Empire Foods, Inc.	Office of the Governor - Emergency Flood Disaster Relief	3,165.50	3,165.50	12-11-79
CC-79-222	Edward Engel	Department of Highways	48.34	48.34	10-30-79
CC-80-424	Sam Epling	Department of Highways	292.04	292.04	1-28-81
CC-78-271*	Erie Insurance Exchange, Subrogee of Charles E. Schooley	Department of Highways	7,000.00	7,000.00	1-28-81
CC-80-189a	James A. Esposito	Office of the State Auditor	182.50	182.50	7-24-80
CC-80-189b	James A. Esposito	Office of the State Auditor	656.25	656.25	7-24-80
CC-81-21	J. Robert Evans, d/b/a Motor Car Supply Co.	Department of Health	60.94	60.94	2-25-81
CC-79-583a	Thomas C. Evans, III	Office of the State Auditor	222.10	222.10	2-12-80
CC-79-583b	Thomas C. Evans, III	Office of the State Auditor	851.25	851.25	2-28-80
CC-79-658	Frank B. Everhart	Office of the State Auditor	68.75	68.75	2-12-80
CC-80-3	Eye & Ear Clinic of Charleston, Inc. (The)	Division of Vocational Rehabilitation	636.00	636.00	5-2-80
CC-80-204	Fairmont General Hospital	Department of Corrections	265.95	265.95	7-21-80
CC-80-62	Falls City Industries, Inc., formerly Falls City Brewing Co.	Nonintoxicating Beer Commission	156.75	156.75	3-18-80
CC-80-66	Fanning Funeral Homes, Inc.	Department of Highways	11,824.77	10,000.00	10-23-80
CC-78-216	Daniel C. Farley, Jr.	Department of Highways	14,730.50	1,500.00	11-19-79

*Legislature did not pass this claim as a moral obligation of the State; therefore, it has not been paid.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-642 & CC-79-403	Norman T. Farley	Office of the State Auditor	201.12	201.12	1-25-80
CC-79-421*	Federal Kemper Insurance Company, as Subrogee of Robert L. Zimmerman	Department of Highways	763.01	763.01	10-23-80
CC-78-148	Robert L. Ferguson, Executor of the Estate of Elizabeth L. Ferguson, Deceased	Department of Highways	5,000.00	5,000.00	1-21-80
CC-79-707	David Michael Fewell	Office of the State Auditor	624.55	624.55	2-12-80
CC-79-521	Elizabeth H. Field	Office of the State Auditor	496.50	496.50	1-15-80
CC-79-644	William C. Field	Office of the State Auditor	402.50	402.50	2-28-80
CC-79-651a	David M. Finnerin	Office of the State Auditor	228.75	228.75	2-12-80
CC-79-651b	David M. Finnerin	Office of the State Auditor	2,248.45	2,248.45	2-28-80
CC-80-213	J. G. Finney	Department of Highways	230.47	230.47	10-10-80
CC-79-567	Robert D. Fisher	Office of the State Auditor	50.00	50.00	2-12-80
CC-80-17	David M. Flannery	Office of the State Auditor	119.90	119.90	2-29-80
CC-79-435	John S. Folio	Office of the State Auditor	462.50	462.50	11-21-79
CC-79-534 & CC-79-668	John S. Folio	Office of the State Auditor	130.00	130.00	1-31-80
CC-80-301	Irene E. Fragale	Department of Highways	93.68	93.68	1-28-81
CC-80-16	John R. Frazier	Office of the State Auditor	3,594.15	3,594.15	2-29-80
CC-79-428 & CC-79-495	R. R. Fredeking, II	Office of the State Auditor	11,780.00	11,780.00	11-21-79
CC-80-122	Russell E. Freeman	Department of Highways	199.53	199.53	8-5-80
CC-80-52	Thomas G. Freeman, II	Office of the State Auditor	690.00	690.00	2-29-80

*Legislature did not pass this claim as a moral obligation of the State; therefore, it has not been paid.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-80-374	L. Edward Friend, II	Office of the State Auditor	821.00	821.00	12-23-80
CC-79-553	Robert W. Friend	Office of the State Auditor	670.00	670.00	2-28-80
CC-80-332	Randy B. Fry	Department of Highways	2,350.00	900.00	12-3-80
CC-79-600a	Janet Frye (Steele)	Office of the State Auditor	525.00	525.00	2-12-80
CC-79-600b	Janet Frye (Steele)	Office of the State Auditor	1,560.35	1,560.35	2-28-80
CC-80-256	Sondra Lynn Funk	Department of Highways	316.00	316.00	10-10-80
CC-79-671a	F. Christian Gall, Jr.	Office of the State Auditor	1,088.00	1,088.00	2-12-80
CC-79-671b	F. Christian Gall, Jr.	Office of the State Auditor	1,417.95	1,417.95	2-28-80
CC-80-407	Robert F. Gallagher	Office of the State Auditor	1,097.00	1,097.00	2-12-81
CC-79-431 & CC-79-564	Robert F. Gallagher	Office of the State Auditor	216.50	216.50	2-27-80
CC-79-99	Charles W. Garland	Department of Highways	60.00	60.00	11-10-80
CC-79-566	Karen L. Garrett	Office of the State Auditor	230.00	230.00	2-12-80
CC-80-32	Karen L. Garrett	Office of the State Auditor	932.50	932.50	2-29-80
CC-80-31	Lary D. Garrett	Office of the State Auditor	715.00	715.00	2-29-80
CC-79-207	Linda Nelson Garrett	Office of the State Auditor	2,216.14	2,216.14	2-7-80
CC-80-78	Garrett, Whittier, & Garrett	Office of the State Auditor	495.00	495.00	2-29-80
CC-80-227	Patricia K. Garrido	Department of Highways	15,000.00	1,500.00	2-25-81
CC-79-37	Martin V. Gaston, Sr.	Department of Highways	1,035.00	942.00	12-11-79
CC-79-620	Phillip D. Gaujot	Office of the State Auditor	270.00	270.00	2-28-80
CC-80-388	General Motors Acceptance Corporation	Department of Motor Vehicles	9,147.03	9,147.03	2-25-81
CC-79-648	Margaret Gibson	Department of Highways	573.94	573.94	6-4-80
CC-79-672	Marjorie J. Gillispie	Department of Highways	103.60	103.60	5-2-80
CC-79-656	Martin J. Glasser	Office of the State Auditor	853.97	853.97	2-28-80
CC-79-244	John R. Glenn	Office of the State Auditor	45.00	45.00	2-13-80

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-328	Mary Jo Goettler	Office of the State Auditor	61.56	61.56	1-15-80
CC-79-410a	David R. Gold	Office of the State Auditor	691.85	691.85	2-27-80
CC-79-439	Grover C. Goode	Office of the State Auditor	1,225.00	1,225.00	11-29-79
CC-79-265	Paul R. Goode, Jr.	Office of the State Auditor	395.00	395.00	2-14-80
CC-79-519	Randy R. Goodrich	Office of the State Auditor	64.57	64.57	1-31-80
CC-79-427	Nicolette Hahon Granack	Office of the State Auditor	326.94	326.94	2-27-80
CC-80-326	Nicolette Hahon Granack	Office of the State Auditor	787.50	787.50	12-23-80
CC-79-610	David F. Greene	Office of the State Auditor	380.00	380.00	2-28-80
CC-79-26	Elizabeth Smith Grafton	Department of Highways	25,000.00	9,000.00	3-5-80
CC-79-526	Boyce Griffith	Office of the State Auditor	1,872.50	1,872.50	2-28-80
CC-78-124	Dean R. Grim	Department of Highways	100,000.00	25,000.00	3-5-81
CC-79-108	Barbara Gruber	Department of Health	3,556.66	3,556.66	9-20-79
CC-80-84	Thomas P. Gunnoe	Department of Highways	66.26	66.26	5-2-80
CC-79-339 & CC-80-49	Jeanne S. Hall	Office of the State Auditor	805.00	805.00	2-7-80
CC-76-134****	William Paul Hall, Sr. Admin. of the Estate of William Paul Hall, Jr.	Department of Health	13,384.00	11,783.19	2-18-80
CC-80-394	Edward J. Hamilton	Department of Banking	167.93	167.93	2-13-81
CC-80-85	Lee Roy Hamilton	Department of Highways	3,739.00	2,804.25	10-10-80
CC-79-577	C. William Harmison	Office of the State Auditor	172.50	172.50	2-12-81
CC-79-346	Ray L. Hampton, II	Office of the State Auditor	295.00	295.00	2-26-80
CC-79-471	Handling, Inc.	Alcohol Beverage Control Commissioner	1,031.00	1,031.00	3-6-80
CC-79-665	Cletus B. Hanley	Office of the State Auditor	205.00	205.00	2-28-80
CC-79-704a	Steven C. Hanley	Office of the State Auditor	1,067.50	1,067.50	2-12-80

****The decision for this claim was not issued at the time this volume was published.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-704b	Steven C. Hanley	Office of the State Auditor	1,410.00	1,410.00	2-29-80
CC-79-716a	W. Del Roy Harner	Office of the State Auditor	3,650.00	3,650.00	1-22-80
CC-79-716b	W. Del Roy Harner	Office of the State Auditor	110.00	110.00	2-29-80
CC-79-595	T. R. Harrington, Jr.	Office of the State Auditor	196.75	196.75	2-28-80
CC-80-125	Gregory A. Harrison	Department of Highways	599.09	599.09	7-21-80
CC-79-329a & CC-79-250	Joseph C. Hash, Jr.	Office of the State Auditor	160.00	160.00	1-22-80
CC-79-329b	Joseph C. Hash, Jr.	Office of the State Auditor	50.00	50.00	2-26-80
CC-79-638	Harry M. Hatfield	Office of the State Auditor	950.00	950.00	2-28-80
CC-79-722	McGinnis E. Hatfield, Jr.	Office of the State Auditor	616.25	616.25	2-29-80
CC-79-140	Cecil Ray Haught	Department of Highways	10,550.00	2,300.00	8-5-80
CC-79-612	Thomas M. Hayes	Office of the State Auditor	541.40	541.40	2-28-80
CC-79-684	Thomas M. Hayes	Office of the State Auditor	4,610.00	4,610.00	1-22-80
CC-79-274	Sprague Hazard	Office of the State Auditor	388.75	388.75	2-14-80
CC-79-552	G. F. Hedges, Jr.	Office of the State Auditor	690.00	690.00	1-22-80
CC-79-165	Walter A. Henriksen	Department of Highways	458.35	458.35	3-6-80
CC-79-708	Jack L. Hickok	Office of the State Auditor	97.80	97.80	2-29-80
CC-76-37	Highway Engineers, Inc.	Department of Highways	350,000.00	33,181.09	12-3-80
CC-79-241a	John C. Higinbotham	Office of the State Auditor	4,300.00	4,300.00	11-29-79
CC-79-241b	John C. Higinbotham	Office of the State Auditor	176.25	176.25	2-13-80
CC-80-105	David L. Hill	Office of the State Auditor	70.00	70.00	2-29-80
CC-79-358a	George W. Hill, Jr.	Office of the State Auditor	600.50	600.50	1-25-80
CC-79-358b	George W. Hill, Jr.	Office of the State Auditor	2,146.50	2,146.50	2-26-80
CC-79-590	Deborah J. Hodges	Department of Highways	43.21	43.21	3-6-80
CC-79-273a	John S. Holy	Office of the State Auditor	2,675.00	2,675.00	11-21-79
CC-79-273b	John S. Holy	Office of the State Auditor	1,500.00	1,500.00	2-14-80

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-497	Lorena B. Hoover	Office of the State Auditor	60.00	60.00	1-15-80
CC-79-170	Kim Hope	Department of Highways	47.27	47.27	10-30-79
CC-79-221a	John S. Hrko	Office of the State Auditor	80.00	80.00	1-22-80
CC-79-221b	John S. Hrko	Office of the State Auditor	500.00	500.00	2-13-80
CC-79-680	Hudgins, Coulling, Brewster & Morhous	Office of the State Auditor	856.50	856.50	2-28-80
CC-79-349	Deborah K. Hunt	Office of the State Auditor	175.00	175.00	1-15-80
CC-79-272	J. Burton Hunter, III	Office of the State Auditor	1,232.70	1,232.70	11-29-79
CC-79-395	J. Burton Hunter, III	Office of the State Auditor	506.31	506.31	2-27-80
CC-79-452	Huntington Water Corporation	Department of Health	543.52	543.52	10-31-79
CC-79-348	Charles J. Hyer	Office of the State Auditor	1,900.00	1,900.00	12-11-80
CC-79-189	IBM Corporation	Department of Culture and History	658.00	658.00	10-31-79
CC-79-596a	Wayne D. Inge	Office of the State Auditor	407.50	407.50	2-7-80
CC-79-596b	Wayne D. Inge	Office of the State Auditor	306.25	306.25	2-28-80
CC-77-98	J.F. Allen Company	Department of Highways	49,519.80	49,519.80	2-25-81
CC-79-475b	Jamison Electrical Construction Co.	Board of Regents	21,662.27	21,662.27	3-11-80
CC-80-53	W. Henry Jernigan	Office of the State Auditor	50.00	50.00	2-29-80
CC-79-597	Frederick A. Jesser, III	Office of the State Auditor	606.50	606.50	2-28-80
CC-79-640	Barney Dale Johnson	Department of Highways	439.29	439.29	10-10-80
CC-80-274	Johnson Controls, Inc.	Department of Public Safety	4,323.67	4,323.67	2-25-81
CC-79-664	Esther Johnson	Department of Highways	523.68	523.68	3-5-81
CC-79-397	Johnston, Holroyd & Gibson	Office of the State Auditor	7,561.55	7,561.55	2-27-80
CC-76-51****	Chester Jones	Department of Highways	24,200.00	3,760.60	2-12-80
CC-79-703a	Jeniver J. Jones	Office of the State Auditor	432.25	432.25	2-12-80

****The decision for this claim was not issued at the time this volume was published.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-703b	Jeniver J. Jones	Office of the State Auditor	682.50	682.50	2-29-80
CC-81-2a	Jeniver J. Jones	Office of the State Auditor	25.00	25.00	2-12-81
CC-81-2b	Jeniver J. Jones	Office of the State Auditor	320.00	320.00	2-12-81
CC-79-282	Jerald E. Jones	Office of the State Auditor	1,120.00	1,120.00	11-21-79
CC-80-38	Maurice L. Jones	Department of Highways	194.70	194.70	5-2-80
CC-79-584	Orton A. Jones	Office of the State Auditor	484.25	484.25	2-28-80
CC-79-475a	Kanawha Office Equipment, Inc.	Board of Regents	2,028.00	2,028.00	3-11-80
CC-79-585	Kanawha Office Equipment, Inc.	Board of Chiropractic Examiners	608.00	608.00	3-6-80
CC-79-290	John S. Kaull	Office of the State Auditor	1,148.80	1,148.80	2-18-80
CC-80-149	Robert H. C. Kay, Trustee, Estate of W. F. Harless	Alcohol Beverage Control Commissioner	225.00	225.00	8-5-80
CC-79-461	C. Dallas Kayser	Office of the State Auditor	497.03	497.03	1-28-80
CC-79-613	Ralph D. Keightley, Jr.	Office of the State Auditor	1,412.50	1,412.50	1-22-80
CC-79-236 & CC-79-434	Michael B. Keller	Office of the State Auditor	718.75	718.75	11-21-79
CC-79-410b	Louis H. Khourey	Office of the State Auditor	284.00	284.00	2-27-80
CC-79-381	William B. Kilduff	Office of the State Auditor	683.85	683.85	2-27-80
CC-79-350	Charles M. Kincaid	Office of the State Auditor	1,647.10	1,647.10	2-26-80
CC-79-110	Gary L. Knowlton	Department of Highways	159.30	145.03	11-10-80
CC-79-712	John C. Krivonyak	Office of the State Auditor	346.25	346.25	2-29-80
CC-79-444	Mr. & Mrs. Tamas A. de Kun	Department of Highways	1,711.18	1,711.18	8-5-80
CC-79-173	Theresa Kurucz	Department of Highways	337.98	337.98	9-20-79
CC-79-437	Alan H. Larrick	Office of the State Auditor	87.50	87.50	2-27-80

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-227	Law Enforcement Ordnance Company	Department of Corrections	5,065.30	5,065.30	10-31-79
CC-79-237	Roy D. Law	Office of the State Auditor	459.00	459.00	1-22-80
CC-79-325a	Carroll T. Lay	Office of the State Auditor	270.00	270.00	11-29-79
CC-79-325b	Carroll T. Lay	Office of the State Auditor	1,404.20	1,404.20	2-26-80
CC-80-379	Carroll T. Lay	Office of the State Auditor	123.75	123.75	12-23-80
CC-79-275	Lucien Lewin	Office of the State Auditor	50.00	50.00	2-14-80
CC-79-305	Lourdes Lezada	Department of Health	7,500.00	6,000.00	5-11-81
CC-79-520	Michael H. Lilly	Office of the State Auditor	382.35	382.35	1-31-80
CC-79-688 & CC-79-384	Michael H. Lilly	Office of the State Auditor	4,128.30	4,128.30	2-29-80
CC-79-379	Philip T. Lilly, Jr.	Office of the State Auditor	163.50	163.50	1-25-80
CC-79-385	Philip T. Lilly, Jr.	Office of the State Auditor	170.00	170.00	2-27-80
CC-79-365	Thomas S. Lilly	Office of the State Auditor	250.00	250.00	2-26-80
CC-80-132	James A. Liotta	Office of the State Auditor	75.00	75.00	7-24-80
CC-79-420a	Jean C. Littlepage	Department of Highways	135.86	71.51	10-30-79
CC-79-420b	Jean C. Littlepage	Department of Highways	73.66	73.66	10-30-79
CC-80-423	Stephen C. Littlepage	Office of the State Auditor	1,291.60	1,291.60	2-24-81
CC-79-677	J. Franklin Long	Office of the State Auditor	9,887.95	9,887.95	2-28-80
CC-79-674	Lawrence B. Lowry	Office of the State Auditor	775.00	775.00	1-22-80
CC-80-97	Leslie D. Lucas, Jr.	Office of the State Auditor	112.50	112.50	2-12-80
CC-80-54	John R. Lukens	Office of the State Auditor	485.14	485.14	2-29-80
CC-79-515	David Lycan	Office of the State Auditor	215.00	215.00	1-31-80
CC-79-522	Carroll Lynch	Department of Highways	1,763.83	1,763.83	3-18-80
CC-80-30	James J. MacCallum	Office of the State Auditor	440.00	440.00	2-29-80
CC-80-130	Malco Plastics, Inc.	Department of Motor Vehicles	539.58	539.58	6-4-80

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-661	Lawrence L. Manypenny	Office of the State Auditor	243.74	243.74	2-28-80
CC-79-309	George A. Markusic	Office of the State Auditor	1,169.96	1,169.96	2-18-80
CC-80-335	Elizabeth M. Martin	Office of the State Auditor	715.00	715.00	12-23-80
CC-79-429 & CC-79-378a	James A. Matish	Office of the State Auditor	285.00	285.00	1-25-80
CC-79-378b	James A. Matish	Office of the State Auditor	522.50	522.50	2-27-80
CC-79-340	Glen K. Matthews	Office of the State Auditor	310.00	310.00	2-7-80
CC-79-694a	Bernard R. Mauser	Office of the State Auditor	500.00	500.00	2-12-80
CC-79-694b	Bernard R. Mauser	Office of the State Auditor	172.90	172.90	2-29-80
CC-79-371	Charles F. McCallister	Department of Highways	1,099.43	1,099.43	6-4-80
CC-79-532	Ronnie Z. McCann	Office of the State Auditor	1,147.50	1,147.50	2-28-80
CC-80-188	Sara H. McClung	Department of Highways	114.97	80.48	2-25-81
CC-79-299	James T. McClure	Office of the State Auditor	329.00	329.00	1-24-80
CC-79-506	Ginny L. McCoy	Office of the State Auditor	285.00	285.00	1-15-80
CC-77-38d	Jonathan E. McDonald	Department of Highways	2,000.00	2,000.00	9-14-79
CC-77-38c	Jonathan E. McDonald, Admin. of the Estate of James Edgar McDonald, dec.	Department of Highways	10,630.50	10,630.50	5-11-81
CC-77-38b	Jonathan E. McDonald, Admin. of the Estate of Penny Jo McDonald, dec.	Department of Highways	10,647.70	10,647.70	5-11-81
CC-78-250	James A. McDougal	Department of Highways	100.00	100.00	1-28-81
CC-80-377	McJunkin Corporation	Department of Highways	1,354.50	1,354.50	2-25-81
CC-76-70****	Thelma E. McIntyre, Admin. of the Estate of Wilma S. McIntyre, dec.	Department of Health	30,000.00	15,627.30	3-2-81

****The decision for this claim was not issued at the time this volume was published.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-491	Susan K. McLaughlin	Office of the State Auditor	180.00	180.00	1-28-80
CC-79-549 & CC-79-316	J.P. McMullen, Jr.	Office of the State Auditor	2,771.33	2,771.33	12-11-79
CC-80-143	Carl Eugene McNeely	Department of Highways	301.91	301.91	7-21-80
CC-79-186	S. A. Meadows	Department of Highways	87.00	87.00	10-30-79
CC-79-200	Barton Meaige	Department of Highways	19.66	19.66	3-18-80
CC-79-603	Teresa A. Meinke	Office of the State Auditor	75.00	75.00	1-15-80
CC-80-26	Robert C. Melody	Office of the State Auditor	2,350.00	2,350.00	2-7-80
CC-79-440	William W. Merow, Jr.	Office of the State Auditor	438.83	438.83	2-27-80
CC-79-543	William W. Merow, Jr.	Office of the State Auditor	185.00	185.00	2-12-80
CC-81-37	William W. Merow, Jr.	Office of the State Auditor	35.00	35.00	2-24-81
CC-80-387	Robert W. Mick	Department of Highways	69.49	69.49	2-13-81
CC-80-87	Wayne R. Mielke	Office of the State Auditor	2,357.29	2,357.29	2-12-80
CC-79-443	Barbara L. Miller	Department of Highways	52.56	52.56	8-5-80
CC-79-341	Colin Miller	Office of the State Auditor	370.00	370.00	2-7-80
CC-79-224 & CC-79-517	Lawrance S. Miller, Jr.	Office of the State Auditor	1,263.69	1,263.69	1-22-80
CC-79-540	Nancy Sue Miller	Office of the State Auditor	351.00	351.00	2-12-80
CC-79-344	Nancy Sue Miller	Office of the State Auditor	135.00	135.00	2-26-80
CC-81-77	Nancy Sue Miller	Office of the State Auditor	665.00	665.00	3-25-81
CC-80-55	Taunja Willis Miller	Office of the State Auditor	65.45	65.45	2-29-80
CC-79-639	William M. Miller	Office of the State Auditor	655.45	655.45	2-12-80
CC-79-706	William Mitchell	Office of the State Auditor	235.00	235.00	2-29-80
CC-79-52	Carl Moats and Pauline Moats	Department of Highways	165.00	165.00	8-5-80
CC-80-277	Modern Press, Inc.	Board of Regents	3,785.77	3,785.77	1-28-81

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-80-196	Carl C. Moles	Department of Highways	583.74	583.74	7-21-80
CC-78-292	Cleo Lively Moore	Department of Highways	13,000.00	5,000.00	3-5-80
CC-80-33**	Jerry D. Moore	Office of the State Auditor	79.60	79.60	2-29-80
CC-80-280	Virgil E. Moore	Department of Highways	1,882.50	1,882.50	3-23-81
CC-80-345	Damon B. Morgan, Jr.	Office of the State Auditor	610.00	610.00	12-23-80
CC-79-424	Damon B. Morgan, Jr.	Office of the State Auditor	321.00	321.00	1-28-80
CC-79-608**	Thomas Ralph Mullins	Office of the State Auditor	366.25	366.25	2-28-80
CC-79-457	Rudolph J. Murensky, II	Office of the State Auditor	307.50	307.50	1-28-80
CC-80-70	Rudolph J. Murensky, II	Office of the State Auditor	115.00	115.00	2-29-80
CC-79-271	Raymond G. Musgrave	Office of the State Auditor	2,997.37	2,997.37	2-14-80
CC-80-42**	Raymond G. Musgrave	Office of the State Auditor	1,500.00	1,500.00	2-29-80
CC-80-344	Raymond G. Musgrave	Office of the State Auditor	644.30	644.30	12-23-80
CC-80-7a	C. Blaine Myers	Office of the State Auditor	235.50	235.50	2-12-80
CC-80-7b	C. Blaine Myers	Office of the State Auditor	993.00	993.00	2-29-80
CC-79-373	Paul Nagy	Office of the State Auditor	85.88	85.88	2-26-80
CC-79-182*	Nationwide Insurance Company, Subrogee of Franklin L. Dalton	Department of Highways	741.45	741.45	10-31-79
CC-80-80	Nellis Motor Sales	Alcohol Beverage Control Commissioner	260.97	260.97	3-6-80
CC-78-296	Catherine Nestor	Department of Highways	25,885.00	11,196.50	3-5-80
CC-79-327 & CC-79-347a	Peter A. Niceler	Office of the State Audtior	123.52	123.52	1-25-80
CC-79-347b & CC-79-529	Peter A. Niceler	Office of the State Auditor	317.45	317.45	2-26-80
CC-80-79*	North Bend State Park	Department of Health	88.12	88.12	3-6-80

*Legislature did not pass this claim as a moral obligation of the State; therefore, it has not been paid.

**The Office of the State Auditor paid this claim; therefore, the claim was not processed for payment.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-291	William O'Brien	Office of the State Auditor	410.00	410.00	2-18-80
CC-79-433	William A. O'Brien	Office of the State Auditor	80.00	80.00	1-28-80
CC-80-19	Daniel A. Oliver	Office of the State Auditor	1,323.75	1,323.75	2-29-80
CC-80-408	Peggy O'Neal (Hart)	Office of the State Auditor	338.96	338.96	2-24-81
CC-79-558	John G. Ours	Office of the State Auditor	382.58	382.58	2-12-80
CC-79-377a	David G. Palmer	Office of the State Auditor	511.00	511.00	1-25-80
CC-79-377b	David G. Palmer	Office of the State Auditor	3,767.02	3,767.02	2-27-80
CC-77-128	Hughie C. Parks	Department of Highways	900.00	900.00	6-4-80
CC-80-107	Hughie C. Parks	Department of Highways	312.50	312.50	6-4-80
CC-80-86	David L. Parmer	Office of the State Auditor	517.50	517.50	2-29-80
CC-79-270a	Charles E. Parsons	Office of the State Auditor	177.50	177.50	1-24-80
CC-79-270b	Charles E. Parsons	Office of the State Audtior	852.50	852.50	2-14-80
CC-79-287	Jack H. Parsons, Jr.	Department of Highways	37.88	37.88	10-30-79
CC-79-460	Brown H. Payne	Office of the State Auditor	350.00	350.00	2-27-80
CC-79-269 & CC-79-317	Eugene D. Pecora	Office of the State Auditor	414.75	414.75	2-14-80
CC-79-201	Garnet L. Pelfrey	Department of Highways	307.93	307.93	10-30-79
CC-79-607	Paul S. Perfater	Office of the State Auditor	125.00	125.00	2-28-80
CC-80-44	Paul S. Perfater	Office of the State Auditor	764.50	764.50	2-12-80
CC-80-25a	William W. Pepper	Office of the State Auditor	857.50	857.50	2-12-80
CC-80-25b	William W. Pepper	Office of the State Auditor	473.70	473.70	2-29-80
CC-79-360	Gerald L. Perry and Deloris Perry	Department of Highways	146.86	146.86	10-30-79
CC-79-509	Reba Dixie Perry	Department of Highways	2,887.07	2,887.07	12-23-80
CC-79-591	Howard M. Persinger, Jr.	Office of the State Auditor	1,792.50	1,792.50	2-28-80
CC-78-218	Zona Ruth Peters	Department of Highways	600.00	451.00	12-23-80

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-192	Joyce Porter	Department of Highways	503.85	306.05	3-6-80
CC-80-98	Roy Porterfield and Donna F. Porterfield	Department of Highways	38.69	38.69	11-10-80
CC-79-308 & CC-79-629	Robert Poyourow	Office of the State Auditor	2,042.88	2,042.88	2-18-80
CC-80-261	Program Resources, Inc.	Department of Finance and Administration	10,178.50	10,178.50	10-10-80
CC-79-281	Charles F. Printz, Jr.	Office of the State Auditor	1,276.34	1,276.34	2-18-80
CC-79-579	Sterling L. Pullen, Jr.	Department of Highways	2,148.81	2,148.81	10-23-80
CC-79-474	Bradley J. Pyles	Office of the State Auditor	1,007.50	1,007.50	2-27-80
CC-79-636	Stephanie J. Racin	Office of the State Auditor	130.00	130.00	2-28-80
CC-79-411	Patrick N. Radcliff	Office of the State Auditor	234.50	234.50	2-27-80
CC-79-87	Glen L. Ramey	Department of Highways	4,933.13	4,933.13	1-28-81
CC-79-451	Jacob W. Ray	Office of the State Auditor	1,461.78	1,461.78	2-27-80
CC-79-321	Roy C. Rayburn, Jr.	Department of Highways	171.67	171.67	10-30-79
CC-79-375**	Philip A. Reale	Office of the State Auditor	444.40	444.40	2-26-80
CC-79-233a	James C. Recht	Office of the State Auditor	122.00	122.00	1-22-80
CC-79-233b	James C. Recht	Office of the State Auditor	946.50	946.50	2-13-80
CC-79-277	J. Wendell Reed	Office of the State Auditor	341.30	341.30	2-14-80
CC-79-473	David R. Rexroad	Office of the State Auditor	290.50	290.50	1-28-80
CC-79-267	Dencil Reynolds and Judith Reynolds	Department of Highways	44.12	44.12	10-30-79
CC-79-13	Roscoe Rhodes and Maxine V. Rhodes	Department of Highways	2,800.00	2,000.00	3-18-80
CC-79-230a & CC-79-417	Ribel & Julian	Office of the State Auditor	327.50	327.50	1-22-80

**The Office of the State Auditor paid this claim; therefore, this claim was not processed for payment.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-230b	Ribel & Julian	Office of the State Auditor	1,590.00	1,590.00	2-13-80
CC-79-239a	Frank Ribel, Jr.	Office of the State Auditor	87.50	87.50	2-12-80
CC-79-239b	Frank Ribel, Jr.	Office of the State Auditor	115.00	115.00	2-13-80
CC-78-235	Margaret K. Richardson	Department of Highways	5,305.08	4,581.05	11-10-80
CC-79-283	V. Alan Riley	Office of the State Auditor	1,482.00	1,482.00	2-18-80
CC-79-571	Fred Risovich, II	Office of the State Auditor	437.70	437.70	2-28-80
CC-79-293	Ronnie Gene Roach	Department of Highways	90.25	90.25	10-30-79
CC-80-302	Lee Roy Robertson	Department of Highways	1,899.00	1,700.00	3-5-81
CC-79-402	Danny Lee Rockett and Kathy Newell Rockett	Department of Highways	199.34	199.34	10-30-79
CC-79-513	J. Robert Rogers	Office of the State Auditor	2,090.40	2,090.40	2-28-80
CC-80-34	Frederick M. Dean Rohrig	Office of the State Auditor	138.33	138.33	2-12-80
CC-80-56	Forrest H. Roles	Office of the State Auditor	93.65	93.65	2-29-80
CC-79-619	H. H. Rose, III	Office of the State Auditor	115.00	115.00	2-12-80
CC-80-90	Alexander J. Ross	Office of the State Auditor	117.50	117.50	2-29-80
CC-79-400	Irene W. Ross	Office of the State Auditor	500.00	500.00	1-15-80
CC-78-288	Franklin D. Rowe	Department of Highways	188.74	188.74	11-19-79
CC-80-45	Timothy R. Ruckman	Office of the State Auditor	126.25	126.25	2-12-80
CC-79-354	Paul A. Ryker	Office of the State Auditor	100.00	100.00	2-26-80
CC-79-260	Martin V. Saffer	Office of the State Auditor	324.25	324.25	1-24-80
CC-80-370	H. F. Salsbery, Jr.	Office of the State Auditor	57.00	57.00	12-23-80
CC-79-408a	H. F. Salsbery, Jr.	Office of the State Auditor	76.00	76.00	1-25-80
CC-79-408b	H. F. Salsbery, Jr.	Office of the State Auditor	167.00	167.00	2-27-80
CC-79-370	Sanders & Blue	Office of the State Auditor	1,142.97	1,142.97	2-26-80
CC-80-92	Ernest J. Sandy	Board of Regents	1,459.00	1,459.00	3-6-80
CC-80-71	Donald E. Santee	Office of the State Auditor	255.00	255.00	2-29-80

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-80-343	Sargent-Welch Scientific Co.	Department of Health	663.50	663.50	12-23-80
CC-79-394	James L. Satterfield	Office of the State Auditor	157.09	157.09	2-27-80
CC-79-289a	Royce B. Saville	Office of the State Auditor	487.50	487.50	11-21-79
CC-79-289b	Royce B. Saville	Office of the State Auditor	643.75	643.75	2-18-80
CC-79-33	Guy N. Sayre	Department of Highways	$ 285.72	$ 285.72	10-30-79
CC-79-626	Jessie Sayre and Densil O. Sayre	Department of Highways	41.01	41.01	3-6-80
CC-79-276	Michael Scales	Office of the State Auditor	161.75	161.75	2-14-80
CC-79-415	Sam E. Schafer	Office of the State Auditor	595.00	595.00	1-28-80
CC-79-246a**	Glenn O. Schumacher	Office of the State Auditor	303.33	303.33	1-22-80
CC-79-246b	Glenn O. Schumacher	Office of the State Auditor	1,851.75	1,851.75	2-13-80
CC-79-678	Robert L. Schumacher	Office of the State Auditor	3,722.82	3,722.82	2-28-80
CC-79-66	A. O. Secret	Department of Highways	96.76	96.76	9-20-79
CC-79-296	James E. Seibert	Office of the State Auditor	2,864.00	2,864.00	11-21-79
CC-79-380a	James R. Sheatsley	Office of the State Auditor	50.00	50.00	1-25-80
CC-79-380b	James R. Sheatsley	Office of the State Auditor	107.50	107.50	2-27-80
CC-76-92	Shel Products, Inc.	Department of Highways	20,000.00	5,900.00	4-1-80
CC-80-68	Shaeffer and Associates	Department of Health	576.00	576.00	3-6-80
CC-79-252	Randy Lee Shamblin	Department of Motor Vehicles	280.00	240.00	10-31-79
CC-79-625	David L. Shuman	Office of the State Auditor	1,908.02	1,908.02	2-28-80
CC-80-65	John S. Sibray	Office of the State Auditor	4,106.58	4,106.58	2-29-80
CC-79-249	Simmons & Martin	Office of the State Auditor	440.00	440.00	1-22-80
CC-79-368	Simmons & Martin	Office of the State Auditor	65.00	65.00	2-26-80
CC-79-416	William E. Simonton, III	Office of the State Auditor	116.90	116.90	1-28-80

**The Office of the State Auditor paid this claim; therefore, the claim was not processed for payment.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-654	F. Alfred Sines, Jr.	Office of the State Auditor	871.25	871.25	2-28-80
CC-79-342	Jacqui Sites	Office of the State Auditor	300.00	300.00	2-12-80
CC-79-531	Jacqui Sites	Office of the State Auditor	60.00	60.00	1-16-80
CC-79-404	Kennad L. Skeen	Office of the State Auditor	633.20	633.20	11-21-79
CC-79-27	James R. Skinner, d/b/a Jim's Grocery	Department of Highways	62,900.65	3,000.00	3-24-81
CC-78-273	John Slone	Department of Health	300,000.00	7,500.00	3-5-81
CC-78-273	John Slone, Admin. of the Estate of Maude Slone, deceased	Department of Health	300,000.00	1,155.00	3-5-81
CC-79-438	Clyde A. Smith, Jr.	Office of the State Auditor	1,311.00	1,311.00	11-29-79
CC-80-20a	Harry A. Smith, III	Office of the State Auditor	852.50	852.50	2-12-80
CC-80-20b	Harry A. Smith, III	Office of the State Auditor	133.75	133.75	2-29-80
CC-78-284	Kevin E. Smith	Department of Highways	2,000.00	128.40	9-20-79
CC-80-104	Virginia Y. Smith	Office of the State Auditor	408.00	408.00	2-29-80
CC-79-145	Joe Snodgrass	Department of Highways	189.49	189.49	3-6-80
CC-79-659 & CC-79-322	Ann E. Snyder	Office of the State Auditor	213.75	213.75	1-24-80
CC-79-660	Melvin C. Snyder, Jr.	Office of the State Auditor	45.00	45.00	2-12-80
CC-79-442 & CC-79-462	David L. Solomon	Office of the State Auditor	280.00	280.00	2-27-80
CC-80-366	Michael L. Solomon	Office of the State Auditor	1,937.50	1,937.50	12-23-80
CC-80-95	Southern West Virginia Clinic	Department of Corrections	185.00	185.00	3-6-80
CC-80-109	Patsy Spatafore	Board of Regents	994.00	994.00	5-11-81
CC-80-8	Spatial Data Systems, Inc.	Board of Regents	650.00	650.00	3-6-80

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-499	Michael I. Spiker	Office of the State Auditor	262.25	262.25	1-31-80
CC-79-432	Dorothy Springer	Office of the State Auditor	59.00	59.00	1-15-80
CC-79-191	Gary Cline Spurgeon	Department of Highways	185.00	185.00	9-20-79
CC-78-197	Harold Ray Stafford	Department of Highways	917.50	917.50	10-31-79
CC-79-361	Richard Starkey	Office of the State Auditor	168.00	168.00	2-26-80
CC-79-670*	State Farm Mutual Automobile Insurance Co., Subrogee of Duling Brokerage, Inc.	Department of Highways	185.70	185.70	3-18-80
CC-78-250*	State Farm Mutual Automobile Insurance Co., Subrogee of James A. McDougal	Department of Highways	1,333.81	1,333.81	1-28-81
CC-80-267	Francoise D. Stauber	Office of the State Auditor	447.00	447.00	2-12-81
CC-80-294	Staunton Foods, Inc.	Department of Corrections	1,842.65	1,842.65	11-10-80
CC-80-72	Ronald F. Stein	Office of the State Auditor	1,842.50	1,842.50	2-12-80
CC-80-126	Stenomask Reporting Service	Office of the State Auditor	50.00	50.00	7-24-80
CC-79-492, CC-79-505, CC-79-604 & CC-79-676	Stenomask Reporting Service	Office of the State Auditor	3,184.39	3,184.39	2-7-80
CC-79-405	Posey L. Stevenson	Department of Highways	72.10	72.10	10-30-79
CC-80-255	Stewart-Decatur Security Systems, Inc.	Department of Corrections	6,755.70	6,755.70	11-10-80
CC-79-295	James A. Stewart	Office of the State Auditor	267.00	267.00	1-15-80
CC-79-294	Lisa A. Stewart	Office of the State Auditor	30.00	30.00	1-15-80
CC-79-559	Stobbs & Stobbs	Office of the State Auditor	2,368.75	2,368.75	2-12-80
CC-80-325	Robert B. Stone	Office of the State Auditor	506.25	506.25	12-23-80

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-426	Robert B. Stone	Office of the State Auditor	323.75	323.75	2-27-80
CC-78-95	Stone Company, Inc.	Department of Highways	5,344.46	4,500.00	3-6-80
CC-79-551	Samuel Spencer Stone	Office of the State Auditor	55.00	55.00	2-12-80
CC-80-324	Ward D. Stone, Jr.	Office of the State Auditor	150.00	150.00	12-23-80
CC-79-425	Ward D. Stone, Jr.	Office of the State Auditor	138.25	138.25	2-27-80
CC-79-472	Ward D. Stone, Jr.	Office of the State Auditor	4,025.00	4,025.00	11-29-79
CC-80-60	Arden Leon Stull	Department of Highways	4,695.00	2,070.00	5-11-81
CC-79-223	Michael D. Sturm	Office of the State Auditor	402.50	402.50	11-5-79
CC-79-268	Michael D. Sturm	Office of the State Auditor	850.00	850.00	2-14-80
CC-79-511a	Larry N. Sullivan	Office of the State Auditor	4,580.00	4,580.00	1-22-80
CC-79-511b	Larry N. Sullivan	Office of the State Auditor	1,903.78	1,903.78	2-27-80
CC-81-76	Larry N. Sullivan	Office of the State Auditor	252.50	252.50	3-25-81
CC-79-211	Richard K. Swartling	Office of the State Auditor	1,725.00	1,725.00	11-5-79
CC-79-477a	Laverne Sweeney	Office of the State Auditor	207.50	207.50	1-28-80
CC-79-477b	Laverne Sweeney	Office of the State Auditor	1,882.25	1,882.25	2-27-80
CC-79-650	Stephen P. Swisher	Office of the State Auditor	458.50	458.50	2-28-80
CC-79-383	Derek Craig Swope	Office of the State Auditor	161.50	161.50	2-27-80
CC-79-111	Mary Louise Szelong	Department of Public Safety	1,385.62	1,100.00	12-11-79
CC-79-112	Gloria Tabit	Department of Highways	7,500.00	6,950.00	12-3-80
CC-79-630	Larry D. Taylor	Office of the State Auditor	115.00	115.00	2-28-80
CC-79-635	Mark A. Taylor	Office of the State Auditor	383.00	383.00	2-28-80
CC-79-687	Mark A. Taylor	Office of the State Auditor	205.50	205.50	2-12-80
CC-79-257	Frank Terango and Duel Terango	Department of Highways	720.11	720.11	3-6-80
CC-79-313	James D. Terry	Office of the State Auditor	852.50	852.50	2-18-80
CC-79-541	James D. Terry	Office of the State Auditor	34.00	34.00	1-31-80

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-206	Nancy J. Thabet	Department of Highways	666.52	666.52	4-1-80
CC-79-319	Bradley H. Thompson	Office of the State Auditor	7,426.47	7,426.47	1-24-80
CC-79-179	Gary Thompson	Department of Highways	286.87	286.87	10-10-80
CC-79-601a	John M. "Jack" Thompson, Jr.	Office of the State Auditor	2,485.00	2,485.00	1-22-80
CC-79-601b	John M. "Jack" Thompson, Jr.	Office of the State Auditor	1,922.50	1,922.50	2-28-80
CC-79-266a	Loudoun L. Thompson	Office of the State Auditor	112.50	112.50	1-24-80
CC-79-266b	Loudoun L. Thompson	Office of the State Auditor	3,551.75	3,551.75	2-14-80
CC-79-467	Richard Thompson	Office of the State Auditor	200.00	200.00	1-28-80
CC-79-516	Richard Thompson	Office of the State Auditor	1,229.10	1,229.10	2-28-80
CC-79-278	Stephen L. Thompson	Office of the State Auditor	227.00	227.00	2-14-80
CC-79-387	Stephen L. Thompson	Office of the State Auditor	202.30	202.30	1-25-80
CC-80-81	Three Printers, Inc.	Department of Health	2,347.27	2,347.27	3-6-80
CC-79-621**	Thomas R. Tinder	Office of the State Auditor	287.70	287.70	2-28-80
CC-79-598	Phil J. Tissue	Office of the State Auditor	235.00	235.00	2-28-80
CC-80-323	Trojan Steel Company	Department of Health	9,200.00	9,200.00	12-23-80
CC-79-232a & CC-79-417	J. M. Tully	Office of the State Auditor	62.50	62.50	1-22-80
CC-79-232b	J. M. Tully	Office of the State Auditor	645.00	645.00	2-13-80
CC-79-256	Cynthia L. Turco	Office of the State Auditor	1,107.52	1,107.52	2-13-80
CC-79-622	Robert L. Twitty	Office of the State Auditor	712.50	712.50	2-28-80
CC-80-359	Rosemarie Twomey	Office of the State Auditor	435.77	435.77	12-23-80
CC-80-61	Uarco, Inc.	Department of Finance and Administration	2,744.95	2,744.95	3-6-80
CC-81-21a	David G. Underwood	Office of the State Auditor	292.50	292.50	2-12-80
CC-81-21b	David G. Underwood	Office of the State Auditor	640.00	640.00	2-29-80

**The Office of the State Auditor paid this claim; therefore, the claim was not processed for payment.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-86****	Paul J. Underwood and Betty O. Underwood	Department of Highways	3,777.09	3,777.09	3-2-81
CC-80-57	W. Warren Upton	Office of the State Auditor	100.15	100.15	2-29-80
CC-80-419	Varian Associates-Instrument Division	Board of Regents	193.78	193.78	1-28-81
CC-79-255	James A. Varner	Office of the State Auditor	181.50	181.50	11-21-79
CC-79-498	James A. Varner	Office of the State Auditor	43.50	43.50	2-29-80
CC-77-203	Louis B. Varney, d/b/a Tri-State Inspection Service	Department of Health	6,666.65	4,250.00	5-11-80
CC-80-47	F. Malcolm Vaughan	Office of the State Auditor	541.52	541.52	2-12-80
CC-80-63	Tony J. Veltri, d/b/a Farmers Delight Co.	Department of Corrections	5,172.78	5,172.78	3-6-80
CC-80-35	Jennifer E. Vail	Office of the State Auditor	53.60	53.60	2-7-80
CC-79-599	Steve Vickers	Office of the State Auditor	241.60	241.60	2-28-80
CC-79-302	Paul A. Viers	Office of the State Auditor	400.00	400.00	11-21-79
CC-78-229	Debra A. Vinson	Department of Highways	44.29	44.29	9-20-79
CC-79-320 (a&b), CC-79-351a & CC-79-572	Robert E. Vital	Office of the State Auditor	10,370.00	10,370.00	1-24-80
CC-79-351b	Robert E. Vital	Office of the State Auditor	175.00	175.00	2-26-80
CC-79-550	Robert M. Vukas	Office of the State Auditor	766.77	766.77	2-28-80
CC-79-611	Charles M. Walker	Office of the State Auditor	1,012.00	1,012.00	2-28-80
CC-79-234	Jack H. Walters	Office of the State Auditor	240.00	240.00	11-21-79
CC-79-310	Boyd L. Warner	Office of the State Auditor	1,728.00	1,728.00	11-21-79

****The decision in this claim was not issued at the time this volume was published.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-693	Boyd L. Warner	Office of the State Auditor	327.00	327.00	1-22-80
CC-79-210	Myrtle Chaffins Watts and Elbert Watts	Department of Highways	4,664.06	3,722.05	11-10-80
CC-79-303	Charles V. Wehner	Office of the State Auditor	35.00	35.00	1-24-80
CC-80-147	Weirton Daily Times	Department of Finance and Administration	34.94	34.94	6-4-80
CC-79-292	Weirton General Hospital	Department of Corrections	4,323.05	4,323.05	11-19-79
CC-80-171	Wente Construction Company, Inc.	Board of Regents	70,249.78	70,249.78	1-28-81
CC-80-315	Weslakin Corporation	Department of Health	139.80	139.80	11-10-80
CC-80-161	West Virginia Telephone Company	Department of Highways	1,293.33	1,293.33	5-11-81
D-748a****	Alva Katherine White	Department of Highways	30,000.00	1,000.00	2-12-80
CC-80-224	Eugene R. White	Office of the State Auditor	600.00	600.00	8-5-80
D-748b****	Paul White and Wanda White	Department of Highways	15,000.00	4,000.00	2-12-80
CC-79-311 & CC-79-369	Bert Michael Whorton	Office of the State Auditor	968.25	968.25	2-26-80
CC-79-419a	Edwin B. Wiley	Office of the State Auditor	1,233.55	1,233.55	2-12-80
CC-79-419b	Edwin B. Wiley	Office of the State Auditor	6,126.08	6,126.08	2-27-80
CC-79-238	T. Owen Wilkins	Office of the State Auditor	800.50	800.50	2-13-80
CC-79-263 & CC-80-2	T. Owen Wilkins	Office of the State Auditor	295.00	295.00	1-24-80
CC-79-675	J. E. Wilkinson	Office of the State Auditor	740.00	740.00	2-28-80
D-749	Charles E. Williams	Department of Highways	150,000.00	12,000.00	5-11-81
CC-80-119	Virginia Williams	Department of Highways	647.50	647.50	12-3-80
CC-80-67	Ernest Williamson	Department of Highways	120.00	119.75	10-23-80

****The decision for this claim was not issued at the time this volume was published.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1979, to June 30, 1981.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-80-215a	Charles W. Wilson	Office of the State Auditor	808.00	808.00	7-24-80
CC-80-215b	Charles W. Wilson	Office of the State Auditor	94.00	94.00	7-24-80
CC-79-537	Merwin B. Wingo	Department of Highways	3,800.00	1,000.00	6-4-80
CC-80-36	Robert E. Wise, Jr.	Office of the State Auditor	699.52	699.52	2-12-80
CC-80-268	Ernest N. Wolford & Patricia K. Wolford	Department of Highways	2,459.74	1,861.82	1-28-81
CC-79-580	Albert Ted Wood	Department of Highways	1,743.29	1,743.29	11-10-80
CC-79-374	Paul H. Woodford, II	Office of the State Auditor	302.50	302.50	2-26-80
CC-79-217	Robert M. Worrell	Office of the State Auditor	210.00	210.00	11-5-79
CC-79-587	Raymond H. Yackel	Office of the State Auditor	45.00	45.00	2-12-80
CC-80-180	David J. Yates	Department of Highways	38.85	38.85	10-10-80
CC-79-262 & CC-79-574	John Yeager, Jr.	Office of the State Auditor	873.40	873.40	2-7-80
CC-79-235	Harold S. Yost	Office of the State Auditor	135.00	135.00	1-22-80
CC-80-50	Mary L. Yost	Office of the State Auditor	1,000.00	1,000.00	2-7-80
CC-80-246	E. H. Young	Department of Highways	610.48	610.48	10-10-80
D-942	Zando, Martin & Milstead, Inc.	State Building Commission	95,014.84	18,833.45	2-13-81
CC-79-581	David L. Ziegler	Office of the State Auditor	342.50	342.50	2-12-80
CC-79-421	Robert L. Zimmerman	Department of Highways	250.00	250.00	10-23-80
CC-79-510a	George Zivkovich	Office of the State Auditor	183.79	183.79	1-31-80
CC-79-510b	George Zivkovich	Office of the State Auditor	320.78	320.78	2-27-80
CC-80-103	George Zivkovich	Office of the State Auditor	45.00	45.00	2-29-80
CC-80-124	George Zivkovich	Office of the State Auditor	80.00	80.00	7-24-80

REPORT OF THE COURT OF CLAIMS (Continued)

(3) Approved claims and awards satisifed by payment out of a special appropriation made by the Legislature to pay claims arising during the fiscal year: None.

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-77-196	Billy Conn Adkins	Department of Corrections	150,000.00	Disallowed	2-14-80
CC-80-207	R. C. Adkins	Department of Highways	800.00	Disallowed	12-3-80
CC-79-121	Kimberly Allen	Board of Regents	1,637.00	Disallowed	12-23-80
CC-78-280	Audra Myrle Armstead	Department of Welfare	10,000.00	Disallowed	2-14-80
CC-80-412	Dayton C. Beard and Jeanne Beard	Department of Highways	48.98	Disallowed	5-11-81
CC-78-299	Beneficial Management Corporation of America	Department of Highways	530.00	Disallowed	11-28-79
CC-79-372	Lester Bess	Department of Highways	169.80	Disallowed	6-4-80
CC-79-63	William T. Blackwell & Karen M. Blackwell	Department of Highways	40.04	Disallowed	2-14-80
CC-77-225	George E. Burgess and Montena Burgess	Department of Highways	150,000.00	Disallowed	3-18-80
CC-79-118	David L. Bush	Department of Highways	195.91	Disallowed	2-14-80
CC-79-176	David A. Campbell and Hobert A. Campbell	Department of Highways	105,000.00	Disallowed	5-11-81
CC-79-20	Dennis Edward Cantley	Department of Highways	500.00	Disallowed	11-28-79
CC-78-287a	Joseph W. Carlile	Department of Highways	72,500.00	Disallowed	4-1-80
CC-78-300	David A. Carrol	Department of Highways	235.00	Disallowed	11-28-79
CC-80-194	Arna Cash	Department of Highways	108.94	Disallowed	10-6-80
CC-79-164	Lee W. Clay	Department of Highways	132.95	Disallowed	2-14-80
CC-79-548	Robert D. Cline	Department of Highways	289.24	Disallowed	6-4-80
CC-79-41	James F. Collins	Department of Highways	426.81	Disallowed	9-20-79
CC-80-287	George M. Cooper	Administrative Office of the Supreme Court of Appeals and Office of the State Auditor	1,380.00	Disallowed	5-11-80

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-59	Billy R. Cowan	Department of Highways	Unliquidated	Disallowed	2-14-80
CC-79-401	G. Lee Cox & June F. Cox	Department of Highways	150.18	Disallowed	6-4-80
CC-80-176	James H. Curnutte, Jr. & Deborah L. Curnutte	Department of Highways	3,640.00	Disallowed	5-11-81
CC-79-208	Eugenia Currey	Department of Highways	82.35	Disallowed	6-4-80
CC-80-127	Michael Dennis	Department of Highways	81.69	Disallowed	11-10-80
CC-79-61	Wendell Dunlap	Department of Highways	1,500.00	Disallowed	11-28-79
CC-79-42	Carl Dunn and Virginia Dunn	Department of Highways	1,081.21	Disallowed	12-11-79
CC-80-182	Kenneth E. Duskey and Lois V. Duskey	Department of Highways	188.37	Disallowed	5-11-81
CC-79-220	Kenneth M. Eary	Department of Highways	153.10	Disallowed	8-5-80
CC-78-10a	Ernie E. Eller, Admin. of the Estate of Issac Eller	Department of Highways	111,319.95	Disallowed	5-11-81
CC-78-10d	Ernie E. Eller, Admin. of the Estate of Isaac James Eller	Department of Highways		Disallowed	5-11-81
CC-78-10c	Ernie E. Eller, Admin. of the Estate of Rosa Lee Eller	Department of Highways		Disallowed	5-11-81
CC-78-10b	Ernie E. Eller, Admin. of the estate of Shirley Fay Eller	Department of Highways		Disallowed	5-11-81
CC-79-89	Erie Insurance Group, subrogee of Frank R. Godbey	Department of Highways	165.83	Disallowed	12-11-79
D-874g	Jimmie W. Fields and Oma Alice Fields	Department of Highways	10,000.00	Disallowed	4-1-80
CC-80-14	David M. Finnerin	Office of the State Auditor	6,570.00	Disallowed	5-15-81
CC-79-330	William J. Fox	Department of Highways	106.74	Disallowed	8-5-80

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-76-35	Arthur Friend and Pauline Friend	Department of Highways	1,000.00	Disallowed	2-14-80
CC-80-121	Victor Frisco and Janet Frisco	Department of Natural Resources	1,956.00	Disallowed	11-10-80
CC-79-124	Larry P. Frye	Department of Highways	211.15	Disallowed	2-14-80
CC-79-576	Mary K. Fuller	Department of Highways	91.08	Disallowed	10-23-80
CC-80-316	Nancy C. Graham	Department of Highways	307.77	Disallowed	5-11-81
CC-79-202	Grange Mutual Casualty Co., subrogee of Jack DeGiovanni	Department of Highways	940.27	Disallowed	10-23-80
CC-78-117	Stanley T. Greene, Jr.	West Virginia Racing Commission	11,647.92	Disallowed	9-20-79
CC-80-101	Clarence G. Hager	Department of Highways	103.66	Disallowed	10-6-80
CC-78-217	Clara Mae Hall	Department of Highways	6,000.00	Disallowed	9-20-79
CC-79-40	Gary Hall	Department of Highways	230.00	Disallowed	2-14-80
CC-79-455	James M. Harper	Department of Highways	380.90	Disallowed	10-23-80
CC-80-190	Mark Allen Hicks	Department of Highways	300.00	Disallowed	12-3-80
CC-79-21	Claudine Hinkle	Department of Welfare	250.00	Disallowed	4-1-80
CC-79-44	Bruce E. Hobbs	Department of Highways	35.74	Disallowed	9-20-79
CC-80-238	Alex Hull	Department of Highways	328.00	Disallowed	5-11-81
CC-78-199	Arlie Neil Humphreys	Department of Highways	398.20	Disallowed	2-14-80
CC-79-216	Emit Jennings, Jr. and Victoria Jennings	Department of Highways	1,050.00	Disallowed	11-10-80
CC-77-183	Collie Jeter, Guardian of Kermit Jeter and Kermit Jeter	Department of Highways	7,289.90	Disallowed	5-11-81
CC-79-114	Robert B. Johnston	Department of Highways	50,000.00	Disallowed	3-24-81

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-73	Mr. and Mrs. Robert Jones	Department of Highways	1,051.24	Disallowed	8-5-80
CC-78-256	Dallas Howard Jude	Department of Highways	93.24	Disallowed	9-20-79
CC-79-39	Kyle King	Department of Highways	132.09	Disallowed	9-20-79
CC-79-445	Millicent Kuman	Board of Regents	656.04	Dismissed	3-12-81
CC-79-55	Henry R. Larmoyeux	Department of Highways	63.24	Disallowed	9-20-79
CC-79-141	James R. Lavender	Department of Highways	1,640.00	Disallowed	8-5-80
CC-79-129	William C. Lawrence	Department of Highways	722.08	Disallowed	2-14-80
CC-79-160	Chester W. Lemasters	Department of Highways	100.43	Disallowed	2-14-80
CC-78-45	William F. LePera and Dixie LePera	Department of Corrections	1,052.62	Disallowed	10-31-79
CC-78-254	Robert Stephen Lowe	Department of Highways	634.18	Disallowed	12-11-79
CC-79-589	William Joseph Manning	Department of Highways	2,059.35	Disallowed	10-23-80
CC-79-135	Frank M. Marchese	Department of Highways	95.79	Disallowed	7-21-80
CC-79-64	Estelle M. Martin	Department of Highways	181.05	Disallowed	9-20-79
CC-81-16	Joseph R. Martin	Office of the State Auditor	140.00	Disallowed	5-15-81
CC-79-128	Ralph Paul Mayes	Department of Highways	168.67	Disallowed	2-14-80
CC-80-157	Peggy Mayhorn	Department of Highways	163.77	Disallowed	12-23-80
CC-77-38a	Jonathan E. McDonald, Admin. of the Estate of Norma Jean McDonald	Department of Highways	110,645.30	Disallowed	9-14-79
CC-78-257	Gary McFann	Department of Highways	276.30	Disallowed	9-20-79
CC-79-143	Mary McLaughlin, by her son Ralph McLaughlin	Department of Highways	20,000.00	Disallowed	3-24-81
CC-79-126	James L. Meadows	Department of Highways	153.68	Disallowed	11-28-79
CC-77-155	Lewis Dale Metz	W. Va. State Board of Probation & Parole and Department of Corrections	5,000.00	Disallowed	11-10-80

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-518	William R. Miller and Carolyn Miller	Department of Highways	4,070.00	Disallowed	5-11-81
CC-79-139	Marjorie Mitchell	Department of Welfare	400.00	Disallowed	2-14-80
CC-79-71	Charles P. Moore	Department of Highways	170.80	Disallowed	11-28-79
CC-79-45	Douglas W. Morris	Department of Highways	52.36	Disallowed	9-20-79
CC-80-186	Douglas Newbell	Department of Highways	267.37	Disallowed	10-6-80
CC-79-138	Barbara A. Ney	Department of Highways	178.49	Disallowed	2-14-80
CC-79-653	Sam Nichols and Della K. Nichols	Department of Highways	81.21	Disallowed	10-6-80
CC-78-189	Robert R. Nickel and Bertha Nickel	Department of Highways	1,814.01	Disallowed	2-14-80
CC-80-226	Andrew Noshagya	Administrative Office of the Supreme Court of Appeals	250.00	Disallowed	5-11-81
CC-78-240	Donald J. Oliverio	Department of Highways	14,500.00	Disallowed	3-11-80
CC-80-122	Charles H. Page and Dorothy Page	Department of Highways	6,844.85	Disallowed	11-10-80
CC-79-406	Linda M. Painter	Department of Highways	325.79	Disallowed	8-5-80
CC-76-38	Paramount Pacific, Inc. on behalf of Pauley Paving Co., Inc.	Department of Highways	81,460.03	Disallowed	2-14-80
CC-79-153	Virginia Pauley	Department of Highways	50.00	Disallowed	10-23-80
CC-80-354	Pawnee Trucking Company	Department of Motor Vehicles	2,281.87	Disallowed	5-11-81
CC-79-525	Julie Peiffer	Department of Highways	492.23	Disallowed	6-4-80
CC-78-255	Judy Ann Smith Perdue	Department of Highways	1,861.41	Disallowed	2-14-80
CC-79-156	Ronald L. Perry and Lynda S. Perry	Department of Highways	84.69	Disallowed	2-14-80

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-77-222	Gail and Ora Pitsenbarger	Department of Highways	15,000.00	Disallowed	9-20-79
CC-79-646	Patricia Porter	Department of Finance and Administration	55.10	Disallowed	11-10-80
CC-79-34	Charles E. Priestley, Jr. and Penny A. Priestley	Department of Highways	207.86	Disallowed	9-20-79
CC-79-87	Glen L. Ramey and Faye Ramey	Department of Highways	4,933.13	Disallowed	10-31-79
CC-80-199	Mary Alice Roberts	Department of Highways	142.12	Disallowed	5-11-81
CC-79-31	Irving Robinson	Department of Highways	211.28	Disallowed	11-28-79
CC-79-151	Kirk Alan Ryckman	Department of Highways	155.75	Disallowed	2-14-80
CC-79-324	Eugene J. Sapp	Department of Highways	75.09	Disallowed	12-3-80
CC-80-205	Rickie Allen Saunders	Department of Highways	939.56	Disallowed	12-23-80
CC-80-167	Thomas H. Sickle	Department of Highways	3,859.00	Disallowed	5-11-81
CC-80-69	James Sisk	Department of Highways	164.00	Disallowed	10-23-80
CC-79-450	David D. Smith	Department of Highways	414.98	Disallowed	4-1-80
CC-76-100	Joseph Raymond Snyder and Sarah Snyder	Department of Highways	4,020.00	Disallowed	11-28-79
CC-80-230	Walton Lee Snyder	Department of Highways	175.00	Disallowed	1-27-81
CC-79-157	Joseph H. Stalnaker	Department of Welfare	1,500.00	Disallowed	12-11-79
CC-79-331	James P. Stemple	Department of Welfare	2,975.00	Disallowed	12-11-79
CC-78-262	Stonewall Casualty Co., subrogee of Anthony Tassone	Department of Highways	1,145.68	Dismissed	10-31-79
CC-80-166	M. Wood Stout and Lova Stout	Department of Highways	261.16	Disallowed	10-6-80
CC-79-449	James Edward Sturm	Department of Highways	531.70	Disallowed	8-5-80

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-1	Eugene C. Suder	Department of Corrections	285.25	Disallowed	10-6-80
CC-79-479	Robert J. Sweda	Department of Highways	72.97	Disallowed	8-5-80
CC-79-174	Tim H. Swofford	Department of Highways	135.20	Disallowed	10-6-80
CC-79-149	Frederick B. Tallamy	Department of Highways	311.47	Disallowed	8-5-80
CC-80-153	Mary Tate	Department of Highways	52.28	Disallowed	10-6-80
CC-80-179	Ayers Thomas	Department of Highways	880.00	Disallowed	11-10-80
CC-76-39	Seba Tipton	Department of Highways	50,000.00	Disallowed	4-1-80
CC-79-231	Mildred Van Horn	Department of Highways	607.70	Disallowed	5-11-81
CC-81-17	Montie VanNostrand	Office of the State Auditor	761.65	Disallowed	5-15-81
CC-79-92	Joseph Vielbig, III	Board of Regents	93.25	Disallowed	4-1-80
CC-80-123	Gary Vilain	Department of Highways	97.85	Disallowed	12-23-80
CC-79-65	John H. Ward and Nancy L. Ward	Department of Highways	328.03	Disallowed	11-28-79
CC-77-169	James R. Watson, who sues by his next friend, his brother, Ronald R. Watson	Department of Health	50,000.00	Disallowed	2-14-80
CC-79-563	Robert Eugene Whitehouse	Department of Highways	111.76	Disallowed	6-4-80
CC-80-181	Earl A. Whitmore, Jr. and Barbara A. Whitmore	Department of Highways	1,600.00	Disallowed	11-10-80
CC-79-158	John Williams	Department of Highways	340.79	Disallowed	12-11-79
CC-79-46	Offie D. Williams	Department of Highways	1,800.00	Disallowed	2-14-80
CC-77-223	Robert Christopher Wise	Department of Highways	2,500.00	Disallowed	12-11-79
CC-78-274	Harold Young	Department of Highways	203.50	Disallowed	9-20-79
D-942	Zando, Martin & Milstead	State Building Commission	185,984.54	Disallowed	2-14-80
CC-79-258	Roger Zicafoose	Department of Highways	70.00	Disallowed	6-4-80

(5) Advisory determinations made at the request of the Governor or the head of a State Agency: None.

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature in the 1981 Legislative session:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-80-402	Appalachian Mental Health Center	Department of Corrections	4,875.00	Disallowed	2-13-81
CC-79-698	Appalachian Regional Hospital	Department of Corrections	10,355.15	Disallowed	2-12-80
CC-80-403	William R. Barton	Department of Corrections	153.00	Disallowed	1-27-81
CC-80-265	Betsy Ross Bakeries, Inc.	Department of Corrections	687.95	Disallowed	10-6-80
CC-80-5	Morris E. Brown	Department of Corrections	24.00	Disallowed	2-12-80
CC-80-202	Captial Credit Corporation	Department of Corrections	313.50	Disallowed	7-21-80
CC-80-398	City of Charleston (The)	Department of Finance and Administration	31,699.20	Disallowed	2-13-81
CC-80-88	Climate Makers of Charleston, Inc.	Department of Corrections	2,568.00	Disallowed	2-12-80
CC-79-556	Dacar Chemical Co.	Department of Corrections	110.00	Disallowed	11-21-79
CC-79-388	Davis Memorial Hospital	Department of Corrections	1,096.62	Disallowed	10-31-79
CC-79-633	Department of Highways	Department of Corrections	195.78	Disallowed	12-12-80
CC-79-647	Exxon Company, U.S.A.	Department of Corrections	246.53	Disallowed	2-12-80
CC-80-314	Grafton City Hospital	Department of Corrections	977.69	Disallowed	10-6-80
CC-80-399	Greenbrier Physicians, Inc.	Department of Corrections	104.00	Disallowed	1-27-81
CC-79-524	Gulf Oil Co., U.S.	Department of Corrections	54.63	Disallowed	10-24-79
CC-79-133	George L. Hill, Jr.	Department of Corrections	600.00	Disallowed	10-31-79
CC-80-12	Huntington Steel & Supply Co.	Department of Corrections	1,028.99	Disallowed	2-12-80
CC-79-631	IBM Corporation	Department of Corrections	836.64	Disallowed	2-12-80
CC-79-709	Industrial Rubber Products Co.	Department of Corrections	301.47	Disallowed	2-12-80
CC-80-133	Interstate Printers & Publishers, Inc.	Department of Corrections	157.30	Disallowed	6-4-80
CC-80-368	Joe L. Smith, Jr., Inc. d/b/a Biggs-Johnston-Withrow	Office of the Governor	24,126.92	Disallowed	2-25-81

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature in the 1981 Legislative session:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-80-151	Johnson Controls, Inc.	Board of Regents	7,780.00	Disallowed	7-21-80
CC-79-489	Kellogg Company	Department of Corrections	4,174.35	Disallowed	10-24-79
CC-79-496	Kroger Co. (The)	Department of Corrections	13.80	Disallowed	10-24-79
CC-80-239	I. H. Luna	Department of Corrections	260.00	Disallowed	10-6-80
CC-80-350	M. Merrick & Associates, Inc.	Department of Corrections	108.38	Disallowed	12-23-80
CC-79-669	Memorial General Hospital	Department of Corrections	46,156.75	Disallowed	2-12-80
CC-80-358	Memorial General Hosptial	Department of Corrections	9,328.93	Disallowed	2-25-81
CC-79-398	Ohio Valley Medical Center, Inc.	Department of Corrections	11,656.57	Disallowed	10-24-79
CC-80-414	Ohio Valley Medical Center, Inc.	Department of Corrections	12,457.00	Disallowed	1-27-81
CC-79-546	Raleigh General Hospital	Department of Corrections	2,432.60	Disallowed	10-24-79
CC-79-508	Randolph County Board of Education	Department of Corrections	392.00	Disallowed	10-24-79
CC-79-686	Southern West Virginia Clinic	Department of Corrections	310.00	Disallowed	2-25-81
CC-80-392	Harry S. Spectre d/b/a Commonwealth Castings Company	Board of Occupational Therapy	997.50	Disallowed	2-25-81
CC-79-539	Taylor County Commission	Department of Corrections	280.00	Disallowed	10-24-79
CC-79-714	Town & Country Dairy	Department of Corrections	2,096.08	Disallowed	2-12-80
CC-79-412	Union Oil Company of California	Department of Corrections	3,248.22	Disallowed	10-24-79
CC-80-404	Robert R. Weiler	Department of Corrections	1,259.00	Disallowed	1-27-81
CC-80-94	Wheeling Hospital	Department of Corrections	585.95	Disallowed	2-12-80
CC-79-588	Xerox Corporation	Department of Corrections	1,050.66	Disallowed	11-21-79
CC-80-425	Xerox Corporation	Department of Corrections	120.00	Disallowed	1-27-81

(7) Approved claims and awards satisfied by payment by the State agency through an opinion decided by the Court under the

OPINIONS

TABLE OF CASES REPORTED

A. J. Baltes, Inc. v. Department of Highways 1
Adkins, Billy Conn v. Department of Corrections 117
Adkins, Mitchell F. v. Department of Highways 434
Adkins, R. C. v. Department of Highways 307
Adkins, Timothy v. Department of Highways 355
Allen, Kimberly v. Board of Regents 321
Allen, Rose M. v. Department of Highways 189
Allstate Construction & Roofing Co. v. Department of Highways 375
American Hospital Supply v. Department of Health 151
American Scientific Products v. Department of Health 557
Anania, Maria Caterina v. Department of Highways 152
Appalachian Engineers, Inc. v. Department of Health 82
Appalachian Homes, Inc. v. Department of Health 349
Appalachian Mental Health Center v. Department of Corrections 350
Appalachian Power Company v. Department of Highways (CC-78-289) 260
Appalachian Power Company v. Department of Health (CC-80-321) 283
Appalachian Power Company v. Department of Public Safety (CC-80-410) 335
Appalachian Regional Hospital v. Department of Corrections (CC-79-697) 153
Appalachian Regional Hospital v. Department of Corrections (CC-79-698) 176
Armstead, Audra Myrle v. Department of Welfare 119
Arnold, Carolyn H. v. Board of Regents 207
Associated Radiologists, Inc. v. Department of Health 226
Atkinson, Robert S. & Evelyn Atkinson v. Department of Highways 18
Bailey, Jeffrey A. v. Department of Highways 376
Bailey, Mary Jo v. Department of Highways 376
Bailey, Ronald L. v. Department of Highways 144
Ball, William Frank d/b/a Ball Trucking, Inc. v. Department of Highways 358
Bank of Gassaway v. Department of Motor Vehicles 154
Barkley, Russell Lee v. Department of Highways 83
Barnett, David S. v. Department of Highways 284
Barrett, Harry H. v. Department of Highways 20
Barton, William R. v. Department of Corrections 331

Bayer, Larry Allen v. Department of Highways 388
Beard, Dayton C. and Jeanne Beard v. Department of Highways 389
Beckley Hospital, Inc. v. Division of Vocational Rehabilitation 227
Beneficial Management Corporation of America v. Department of Highways 71
Bess, Lester v. Department of Highways 211
Besty Ross Bakeries, Inc. v. Department of Corrections 251
Blackwell, William T. and Karen M. Blackwell v. Department of Highways 121
Bleigh, Randy N. v. Department of Highways 191
Board of Education of the County of Kanawha (The) v. Department of Highways 60
Bogert, Paul v. Department of Highways 269
Boyd, Katherine H. v. Department of Highways 435
Bracken Construction Company v. Department of Highways 335
Brogan, F. William, Jr., et al. v. Office of the State Auditor (Mental Hygiene Commissioner claims) 67
Brown, Morris E. v. Department of Corrections 176
Burgess, George E. and Montena Burgess v. Department of Highways 181
Burton, Virginia v. Department of Highways 44
Bush, David L. v. Department of Highways 122
Bush, Homer v. Department of Highways 21
Butler, Harley C. v. Department of Highways 208
Campbell, David A. and Hobert A. Campbell v. Department of Highways 391
Campbell, James Earl v. Department of Health 382
Campbell, Kenneth Ray v. Department of Health 382
Campbell, Melvin S. v. Department of Health 382
Cantley, Dennis Edward v. Department of Highways 72
Capital Credit Corporation v. Department of Corrections 228
Carlile, Joseph W. v. Department of Highways 192
Carrol, David A. v. Department of Highways 73
Carmet Company v. Department of Highways 145
Carper, George v. Department of Highways 45
Casey, Frances Jeanette v. Department of Highways 182
Cash, Arna v. Department of Highways 252
Casto, Janet Aultz v. Department of Highways 377

Donahue, Cynthia v. Board of Regents 399
Duling Brokerage, Inc. v. Department of Highways 185
Dunlap, Reba C. v. Department of Highways 285
Dunlap, Wendell v. Department of Highways 75
Dunn, Carl and Virginia Dunn v. Department of Highways .. 86
Duskey, Kenneth E. and Lois V. Duskey v. Department of Highways 401
E. I. du Pont de Nemours & Co. v. Department of Health 359
Eary, Kenneth M. v. Department of Highways 235
Eller, Ernie E., Admin. of the Estate of Isaac Eller v. Department of Highways (CC-78-10a) 402
Eller, Ernie E., Admin. of the Estate of Isaac James Eller v. Department of Highways (CC-78-10d) 402
Eller, Ernie E., Admin. of the Estate of Rosa Lee Eller v. Department of Highways (CC-78-10c) 402
Eller, Ernie E., Admin. of the Estate of Shirley Faye Eller v. Department of Highways (CC-78-10b) 402
Eller, Joe B. v. Department of Highways 155
Ellis, Sue H. v. Board of Regents 195
Empire Foods, Inc. v. Office of the Governor - Emergency Flood Disaster Relief 87
Engel, Edward v. Department of Highways 45
Epling, Sam v. Department of Highways 338
Erie Insurance Exchange, Subrogee of Charles Schooley v. Department of Highways 339
Erie Insurance Group, Subrogee of Frank R. Godbey v. Department of Highways 88
Evans, J. Robert d/b/a Motor Car Supply Co. v. Department of Health 360
Exxon Company, U.S.A. v. Department of Corrections 174
Eye & Ear Clinic of Charleston, Inc. (The) v. Division of Vocational Rehabilitation 209
Fairmont General Hospital v. Department of Corrections 228
Falls City Industries, Inc. formerly Falls City Brewing Co. v. Nonintoxicating Beer Commission 186
Fanning Funeral Homes, Inc. v. Department of Highways ... 271
Farley, Daniel C., Jr. v. Department of Highways 63
Federal Kemper Insurance Company, as Subrogee of Robert L. Zimmerman v. Department of Highways 282
Ferguson, Robert L., Executor of the Estate of Elizabeth L. Ferguson, Deceased v. Department of Highways 103
Fields, Jimmie W. and Oma Alice Fields v. Department of Highways 196

Cerullo, Leonard A. v. Alcohol Beverage Control Commissioner 392
City of Charleston (The) v. Department of Finance and Administration 350
Clark, John F. v. Department of Highways 85
Clay, Lee W. v. Department of Highways 123
Climate Makers of Charleston, Inc. v. Department of Corrections 172
Cline Distributing Company v. Nonintoxicating Beer Commission 351
Cline, Robert D. v. Department of Highways 212
Coffman, Charles L. v. Board of Regents 359
Coleman Oil Company, Inc. v. Department of Highways 183
Collins, James F. v. Department of Highways 22
Colliton, Nita Kay v. Alcohol Beverage Control Commissioner 62
Conn, Eugene W. v. Department of Highways 194
Consolidated Contractors v. State Tax Department 45
Cook, Violet v. Department of Highways 213
Cooper, George M. v. Administrative Office of the Supreme Court of Appeals and Office of the State Auditor 394
Cowan, Billy R. v. Department of Highways 124
Cox, Bertie K. v. Department of Highways 184
Cox, G. Lee & June F. v. Department of Highways 215
Cozad, Richard E. v. Department of Highways 261
Crissi, Gloria M. v. Department of Highways 337
Curnutte, James H., Jr. and Deborah L. Curnutte v. Department of Highways 396
Currey, Eugenia v. Department of Highways 216
Dacar Chemical Co. v. Department of Corrections 69
Dalton, Franklin L. v. Department of Highways 51
Davis and Elkins College v. Division of Vocational Rehabilitation 308
Davis, Helen Joyce v. Office of the State Auditor 57
Davis Memorial Hospital v. Department of Corrections 46
Davoli, Michael J. v. Insurance Department 338
Demersman, Carol A. v. Department of Highways 352
Dennis, Michael v. Department of Highways 285
Department of Highways v. Department of Corrections 173
Dingess, Melvin and Corenia Dingess v. Department of Highways 146
Dodd, Arley Don v. Department of Highways 397

Finnerin, David M. v. Office of the State Auditor (CC-79-651a&b) 110
Finnerin, David M. v. Office of the State Auditor (CC-80-14) . 431
Finney, J. G. v. Department of Highways 262
Fox, William J. v. Department of Highways 236
Fragale, Irene E. v. Department of Highways 340
Freeman, Russell E. v. Department of Highways 237
Friel, Hobert v. Department of Highways 404
Friend, Arthur and Pauline Friend v. Department of Highways 125
Frisco, Victor and Janet Frisco v. Department of Natural Resources 287
Fry, Randy B. v. Department of Highways 309
Frye, Larry P. v. Department of Highways 126
Fuller, Mary K. v. Department of Highways 272
Funk, Sondra Lynn v. Depatment of Highways 263
Garland, Charles W. v. Department of Highways 288
Garrido, Patricia K. v. Department of Highways 361
Gaston, Martin V., Sr. v. Department of Highways 90
General Motors Acceptance Corporation v. Department of Motor Vehicles 363
Gibson, Margaret v. Department of Highways 217
Gillispie, Marjorie J. v. Department of Highways 209
Grafton City Hospital v. Department of Corrections 253
Grafton, Elizabeth Smith v. Department of Highways 147
Graham, Nancy C. v. Department of Highways 406
Grange Mutual Casualty Co., Subrogee of Jack DeGiovanni v. Department of Highways 273
Greenbrier Physicians, Inc. v. Department of Corrections 331
Greene, Stanley T., Jr. v. West Virginia Racing Commission 23
Grim, Dean R. v. Department of Highways 378
Gruber, Barbara v. Department of Health 24
Gulf Oil Co., U.S. v. Department of Corrections 43
Gunnoe, Thomas P. v. Department of Highways 210
Hager, Clarence G. v. Department of Highways 253
Hall, Clara Mae v. Department of Highways 25
Hall, Gary v. Department of Highways 127
Hamilton, Edward J. v. Department of Banking 353
Hamilton, Lee Roy v. Department of Highways 263
Handling, Inc. v. Alcohol Beverage Control Commissioner... 156
Harper, James M. v. Department of Highways 274
Harrison, Gregory A. v. Department of Highways 229

Haught, Cecil Ray v. Department of Highways 237
Henriksen, Walter A. v. Department of Highways 157
Hicks, Mark Allen v. Department of Highways 310
Highway Engineers, Inc. v. Department of Highways 311
Hill, George L., Jr. v. Department of Corrections 47
Hiner, Ida M. and Norman F. Hiner d/b/a Hercules Construction Company v. Department of Natural Resources 315
Hinkle, Claudine v. Department of Welfare 199
Hobbs, Bruce E. v. Department of Highways 27
Hodges, Deborah J. v. Department of Highways 159
Hope, Kim v. Department of Highways 45
Hrko, John S., et al. v. Office of the State Auditor (CC-79-221a) (Mental Hygiene Attorney claims) 104
Hrko, John S., et al. v. Office of the State Auditor (CC-79-221b) (Needy Persons Fund claims) 110
Hull, Alex v. Department of Highways 408
Huntington Steel & Supply Co. v. Department of Corrections 176
Huntington Water Corporation v. Department of Health 47
Humphreys, Arlie Neil v. Department of Highways 128
IBM Corporation v. Department of Culture and History (CC-79-189) 48
IBM Corporation v. Department of Corrections (CC-79-631) 174
Industrial Rubber Products Co. v. Department of Corrections 176
Interstate Printers & Publishers, Inc. v. Department of Corrections 218
J. F. Allen Company v. Department of Highways 364
Jamison Electrical Construction Co. v. Board of Regents 178
Jennings, Emit, Jr. and Victoria Jennings v. Department of Highways 289
Jeter, Collie, Guardian of Kermit Jeter and Kermit Jeter v. Department of Highways 409
Joe L. Smith, Jr., Inc., d/b/a Biggs-Johnston-Withrow v. Office of the Governor 368
Johnson, Barney Dale v. Department of Highways 265
Johnson Controls, Inc. v. Board of Regents (CC-80-151) 230
Johnson Controls, Inc. v. Department of Public Safety (CC-80-274) 369

Johnson, Esther v. Department of Highways 380
Johnston, Robert B. v. Department of Highways 387
Jones, Maurice L. v. Department of Highways 211
Jones, Mr. and Mrs. Robert v. Department of Highways 239
Jude, Dallas Howard v. Department of Highways 28
Kanawha Office Equipment, Inc. v. Board of Regents (CC-79-475a) 179
Kanawha Office Equipment, Inc. v. Board of Chiropractic Examiners (CC-79-585) 159
Kay, Robert H. C., Trustee, Estate of W. F. Harless v. Alcohol Beverage Control Commissioner 241
Kellogg Company v. Department of Corrections 43
Kessler, Bert v. Department of Highways 436
King, Kyle v. Department of Highways 29
Knowlton, Gary L. v. Department of Highways 291
Kolinski, Margaret A. and Raymond L. Kolinski v. Board of Regents and Charles V. Campanizzi 206
Kroger Co. (The) v. Department of Corrections 43
Kuman, Millicent v. Board of Regents 384
Kun, Mr. and Mrs. Tamas A. de v. Department of Highways 234
Kurucz, Theresa v. Department of Highways 30
Larmoyeux, Henry R. v. Department of Highways 31
Lavender, James R. v. Department of Highways 241
Law Enforcement Ordnance Company v. Department of Corrections 49
Lawrence, William C. v. Department of Highways 129
Lemasters, Chester W. v. Department of Highways 130
LePera, William F. and Dixie LePera v. Department of Corrections 49
Lezada, Lourdes v. Department of Health 412
Littlepage, Jean C. v. Department of Highways (CC-79-420a) 45
Littlepage, Jean C. v. Department of Highways (CC-79-420b) 45
Lowe, Robert Stephen v. Department of Highways 91
Luna, I. H. v. Department of Corrections 254
Lynch, Carroll v. Department of Highways 187
M. Merrick & Associates, Inc. v. Department of Corrections 322
Malco Plastics, Inc. v. Department of Motor Vehicles 219
Manning, William Joseph v. Department of Highways 275

Marchese, Frank M. v. Department of Highways 230
Martin, Estelle M. v. Department of Highways 32
Martin, Joseph R. v. Office of the State Auditor 432
Mayes, Ralph Paul v. Department of Highways 131
Mayhorn, Peggy v. Department of Highways 323
McCallister, Charles F. v. Department of Highways 219
McClung, Sara H. v. Department of Highways 371
McDonald, Jonathan E. v. Department of Highways (CC-77-38d) 13
McDonald, Jonathan E., Admin. of the Estate of James Edgar McDonald, Deceased v. Department of Highways (CC-77-38c) 13
McDonald, Jonathan E., Admin. of the Estate of Norma Jean McDonald, Deceased, v. Department of Highways (CC-77-38a) 13
McDonald, Jonathan E., Admin. of the Estate of Penny Jo McDonald, Deceased v. Department of Highways (CC-77-38b) 13
McDougal, James A. v. Department of Highways 344
McFann, Gary v. Department of Highways 33
McJunkin Corporation v. Department of Highways 373
McLaughlin, Mary, by her son Ralph McLaughlin v. Department of Highways 387
McNeely, Carl Eugene v. Department of Highways 232
Meadows, James L. v. Department of Highways 76
Meadows, S. A. v. Department of Highways 45
Meaige, Barton v. Department of Highways 187
Memorial General Hospital v. Department of Corrections (CC-79-669) 175
Memorial General Hospital v. Department of Corrections (CC-80-358) 373
Metz, Lewis Dale v. W. Va. State Board of Probation & Parole and Department of Corrections 292
Mick, Robert W. v. Department of Highways 353
Miller, Barbara L. v. Department of Highways 243
Miller, William R. and Carolyn Miller v. Department of Highways 414
Mitchell, Marjorie v. Department of Welfare 132
Moats, Carl and Pauline Moats v. Department of Highways 243
Modern Press, Inc. v. Board of Regents 341
Moles, Carl C. v. Department of Highways 233

Perry, Ronald L. and Lynda S. Perry v. Department of Highways 138
Peters, Zona Ruth v. Department of Highways 325
Pitsenbarger, Gail and Ora v. Department of Highways 35
Porter, Joyce v. Department of Highways 161
Porter, Patricia v. Department of Finance and Administration 295
Porterfield, Roy and Donna F. Porterfield v. Department of Highways 297
Priestley, Charles E., Jr. and Penny A. Priestley v. Department of Highways 36
Program Resources, Inc. v. Department of Finance and Administration 266
Pullen, Sterling L., Jr. v. Department of Highways 278
Raleigh General Hospital v. Department of Corrections 43
Ramey, Glen L. v. Department of Highways (Awarded) 342
Ramey, Glen L. and Faye Ramey v. Department of Highways (Disallowed) 52
Randolph County Board of Education v. Department of Corrections 43
Rayburn, Roy C., Jr. v. Department of Highways 45
Reynolds, Dencil and Judith v. Department of Highways 45
Rhodes, Roscoe and Maxine V. Rhodes v. Department of Highways 188
Richardson, Margaret K. v. Department of Highways 298
Roach, Ronnie Gene v. Department of Highways 45
Roberts, Mary Alice v. Department of Highways 417
Robertson, Lee Roy v. Department of Highways 381
Robinson, Irving v. Department of Highways 78
Rockett, Danny Lee and Kathy Newell Rockett v. Department of Highways 45
Rowe, Franklin D. v. Department of Highways 65
Ryckman, Kirk Alan v. Department of Highways 139
Sandy, Ernest J. v. Board of Regents 163
Sapp, Eugene J. v. Department of Highways 317
Sargent-Welch Scientific Co. v. Department of Health 327
Saunders, Rickie Allen v. Department of Highways 328
Sayre, Guy N. v. Department of Highways 45
Sayre, Jessie and Densil O. Sayre v. Department of Highways 164
Secret, A. O. v. Department of Highways 37
Shaeffer and Associates v. Department of Health 165

Moore, Charles P. v. Department of Highways 77
Moore, Cleo Lively v. Department of Highways 148
Moore, Virgil E. v. Department of Highways 385
Morris, Douglas W. v. Department of Highways 34
Mullins, Franklin D. and Sarah Y. Mullins v. Department of Highways 436
Nationwide Insurance Company, Subrogee of Franklin L. Dalton v. Department of Highways 51
Nellis Motor Sales v. Alcohol Beverage Control Commissioner 160

Nestor, Catherine v. Department of Highways 150
Newbell, Douglas v. Department of Highways 255
Ney, Barbara A. v. Department of Highways 133
Nichols, Sam and Della K. Nichols v. Department of Highways 256
Nickel, Robert R. and Bertha Nickel v. Department of Highways 134
North Bend State Park v. Department of Health 161
Noshagya, Andrew v. Administrative Office of the Supreme Court of Appeals 415
Ohio Valley Medical Center, Inc. v. Department of Corrections (CC-79-398) 42
Ohio Valley Medical Center, Inc. v. Department of Corrections (CC-80-414) 332
Oliverio, Donald J. v. Department of Highways 180
Page, Charles H. and Dorothy Page v. Department of Highways 294
Painter, Linda M. v. Department of Highways 245
Paramount Pacific, Inc. on behalf of Pauley Paving Co., Inc. v. Department of Highways 135
Parks, Hughie C. v. Department of Highways (CC-77-128) 221
Parks, Hughie C. v. Department of Highways (CC-80-107) 221
Parsons, Jack H., Jr. v. Department of Highways 45
Pauley, Virginia v. Department of Highways 277
Pawnee Trucking Company v. Department of Motor Vehicles 416
Peiffer, Julie v. Department of Highways 222
Pelfrey, Garnet L. v. Department of Highways 45
Perdue, Judy Ann Smith v. Department of Highways 137
Perry, Gerald L. and Deloris Perry v. Department of Highways 45
Perry, Reba Dixie v. Department of Highways 324

Shamblin, Randy Lee v. Department of Motor Vehicles 53
Shel Products, Inc. v. Department of Highways 201
Sickle, Thomas H. v. Department of Highways 418
Sisk, James v. Department of HIghways 280
Skinner, James R., d/b/a Jim's Grocery v. Department of Highways 387
Slone, John v. Department of Health 382
Slone, John, Admin. of the Estate of Maude Slone, Deceased v. Department of Health 382
Smith, David D. v. Department of Highways 202
Smith, Kevin E. v. Department of Highways 38
Snodgrass, Joe v. Department of Highways 246
Snyder, Joseph Raymond and Sarah Snyder v. Department of Highways 79
Snyder, Walton Lee v. Department of Highways 333
Southern West Virginia Clinic v. Department of Corrections (CC-79-686) 176
Southern West Virginia Clinic v. Department of Corrections (CC-80-95) 165
Spatafore, Patsy v. Board of Regents 399
Spatial Data Systems, Inc. v. Board of Regents 166
Spectre, Harry S., d/b/a Commonwealth Castings Company v. Board of Occupational Therapy 374
Spurgeon, Gary Cline v. Department of Highways 39
Stafford, Harold Ray v. Department of Highways 54
Stalnaker, Joseph H. v. Department of Welfare 93
State Farm Mutual Automobile Insurance Co., Subrogee of Duling Brokerage, Inc. v. Department of Highways 185
State Farm Mutual Automobile Insurance Co, Subrogee of James A. McDougal and James A. McDougal v. Department of Highways 344
Staunton Foods, Inc. v. Department of Corrections 300
Stemple, James P. v. Department of Welfare 94
Stevenson, Posey L. v. Department of Highways 45
Stewart-Decatur Security Systems, Inc. v. Department of Corrections 301
Stewart, Lisa A., et al. v. Office of the State Auditor (Court Reporter claims) 100
Stone Company, Inc. v. Department of Highways 167
Stonewall Casualty Co., Subrogee of Anthony Tassone v. Department of Highways 55
Stout, M. Wood and Lova Stout v. Department of Highways 256

Stull, Arden Leon v. Department of Highways 420
Sturm, James Edward v. Department of Highways 248
Sturm, Michael D. v. Office of the State Auditor 57
Suder, Eugene C. v. Department of Corrections 258
Swartling, Richard K. v. Office of the State Auditor 57
Sweda, Robert J. v. Department of Highways 249
Swofford, Tim H. v. Department of Highways 259
Szelong, Mary Louise v. Department of Public Safety 96
Tabit, Gloria and Charles Tabit v. Department of Highways 318
Tallamy, Frederick B. v. Department of Highways 250
Tate, Mary v. Department of Highways 259
Taylor County Commission v. Department of Corrections ... 43
Tedrow, Charles E. v. Department of Highways 438
Terango, Frank and Duel Terango v. Department of Highways 168
Thabet, Nancy J. v. Department of Highways 203
Thompson, Gary v. Department of Highways 266
Three Printers, Inc. v. Department of Health 169
Thomas, Ayers v. Department of Highways 301
Tipton, Seba v. Department of Highways 196
Town & Country Dairy v. Department of Corrections 176
Trojan Steel Company v. Department of Health 329
Uarco, Inc. v. Department of Finance and Administration ... 170
Union Oil Company of California v. Department of Corrections 43
United States Post Office v. Department of Highways 438
Van Horn, Mildred v. Department of Highways 422
VanNostrand, Montie v. Office of the State Auditor 433
Varian Associates-Instrument Division v. Board of Regents 345
Varney, Louis B., d/b/a Tri-State Inspection Service v. Department of Health 423
Veltri, Tony J., d/b/a Farmers Delight Co. v. Department of Corrections 171
Vielbig, Joseph, III v. Board of Regents 204
Vilain, Gary v. Department of Highways 330
Vinson, Debra A. v. Department of Highways 40
Ward, John H. and Nancy L. Ward v. Department of Highways 81
Watson, James R., who sues by his next friend, his brother, Ronald R. Watson v. Department of Health 139

Watts, Myrtle Chaffins and Elbert Watts v. Department of Highways 302
Weiler, Robert R. v. Department of Corrections 333
Weirton Daily Times v. Department of Finance and Administration 223
Weirton General Hospital v. Department of Corrections 66
Wente Construction Company, Inc. v. Board of Regents 346
Weslakin Corporation v. Department of Health 304
West Virginia Telephone Company v. Department of Highways 426
Wheeling Hospital v. Department of Corrections 178
Whitehouse, Robert Eugene v. Department of Highways 224
Whitmore, Earl A., Jr. and Barbara A. Whitmore v. Department of Highways 304
Williams, Charles E. v. Department of Highways 428
Williams, John v. Department of Highways 97
Williams, Offie D. v. Department of Highways 140
Williams, Virginia v. Department of Highways 319
Williamson, Ernest v. Department of Highways 281
Wingo, Merwin B. v. Department of Highways 225
Wise, Robert Christopher v. Department of Highways 98
Wolford, Ernest N. & Patricia K. Wolford v. Department of Highways 348
Wood, Albert Ted v. Department of Highways 305
Worrell, Robert M. v. Office of the State Auditor 57
Xerox Corporation v. Department of Corrections (CC-79-588) 70
Xerox Corporation v. Department of Corrections (CC-80-425) 334
Yates, David J. v. Department of Highways 268
Young, E. H. v. Department of Highways 268
Young, Harold v. Department of Highways 41
Zando, Martin & Milstead, Inc. v. State Building Commission (Awarded) 354
Zando, Martin & Milstead, Inc. v. State Building Commission (Held open) 142
Zicafoose, Roger v. Department of Highways 226
Zimmerman, Robert L. v. Department of Highways 282

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

Opinion issued September 14, 1979

A. J. BALTES, INC.

vs.

DEPARTMENT OF HIGHWAYS

(D-1002)

James R. Watson, Attorney at Law, for the claimant.

Stuart Reed Waters, Jr., Attorney at Law, for the respondent.

WALLACE, JUDGE:

The claimant filed its claim for an equitable adjustment against the respondent in the amount of $1,393,814.53 for costs incurred in the execution of its contract with the respondent, which costs were due to excessive and unforeseen subsurface material that was unsatisfactory for use as embankment foundation.

The claimant was the successful bidder on respondent's project 483(15). This project was for the construction of a portion of what is now Route 48, and covered approximately 2 1/2 miles of road in the mountains of Preston County, West Virginia, in the vicinity of Cooper's Rock State Forest near Morgantown.

It was contended by the claimant that the site conditions indicated in the contract differed materially from the conditions actually encountered in three areas designated "claimed areas". These areas were identified at the hearing as:

(1) from station 149a50 to 154a50, for a distance of 1500 ft.

(2) from station 228a50 to 240a00, for a distance of 1150 ft.

(3a) from station 251a50 to 262a00, for a distance of 1050 ft.

(3b) from station 262a50 to 268a50, for a distance of 600 ft.

Each of the claimed areas was in a valley where fill benches had to be constructed to support the fill for the highway. It had been anticipated, from the design features and boring information, that the contract indicated that the fill bench areas would be constructed to a depth in reasonably close conformity with the plans.

The claimant encountered unforeseeable subsurface conditions and material. The material was not suitable for embankment foundation. In order to reach rock or shale base, it was necessary to excavate to a greater depth and over a greater length than that indicated in the contract. The excavation to a greater depth resulted in costs not anticipated in the bid price. An increased amount of subsurface water was encountered, which required continuous pumping of the water from the claimed areas. High production equipment could not be used to its best advantage in the congested area. Additional equipment was required, and it became necessary for bulldozers to push hauling units out of the claimed areas when such units were unable to move under their own power. These factors interrupted the claimant's planned schedule.

The claimant contends that the difficulties encountered entitled it to an upward equitable adjustment in the contract price under the terms of the "changed condition clause" or the "differing site condition clause" in Section 104.2 of the Standard Specifications of 1968. This section provides in part:

> "Should the Contractor encounter or the Commission discover during the progress of the work subsurface or latent physical conditions at the site differing materially from those indicated in the contract, or unknown physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract, the Engineer shall be notified in writing of such conditions; and if the Engineer finds the conditions do materially differ and cause an increase or decrease in the cost of, or the time required for performance of the contract, an equitable adjustment will be made and the contract modified in writing accordingly."

The respondent relies on another portion of Section 104.2 of the Standard Specifications of 1968, which provides:

"The Commission reserves the right to make alterations in the Plans or in the quantities of work as may be necessary or desireable at any time either before or during the work under the Contract. Such alterations shall not be considered as a waiver of any conditions of the Contract nor invalidate any of the provisions thereof, provided such alterations do not decrease or increase the total cost of the project more than twenty-five percent, based on the original Contract quantites and the unit bid prices, and provided further that such alterations do not result in an increase or decrease of more than twenty-five percent in quantity of any one major Contract item . . . ."

The difference between the original bid quantity of unclassified excavation and the quantity excavated was 4.4 percent. The respondent contends that since the above-quoted section requires a material difference of more than twenty-five percent in the quantity of a major item before there can be an adjustment in the contract price, the claimant is not entitled to an equitable adjustment.

Regardless of the fact that the quantity excavated was only 4.4 percent in excess of the original bid quantity to be excavated, the Court finds that a changed or different site condition existed. The crux of this claim is not the quantity of that excavated, but rather, the additional expenses required by the changed conditions not anticipated in the contract. The claimant had the rignt to rely upon the plans furnished by the respondent, and the plans should have been corrected to compensate for the extra expense incurred.

According to the Standard Specifications, and under the terms of the contract, the claimant was required to give the Engineer written notice that it intended to make claim for additional compensation in the form of an equitable adjustment due to differing site conditions. The contract further provides that such notice shall be given before work is commenced in the claimed area so that the Engineer is afforded the opportunity for keeping strict account of the actual cost. Failure to comply with this provision under the contract is to be considered a waiver by the claimant or contractor of any claim for additional compensation.

In this case, the claimant gave written notice by letter dated June 15, 1971, and received by the respondent on June 17, 1971. This was approximately two months after the claimant contends it encountered differing site conditions. John W. Baltes, of the

claimant company, testified that when a rock or shale base was not reached at a point anticipated under the contract plans, excavation was continued in an attempt to reach a solid base. At that time, it was not anticipated that there would be a changed site condition which would necessitate a claim for an equitable adjustment in the contract price. As soon as it became apparent that a substantial changed condition existed, the notice seeking an adjustment was given. This seems to the Court to be a feasible and acceptable explanation of the two-month delay in the notification to the respondent.

By reason of the changed site condition, the claimant incurred extra expense not contemplated under the contract. The claimant, in support of its claim, contends that it incurred additional expense and time in the following areas:

1. Additional cost of excavation and embankment construction.
2. Additional cost of excavation and equipment standby.
3. Additional cost of concrete paving equipment standby.
4. Additional cost of support equipment.
5. Additional cost of construction, maintenance, and removal of ramps and hard roads.
6. Additional cost of pumping and dewatering.
7. Additional cost of select rock fill.
8. Additional cost of drainage work.
9. Additional cost of work performed in 1973 due to price increases.
10. Additional cost of financing the added costs incurred in connection with performance of the contract.

Before discussing the claimed items of damages, it is necessary that the Court consider the motion made by the claimant at the close of the testimony that, in the event the Court found a changed condition did occur, the parties be permitted to negotiate the matter of the quantum of recovery, which motion the Court sustains, subject to the guidelines herein set forth. It is the opinion of the Court that all matters claimed by A. J. Baltes, Inc. are not recoverable, and consideration must be given to applicable laws governing recovery under a changed conditions clause.

contractor was compensated for the cost of idle equipment in a breach of contract suit because of the failure of the defendant to make available as per contract the necessary runways for the timely completion of the plaintiff's work. Likewise, in *Laburnum*, supra, failure by the government to correct faulty specifications caused the complained of delay, and the plaintiff suffered damages due to the idleness of equipment which were recovered in a breach of contract action. As noted by the court in *Hall*, supra, at 563, the government ". . .is not liable for delays which it did not cause, over which it had no control, or delays encountered by a contractor notwithstanding diligence in performance of its responsibilites under the contract."

In the case of *Jefferson*, supra, the government prepared design specifications based upon fifteen borings conducted at the project site. These proved to be erroneous, and resulted in substantial undercutting and delays. After being awarded an equitable adjustment based upon the "*Rice* doctrine", the plaintiff sought recovery for delay-caused damages. In denying recovery, the court held that:

> "In the absence of proof of some act or omission from which we can deduce that defendant is at fault we cannot conclude that there has been a breach within the *Laburnum* exception and, therefore, recovery is limited to the remedies provided for under the contract." *Jefferson*, supra, at 1015.

In the instant case, we are presented with a claim for an equitable adjustment as provided for by the contract rather than a breach of contract action wherein the government is shown to be at fault or for recovery for a governmentally induced unreasonable delay. Respondent is liable for such damages only when it is shown to be responsible for the complained of delays. Accordingly, the claimant cannot recover damages from delays not caused by the respondent.

In determing the amount of recovery under a "changed conditions clause", there are two standard techniques for demonstrating cost incurred as a result of the unanticipated condition. The first method, or "actual cost" theory, is based on a daily cost analysis of the additional expenses required by the changed condition.

The second method of computation is the difference between what it cost to do the work and what it would have cost if the

As a general rule, where the conditions encountered during excavation differ materially from those indicated by the plans and no fault in the preparation of the borings, drawings, or plans is proved, the remedies available under a standard changed conditions clause are limited to an equitable adjustment, non-assessment of liquidated damages, and an extension of time to complete the project. *Jefferson Construction Company v. United States,* 392 F.2d 1006 (1968). This limited scope of recovery, known as the "*Rice* doctrine", was established by the United States Supreme Court in a series of cases beginning with *United States v. Rice,* 317 U.S. 61 (1942); *United States v. Blair,* 321 U.S. 730 (1944); *United States v. Foley, Co.,* 329 U.S. 64 (1946). In *Rice* and those following, the Supreme Court was required to interpret and define the "changed conditions" clause in government contracts, which by the admission of all parties is virtually identical to Section 104.2 of the Standard Specifications quoted herein. Recovery was confined to additional costs due to structural changes required by the unexpected conditions, and to an extension of time for completion with an immunity from otherwise applicable liquidated damages. Recovery was denied for ". . .consequential damages which might flow from delay taken care of in the 'difference of time' provision." (*Rice,* supra, at 67) It is unnecessary for this Court to review the history of the "*Rice*" doctrine and the exceptions attached since its promulgation; it is sufficient to note that when the delay complained of is not caused by the governmental agency, the doctrine is fully applicable and controlling. *United Contractors v. United States,* 368 F.2d 585, 177 U.S. Ct.Cl. 151 (1966).

Based upon the record, the Court is of the opinion that the respondent was not negligent in the preparation of boring data or other design specifications provided to all bidders on the project, nor that the respondent intentionally misrepresented anticipated subsurface conditions. In support of the claim for delay-caused damages, the claimant relies heavily upon the cases of *Nolan Brothers, Inc. v. United States,* 437 F.2d 1371 (1974), *L. L. Hall Construction Co. v. United States,* 379 F.2d 599 (1966), and *Laburnum Construction Corp. v. United States,* 325 F.2d 451 (1963). In each of the above cases, damages resulting from delays were recoverable when it was shown that the government was responsible for the delay. Recovery for damages due to idle equipment was allowed in *Nolan,* supra, when the government terminated the contract for its own convenience. In *Hall,* supra, the

unforeseen conditions had not been encounted. *Kaiser Indus. Corp. v. United States*, 340 F.2d 322, 337 (Ct. Cl. 1965). The difficulty in using this more speculative method is that it is premised upon a finding that but for the changed condition, the contractor would have rendered a timely performance. This Court is unable to make that determination in this instance. The result is that a contractor, who has submitted a low bid which would have possibly resulted in a net loss had not the changed condition been encountered, is able to recoup a windfall gain under the comparison cost theory. This is not the purpose of the equitable adjustment under Standard Specification 104.2. While not unmindful of the inherent difficulties in computation, the Court finds that the "actual cost" theory should be the appropriate measure in this case.

The recoverable items of cost must be realistically confined to the additional cost incurred by the claimant, and which were directly and proximately caused by the changed conditions. Expenses which the contractor would have been required to expend in any event had no changed condition occurred are not compensable as part of an equitable adjustment. *Dale Ingram, Inc. v. United States*, 475 F.2d 1177 (Ct. Cl. 1973).

Undoubtedly, the unanticipated condition caused expense to the claimant not contemplated in the original contract bid price. The claimant was required to excavate at substantially greater depths than indicated in the contract and at a substantial increase in both labor and equipment costs. This excavation was performed in narrow valleys caused the claimant to change radically the normal method of operation and to adopt more expensive and specialized methods of work. Continued excavation necessitated a constant flux of establishment and relocation of haul roads and ramps. Water conditions at the base of the excavations required unanticipated and costly pumping and drainage operations. In view of the conditions encountered, the claimant was forced to utilize a select rock fill at increased labor and equipment costs. All of the above are recoverable costs directly attributable to the changed condition and should be included in an equitable adjustment. Care must be taken to avoid duplications and overlaps, and recovery limited to those damages which claimant can prove to have been directly and proximately caused by the changed condition. In particular, the evidence concerning additional equipment appeared suspect. As the court in *Lowder v. North Carolina State Highway Comm'n.*, 217 S.E.2d 682, 700 (1975) noted:

> "To report that 36 machines are on a job site on a given day is unsatisfactory. It would be better practice to report not only the number of machines on the job, but also the number of machines operating, the task each performs, and the length of time each operates. The product of that kind of record keeping is more likely to bear the earmarks of reliability."

Judgment decisions by the contractor to stockpile equipment on the job site do not necessarily constitute costs recoverable under an equitable adjustment.

In each of the claimed items of damages, the claimant has include a 9% allowance for overhead, a 10% allowance for profit, and a 2% allowance for anticipated Business and Occupation taxes. This Court has recognized the validity of awards for overhead and Business and Occupation taxes. *Baker & Hickey Co. v. State Road Comm'n.*, 7 Ct. Cl. 195 (1969). However, the courts are divided over whether profits are properly considered in determining the amount of the equitable adjustment. The Court is of the opinion that an equitable adjustment entitles the contractor to compensation for those expenses directly resulting from the changed condition, but not to a profit on the additional work. The primary purpose of the equitable adjustment is to protect the contractor from the risk of *loss*, and therefore, may be properly viewed as a recovery in quantum meruit.

The claimant claims damages occasioned by additional financing costs due to the changed conditions encountered. Admittedly, claimant is aware of that portion of West Virginia Code 14-2-12 which states that:

> ". . .In determining the amount of the claim, interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest."

The claimant, however, urges this Court to consider a virtually identical Federal statute and a few cases decided by the United States Court of Claims allowing recovery of interest on finance charges on contractor loans. In his pre-trial brief, the claimant cites the cases of *Bell v. United States*, 404 F.2d 975 (1968) and *Phillips Construction Co. Inc. v. United States*, 374 F.2d 538 (1967) in support of his claim. The court in *Bell* upheld the practice of the Armed Services Board of Contract Appeals of allowing such recovery. This practice was initiated by a Department of Defense policy change in 1954 which departed from the long standing

doctrine of no interest recovery. Hence, in effect, the defendant government administratively chose to grant compensation for such interest costs, and the Court of Claims sustained this decision. In *Phillips,* supra, the Court of Claims included additional financing costs in an equitable adjustment of a military construction contract under the Capehart Housing Act, which required the contractor to secure loans in the amount of the required project. "It was *inherent* in the scheme of the Act that the contractor would obtain private financing and pay interest. . ." *Phillips,* supra, at 541. Aided by this apparent legislative intent and the fact that the parties obviously contemplated the payment of interest at the formation of the contract, the Court was able to circumvent 28 U.S.C. §2516(a), which disallowed interest without a contract provision or act of Congress providing for such payment. It is clear that in each case the Court did not act solely upon its own initiative, but rather implemented a policy properly founded upon administrative or legislative authority.

In the instant case, the contract does not provide for the recovery of interest, and this Court by statute lacks jurisdiction to award interest, and therefore denies recovery of interest and finance charges.

As discussed above, two of the elements of an equitable adjustment under a "changed conditions" clause are the non-assessment of liquidated damages for delays directly resulting from the unanticipated condition and a reasonable extension of time in which to complete the required project when the claimant encountered the unforeseen subsurface condition, substantial excavation in excess of contract indications was necessitated. The additional time required to excavate to a suitable base caused interruptions to the claimant's projected work schedule and resulted in a delay in the overall completion of the contract. Without prejudice to its contention that a "changed condition" under Standard Specification 104.2 had not yet been encountered, the respondent granted the claimant additional work days based upon the number of days the claimant actually spent on the fill bench areas in excess of the scheduled date of completion. While claimant contends this method of computation is inaccurate, the Court finds that this extension was reasonable.

Obviously, there was a direct causal relationship between the additional work required by the changed conditions and the overall delay in the completion of the project. However, it appears

to this Court that the claimant failed to provide adequately for common delays encountered in highway construction and caused by inclement weather, absence or illness of critical personnel, or breakdowns in equipment. It is the responsibility of the contractor to determine the scheduling of activities and the method of actual construction, and to establish a projected timetable or CPM. Errors in judgment or computations on the part of the contractor are not the responsibility of the State. The claimant has not proven that the overall delay or the failure by the contractor to meet the revised completion date was caused by the changed conditions, and therefore the claimant is not entitled to a total recovery of the assessed liquidated damages. *Fehlhaber Corp. v. United States*, 151 F. Supp. 817 (Ct.Cl. 1957). However, the respondent assessed liquidated damages at the stipulated amount of $300.00 a day for sixty days, or a total of $18,000.00. The dates used in determining the assessment were the revised completion date of September 28, 1973 and the formal opening of the highway on December 28, 1973. It was uncontested that the project was substantially completed and accepted on December 6, 1973; it is this date, and not the date of dedication which should have properly been used in the computation of liquidated damages. Therefore, the claimant is entitled to recover 22 days for a total of $6,600.00 of the liquidated damages assessed by the respondent.

The Court directs that the parties consider the findings herein, and at the approximate time not to exceed 120 days from the date of this opinion, file their recommendations for the amount of recovery for the approval of this Court.

IN THE COURT OF CLAIMS
OF THE STATE OF WEST VIRGINIA

A. J. BALTES, INC.,
a Corporation,

Claimant,

vs. Claim No. D-1002

THE WEST VIRGINIA DEPARTMENT
OF HIGHWAYS, et al.,

Respondents.

ORDER AND RECOMMENDATION

This day came A. J. Baltes, Inc., a corporation, Claimant, by James R. Watson, its Attorney, and came the West Virginia

Department of Highways, et al., Respondents, by Stuart Reed Waters, Jr., their Attorney, and jointly represented to the Court that as directed by the Court in its opinion issued in the above styled claim, the parties have agreed to an amount of recovery for approval by the Court.

It is hereby jointly recommended by A. J. Baltes, Inc., Claimant, and The West Virginia Department of Highways, et al., Respondents, that the Claimant is entitled to recover from the Respondents, the following sums of money on the following items:

I. EXCAVATION AND EMBANKMENT COST

A. Excavating and Select Rock Fill Placement Cost in "Claimed Areas" $585,369.83

B. Labor and Equipment Cost for Blasting for Select Rock Fill in "Claimed Areas" $81,633.02

C. Explosives Cost for Blasting Select Rock Fill for "Claimed Areas" $32,106.32

Total Actual Cost for Excavation and Select Rock Fill Embankment in "Claimed Areas" $699,109.17

II. IDLE EQUIPMENT STANDBY

From Date Equipment First Used Until 6/1/71 ..... $42,374.03

III. OTHER ACTUAL COSTS

Including Haul Roads, Pumping, Dewatering and Drainage on Pipe Washout $36,879.32

TOTAL ACTUAL COST FOR WORK IN "CLAIMED AREAS" $778,362.52

IV. ADJUSTMENTS

A. Adjustment to total actual cost for payments made at unit bid price based on planned quantities of fill bench excavation between 3/1/71 and 10/31/71 ..... $154,032.34

B. Adjustment to total actual cost for payments made at unit bid price based on planned quantities of select rock fill excavation placed between 3/1/71 and 10/31/71 ..... $101,973.69

TOTAL ADJUSTED ADDITIONAL COST DUE TO DIFFERING SITE CONDITIONS $522, 356.49

V. PAYMENT FOR PRIOR DISALLOWED QUANTITIES

A. Waste

14,206 cubic yards were wasted from below template excavation near Sta. 237 after April 5, 1971 ..... $12,501.28

B. FAT FILLS

Initially the Respondents disallowed 58,663 cubic yards but based upon the Court's Opinion in the case styled *Vecellio & Grogan, Inc. vs. Department of Highways,* the Respondents have agreed to compensate the Claimant for 36,471 cubic yards $46,813.96

VI. LIQUIDATED DAMAGES IMPROPERLY ASSESSED $6,600.00

TOTAL RECOMMENDED AWARD $588,271.73

It is further agreed by and between the Claimant and the Respondents hereto that all other items of claim and parts of items of claim not agreed to be paid in this recommendation, as set out and alleged in Claimant's Notice of Claim filed in this action, are to be disallowed and not considered by the Court for any award and are to be dismissed.

Upon consideration of the Claimant's and the Respondents' representations, the Opinion of the Court heretofore filed in deciding the subject claim and the recommendation set out aforesaid, the Court is of the opinion to and does sustain the same and the same are hereby received, filed, and accepted; and it is hereby further ordered that the Claimant be and it is hereby granted an award against the Respondents in the total amount of Five Hundred Eighty-eight Thousand Two Hundred Seventy-one Dollars and Seventy-three Cents ($588,271.73).

It is hereby further ordered that all other items of claim and parts of claims set out and alleged in Claimant's Notice of Claim, which were not allowed in the above award, are hereby disallowed.

Entered this 24th day of January, 1980.

John B. Garden
Judge

APPROVED BY:

A. J. BALTES, INC.,
a Corporation,

By James R. Watson
Its Counsel

WEST VIRGINIA DEPARTMENT
OF HIGHWAYS, et al.

By Stuart Reed Waters, Jr.
Their Counsel

Opinion issued September 14, 1979

JONATHAN E. McDONALD, ADMINISTRATOR
OF THE ESTATE OF NORMA JEAN
McDONALD, DECEASED, ET AL.

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-38a-d)

Jerald E. Jones, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

The claimant, Jonathan E. McDonald, duly appointed administrator of the estates of Norma Jean McDonald, James Edgar McDonald, and Penny Jo McDonald, deceased, seeks recovery for the wrongful deaths of the three decedents resulting from an automobile accident which occurred on January 15, 1976. Jonathan E. McDonald seeks recovery for damages to his 1973 Ford Pinto automobile.

On the date in question, at approximately 8:50 p.m., Norma Jean McDonald was proceeding northerly on W.Va. Route 19 about 3/10

of a mile north of Clarksburg, West Virginia, and approximately five miles south of her residence in Spelter, West Virginia. Mrs. McDonald was driving a 1973 Ford Pinto automobile registered to her son, Jonathan E. McDonald, and was accompanied by two of her children, James, age 11, and Penny Jo, age 23. As she travelled a straight and level section of road of approximately one-half mile in length in the vicinity of Gore, West Virginia, Mrs. McDonald encountered a stretch of ice on the highway, lost control of the vehicle, and skidded into the southbound lane of Route 19, colliding with an automobile coming in the opposite direction. The impact caused the McDonald automobile to overturn and be thrown off the west side of the highway, resulting in the deaths of the three occupants.

The north lane of the portion of Route 19 in question is flanked on the east by a relatively steep bank which runs down to the highway. The berm of the northbound lane slopes gently downward toward the base of the bank, forming a shallow ditch some three feet off the surface of the highway. Water accumulating in the ditch normally would flow southward into a drain, and then underneath the road into a larger ditch below the west side of the highway. The fact was undisputed that the water did not drain properly. Instead, due to a clogged culvert, the water spread onto the northbound lane of the highway. It was established that this condition persisted for a considerable period of time prior to the day of the accident. During the preceding week, fluctuating winter temperatures caused the water to form a recurring sheet of ice on the road.

From the testimony of two employees of the respondent, Paul Pernell and Melton Malone, it is clear that the respondent had notice of the recurring ice condition, but also knew or should have known of the source of the water and ice upon the highway. The respondent's garage was located approximately one quarter of a mile from the scene of the accident. On the day of the accident, several complaints were made to the garage as to the existence of ice on the specific portion of highway in question.

Respondent's employee, Melton Malone, testified that he had salted and cindered the general area in question three different times on the day of the accident. The last application was made at approximately 3:40 p.m. He further testified, under cross-examination, that it was foreseeable that a combination of traffic and a continuous flow of water onto the road could eventually

negate the effect of the salt and allow the water to re-freeze. Although the ice had been treated, water continued to spread onto the highway from the shallow drainage area. No warnings were posted by the respondent to alert motorists.

It was established at the hearing that ice did re-form on the highway the night of the accident. Mr. Brice Warne testified that, while en route to Shinnston from Clarksburg at approximately 8:00 p.m., he encountered ice on the northbound lane of the portion of highway in question. Temporarily losing control of his vehicle, he slid into the southbound lane. Fortunately, Mr. Warne slowed and was able to regain control of his automobile. The existence of ice was further corroborated by the testimony of Corporal J. I. Plybon and Trooper Lowell Maxey of the Department of Public Safety, both of whom examined the highway at 9:05 p.m., or approximately 15 minutes after the accident. Corporal Plybon stated that a thin sheet of ice covered the northbound lane for about 50 to 100 feet south of the point of impact of the vehicles, and that water flowed across the highway for an additional 200 feet southward.

Following the decision in the case of *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947), this Court has repeatedly held that the State is not a guarantor of the safety of the travelers on its roads. "The State is not an insurer and its duty to travelers is a qualifed one, namely, reasonable care and diligence in the maintenance of a highway under all circumstances." *Parsons v. State Road Comm'n.,* 8 Ct.Cl. 35 (1969). The State can neither be required nor expected to keep its highways absolutely free of ice and snow at all times, and the presence of an isolated ice patch on a highway during winter months is generally insufficient to charge the State with negligence. See 39 Am. Jur.2d *Highways, Streets, and Bridges* §506. See also *Woofter v. State Road Comm'n.,* 2 Ct.Cl. 393 (1944); *Christo v. Dotson,* 151 W.Va. 696, 155 S.E.2d 571 (1967).

The facts of this case, however, impel the Court to find negligence on the part of the respondent. The accumulation of ice and water on the highway was not due to natural elements, but to a clogged culvert, the routine maintenance of which was the admitted responsibility of the respondent. Liability has usually been found where governmental authorities have permitted gutters or culverts to become clogged and defective so that water flowing over the streets or sidewalks freezes, resulting in injuries. See 39 Am. Jur.2d *Highways, Street and Bridges* §516. Although it is unclear whether the respondent had actual knowledge or should have

had knowledge of the particular culvert adjacent to the site of the accident, the continuous flow of water onto the highway in January constituted an unusually dangerous condition. The respondent was chargeable with a ". . . duty to inspect and correct the condition within the limits of funds appropriated by the legislature for maintenance purposes." *Varner v. Dept. of Highways,* 8 Ct.Cl. 119 (1970). After the applications of salt and cinders, there was still a flow of water onto the highway, and although the existence of ice had been temporarily relieved, the dangerous condition had not been completely remedied. The Court is of the opinion that it was foreseeable that the continued spread of water onto the road and the drop in temperature after sundown would result in the reformation of ice, posing a hazard for ordinary traffic. Failure to correct the situation constituted negligence on the part of the respondent.

While finding the respondent guilty of negligence in the maintenance of the highway, the Court cannot disregard the apparent lack of due care on the part of the driver, Norma Jean McDonald. It is the duty of all motorists to operate their vehicles in a reasonably prudent and cautious manner under all circumstances. See *Williams v. Dept. of Highways,* 9 Ct.Cl. 216 (1973). The testimony and photographs of the scene of the accident depict a lengthy stretch of level, straight highway. Visibility, under normal conditions, would be several hundred feet in both directions. The weather was clear. Mr. Warne stated that while proceeding at a speed of approximately 45 mph, he saw ice ahead in the northbound lane, yet took no precautionary measures before skidding on the ice. At that point, he, in his own words, "woke up real quick." It was revealed that this section of icy road could be negotiated with reasonable safety at about 25 mph.

The Court finds, from the record, that the respondent was negligent in failing to properly maintain the surface of the highway under the conditions existing on the night of the accident. The Court further finds that Norma Jean McDonald negligently failed to exercise ordinary care against a visibile and hazardous condition, and that her negligence proximately caused the accident which resulted in her death and the deaths of her children. It is well settled that such contributory negligence will bar recovery, and, while sympathetic to the tragedy which was befallen the McDonald family, the Court disallows the claim of the Estate of Norma Jean McDonald. *Swartzmiller v. Dept. of Highways,* 10 Ct.Cl. 29 (1973).

Regarding the claims presented by the Estates of James Edgar McDonald and Penny Jo McDonald, it is an established principle of law that the negligence of the operator of a vehicle cannot be imputed to the passengers therein, where such passengers are neither guilty of negligence nor exerted any control over the driver. *Smith v. Dept. of Highways*, 11 Ct.Cl. 221 (1977). As it has been shown that the negligence of the respondent was one of the concurring causes of the accident, recovery for the estates of the two McDonald children will be allowed. *Long v. City of Weirton*, ...W.Va....., 214 S.E.2d 832 (1975).

As for the claim for damages to the 1973 Ford Pinto automobile belonging to the claimant, Jonathan E. McDonald, it is generally held, in the absence of statutory provisions to the contrary or in the absence of an agency relation, that contributory negligence of the driver will not be imputed to the owner of the vehicle who was not present at the time of the accident, was not concerned with the driver's mission, and was exercising no control over the use and operation of the vehicle. 65A C.J.S. *Negligence* §168(2), p. 212. As there are no West Virginia statutes to the contrary, this Court will follow the general rule that where the owner of a vehicle lends it to another, who thus becomes his bailee, the contributory negligence of the bailee will not be imputed to the bailor. Therefore, the claim of Jonathan E. McDonald, for damages to his vehicle in the amount of $2,000.00, which figure represents the fair market value of said vehicle at the time of the accident, is hereby allowed.

In accordance with the above, the Court denies the claim of Jonathan E. McDonald, Administrator of the Estate of Norma Jean McDonald and allows the claim of Jonathan E. McDonald for damages to his vehicle in the amount of $2,000.00. It was stipulated by and between counsel for the claimants and the respondent that James Edgar McDonald was eleven (11) years of age on the date of his death; that he had a life expectancy of 58.65 years; and that funeral expense for his burial amounted to $630.50; and that such expense was necessary and reasonable in that amount. It was further stipulated that Penny Jo McDonald was twenty-three (23) years of age on the date of her death; that she had a life expectancy of 47.64 years; and that her funeral expense amounted to $647.70, which expense was necessary and reasonable in that amount.

The West Virginia Wrongful Death Statute, Code 55-7-6, as amended, on January 15, 1976, provided, inter alia, that a jury in such an action could award damages not exceeding $10,000.00 and

also the reasonable funeral expense, reasonable hospital, medical and other expenses incurred as a result of the wrongful act, neglect or default of the defendant or defendants. It further provided that the jury might award further damages not exceeding $100,000.00 if it could be demonstrated that the dependent distributees of the deceased sustained a financial or pecuniary loss. No attempt was made on behalf of the claimants in these claims to establish financial or pecuniary loss and, consequently, the damages in the James Edgar McDonald and Penny Jo McDonald claims are limited to $10,000.00, plus the respective funeral expenses. As a result of the foregoing, disposition of these claims is made as follows:

Claim No. CC-77-38a—Jonathan E. McDonald, Administrator of the Estate of Norma McDonald - Disallowed.

Claim No. CC-77-38b—Jonathan E. McDonald, Administrator of the Estate of Penny Jo McDonald - Award of $10,647.50.

Claim No. CC-77-38c—Jonathan E. McDonald, Administrator of the Estate of James Edgar McDonald - Award of $10,630.50.

Claim No. CC-77-38d—Jonathan E. McDonald - Award of $2,000.00.

Opinion issued September 20, 1979

ROBERT S. & EVELYN ATKINSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-6)

James A. Matish, Attorney at Law, for claimant.

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

RULEY, JUDGE:

On March 24, 1977, claimant, Robert S. Atkinson, was driving his 1974 Pontiac Catalina south on U. S. Route 19 in Marion County. Swerving to the right to avoid an oncoming coal truck, he ran into a large rock on the berm. Mr. Atkinson and his wife sustained personal injuries; the car was totally destroyed. The evidence indicates that the day was sunny and the road was dry. The huge rock was only four inches from the edge of the pavement, where it had lain for approximately three months. Claimants allege that the State's failure to remove the rock from the berm was negligent,

proximately caused their accident, and entitles them to recover the stipulated amount of $4,948.90 in damages.

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). But the State can be found liable if its maintenance of its roads falls short of a standard of "reasonable care and diligence...under all the circumstances." *Parsons v. State Road Commission*, 8 Ct. Cl. 35 (1969). In this case, uncontroverted testimony established that this rock had been on the berm, close to the pavement, for at least three months. The State has been found negligent in the past for failure to keep a berm clear (*Wolverton v. Dept. of Highways*, 9 Ct. Cl. 223 [1973]); it can be found negligent in this case if it knew, or should have known, of the hazard posed by the rock and failed to correct the situation. *Davis v. Dept. of Highways*, 12 Ct. Cl. 31 (1977).

The Court finds that the presence of a boulder as large as the one struck by claimant, within four inches of the paved road, constitutes a definite hazard to traffic on the road. The Court also holds that the State had constructive notice of the existence of this hazard. Respondent should have detected the boulder and moved it during the three months preceding the accident. Its failure to do so constitutes negligence. Since Route 19 is so narrow, and travelled by coal trucks, it was easily foreseeable that vehicles, when passing each other, might edge onto the berm and strike a hazard like this one; therefore, the State's negligence was also a proximate cause of the wreck.

This case was heard by this Court prior to the West Virginia Supreme Court's recent decision in *Bradley v. Appalachian Power* (July 10, 1979), which adopted the rule of comparative negligence. In *Bradley*, the State Supreme Court adopted the retroactivity principles first enunciated in *Li v. Yellow Cab*, 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P. 2d 1226 (1975) and *Placek v. Sterling Heights*, 275 N.W. 2d 511 (Mich. 1979), which applied newly-adopted rules of comparative negligence to cases which, as of the date of those opinions, had not yet reached trial, or cases on appeal in which the question of comparative negligence had been preserved for appeal. Accordingly, the rule of comparative negligence does not apply to this case. The State will be free of liability if the claimant was contributorily negligent.

But the Court does not find any evidence of contributory negligence. There is no convincing evidence of speeding, or

inattention, on the part of the claimant. The claimant was neither familiar with the road, nor aware of the boulder's presence. Perhaps a more expert driver would not have struck the rock. But the claimant was driving at a normal speed, with his eyes on the oncoming coal trucks, and—in adjusting his path to avoid the trucks—struck a boulder which was too close to the roadway. The evidence compels the Court to conclude that claimant behaved like a reasonably prudent driver, and was not contributorily negligent.

Accordingly, the Court finds the State liable in the stipulated amount of $4,948.90.

Award of $4,948.90.

Opinion issued September 20, 1979

HARRY H. BARRETT

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-53)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $68.30, based upon the following facts: On or about December 5, 1978, a work crew from the West Virginia Department of Highways was performing work on West Virginia Route 50/9 in the vicinity of the claimant's residence. In the course of this work, said crew negligently operated a bush hog and broke claimant's gas line. As this negligence was the proximate cause of the damage suffered by the claimant, the Court finds the respondent liable, and hereby makes an award to the claimant in the amount stipulated.

Award of $68.30.

Opinion issued September 20, 1979

HOMER BUSH

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-72)

Claimant appeared in his own behalf.

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

RULEY, JUDGE:

Respondent employed the Mountaineer Construction Company to straighten a curve on U.S. Route 60 near Malden, W.Va. On April 18, 1977, a windy day, a caution sign owned by the construction company was blown over. Part of it fell underneath claimant's car, damaging it. Claimant seeks to recover the $100.00 deductible, which was not covered by his insurance company, and the cost of renting a car to replace his for the three weeks it took to effect repairs.

Liability in this case is determined by the doctrine of res ipsa loquitur. The doctrine "is available to the plaintiff in any action based on negligence where the instrumentality producing the injury is under the exclusive control of the defendant, and the accident is of such a character as does not occur if due care is used." 2B Michie's Jurisprudence, "Automobiles", §85. This case is a perfect example for the application of the doctrine. The caution sign was under the exclusive control of the State's agent, the construction company. The exercise of due care by the State's agents would have prevented the occurrence of this accident. The application of the doctrine of res ipsa loquitur thus establishes a presumption of negligence on the respondent's part. Respondent has failed to rebut this presumption. The day was not extraordinarily windy, no other cause of the accident has even been alleged, and the claimant was driving properly and was therefore not contributorily negligent. Accordingly, the respondent is found liable.

The amount of damages is more difficult to ascertain. The claimant is entitled to recover his $100.00 out-of-pocket expenses for repairs to his transmission (the amount of the deductible under his insurance policy), an amount which was adequately documented, proven, and not contested. But claimant was unable

to produce a receipt for the cost of renting a replacement car, although he did provide an estimate of such costs which he obtained from Hertz, in the amount of $572.51. Damages must be proved with reasonable certainty. *Thomas v. Dept. of Highways,* 10 Ct.Cl. 187 (1975). The Court is uncertain about the extra charges per mile which claimant seeks to recover, but feels compelled to make an award for three weeks' rental. Considering claimant's estimates, an award of $15.00 per day, for 21 days, seems fair and reasonable. Accordingly, claimant is to recover $315.00 for the rental of a replacement vehicle, plus his $100.00 deductible.

Award of $415.00.

Opinion issued September 20, 1979

JAMES F. COLLINS

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-41)

Andrew J. Goodwin, Attorney at Law, for claimant.

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

RULEY, JUDGE:

On May 14, 1978, claimant was driving his automobile along Piedmont Road in Kanawha County, when a rock fell from the embankment along the road and struck claimant's car, damaging it. Claimant alleges that respondent is liable for the damages.

As Judge Garden stated in *Hammond vs. Department of Highways,* 11 Ct. Cl. 234 (1977): "The unexplained falling of a rock or boulder into a highway, without a positive showing that the Department of Highways knew or should have known of a dangerous condition and should have anticipated injury to person or property, is insufficient in our opinion to justify an award." 11 Ct.Cl. at 236. Rockslides are a common occurrence on roads cut through terrain as rough as West Virginia's; unless the Department of Highways has reason to anticipate a particular rockslide and time to prevent it, it cannot be held liable when a rock falls on a car. There is no evidence in this case of notice to, or knowledge on the part of the resondent which would make the respondent negligent

and liable for the results of this unfortunate accident. Accordingly, the claim must be denied.

Claim disallowed.

Opinion issued September 20, 1979

STANLEY T. GREENE, JR.

vs.

WEST VIRGINIA RACING COMMISSION

(CC-78-117)

Phillip D. Gaujot, Attorney at Law, for claimant.

Gregory Bailey, Assistant Attorney General, for respondent.

RULEY, JUDGE:

The claimant, a resident of Leesburg, Virginia, was employed by the respondent for a period of eight years as a steward at the Charles Town, West Virginia, Race Track. He seeks an award in the sum of $11,647.92 which he allegedly expended for legal counsel incident to the defense of an action instituted against him under the Civil Rights Act, 42 U.S.C. §1983. During his testimony, he made the following answers to the following questions by Judge Garden:

"Q. You've indicated that there was never any indication from anybody with the Attorney General's Office that the State of West Virginia would pay your own personal attorney fee; is that correct?

A. Yes, sir.

Q. Did Mr. Buch, who was Chairman of the Racing Commission, ever advise you that the State of West Virginia would pay your own personal attorney fees?

A. No, sir, he never advised me that they would pay it. No, sir.

Q. Did anybody ever indicated to you that your personal attorney, his fee would be paid by the State of West Virginia?

A. Well, nobody. It never was discussed, to tell you the truth."

No legal theory under which the Court could allow an award was cited, and the Court can perceive none.

Claim disallowed.

Opinion issued September 20, 1979

BARBARA GRUBER

vs.

DEPATMENT OF HEALTH,
DIVISION OF MENTAL HEALTH

(CC-79-108)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $3,556.66 for overtime worked at respondent's Colin Anderson Center from March 3, 1976, through August 31, 1977.

In its Answer, the respondent admits the allegations of fact set forth in the Notice of Claim, but states further that the claimant was not paid by the Department of Health because there were not sufficient funds on hand in the appropriation for the fiscal year in question from which the claim could have been paid.

The decision of this Court in *Airkem Sales and Service, et al. v. Dept. of Mental Health*, 8 Ct. Cl. 180 (1971), was based upon West Virginia Code 12-3-17, which prohibits any State officer from authorizing or paying any account incurred during any fiscal year out of the appropriation for the following year.

However, in a subsequent case, this Court held that claims for personal services will not be denied (as are those for merchandise or services rendered under contract), since the balance in the personal services account is immaterial. *Elva B. Petts and James M. Preston v. Division of Vocational Rehabilitation*, Claim Nos.

D-927d and D-927i. See also *Jack L. Rader v. Dept. of Health*, Claim No. CC-78-223.

The Court therefore finds the respondent liable for the overtime worked by the claimant, and hereby makes an award to the claimant in the amount agreed upon by the parties.

Award of $3,556.66.

Opinion issued September 20, 1979

CLARA MAE HALL

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-217)

Claimant did not appear.

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

WALLACE, JUDGE:

James E. Patterson filed this claim in the amount of $6,000.00 for damage caused by surface water to certain real property on which his residential trailer is situated. It developed at the hearing that the legal owner of the land was Mr. Patterson's mother-in-law, Clara Mae Hall, and the Court on its own motion amended the claim accordingly. The claimant did not appear; the testimony and support of the claim were presented solely by Mr. Patterson.

Mr. Patterson lives in St. Albans, West Virginia, at 1010 Avesta Drive, which is also Route 12/9 maintained by the respondent. He contended that the respondent was negligent in failing to properly maintain a drain located directly across the road from the left front corner of the claimant's lot. The drain had become clogged, and during hard rains or major snow thaws water would flow over the surface of the road into a natural drainage area next to claimant's lot. Normally the water would flow into the drain, then to a culvert and pipe under the road and into the natural drainage area on the left boundary of claimant's property. Mr. Patterson testified that the surface water flooded the claimant's lot, thereby washing away all topsoil and negating any effort to grow grass. He further stated that he had notified the respondent of the condition, but that no

corrective action was taken. In order to alleviate the problem, he repeatedly dug a drainage ditch along the front of the lot.

While it appears that the respondent may have been negligent in allowing the clogged condition to continue, the Court is not disposed to make an award after a careful examination of all the evidence. The testimony of Claude Blake, a claims investigator for the respondent, substantially contradicted Mr. Patterson's contention that the flow of water across the highway caused the flooding of the lot. Mr. Blake acknowledged that the clogged drain caused the water to flow across the road, but stated that it flowed directly into the natural gully on the vacant lot to the left of the claimant's property. This observation is supported by photographs intorduced into evidence, namely, Claimant's Exhibit #14 and Respondent's Exhibit #8.

The record also reveals that the claimant's lot is on a natural slope, and while it is an estimated three feet higher than the natural drainage area of the vacant lot, it is lower than the land adjoining on the right.

It is evident that any accumulation of flow of water onto claimant's land is largely attributable not to the clogged drain, but to the natural flow of water from the higher land levels. See *Caldwell v. Department of Highways*, 11 Ct. Cl. 50 (1975).

The Court is of the opinion that the claimant has not proved by a preponderence of the evidence that the damages were directly and proximately caused by the negligence of the respondent. Accordingly, the claim is disallowed.

Claim disallowed.

Opinion issued September 20, 1979

BRUCE E. HOBBS

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-44)

Claimant appeared in person.

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

WALLACE, JUDGE:

The claimant filed this claim against the respondent in the amount of $35.74 for damages to his 1978 Mercury Monarch automobile which occurred on January 1, 1979.

On the day of the accident, the claimant was driving on Route 1/5 from Logan, West Virginia, to his farm. It was daylight. He described the weather as "mushy". The claimant testified that he was proceeding at eight to ten miles per hour when he struck a large hole in the road, resulting in damage to the power steering hose and the loss of power steering fluid in his automobile. He further stated that he drove to and from his farm on this road every two to three weeks and knew that the road was in bad condition.

Route 1/5 is a secondary road which, apparently, is of the same construction and maintenance requirements as are all secondary roads in the State. It is an average, local scenic road and has to be accepted as such with the usual maintenance requirements of such class of road, and not the maintenance of a first-class highway. See *Bartz v. Dept. of Highways*, 10 Ct. Cl. 170 (1975).

The consistent position of the Court with respect to cases involving highway defects is outlined in the opinion in *Parsons v. State Road Comm'n.*, 8 Ct. Cl. 35, as follows:

> "This Court has many times held that the State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all circumstances. The case of *Adkins v. Sims*, 130 W.Va. 645, 46 S.E. 2d 81 (1947) holds that the user of the highways travels at his own risk and that the State does not and cannot assure him a safe journey. The mainte-

nance of highways is a governmental function and funds available for road improvements are necessarily limited. *Varner v. Dept. of Highways,* 9 Ct. Cl. 219 (1973)."

From the record in this case, the Court finds that the claimant has not proved such a positive neglect of duty on the part of the respondent as would impose a legal obligation upon the respondent to pay the claimant's damages. Accordingly, the Court is of the opinion to and does hereby disallow this claim.

Claim disallowed.

Opinion issued September 20, 1979

DALLAS HOWARD JUDE

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-256)

Claimant appeared in his own behalf.

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

RULEY, JUDGE:

On September 27, 1978, claimant's wife was travelling south in claimant's automobile on Route 49, between Matewan and Thacker, when rocks fell (from a rock wall beside the road) into the road in front of claimant's car. Mrs. Jude swerved to the left, but was unable to avoid all the rocks. Her left front tire struck one of the rocks, causing a flat and knocking the front end of the car out of alignment. Claimant seeks damages in the amount of $93.24.

The State neither insures nor guarantees the safety of motorists on its highways. *Adkins v. Sims,* 130 W.Va. 645 (1947). The State must have had actual or constructive notice of the danger posed by a particular rock wall before it can be found negligent. There is no evidence of notice of this particular hazard in this case. Claimant's wife's allegations that the area was known for occassional rock falls, even if true, are not specific enough to render the State negligent. They also indicate that she was aware of the possibility of a fall, and the absence of falling rock signs does not make the State liable without convincing evidence of the prior, prolonged exis-

tence of such a hazard. *Dickinson v. Dept. of Highways*, 11 Ct. Cl. 72 (1975). The evidence in this case was not sufficiently convincing. Accordingly, the claim must be denied.

Claim disallowed.

Opinion issued September 20, 1979

KYLE KING

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-39)

Claimant appeared in person.

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

WALLACE, JUDGE:

On Saturday, January 6, 1979, at about 9:00 p.m., the claimant's 1977 Monte Carlo automobile was damaged in the amount of $132.09 when the right rear wheel struck a catch basin and a defective and broken curb at the southwest corner of the intersection of Washington Street and Michigan Avenue in the City of Charleston, West Virginia. The claimant testified that he had been proceeding east on Washington Street (U.S. 60) and was attempting to make a right turn onto Michigan Avenue and then proceed in a southerly direction on that street. The roads at the time were snowy and slick. Mr. King candidly admitted in his testimony that he was aware of the existence of what he described as a hazard, but he indicated that another vehicle was proceeding north on Michigan Avenue, and it was necessary for him to make a sharp turn onto Michigan Avenue in order to avoid hitting this vehicle.

The testimony further revealed that, at or about this same time, certain construction work was being performed by E. L. Harris & Sons on the lot at the southwest corner of this intersection, which work may or may not have included the repair of the broken curb above the subject catch basin. In any event, it was not established who, as a matter of law, was responsible for the repair and maintenance of the broken curb.

Without discussing what would appear to the Court to be contributory negligence on the part of the claimant, it is fundamental that any claimant must establish negligence by a preponderance of the evidence. Primarily, the claimant has failed to establish a duty on the part of respondent to maintain this curb, and secondly, has failed to establish a negligent breach of any such duty. For these reasons this claim must be disallowed.

Claim disallowed.

Opinion issued September 20, 1979

THERESA KURUCZ

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-173)

No appearance by claimant.

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

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's automobile in the amount of $337.98 were caused when said vehicle dropped into a cut-away section on the Fory Henry Bridge in Wheeling, West Virginia, which bridge is owned and maintained by respondent; and to the effect that the respondent had cut away sections of asphalt from the surface of said bridge and negligently left an exposed area with no warning signs, which negligence was the proximate cause of the damages sustained by the claimant, the Court finds the respondent liable, and hereby makes an award to the claimant in the amount of $337.98.

Award of $337.98.

Opinion issued September 20, 1979

HENRY R. LARMOYEUX

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-55)

Claimant appeared in his own behalf.

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

RULEY, JUDGE:

On January 22, 1979, claimant was driving his automobile across the Patrick Street Bridge in Charleston when it struck a pothole in the right-hand lane. The right front tire and rim were damaged. Claimant seeks to recover the amount of damages from the respondent.

The State cannot, and does not, insure or guarantee the safety of motorists travelling on its highways. *Adkins v. Sims*, 130 W.Va. 645 (1947). It can only exercise reasonable care and diligence in maintaining its roads, within the limits imposed by a fixed budget. The respondent cannot be held liable for damages caused by collisions with potholes unless the claimant proves that respondent had actual or constructive notice of the existence of the danger posed by a particular pothole, and sufficient time in which to eliminate the danger. *Davis v. Dept. of Highways*, 12 Ct. Cl. 31 (1977). Claimant brought forth no such evidence in this case. Therefore, the claim must be denied.

Claim disallowed.

Opinion issued September 20, 1979

ESTELLE M. MARTIN

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-64)

Claimant appeared in person.

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

WALLACE, JUDGE:

The claimant filed this claim in the amount of $181.05 against the respondent for damages to her 1978 Ford Fiesta automobile.

The accident occurred on January 22, 1979, at approximately 7:30 a.m. on Big Tyler Road. The claimant was proceeding northerly toward Sissonville, West Virginia. Snow was beginning to accumulate. The claimant testified that she traveled the road five to ten times each week and knew that the road was full of potholes. In explaining what happened, the claimant stated:

> "I was headed north. The southbound lane had bumper-to-bumper traffic in it at a standstill, and just to explain a little bit about what happened, I was driving up and I came upon the hole after the car in front of me had gone by, and the traffic in the southbound lane was over some, and I swerved to avoid it and I hit the edge of the hole, and the hole is approximately, I'd say, two feet wide and I'd say around three to four feet, or three to four inches, deep."

The hole was located about four to five inches from the right-hand side of the road. The right front wheel of claimant's automobile struck the hole, causing the damages.

Under cross-examination, the claimant testified that she saw the hole after an automobile in front of her missed it and she slowed down to "maybe 5-10 miles per hour."

Without a positive showing of negligence on the part of the respondent, this case is governed by the well settled principle of *Adkins v. Sims*, 130 W.Va. 645, 46 S.E. 2d 81 (1947), that the State is not a guarantor of the safety of travelers and the user of the highway travels at his own risk. The existence of a defect in the highway does not establish negligence per se.

The claimant testified that she swerved to avoid the southbound traffic and then struck the hole after the automobile in front of her missed it.

The evidence in the record is not sufficient to establish such negligence on the part of the respondent as to create liability for the claimant's damage. Accordingly, the Court is of the opinion to and does disallow the claim.

Claim disallowed.

Opinion issued September 20, 1979

GARY McFANN

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-257)

Claimant appeared in person.

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

WALLACE, JUDGE:

On or about September 16, 1978, at approximately 10:00 p.m., the claimant was driving on Route 61 between Cabin Creek and Montgomery, West Virginia. The claimant testified that he was proceeding at a speed of approximately 35 miles per hour. It was raining and the visibility was poor. As he encountered three or four cars coming in the opposite direction in the vicinity of Crown Hill, West Virginia, the claimant struck a hole in the berm of the road, which hole was six to eight inches deep and extended into the highway for an estimated eight to ten inches. Claimant's automobile sustained damages in the amount of $276.30.

At the time of the accident, Route 61 between Cabin Creek and Montgomery was undergoing extensive re-paving and berm work. Construction signs of the Black Rock Construction Co. were posted at each end of the construction area. The claimant testified that he was aware of the road construction in the area.

Without a positive showing of negligence on the part of the respondent, this case must fall within the purview of the

well-settled principles of *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947) to the effect that the State is not an insurer of the safety of a traveler on its highways. There is nothing in the record by which actual negligence on the part of the respondent can be established. Therefore, the Court is of the opinion to and does hereby disallow the claim.

Claim disallowed.

Opinion issued September 20, 1979

DOUGLAS W. MORRIS

VS.

DEPARTMENT OF HIGHWAYS

(CC-79-45)

Claimant appeared in person.

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

WALLACE, JUDGE:

On Monday, January 22, 1979, the claimant was operating his 1978 Ford Fiesta automobile in an easterly direction on U.S. Route 60. He was proceeding from his home in St. Albans, West Virginia, and was approaching what would be the westerly corporate limits of South Charleston, West Virginia. He was proceeding at a speed of 30 to 35 miles per hour in the left-hand lane of the two lanes reserved for eastbound traffic when his left rear wheel struck a pothole located about two feet south of the medial strip in his lane of traffic. As a result, the sidewall of the tire was ruptured, and evidence was introduced that the cost of a new tire would amount to $52.36.

The claimant testified that the accident occurred about 7:10 a.m., and that he did not see the pothole because at that hour it was dark and some two or three inches of snow covered the roadway, including the offending pothole. Mr. Morris further testified that while he travelled this particular road frequently in going to work, he did not know of the existence of this pothole. He indicated that he had not travelled this roadway since the preceeding Tuesday, having been confined to his home as a result of the flu, inferring at least that the pothole had appeared during that six-day period.

We find no evidence in the record which, in our opinion, brands the claimant as being guilty of contributory negligence. At the same time, we find no evidence that the respondent knew or should have known of the existence of this pothole. The respondent is not an insurer of users of its highways and is charged only with the duty to use reasonable care and diligence in the maintenance of its highways. *Parsons vs. State Road Comm'n.*, 8 Ct. Cl. 35 (1969). The mere existence of a pothole in a road, without more, is not sufficient to impose liability upon the respondent.

As a result of the foregoing, this claim is denied.

Claim disallowed.

Opinion issued September 20, 1979

GAIL and ORA PITSENBARGER

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-222)

Claimant appeared in his own behalf.

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

RULEY, JUDGE:

Claimants allege that their property was damaged by the pooling of water caused by respondent's negligent placement of a culvert under, and care of drainage along, a public roadway adjacent to claimants' property. The evidence indicates that part of the claimants' property is a natural drain; that the property has been swampy for at least a decade; and that nearby landowners had taken measures to drain their property which may have increased the flow of water to claimants' property. No evidence of negligent placement or care of the culvert came forth. "The State can only be held on the duty of exercising reasonable care and diligence in the maintenance of its highways. Under the law of this State, surface water is considered a common enemy which each landowner must fight off as best he can, provided that an owner of higher ground may not inflict injury to the owner of lower ground beyond what is reasonably necessary." *Holdren v. Dept. of Highways,* 11 Ct.Cl. 75 (1975). The State has taken necessary and reasonable steps to deal

with difficult drainage problems near claimants' property; there is no evidence before this Court which leads to a conclusion that the State was negligent or caused any damage to claimants' property.

Claim disallowed.

Opinion issued September 20, 1979

CHARLES E. PRIESTLEY, JR.
and PENNY A. PRIESTLEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-34)

Claimant, Penny A. Priestley, appeared in person.

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

WALLACE, JUDGE:

The claimants, Charles E. Priestley, Jr. and Penny A. Priestley, filed this claim in the amount of $207.86 against the respondent for damages to their 1977 Monte Carlo automobile which occurred on January 1, 1979, at approximately 6:30-7:00 p.m. The scene of the accident was Big Tyler Road in Cross Lanes, West Virginia. It was dark, and it was raining. The claimant, Penny A. Priestley, while driving the automobile, struck a hole in her lane of traffic about ten inches from the right berm. During her testimony, she stated that she travelled this road about once every two weeks and that she had seen holes in the pavement on previous occasions.

The law of West Virginia is well establishing 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). "As the State is not an insurer of the safety of those travelling on the public roads, anyone injured or who sustains damage must prove that the State has been negligent in order to render the State liable." *Hanson v. State Road Comm'n.,* 8 Ct. Cl. 100 (1970). The existence of a defect in the road does not establish negligence per se. *Bodo v. Dept. of Highways,* 11 Ct. Cl. 179 (1977); *Light v. Dept. of Highways,* 12 Ct. Cl. 61 (1977).

The record does not establish negligence on the part of the respondent, and, accordingly, the Court disallows the claim.

Claim disallowed.

Opinion issued September 20, 1979

A.O. SECRET

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-66)

No appearance by claimant.

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

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's vehicle in the amount of $96.76 were caused when said vehicle struck a steel rod protruding from the Route 50 bridge of Interstate 79 at Bridgeport, West Virginia, which bridge is owned and maintained by the respondent; and to the effect that said damages were proximately caused by the negligence of an employee of the respondent, who used a grader to pull out an expansion joint on said bridge and exposed a steel rod, the Court finds the respondent liable, and hereby makes an award to the claimant in the amount of $96.76.

Award of $96.76.

Opinon issued September 20, 1979

KEVIN E. SMITH

VS.

DEPARTMENT OF HIGHWAYS

(CC-78-284)

Claimant appeared in person.

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

WALLACE, JUDGE:

At approximately 4:55 p.m. on October 19, 1978, the claimant was driving his 1978 Chevrolet Camaro automobile easterly on U.S. Route 60, a four-lane highway with exit and entrance ramps similar to those commonly found on interstate highways. As he approached the DuPont-Belle exit, the claimant noticed a motorist who had run out of gas and was attempting to hitch a ride. With the intention of aiding the stranded motorist, the claimant reduced his speed and drove his automobile onto a "Y"-shaped concrete berm separating the highway from the exit ramp. Just prior to stopping, he saw two metal objects mounted in the center of the berm. He applied his brakes but was unable to avoid striking them. The underside of the vehicle was damaged, and the claimant lost several hours of work.

Edward Goodwin, Claims Chief for the Department of Highways, testified that the metal objects were bases for "breakaway" road signs. These bases were 3⅜ inches above the road surface and were cemented into the concrete berm.

The Court is of the opinion that in this case, the placement of these metal bases constituted a dangerous obstruction. It is highly foreseeable that the berm between the highway and an exit ramp would be used for emergency stops, and that an accident such as the one in this case could occur.

The respondent attempted to show that the undercarriage of an automobile of the same make and model as claimant's would have cleared the bases. However, the respondent failed to consider the fact that the front portion of a braking automobile is projected downward closer to the road surface, and further, the claimant's automobile was equipped with a special sport suspension which lowered the clearance of the undercarriage to the road surface.

The damage sustained by the automobile was repaired at a cost of $290.87, which was paid, with the exception of $100.00 deductible, by the claimant's insurance carrier. The insurance company took no active part in the presentation of the claim. The claimant testified that, as a result of the accident, his semiannual premium had been increased by $209.00. He further stated that he was advised by his insurance company to file the claim before this Court, obtain an award, and reimburse the company for the cost of repairs. Upon reimbursement to the company, the claimant was told that the accident would be removed from his record and his premiums returned to the previous levels.

Since this claim was not properly subrogated before the Court, an award cannot be made for the total cost of repairs. However, the $100.00 deductible paid by the claimant is an element of damage which the State in equity and good conscience should absorb. The claimant stated that as a result of the accident, he lost eight hours of work at an hourly rate of $3.55, or a total of $28.40.

The Court, believing that libility exists on the part of the respondent, and that the claimant was free from contributory negligence, makes an award to the claimant in the amount of $128.40.

Award of $128.40.

Opinion issued September 20, 1979

GARY CLINE SPURGEON

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-191)

No appearance by claimant.

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

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's vehicle in the amount of $185.00 were caused when said vehicle struck a jagged piece of steel protruding from the sidewalk on Bridge No. 21-19-31.32, which bridge is part of U.S. Route 19 and is

owned and maintained by the respondent; and to the effect that negligence on the part of the respondent was the proximate cause of said damage, the Court finds the respondent liable, and hereby makes an award to the claimant in the above-stated amount.

Award of $185.00.

Opinion issued September 20, 1979

DEBRA A. VINSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-229)

No appearance by claimant.

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

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's automobile in the amount of $44.29 were caused when said vehicle struck a piece of metal protruding from a bridge owned and maintained by respondent, which bridge is a part of Route 16 between Ellenboro, West Virginia, and Harrisville, West Virginia; and to the effect that negligence on the part of the respondent was the proximate cause of said damage, the Court finds the respondent liable, and hereby makes an award to the claimant in the above-stated amount.

Award of $44.29.

Opinion issued September 20, 1979

HAROLD YOUNG

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-274)

Claimant appeared in person.

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

WALLACE, JUDGE:

The claimant, Harold Young, filed this claim against the respondent in the amount of $203.50 for damages to his 1977 Monte Carlo automobile.

On October 15, 1978, the claimant was driving in his automobile from Clendenin to Nitro, West Virginia, on Route 119 at approximately 8:30 p.m. It was dark and it had been raining. Traffic was heavy.

The claimant testified that he travelled Route 119 about once every two weeks and was aware that the road was under construction. As he approached the area of Mink Shoals Hill, he was proceeding at approximately 30 mph behind a tractor trailer truck. The truck struck some steel plates placed in the road due to the construction. The claimant stated that a plate corner "flipped up" and he swerved to miss it. The right front and right rear wheels of his automobile struck a hole on the right edge of the blacktop surface of the road next to the berm causing damage to the wheels and rims of the automobile.

Without a positive showing of negligence on the part of the respondent, this case is governed by the well settled principle of *Adkins v. Sims,* 130 W. Va. 645, 46 S.E. 2d 81 (1947), cited in *Parsons v. State Road Comm'n.,* 8 Ct. Cl. 35, that the State is not a guarantor of the safety of travelers and the user of the highway travels at his own risk. The duty of the State in the maintenance of highways is one of reasonable care and diligence under all circumstances. See *McFann v. Dept. of Highways,* 13 Ct. Cl. 33 (1979); *Childers v. Dept. of Highways,* 12 Ct. Cl. 346 (1979).

There is nothing in the record by which actual negligence on the part of the resondent can be established. Therefore, the Court is of the opinion to and does hereby disallow the claim.

Claim disallowed.

Opinion issued October 24, 1979

OHIO VALLEY MEDICAL CENTER, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-398)

No appearance on behalf of claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

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

In June and July of 1978, hospital services were rendered by claimant to a prisoner of the West Virginia State Penitentiary in the amount of $16,941.36. On or about August 29, 1978, respondent made a payment of $5,284.79, leaving a remainder of $11,656.57 unpaid, which sum is the amount of this claim.

Respondent, in its Answer, admits the allegations in the Notice of Claim, and states further that there were no funds remaining in the respondent's appropriation for fiscal year 1977-78 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 the 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 October 24, 1979

UNION OIL COMPANY OF CALIFORNIA

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-412)

KELLOGG COMPANY

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-489)

THE KROGER CO.

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-496)

RANDOLPH COUNTY BOARD OF EDUCATION

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-508)

GULF OIL CO., U.S.

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-524)

TAYLOR COUNTY COMMISSION

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-539)

RALEIGH GENERAL HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-546)

No appearance on behalf of claimants.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

For purposes of submission, the above claims were consolidated and represent an aggregate claim of $10,595.60 for goods and services furnished to the respondent for which the claimants have not received payment.

The respondent filed Answers admitting all of the allegations pertaining to each of the claims. The Answers further allege that there were no funds remaining in the respondent's appropriations for the fiscal years in question from which the obligations could have been paid.

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

For the foregoing reasons, the claims are denied.

Claims disallowed.

Opinion issued October 30, 1979

VIRGINIA BURTON, ET AL.

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-225)

PER CURIAM:

The claims in the above-styled actions were submitted to the Court on written stipulations acknowledging liability on the part of the respondent caused by the disrepair of the floor of the Shadle Bridge over the Kanawha River between Henderson and Point Pleasant, West Virginia. The bridge is maintained by the respondent. According to the stipulations, the Court finds that the negligence of the respondent was responsible for the damages sustained by the vehicle of each of the claimants on the dates indicated below, and the Court further finds the damages to be

reasonable and makes awards to each of the claimants as follows:

Claim No.	Claimant	Date of Accident	Award
CC-79-225	Virginia Burton	June 1, 1979	$199.14
CC-79-213	George Carper	May 29, 1979	$135.94
CC-79-222	Edward Engel	May 21, 1979	$ 48.34
CC-79-170	Kim Hope	March 30, 1979	$ 47.27
CC-79-420a	Jean C. Littlepage	February 20, 1979	$ 71.51
CC-79-420b	Jean C. Littlepage	August 4, 1979	$ 73.66
CC-79-186	S. A. Meadows	April 29, 1979	$ 87.00
CC-79-287	Jack H. Parsons, Jr.	June 16, 1979	$ 37.88
CC-79-201	Garnet L. Pelfrey	April 27, 1979	$307.93
CC-79-360	Gerald L. Perry and Deloris Perry	June 26, 1979	$146.86
CC-79-321	Roy C. Rayburn, Jr.	July 7, 1979	$171.67
CC-79-267	Dencil Reynolds and Judith Reynolds	June 14, 1979	$ 44.12
CC-79-293	Ronnie Gene Roach	June 26, 1979	$ 90.25
CC-79-402	Danny Lee Rockett and Kathy Newell Rockett	July 2, 1979	$199.34
CC-79-33	Guy N. Sayre	November 29, 1978	$ 285.72
CC-79-405	Posey L. Stevenson	March 19, 1979	$ 72.10

Opinion issued October 31, 1979

CONSOLIDATED CONTRACTORS

vs.

STATE TAX DEPARTMENT

(CC-79-343)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

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

The claim arises from a contract whereby claimant furnished the material and labor to install 32 bulkheads at the heads of windows and/or offsets in rooms belonging to respondent. Payment for extra work in the amount of $1,600.00 was not made to the claimant due to the lack of a purchase order.

In its Amended Answer, the respondent admits the allegations set forth in the Notice of Claim and states that sufficient funds remained in its appropriation for the fiscal year in question from which the claim could have been paid.

Accordingly, this Court hereby makes an award to the claimant in the amount requested.

Award of $1,600.00.

Opinion issued October 31, 1979

DAVIS MEMORIAL HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-388)

No appearance by claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $1,096.62 for hospital services rendered to inmates of respondent's Huttonsville Correctional Center.

In its Answer, the respondent admits the allegations of fact set forth in the Notice of Claim, but further states that there were no funds remaining in the respondent's appropriation for the fiscal years in question from which the obligations 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. Department of Mental Health*, 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued October 31, 1979

GEORGE L. HILL, JR.

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-133)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $600.00 for services rendered in May of 1978 at the West Virginia State Penitentiary.

In its Answer, the respondent admits the validity of the claim, but further alleges that sufficient funds were not available in the respondent's appropriation for 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. Department of Mental Health,* 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued October 31, 1979

HUNTINGTON WATER CORPORATION

vs.

DEPARTMENT OF HEALTH

(CC-79-452)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $543.52, representing the amount due on a corrected water bill issued to respondent.

In its Answer, the respondent admits the validity of the claim and joins with the claimant in requesting that an award be made in favor of the claimant in the amount requested.

Based on the foregoing, the Court hereby makes an award to the claimant in the amount of $543.52.

Award of $543.52.

Opinion issued October 31, 1979

IBM CORPORATION

vs.

DEPARTMENT OF CULTURE AND HISTORY

(CC-79-189)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for the respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $658.00 for liquidation charges as set forth and defined in a lease agreement with respondent.

Respondent, in its Amended Answer, admits the validity of the claim and states that sufficient funds remained in its appropriation for the fiscal year in question from which the claim could have been paid.

Accordingly, this Court hereby makes an award to the claimant in the amount requested.

Award of $658.00.

Opinion issued October 31, 1979

LAW ENFORCEMENT ORDNANCE COMPANY

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-227)

No appearance by claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $5,065.30, which figure represents the balance due on a purchase order for equipment which the claimant did not receive from the respondent.

In its Answer, the respondent admits the validity of the claim, but states that the services rendered by the claimant during the year 1974 were not presented for payment during the fiscal year in question. The fiscal year had expired and the bill could not then be paid.

Based on the foregoing, an award in the amount of $5,065.30 is hereby made to the claimant.

Award of $5,065.30.

Opinion issued October 31, 1979

WILLIAM F. LEPERA and DIXIE LEE LEPERA

vs.

DEPARTMENT OF CORRECTIONS

(CC-78-45)

Claimant Dixie Lee LePera appeared in behalf of claimants.

Gregory E. Elliott, Assitant Attorney General, for respondent.

RULEY, JUDGE:

On the evening of February 4, 1978, a 1971 Ford vehicle belonging to the claimant, Dixie Lee LePera, was stolen from her

residence in Grafton, West Virginia, by four escapees from the West Virginia Industrial School for Boys. At the time of the theft, the vehicle was unlocked and the key was in the ignition. Claimant seeks reimbursement for damages to the vehicle, as well as a towing fee, for a total amount of $1,052.62.

On the night of the escape, according to the testimony of Correctional Officer H. Kenneth Jackson, Jr., there were approximately 35 boys in Cottage 7, of which Mr. Jackson was the supervisor. He and another supervisor, Mr. Thomas Jenkins, made continuous routine checks of the boys that evening. Mr. Jackson stated that the escape occurred in a five-minute interval between checks. The boys escaped by breaking the quarter-inch chain on a low casement window and climbing out. Upon discovering that the nine boys were missing, Mr. Jackson got the remaining boys together in one room and called the shift supevisor, as is the normal procedure following an escape. Four of the nine escapees were later identified as the ones involved in the theft of claimant's vehicle.

In order for the claimants to recover in this case, it must be established that negligence on the part of the respondent was the proximate cause of the damages suffered by the claimants. In this regard, we find a prior decision of this Court to be controlling. The case of *Hogue vs. Department of Public Institutions*, 9 Ct. Cl. 132 (1972), is almost identical to this case. In *Hogue*, nine boys escaped from the Industrial School and three of them stole an automobile belonging to an area resident. The escape occurred when the boys pushed out a heavy wire grating securing a window, dropped to the ground, and ran away. In the Opinion in that case, Judge Jones set forth a detailed analysis of the nature and purposes of the Industrial School for Boys, noting that it "is not a prison, there are no walls, security fences, bars, cells or armed guards. The School purports and tries to be a correctional institution." The question in the *Hogue* case, as well as in this case, was whether the supervisor was negligent in having failed to properly secure the window or detect the efforts to escape. The Court in *Hogue* found no negligence, and we are compelled to reach the same result here.

There is nothing in the evidence to indicate that either of the supervisors acted in a negligent manner. The window through which the escapees slipped had been chained. The routine check of the boys was in progress. With 35 boys in their charge, it is evident that the two supevisors could not be everywhere at once.

The Court is of the opinion that negligence on the part of the respondent's supervisors has not been proved. Even if such neglience had in fact been established, it would not be considered the proximate cause of the damage to the claimants' vehicle. Claimant Dixie Lee LePera testified that the keys had been left in the vehicle that evening. This neglient act on behalf of the claimants, in leaving the vehicle ready for any passer-by to convert to his own use, would be the proximate cause of any subsequent harm done to the vehicle.

Accordingly, the Court hereby disallows the claim.

Claim disallowed.

Opinion issued October 31, 1979

NATIONWIDE INSURANCE COMPANY,

SUBROGEE OF FRANKLIN L. DALTON

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-182)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $741.45, based upon the following facts: On or about May 11, 1978, claimant's subrogee, Franklin L. Dalton, was operating an automobile titled in the name of Norma Dalton on U.S. Route 219, a highway owned and maintained by the respondent.

While proceeding along this highway, Mr. Dalton came upon respondent's construction site in Pickaway, Monroe County, West Virginia. Respondent had no flagmen present and placed no warning signs in the vicinity, even though the work site was obscured from public view by the crest of a hill.

As the Dalton vehicle approached the crest, upon which respondent's machinery was blocking the roadway, it slid 138 feet,

and struck an embankment, causing damage to the front of claimant's insured's vehicle. This occurred because of the negligence of the respondent, which negligence was the proximate cause of the damages sustained.

Respondent is therefore liable to the claimant for the sum of $741.45, which is a fair and equitable estimate of the damages sustained by the claimant's insured.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $741.45.

Opinion issued October 31, 1979

GLEN L. RAMEY and FAYE RAMEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-87)

Claimant Glen L. Ramey appeared in behalf of claimants.

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

RULEY, JUDGE:

Claimants own property adjacent to Beech Fork Road, otherwise known as Secondary Road 52/4. The claimants allege that respondent's negligent failure to maintain properly a culvert and drainage ditches on Beech Fork Road caused water to flow onto and damage their property. The evidence indicated that claimants' property is situated below the road; that a natural drain runs within 50 feet of claimants' property; that the drainage problem was in existence at the time claimants bought their house; that the culvert was occasionally clogged; and that claimants' driveway was situated so as to funnel water towards the house.

The general rule for drainage cases like this one was enunciated by Judge Petroplus in *Whiting v. Smith,* 8 Ct. Cl. 45 (1969): "Unless a landowner collects surface water into an artificial channel, and precipitates it with greatly increased or unnatural quantities upon his neighbor's land, causing damage, the law affords no redress." 8 Ct. Cl. at 47. There was no evidence in this case that respondent's actions, or failures to act, created any unusual or extraordinary

flow of water onto claimants' land. Part of claimants' problem can be attributed to their own driveway. Although the Court realizes the serious nature of the damage to claimants' property, it cannot in good faith find the State responsible for the damage or compel the respondent to provide compensation to the claimants. Accordingly, the claim is denied.

Claim disallowed.

Opinion issued October 31, 1979

RANDY LEE SHAMBLIN

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-79-252)

Claimant appeared on his own behalf.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GARDEN, JUDGE:

As the result of an order issued by the respondent, a member of the Department of Public Safety, on April 22, 1979, picked up the claimant's chauffeur's license from him. The order had been sent out as the result of the claimant's allegedly having issued a bad check to the respondent. At the time, the claimant was employed by the Donahue Excavating Company of Ripley, West Virginia, as a truck driver. Due to the loss of his license, claimant's employer terminated his employment on April 23, 1979.

Claimant contended that the order issued by respondent, which resulted in the loss of his license, should have been directed to another individual with the same name who lived in the Charleston area. This contention was admitted by the respondent in its Answer.

Claimant employed an attorney to help him clear up the situation, and after securing several temporary licenses from respondent, the claimant's chauffeur's license was finally returned to him on May 28, 1979. Claimant testified that when his license was taken from him, he was earning $200.00 per week, and that as a result, he lost four days of work, or $160.00. He further testified that

he made four separate trips to Charleston, three from Ripley and one from Logan, in order to obtain restoration of his license at the expense of $20.00 per trip.

This situation, not intentionally created by the respondent, was an administrative error on the part of the respondent. The claimant did nothing to create the situation and should be compensated for his losses. An award is thus made in favor of the claimant in the amount of $240.00.

Award of $240.00.

Opinion issued October 31, 1979

HAROLD RAY STAFFORD

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-197)

Claimant appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

WALLACE, JUDGE:

At approximately 6:30 p.m. on November 30, 1977, the claimant, Harold Ray Stafford, was operating his 1970 Ford 250 four-wheel-drive truck in a westerly direction on West Virginia Route 10 from the community of Nibert, West Virginia, to the City of Logan, West Virginia. The claimant testified that the weather was clear and that he was travelling at a speed of about 35 miles per hour when his right front tire struck a water-filled hole in the two-lane, asphalt highway. Claimant further testified that this hole was six feet long, 38 inches wide, and 14½ inches deep, and that the damage to his vehicle was in the amount of $917.50.

Claimant was alone in the truck, and was travelling from Nibert to Logan to pick up his brother-in-law. He testified that he had been over this road six weeks prior to the accident but had not observed any potholes, just water. Claimant stated that he was unable to swerve to avoid the water due to oncoming traffic.

This Court has often held that the user of the highway travels at his own risk, and that the State does not and cannot assure him a

safe journey. *Adkins v. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947). However, it is also true that the respondent does owe a duty of exercising reasonable care and diligence in the maintenance of the State's highways, and if the respondent knows or should have known of a defect in the highway, it must act within a reasonable time to remedy such defect.

This accident occurred at dusk, and the claimant had no prior knowledge of the existence of the pothole. West Virginia Route 10 is one of the principal roads connecting the City of Logan with points south, and we believe that a heavily-travelled highway merits more attention from a maintenance standpoint than one that is less frequently used. It seems rather obvious that a hole six feet long, 38 inches wide, and 14½ inches deep did not appear suddenly, and must have been in existence for some time prior to claimant's mishap.

Believing that the respondent had constructive notice of the existence of this defect in the highway, and that the respondent's negligence in not making the necessary repairs was the proximate cause of the damage to the claimant's vehicle, we hereby make an award to the claimant in the amount of $917.50.

Award of $917.50.

Opinion issued October 31, 1979

STONEWALL CASUALTY CO.,
SUBROGEE OF ANTHONY TASSONE

VS.

DEPARTMENT OF HIGHWAYS

(CC-78-262)

Jacques R. Williams, Attorney at Law, for claimant.

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

PER CURIAM:

This claim grows out of a motor vehicle accident which occurred on October 15, 1976. The claimant, upon payment to its insured, under the collision coverage of its insurance policy, on October 27, 1976, became subrogated to its insured's claim for property

damage in the sum of $1,145.68. This claim, in that sum, was filed on October 25, 1978, and came on for hearing upon the respondent's motion to dismiss based upon the two-year period of limitations delineated in West Virginia Code §55-2-12.

Claimant's counsel argued that the claimant had no cause of action until October 27, 1976, the date of claimant's payment to its insured, and that the period of limitations should run from that date rather than the date of the accident. In other words, that a period of limitations could be extended by subrogation, a novel but obviously illogical conclusion. It also was argued that the claimant was misled in some vague manner by correspondence between the parties a few months before the period expired, but the Court is unable to perceive any statement or conduct on the part of the respondent which was calculated to mislead the claimant.

Of course, in other courts of this State, limitations simply is an affirmative defense which must be pleaded and proved. But, in this Court, it is a jurisdictional matter. West Virginia Code §14-2-21, provides in part:

> "The court shall not take jurisdiction of any claim, whether accruing before or after the effective date of this article, 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,..."

Accordingly, the motion to dismiss must be, and it is, granted.

Motion to dismiss sustained.

Opinion issued November 5, 1979

RICHARD K. SWARTLING

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-211)

ROBERT M. WORRELL

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-217)

MICHAEL D. STURM

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-223)

HELEN JOYCE DAVIS

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-242)

No appearance by claimants.

Henry C. Bias, Jr., Deputy Attorney General, for respondents.

RULEY, JUDGE:

Since these four cases are governed by the same principles of law, they have been consolidated by the Court on its own motion for purposes of this decision.

In *Swartling*, the claimant, a lawyer, seeks recovery of the sum of $1,725.00, the cumulative amount of various Orders entered by the Circuit Court of Wetzel County for services rendered by him as Mental Hygiene Commissioner for Wetzel County in various mental hygiene proceedings.

In *Worrell*, the claimant, a lawyer, seeks recovery of the sum of $210.00, the amount of an Order entered by the Circuit Court of Wyoming County for services rendered by him as counsel for an indigent criminal defendant.

In *Sturm*, the claimant, a lawyer, seeks recovery of the sum of $402.50, the amount of an Order entered by the Circuit Court of Wyoming County for services rendered by him as counsel for an indigent person in a mental hygiene proceeding.

Finally, in *Davis*, the claimant, a court reporter, seeks recovery of the sum of $94.47, the cumulative amount of various Orders entered by the Circuit Court of Doddridge County for services rendered by her as a court reporter in various mental hygiene proceedings.

All of the mentioned Circuit Court Orders were entered in the 1978-79 fiscal year. Payment in each case was denied by the State Auditor because funds for payment were not available. An Answer has been filed in each case acknowledging the validity and propriety of the claim asserted, and the cases have been submitted to this Court upon the pleadings.

West Virginia Code, Chapter 27, Article 5, provides for the appointment by circuit courts of persons such as the claimants in *Swartling*, *Sturm* and *Davis* to render the services which they did render in mental hygiene proceedings. It also provides for their payment for such services from the "mental hygiene fund" upon orders such as those entered in each case.

West Virginia Code, Chapter 51, Article 11, provides that circuit courts shall appoint counsel for poor criminal defendants, as in *Worrell*, and provides for their payment from the "Representation of needy persons fund".

Both of the designated funds, of course, are subject to appropriation by the Legislature.

The right to counsel by defendants in criminal cases has been mandated by the United State Supreme Court. See Annotation: Accused's right to counsel under the Federal Constitution—Supreme Court cases, 18 L. Ed. 2d 1420. It also has been held that persons whose mental capacity is being judicially determined are entitled to the same constitutional protection as is given to the accused in criminal cases. See 41 Am. Jur. 2d "Incompetent Persons" Section 15. Although there was a time when such services as counsel for indigent persons were imposed upon lawyers without compensation, most states, like West Virginia, now have statutes which provide for compensation at modest rates. See Annotation: Construction of state statutes

providing for compensation of attorney for services under appointment by court in defending indigent accused, 18 A. L. R. 3d 1074.

The Legislature, in obvious recognition of the foregoing authorities, adopted the statutes previously cited which provide for the appointment by the several circuit courts in the State of persons such as the claimants to perform services such as those performed by the claimants and for the payment for those services upon entry of a circuit court order. Thus, these claims are distinguished from those involved in *Airkem Sales and Service, et al. v. Dept. of Mental Health,* 8 Ct. Cl. 180 (1971). Having delegated, or perhaps mandated, those duties upon the circuit courts, should the Legislature then defeat them by failing to appropriate sufficient funds for their performance? It is manifest that an affirmative answer to that question would be contrary to the public interest and public policy. Circuit judges, being officers of the judicial branch of government, unlike the various executive agencies, are not kept informed of the balances in the mental hygiene fund or the representation of needy persons fund. Furthermore, even if by some means they were informed that these funds were exhausted, would they have any less duty to appoint counsel for poor persons under the statutes involved or to direct payment for such services? Clearly, these are claims which the State in equity and good conscience should discharge and pay. West Virginia Code §14-2-13. Accordingly, awards are made as follows:

To the claimant, Swartling, the sum of $1,725.00;

To the claimant, Worrell, the sum of $210.00;

To the claimant, Sturm, the sum of $402.50; and,

To the claimant, Davis, the sum of $94.47.

Opinion issued November 19, 1979

THE BOARD OF EDUCATION
OF THE COUNTY OF KANAWHA

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-215)

Jack McClanahan, Principal of Andrew Jackson Junior High School, appeared on behalf of claimant.

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

RULEY, JUDGE:

This claim was originally filed by Andrew Jackson Junior High School, but during the testimony it was developed that the damaged vehicle, a 1974 Dodge van, was in fact owned by The Board of Education of the County of Kanawha, and as a result, the true party in interest was substituted as the claimant on the Court's own motion.

On January 2, 1979, the van was being driven in an easterly direction on Interstate 64 by John David Nelson, a teacher at the Andrew Jackson Junior High School, located near Cross Lanes, West Virginia. It was around noon, and Nelson was transporting a group of students and basketball players from the school to attend a basketball game at Horace Mann Junior High School. Among the occupants of the van was Larry Milam, the head coach of the basketball team.

At and near the accident scene, Interstate 64 consists of four lanes for eastbound traffic, and in addition, an emergency lane is located to the south of four eastbound lanes. Prior to reaching a point west of the Broad Street exit from Interstate 64, the claimant's van, which was being driven in the first or most southerly lane of this expressway, was passed by a brown van, which pulled in front of and into the lane being occupied by claimant's van. Shortly thereafter, the brown van turned to the left for reasons unknown at that time to Nelson. Suddenly, Nelson observed a white Plymouth automobile, owned by respondent, in a stopped position directly in front of him and in his lane of travel.

On direct examination, Nelson testified that when he first observed respondent's vehicle, it was 100 yards in front of him; but

later, on cross-examination, he stated that it was only four to five car lengths in front of him. He further testified that a vehicle was passing him on his left and that at least two of respondent's dump trucks were stopped or parked in the emergency lane to his immediate right. Larry Milam, who was sitting in the front passenger seat, testified that when the brown van suddenly turned to the left, the respondent's vehicle was stopped only "100 feet or so" in front of claimant's vehicle. An estimate of repairs from Capitol City Body Works, Inc. was introduced into evidence reflecting that the repairs to claimant's vehicle would cost $1,694.81. No testimony was introduced by respondent to explain the reason or necessity for its vehicle being stopped in its position on the expressway.

We believe that liability in this claim is controlled by West Virginia Code §17C-13-1, which is as follows:

> "(a) Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled part of the highway when it is practicable to stop, park, or so leave such vehicle off such part of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicles shall be available from a distance of two hundred feet in each direction upon such highway.
>
> (b) This section shall not apply to the driver of any vehicle which is disabled while on the paved or main-traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position."

We are of the opinion that the respondent violated the provisions of the above, and as such, was guilty of prima facie negligence and that such negligence was the proximate cause of the accident and the resulting damage to claimant's vehicle. We do not believe that the driver of claimant's vehicle was guilty of any negligence, and therefore, there is no reason to invoke the doctrine of comparative negligence.

Accordingly, an award is hereby made in the amount of $1,694.81.

Award of $1,694.81.

Opinion issued November 19, 1979

NITA KAY COLLITON

vs.

ALCOHOL BEVERAGE CONTROL COMMISSIONER

(CC-78-212)

George R. Triplett, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

RULEY, JUDGE:

The claimant, a widow, is the owner and proprietor of a retail grocery store and lunchroom business operated in conjunction with a gasoline station in the village of Riverton, Pendleton County, West Virginia. In June, 1978, she applied to the respondent for a retail liquor license. Thereafter, agents of the respondent led the claimant to believe that the application would be granted: by suggesting extensive remodeling of the premises which would be required; by informing her orally that the application had been accepted and to proceed with her plans incident to remodeling; by informing her that the respondent would supply required shelving; and, according to the admission of the respondent's assistant commissioner, by informing her that the application would be approved. Approximately two months after the application was made, it was denied. In the interim, and acting in reliance upon the representations delineated above, the claimant incurred substantial expense in order to comply with the requirements designated by the respondent's agents.

Although the claimant never did receive a license or contract in the form required by law, as was stated in *Cook v. Dept. of Finance and Administration,* 11 Ct. Cl. 28, at 30 (1975), ". . .it should be remembered that claimant is not a lawyer and could not be expected to be aware fully of the legal requirements necessary to make a perfectly formal contract with the State". Following that precedent, it appears that an award to the claimant should be made.

Turning to the issue of damages, it appears to the Court that the claimant is entitled to recover costs of repair, reimbursement for expenses directly occasioned by the respondent's conduct, and compensation for loss of use or rental value of the premises for the

two-month period. Applying those criteria to the facts of this case, it appears that the claimant is entitled to recover the sum of $5,833.49 (materials, $2,098.59; labor, $2,320.00; equipment, $1,014.90; loss of use, $400.00). The Court is aware of no authority and none was cited by counsel supporting the claim for counsel fees.

Award of $5,833.49.

Opinion issued November 19, 1979

DANIEL C. FARLEY, JR.

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-216)

John S. Hrko, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

On April 11, 1978, claimant, Daniel C. Farley, Jr., was driving his 1976 Buick Electra automobile north on West Virginia Route 10 over Herndon Mountain, proceeding to Mullens, Wyoming County, West Virginia. The road over the mountain was a crooked, mountainous road, full of sharp turns and hairpin curves. It was a wet, misty day. As the claimant was proceeding around a sharp curve on the mountain at approximately 25 mph, he came upon a slide extending onto the right-hand side of the highway. In order to negotiate the curve, he crossed the center line of the road, the left front of his automobile striking an oncoming truck. Mr. Farley sustained personal injuries and the automobile was totally destroyed.

Bill Wilcox, the County Supervisor for the respondent in Wyoming County, testified that he knew of the existence of the slide about a month before it was removed from the road. He stated that respondent's employees were busy cleaning up after flooding in another section of the county and that equipment to remove the slide had to come from Raleigh County. He also testified that Route 10 was "probably the most traveled road in the county."

He stated, "We thought there was plenty of room to suffice for the traffic to go around without any great danger. Of course, on Herndon Mountain, there's always danger because it is a hazardous road."

Trooper W. H. Berry of the Department of Public Safety, who investigated the accident, testified that the curve was very sharp and that the claimant had limited visibility, and the only way to negotiate the curve was to change lanes. The measurements made by the trooper, as shown on his diagram of the accident (Claimant's Exhibit No. 6), indicated the road was 20 feet wide and that the slide extended onto the highway for 3½ feet.

The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). However, the State can be found liable if the maintenance of its roads falls short of a standard of "reasonable care and diligence...under all circumstances." *Parsons v. State Road Comm'n.,* 8 Ct. Cl. 35 (1969). See *Atkinson v. Dept. of Highways,* 13 Ct. Cl. 18 (1979). The uncontroverted testimony in this claim established that the slide had been on the highway for at least a month before the accident. Since Route 10 is a narrow, heavily traveled road, it was foreseeable that vehicles using the road might have an accident. The respondent's failure to remove the slide constituted negligence and was the proximate cause of the accident.

The claimant injured his left wrist and shoulder and received a cut on his head, still requiring medication for pain. It was stipulated that his medical expenses were $129.25. His automobile was destroyed, for which he was compensated by his insurance carrier, except for a $250.00 deductible. The replacement of his eyeglasses cost $106.00. Accordingly, the Court makes an award to the claimant in the amount of $1,500.00.

Award of $1,500.00.

Opinion issued November 19, 1979

FRANKLIN D. ROWE

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-288)

Claimant appeared in person.

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

RULEY, JUDGE:

On the evening of November 17, 1978, the claimant's daughter, Lisa J. Rowe, was driving his 1978 Fiat automobile on Norway Avenue in Huntington, West Virginia. She was proceeding from her home on Arlington Boulevard to pick up pizza for the family dinner that evening. Upon reaching the intersection of Arlington Boulevard and Norway Avenue, she turned onto Norway Avenue and shortly thereafter, as she proceeded uphill and into a curve, she struck a large pothole, and as a result, ruptured both the right front and right rear tires of the automobile and damaged both rims.

The claimant testified that, upon being called by his daughter, he proceeded to the scene of the accident and examined the pothole and found that it was about two feet in diameter and over a foot deep. The claimant's daughter testified that she was driving at a slow speed, was unaware of the pothole, and did not see the same before the accident. Claimant testified that his damages totaled $188.74, which consisted of the cost of two new tires, two new tubes, and two new rims. He further indicated that he was not seeking recovery for the cost of realigning the car or a towing charge that was incurred.

The claimant called William E. Wetherholt as a witness on his behalf. Wetherholt testified that he lived at 827 Norway Avenue, and that the subject pothole was right in front of his home; that he was well aware of the existence of the hole, having struck it on several occasions; and that starting in July of 1978 and up to the date of the subject accident, he had personally made 15 to 20 phone calls to respondent's headquarters in Barboursville complaining of the pothole and requesting that it be repaired. Respondent called no witnesses in defense of this claim.

The record certainly reflects, by a preponderance of the evidence, that respondent had actual notice of the existence of this

pothole. The failure of respondent to remedy this defect in Norway Avenue constitutes negligence, and we thus make an award in favor of claimant in the amount of $188.74.

Award of $188.74.

Opinion issued November 19, 1979

WEIRTON GENERAL HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-292)

No appearance by claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted upon the pleadings by the parties, the claimant seeks payment of the sum of $4,323.05 for services rendered to an inmate of the Hancock County Jail under the custody of the respondent.

In its Answer, the respondent admits the allegations of fact set forth in the Notice of Claim, but further states that the services were rendered during the year 1978, but the bill for said services was not presented for payment until the next fiscal year. The proper fiscal year had expired and the bill could not then be paid. Sufficient funds were available with which to pay for the services had the bill been presented in the proper fiscal year.

Based on the foregoing facts, an award in the amount of $4,323.05 is hereby made to the claimant.

Award of $4,323.05.

Opinion issued November 21, 1979

F. WILLIAM BROGAN, JR.

vs.

OFFICE OF THE STATE AUDITOR*

(CC-79-229)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant F. William Brogan, Jr., an attorney at law from Weirton, West Virginia, served as Mental Hygiene Commissioner by appointment of the Circuit Court of Hancock County pursuant to the provisions of West Virginia Code, Chapter 27, Article 5. This statute provides for the payment of mental hygiene commissioner fees out of the "mental hygiene fund" by the State Auditor. West Virginia Code §27-5-4(i). Claimant's fees, in the total amount of $3,957.50, were denied by the respondent because the fund was exhausted.

The factual situation in this claim is identical to that in *Richard K. Swartling, et al. v. Office of the State Auditor*, issued on November 5, 1979. Accordingly, an award in the amount of $3,957.50 is made to the claimant.

Award of $3,957.50.

*The Court issued per curiam decisions in accordance with this decision granting awards to claimants who also served as mental hygiene commissioners. The following is a list of those claimants and the awards granted.

John J. Droppleman	$ 454.25
John S. Folio	462.50
R. R. Fredeking, II	11,780.00
John S. Holy	2,675.00
Jerald E. Jones	1,120.00
Michael B. Keller	718.75
Royce B. Saville	487.50
James E. Seibert	2,864.00
Kennad L. Skeen	633.20
James A. Varner	181.50
Paul A. Viers	400.00

Jack H. Walters 240.00
Boyd L. Warner 1,728.00
Stephen Jon Ahlgren 347.50
Dennis V. Dibenedetto 600.00
Grover C. Goode 1,225.00
John C. Higinbotham 4,300.00
J. Burton Hunter, III 1,232.70
Carroll T. Lay 270.00
Clyde A. Smith, Jr. 1,311.00
Ward D. Stone, Jr. 4,025.00
Charles J. Hyer 1,900.00
J. P. McMullen, Jr. 2,771.33
Lawrance S. Miller, Jr. 1,263.69
David B. Cross 1,032.50
Larry N. Sullivan 4,580.00
Gilbert Gray Coonts 2,300.00
G. F. Hedges, Jr. 690.00
J. K. Chase, Jr. 2,150.00
John M. "Jack" Thompson, Jr. 2,485.00
Ralph D. Keightley, Jr. 1,412.50
Lawrence B. Lowry 775.00
Thomas M. Hayes 4,610.00
Boyd L. Warner 327.00
W. Del Roy Harner 3,650.00
Linda Nelson Garrett 2,216.14
John B. Breckinridge 200.00
Stephen A. Davis 2,018.50
Robert C. Melody 2,350.00
Robert A. Burnside, Jr. 412.00
David L. Parmer 517.50
Marvin L. Downing 423.00

Opinion issued November 21, 1979

DACAR CHEMICAL CO.

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-556)

No appearance on behalf of claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $110.00, representing one month's service under its monthly service contract with the Huttonsville Correctional Center.

In its Answer, the respondent admits the allegations of fact set forth in the Notice of Claim, but further alleges that there were no funds remaining in the respondent's appropriation for the fiscal year in question from which the obligation 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. Department of Mental Health,* 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued November 21, 1979

XEROX CORPORATION

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-588)

No appearance on behalf of claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $1,050.66, representing the amount due on two invoices issued to respondent for Xerox equipment rental.

In its Answer, the respondent admits the allegations of the Notice of Claim, and states further that there were no funds remaining in the respondent's appropriation for the fiscal year in question from which the bills 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. Department of Mental Health*, 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued November 28, 1979

BENEFICIAL MANAGEMENT
CORPORATION OF AMERICA

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-299)

No appearance by the claimant.

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

RULEY, JUDGE:

James DeCarlo filed this claim against the respondent on behalf of his son, David J. DeCarlo. However, during the hearing it developed that the damages claimed were sustained by an automobile leased by Beneficial Management Corporation of America, and the Court amended the claim to name the corporation as claimant.

Mr. DeCarlo testified that his son, David DeCarlo, had an accident on November 5, 1978, while driving a 1976 Cougar automobile which was leased to Beneficial, the elder DeCarlo's employer. The accident occurred at the intersection of Secondary Highway 6/4 and River Park Circle Subdivision in St. Albans, West Virginia. David DeCarlo, the driver of the vehicle, did not testify. Mr. DeCarlo testified that vision at the intersection was impaired by hedges.

Certain photographs were introduced on behalf of the claimant and the respondent. Claimant's Exhibit No. 1 depicts the hedges and discloses a utility pole in the background in line with the hedges.

Doyle Thomas, Maintenance Supervisor for the respondent in Kanawha County, testified that he was familiar with the intersection where the accident occurred. He stated that the hedges were on the property line and not maintained by the respondent. He did not know to whom they belonged and stated that no complaints had been received about the hedges.

In his testimony, Mr. DeCarlo stated that a monetary award was secondary and asked the Court's assistance in improving the visibility at the intersection where the accident occurred. Of course, such relief is beyond the jurisdiction of this Court, its

jurisdiction being limited to granting or denying a monetary award. In addition, since the evidence fails to establish negligence on the part of the respondent, this claim must be denied. Accordingly, the Court disallows the claim.

Claim disallowed.

Opinion issued November 28, 1979

DENNIS EDWARD CANTLEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-20)

Claimant appeared in his own behalf.

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

RULEY, JUDGE:

Claimant's wife was driving his car along Route 3 near Arnett, West Virginia, on December 4, 1978. She was returning from checking her mail when she ran over several rocks lying upon the pavement, thereby damaging the vehicle. The rocks had not been on the road earlier that day when she drove to Arnett. Her testimony disclosed that, immediately before the collision, a van in front of her travelling in the same direction had swerved suddenly, and apparently avoided striking the rocks. Immediately after the collision, oil began to leak from claimant's car. Mrs. Cantley then drove the car three or four miles to get the oil replaced. The car then would not start and the claimant's wife had it towed to a service station. At the service station the attendants repaired the oil pan, and the car started, but it ran with unusual engine noise. Mrs. Cantley attempted to drive the car home, but it broke down again, and the Cantleys had to have it towed to their home. Claimant seeks damages in the amount of $500.00 as compensation for a replacement engine, oil, and towing charges.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims,* 130 W.Va. 645 (1947). To be found liable, the State must have had either actual or constructive notice of the particular hazard which caused the

accident. *Davis v. Dept. of Highways,* 12 Ct. Cl. 31, (1977). No evidence indicating notice, or the prolonged existence of this hazard, came forth in this case. To the contrary, Mrs. Cantley's uncontroverted testimony leads to the conclusion that the rocks had fallen only a short time before the collision occurred. Without notice of the hazard caused by the rocks and a reasonable opportunity to remove them, the respondent cannot be held liable. Accordingly, the claim must be denied.

Claim disallowed.

Opinion issued November 28, 1979

DAVID A. CARROL

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-300)

Claimant appeared in person.

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

WALLACE, JUDGE:

On or about December 8, 1978, at 6:30 p.m., the claimant was proceeding in an easterly direction on State Route 50/37, commonly referred to as the Murphytown Road. It was dark and a little rain was falling, although it had been raining hard a little earlier. The road at the point of the accident is a two-lane asphalt road, descending slightly as one proceeds in an easterly direction. On the north side of the road is a hillside which is interspersed with rock ledges, and a wide berm is on the southerly side of the road.

Claimant testified that he was operating his 1957 Chevrolet automobile at a speed of about 40 miles per hour when he observed rocks not only on the road, but also falling from the hillside on the north side of the road; that one large rock in particular rolled directly into his lane of travel, and that he was unable to avoid striking it. As a result, according to the claimant, the entire front end of his automobile was demolished. An estimate from Wharton Cadillac-Olds Co. of Parkersburg was introduced into evidence reflecting damages in the amount of $240.00. The claimant's

testimony as to the facts of the accident was corroborated by a guest passenger in his vehicle, Mary Hayes. The claimant contended that respondent was negligent in failing to erect any signs warning motorists of the danger of falling rocks and failing to bench the hillside, which, of course, is one method of avoiding the possibility of rock slides.

Vernon Marlow, respondent's Wood County Superintendent, testified that he was notified of the rock slide through phone calls and that he personally went to the scene and supervised the removal of the rocks and other debris from the road. He confirmed the claimant's testimony that there were no warning signs posted in the area, but, in explanation, he stated that they had never experienced any difficulty with rock slides in this particular area. Elden M. Guinn, Jr., an employee of respondent who performed the removal of the rocks from the road with an endloader, confirmed Mr. Marlow's testimony, indicating that during his prior tenure of employment of 2½ years with respondent, no problems with rock slides in this area had arisen.

This Court has, through the years, been presented with claims of a similar nature, and, with few exceptions, has declined to make awards primarily on the basis that respondent is not an insurer of motorists using the highways of this State. Awards have been made in some claims when it has been demonstrated that the Department of Highways knew or should have known that a particular area of highway was dangerous because of frequent rock slides, and failed to take adequate precaution to remove the hazard or warn motorists. This Court is of the opinion that the claimant has failed to establish by a preponderance of the evidence the necessary elements of liability on the part of respondent. See *Hammond v. Department of Highways,* 11 Ct. Cl. 234 (1977), and cases cited therein. For the reasons hereinabove expressed, this claim is denied.

Claim disallowed.

Opinion issued November 28, 1979

WENDELL DUNLAP

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-61)

Beverly Sharon Dunlap appeared on behalf of the claimant.

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

RULEY, JUDGE:

This claim was originally filed in the name of Beverly Sharon Dunlap, but at the outset of the hearing, it developed that the car that was damaged as the result of the incident hereinafter set forth was owned by her husband, Wendell Dunlap. The Court, on its own motion, substituted Mr. Dunlap as the claimant, he being the real party in interest.

Mrs. Dunlap, the only witness who testified at the hearing, related that at about 6:00 p.m. on January 17, 1979, she was proceeding in a westerly direction on Interstate 64 en route from Belle, West Virginia, to her home in Alum Creek, and was nearing the Greenbrier Exit in Charleston. She testified that she was operating her husband's 1972 Monte Carlo automobile at a speed of about 50 miles per hour when she observed a large rock rolling from the hillside to her right. Believing that the rock would be caught in the ditch line, she moved to her left and nearer to the center line. Unfortunately, the rock was not caught in the ditch line, and rolled directly into the path of her vehicle. Due to the presence of other traffic, she was unable to avoid striking the rock. As a result, her husband's car, which at the time had a fair market value of $1,500.00, was rendered a total loss. According to Mrs. Dunlap, she had no knowledge of rocks ever having fallen from the particular area of hillside adjacent to Interstate 64.

No evidence was introduced that the respondent was on notice or had any reason to anticipate that this particular rock, or any rocks in the area, would suddenly break away from the hillside and fall into the highway. For this reason, and in accordance with prior opinions of the Court, we must deny this claim. See *Hammond v.*

Dept. of Highways, 11 Ct. Cl. 234 (1977) and *Collins v. Dept. of Highways*, 13 Ct. Cl. 22 (1979).

Claim disallowed.

Opinion issued November 28, 1979

JAMES L. MEADOWS

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-126)

Claimant appeared in his own behalf.

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

RULEY, JUDGE:

Between 5:30 and 6:30 on the evening of February 24, 1979, the claimant, James L. Meadows, was operating his 1978 Oldsmobile in a southerly direction on Route 20 in Upshur County. He was about three miles south of Buckhannon, West Virginia. It was dark and raining, and traffic was heavy. He testified that he was travelling at a speed of less than 25 miles per hour when he hit a chuckhole violently, "the worst I had ever hit in my experience."

As a result of striking this chuckhole, both the front and rear tires on the right side of his car were ruptured and both rims were bent, and Mr. Meadows estimated that his total damage was in the amount of $153.68. He did not return to the scene of the accident, and was therefore unable to testify as to the size of the chuckhole or its exact location in the road. No admissible evidence was introduced at the hearing to establish that respondent had knowledge, either actual or constructive, of the existence of this particular chuckhole.

In view of the fact that as a matter of law the respondent is not an insurer of those using the highways of this State, and no evidence having been presented to establish notice, we are of the opinion that the claimant has failed to establish his claim by the necessary preponderance of the evidence, and, accordingly, this claim is denied.

Claim disallowed.

Opinion issued November 28, 1979

CHARLES P. MOORE

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-71)

Claimant's wife, Carsie K. Moore, appeared on behalf of claimant.

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

WALLACE, JUDGE:

This claim was originally filed by Charles P. Moore and Carsie K. Moore, the latter being the only witness who testified in the claim, and when it was developed through her testimony that the car, a 1974 Mercury Montego, was titled in the name of her husband, Charles P. Moore, she was dismissed as a party claimant on the Court's own motion.

Mrs. Moore testified that on or about the 23rd day of January, 1979, at about 3:40 p.m., she was taking her son to basketball practice at Winfield High School and was travelling on State Route 35. According to her testimony, the roads were slick and snowy. During the trip, she passed what she thought to be a truck belonging to respondent, which was proceeding in the opposite direction on State Route 35. The truck was throwing cinders, and as the two vehicles passed each other, a cinder or rock was thrown against Mrs. Moore's windshield and cracked it. An estimate of the cost for replacement of the cracked windshield in the amount of $174.90 was admitted into evidence.

In addition to being unable to identify the subject truck as being a vehicle owned and operated by the respondent, Mrs. Moore was unable to relate in her testimony whether the object that cracked her windshield came from the bed of the truck, was thrown from the bed of the truck by a person spreading cinders, or was possibly thrown into the windshield by the tires of the truck. Because the claimant has failed to establish by a preponderance of the evidence that the windshield was damaged as a result of some act of negligence on the part of respondent, this claim must be disallowed.

Claim disallowed.

Opinion issued November 28, 1979

IRVING ROBINSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-31)

Claimant's son, Casey J. Robinson, appeared on behalf of claimant.

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

GARDEN, JUDGE:

On December 25, 1978, the claimant's car, a 1978 Chrysler Cordoba, was being operated by his son, Casey J. Robinson, in a northerly direction on Campbell's Creek Drive in Kanawha County, West Virginia. The incident hereinafter described occurred shortly after midnight. The weather conditions were bad and the road was icy, according to the claimant's son, because of drainage problems in the area. Campbell's Creek Drive in the vicinity of the accident is a narrow two-lane road of concrete construction.

Claimant's son testified that he was driving at a speed of 15 or 20 miles per hour when the right front and rear wheels of the automobile struck a pothole which he did not observe until he struck it, partly because the hole was filled with water. His testimony also established that the pothole extended from the berm on the east side of the road to at least 24 inches into the roadway, and was at least 6 to 8 inches in depth. He further testified that he was unaware of the presence of the pothole, not having used this particular road for a period of four or five months before the accident. Several companions of claimant's son, who were passengers in the car, corroborated his testimony in all material respects. Gloria Sue Ramsey testified that, while she did not witness the subject accident, she lived within four or five miles of the scene of the accident and was aware that the pothole had been in existence for a couple of months prior to the accident. Ms. Ramsey gained this knowledge as a result of going to and from school on a daily basis over this period of time. She added that she had never reported to the respondent the existence of the subject pothole.

The respondent is not an insurer of the safety of motorists using the highways of this State, and since the claimant has failed to

establish that the respondent had knowledge (either actual or constructive) of the existence of this pothole, the claimant's claim for damages in the amount of $211.28 must be denied.

Claim disallowed.

Opinion issued November 28, 1979

JOSEPH RAYMOND SNYDER
and SARAH SNYDER

vs.

DEPARTMENT OF HIGHWAYS

(CC-76-100)

John F. Somerville, Jr., Attorney at Law, for claimants.

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

WALLACE, JUDGE:

This claim was filed by Joseph Raymond Snyder against the respondent. During the course of the hearing, it developed that the property alleged to have been damaged was owned by Joseph Raymond Snyder and his wife, Sarah. The Court amended the claim to include Sarah Snyder as a claimant.

The claimants seek recovery in the amount of $4,020.00 for damages to the aluminum siding on their house, and to trees, shrubbery, and a vegetable garden, allegedly resulting from the negligent spraying by respondent of an herbicide during routine maintenance operations conducted along Route 28 in the vicinity of Ridgeley, Mineral County, West Virginia.

On May 5, 1975, employees of the respondent were engaged in weed control operations along the right of way of Route 28. Utilizing a weed killer, identified as a solution of three parts each of HY-VAR XL and 2-4-D to 100 parts water, they were spraying under guardrails, around road signs, mailboxes, and along drainage ditches. The claimants' house is located approximately 50 feet from Route 28, between the towns of Ridgeley and Wiley Ford, and faces easterly towards the highway. The respondent sprayed the mouth of a drainage ditch and around the base of a speed limit sign in the immediate vicinity of the claimants' property. There is a

natural drainage ditch located on a neighbor's property which runs perpendicular to the highway and slopes easterly down towards the road, where it empties into a culvert maintained by the respondent. The measured distance from this culvert to the southeast corner of the claimants' house was 100 feet. Mr. Snyder testified that he was told by a neighbor that he, the neighbor, paid the spraying crew a few dollars to leave the highway and spray an additional 30 feet up the drainage ditch. This was denied by Archie Self, a member of the spraying crew, who testified that the spray was applied only around the base of a speed limit sign and the mouth of the ditch.

The claimants contend that the respondent was negligent in applying the chemical by allowing an overspray of the weed killer to drift onto the aluminum siding on the north and south sides of their house, resulting in such severe discoloration and fading as to necessitate replacement on those sides of the house. The claimants further contend that the overspray of the weed killer destroyed several trees, hedges, climbing rose bushes, and a vegetable garden.

David G. Rearick, a qualified expert in horticulture, testified on behalf of the respondent. He stated that he inspected the claimants' property some three years after the time of the spraying, and if there had been such spray damage as that claimed by the claimants, it would still be evident and discernible. It was his opinion that there was no damage consistent with that normally caused by HY-VAR XL and 2-4-D, and that the solution used by the respondent, unless applied directly, would not result in extensive damage to the plants and garden of the claimants.

The claimants presented a letter from the technical manager of the manufacturer of the aluminum siding used by the claimants on their home. The letter states that the effect of HY-VAR XL and 2-4-D, when coming into contact with aluminum siding, will soften the protective coating and cause permanent staining. It was stipulated at the hearing that the writer of the letter had not inspected the house, nor was familiar with any of the circumstances of this claim. Further, the letter was lacking in such highly probative information as the amount, relative concentration, and external conditions under which the chemical solution will produce the stated detrimental effect.

After careful consideration of the record, it is the opinion of the Court that all the evidence and testimony adduced at the hearing

establish merely the possibility of a causal connection between the use of the weed killer and the alleged damages. The evidence is not sufficient and does not warrant a conclusion that the damages claimed resulted from any act of the respondent. For the reasons stated, the Court is of the opinion to, and does, disallow the claim.

Claim disallowed.

Opinion issued November 28, 1979

JOHN H. WARD and NANCY L. WARD

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-65)

Claimants appeared in person.

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

GARDEN, JUDGE:

This claim was originally filed in the name of John H. Ward, but when the testimony disclosed that the damaged automobile, a 1977 Datsun, was titled in the joint names of the claimant and his wife, Nancy L. Ward, the Court on its own motion joined Nancy L. Ward as an additional claimant.

Mrs. Ward testified that she was driving the Datsun automobile on Route 52 on the morning of January 24, 1979, on her way to work from her home in Milton, West Virginia. It was about 7:15 a.m. and it was raining and still dark. Mrs. Ward stated that her headlights were burning and that she was travelling at a speed of about 40 to 45 miles per hour when the right front and right rear wheels of her vehicle struck a pothole located on the right-hand side of her lane of travel. She testified that she was personally unaware of the existence of the hole and did not see it prior to the impact, possibly because it was filled with water. As a result, the Wards' automobile sustained damage in the amount of $328.03.

Claimant, John H. Ward, a detective with the Huntington Police Department, testified that he was notified of the incident by his wife after she arrived at her place of employment, and that he proceeded to the scene of the accident, arriving at about 10:00 a.m. By the time he arrived, the respondent had filled the hole with

gravel, but he made measurements and took pictures of the hole, which photographs were admitted into evidence. Mr. Ward testified that his measurements revealed that the hole was seven feet, three inches in length and one foot, eleven and one-half inches in width.

Some hearsay evidence disclosed that this pothole had existed for some time prior to the date of the accident, but no competent evidence established that respondent knew or should have known of the existence of the hole and failed to take any remedial action to repair it. Therefore, and because the respondent as a matter of law is not an insurer of motorists using the highways of this State, we must decline to make an award.

Claim disallowed.

Opinion issued December 11, 1979

APPALACHIAN ENGINEERS, INC.

vs.

DEPARTMENT OF HEALTH,
DIVISION OF MENTAL HEALTH

(CC-79-502)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $1,325.00 for engineering and consultant services performed for respondent. In its Answer, the respondent admits the validity of the claim and states that the claimant would have received the sum requested, were it not for the close of the fiscal year. During that fiscal year, funds were available in respondent's appropriation from which the claim could have been paid.

In view of the foregoing, the Court hereby makes an award to the claimant in the amount of $1,325.00.

Award of $1,325.00.

Opinion issued December 11, 1979

RUSSELL LEE BARKLEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-187)

William M. Miller, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

On the afternoon of August 12, 1976, the claimant, having finished his workday in Thomas, West Virginia, was returning to his home in Parsons, West Virginia. He was traveling in a southerly direction on State Route 219, operating a Suzuki 380 motorcycle which he had purchased new for a price of about $1,100.00. At the time of the accident, he was heading down a rather mountainous stretch of Route 219, had just negotiated a turn, commonly referred to by denizens of the area as "Wild Mackey Turn", and was proceeding on a descending, relatively straight stretch of road. Claimant testified that he was traveling at a speed of 50 miles per hour and that the posted speed limit was 55 miles per hour. As he entered a shaded section of the road, he suddenly encountered, in his lane of travel, three or four "bumps or humps" which were from eight to ten inches in height. He stated that he saw these bumps or humps when he was three or four feet from them, and that, while he applied his brakes, he was unable to avoid striking them. As a result, he was thrown from his motorcycle, and both he and the motorcycle slid on the aspnalt roadway some 50 feet. The claimant suffered lacerations and abrasions to his hands, arms, and legs, and the motorcycle was badly damaged. Claimant was taken from the scene of the accident to his home in Parsons, and from there to the Memorial General Hospital in Elkins where he was treated for his injuries. There was no testimony to the contrary; therefore, the Court assumes that his recovery was uneventful and that the injuries were not permanent in nature.

Claimant further testified that he returned home, and, accompanied by his wife, went back to the scene of the accident. He stated that there were no signs erected either north or south of the accident site warning motorists of a construction area. Mary Jane Barkley, the claimant's wife, testified and confirmed her husband's testimony with regard to the absence of signs and the existence of the three or four bumps or humps in the road. Charles Lansberry also testified on behalf of the claimant, stating that he saw the claimant and his wife at the accident scene shortly after 6:00 p.m., and, at that time, the claimant was bandaged and covered with tar. He, too, confirmed the absence of any signs and the existence of the bumps or humps. Mr. Lansberry further stated that he had driven over this particluar road two days prior to claimant's accident and had observed these bumps. He said that "it was pretty rough".

Robert Cooper, a foreman for respondent in Tucker County, testified that he was in charge of a crew working on Route 219, and they were straightening two curves in the road just south of the point of the accident. He indicated that this work was started in the spring of 1976 and was not completed until sometime subsequent to the accident date. Mr. Cooper stated that "Construction Area Ahead" signs were posted on the date of the accident, one of which was for southbound traffic placed just after "Wild Mackey Turn". He further stated that "Rough Road" signs had been erected in the area, but they had been removed prior to the date of claimant's accident. He denied having any knowledge of the existence of the bumps or humps as described by the claimant and his witnesses, although he indicated that the area where his crew was working on August 12 was 75 to 80 yards south of the accident scene.

Claimant testified that, in his opinion, the motorcycle had a fair market value of $900.00 on the date of the accident, but he expressed no opinion as to its value after the accident. An estimate of repairs from Parson's Indian Sales in the amount of $673.40 was introduced into evidence. No medical expenses were incurred, the same having been paid by welfare. Claimant was earning $3.00 per hour at his place of employment in Thomas and was unable to work for six days. His loss in wages amounted to $144.00.

We are of the opinion that the evidence in respect to the negligence of the respondent preponderates in favor of the claimant. In addition, the respondent's failure to maintain this particular portion of Route 219 in a reasonably safe condition and its failure to erect any signs to warn motorists of the unsafe condition of the road constituted negligence. On the other hand,

the Court is of the further opinion that the claimant was guilty of negligence. He traveled this road five times a week, and certainly knew, or should have known, of the construction going on in this particular area and the rough condition of the road. Yet, he proceeded down this mountainous road on a motorcycle at a speed of 50 miles per hour. If the West Virginia Supreme Court of Appeals had not, on July 10, 1979, judicially embraced the doctrine of comparative negligence in the case of *Bradley v. Appalachian Power Company*, 256 S.E. 2d 879 (1979), we would deny recovery on the basis of the claimant's contributory negligence. While the claimant was, in our opinion, negligent, such negligence did not equal or exceed the negligence of the respondent. The Court believes that the respective negligence of the parties is as follows: claimant - 40 per cent, and respondent - 60 per cent.

The Court is of the further opinion that this claim, considering claimant's pain and suffering, the damage to his motorcycle, and his loss of wages, has a value of $1,800.00. Reducing this figure by 40 per cent, we hereby make an award to the claimant in the amount of $1,080.00.

Award of $1,080.00.

Opinion issued December 11, 1979

JOHN F. CLARK

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-338)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $71.93, based upon the following facts.

On or about June 12, 1979, claimant was operating his Pontiac automobile on West Virginia Route 60 at Chimney Corner, Fayette County, West Virginia, a highway owned and maintained by the respondent.

In the course of said operation, claimant's vehicle crossed over a traffic counter which had been placed across the highway by the respondent. The hose portion of the traffic counter broke, wrapped around claimant's right front tire, and damaged said tire beyond repair. This occurred because of the negligence of the respondent, which negligence was the proximate cause of the damages suffered by the claimant. Respondent is therefore liable to the claimant for the sum of $71.93, which is a fair and equitable estimate of the damages sustained.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $71.93.

Opinion issued December 11, 1979

CARL DUNN and VIRGINIA DUNN

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-42)

Claimants appeared in person.

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

GARDEN, JUDGE:

On December 5, 1978, the claimant Virginia Dunn was operating a Ford Granada, which was titled in her name and in the name of her husband, Carl Dunn, the co-claimant in this case. Mrs. Dunn was proceeding on W. Va. Route 3 (commonly referred to as Whitman Road) when the left front wheel of the car struck a pothole which was later measured to be at least three feet, two inches in width, an equivalent distance in length, and about six inches in depth. As a result of striking this hole, the claimant lost control of her car and struck and damaged the fencing of a trailer court located on the right-hand side of the highway.

As a result of striking this pothole, the existence of which claimant quite candidly admitted she was aware, damages in the amount of $1,081.21. were sustained by claimants' car. While admitting that she was aware of the existence of the hole, the

claimant opined that she didn't realize how deep it was. Some evidence was introduced that notice of the existence of this pothole had been transmitted to the respondent prior to claimant's accident, but, in the Court's opinion, this evidence fell short of the necessary evidentiary preponderance upon which this Court could predicate liability, particularly, as in this case, where the claimant admitted prior knowledge of the existence of this pothole. For the reasons expressed above, this Court must disallow this claim.

Claim disallowed.

Opinion issued December 11, 1979

EMPIRE FOODS, INC.

vs.

OFFICE OF THE GOVERNOR-
EMERGENCY FLOOD DISASTER RELIEF

(CC-79-447)

Paul Zakaib, Jr., Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GARDEN, JUDGE:

As a result of the severe flooding in the Williamson area in April of 1977, the respondent purchased food and other commodities from the claimant for delivery by claimant to the flood-stricken residents. Claimant invoiced the respondent for a total of $20,610.22 for this merchandise, which sum was paid by respondent to the claimant.

Included in this merchandise were several thousand gallons of milk, which claimant purchased from Broughton's Farm Dairy, and 5,000 loaves of bread, purchased by claimant from the Purity Baking Company. The milk was delivered by claimant in 900 large durable plastic cases owned by Broughton, and the bread, in 468 similar cases owned by Purity. It was understood between claimant and respondent that, after delivery of the milk and bread, the cases would be collected at a central point by respondent and would thereafter be picked up by claimant. For reasons not fully disclosed by the record, the claimant recovered only 69 of the milk cases and 128 of the bread cases. As a result, Broughton invoiced

claimant for the remaining 340 cases at a cost of $3.20 per case, or a total of $1,088.00, and Purity invoiced claimant for the remaining 831 bread cases at a cost of $2.50 per case, or a total of $2,077.50.

Claimant, in turn, requested payment of these sums by respondent, which request was refused. Respondent took the position that the original invoices did not include or indicate the delivery of milk or bread cases, and that purchasing regulations prevented them from paying for any item where proof of delivery was not furnished. Claimant therafter filed its claim in this Court.

The Court is of the opinion that the record clearly establishes the delivery and non-return of the milk and bread cases in accordance with the agreement between the claimant and respondent. Claimant is therefore entitled to an award in the total amount of $3,165.50 so that it might make proper restitution to Broughton and Purity.

Award of $3,165.50.

Opinion issued December 11, 1979

ERIE INSURANCE GROUP,
SUBROGEE OF FRANK R. GODBEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-89)

Claimant appeared in person.

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

WALLACE, JUDGE:

At approximately 6:10 p.m. on January 27, 1979, the claimant, Frank R. Godbey, was operating his 1973 Buick automobile in a westerly direction on Interstate 64 between the Institute and Cross Lanes exits in Kanawha County, West Virginia. The claimant testified that it was starting to snow and the road was wet. About a mile ahead of him, claimant saw a truck with the back end raised, spreading salt. As the claimant proceeded around the truck in the passing lane, the side of his car and the windshield were pelted with salt. Claimant then took the Cross Lanes exit and went home.

Upon arriving home, he noticed a four-inch crack in the windshield of his automobile. This he attributed to the salt-spreading truck which, he testified, belonged to the Department of Highways.

In order for the claimant to recover in this case, it must be established that negligence on the part of the respondent was the proximate cause of the damages suffered by the claimant.

This Court has recognized that the respondent is under a legal duty to keep the highways of this State in a reasonably safe condition, and, at times, it becomes necessary for the respondent to create temporarily hazardous conditions, against which the respondent must adequately warn the public. *McArthur v. Dept. of Highways*, 10 Ct. Cl. 136 (1974). If the truck in the instant case were creating a hazardous condition by spreading salt upon the highway, the evidence discloses that adequate warning was being given. The claimant himself testified that the truck "had a flasher" and was travelling "slower than 40 miles per hour."

Even if the respondent were found to be negligent in some way, the actions of the claimant bar recovery. The claimant was fully aware of the position of the vehicle ahead. He testified, "The back end was raised up so high that I hadn't seen them that high before," yet claimant proceeded to pass the vehicle.

To operate a motor vehicle in the face of visibile hazards of which a driver is aware, or, in the exercise of reasonable care, should be aware, is to assume a known risk. This bars recovery. *Swartzmiller v. Dept. of Highways*, 10 Ct. Cl. 29 (1973).

In accordance with the foregoing, this claim must be denied.

Claim disallowed.

Opinion issued December 11, 1979

MARTIN V. GASTON, SR.

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-37)

Claimant appeared in person.

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

GARDEN, JUDGE:

At about 2:15 a.m. on July 16, 1978, the claimant's son, Martin V. Gaston, Jr., was operating his father's 1971 Pontiac automobile in a westerly direction on I-64 in Charleston and was preparing to turn off I-64 at the Oakwood exit. It was raining hard, and, in fact, had been raining since about 7:00 the evening before. In order for a westbound motorist on I-64 to use the Oakwood exit, a right turn must be made. The exit then descends rather sharply and turns to the left and then on to Oakwood Road.

Young Gaston testified that he had been traveling at a speed of about 50 miles per hour on I-64 but was decelerating when he made his right turn onto the exit ramp. Upon entering the ramp, he suddenly struck a large accumulation of water which caused his car to hydroplane. As a result, he lost control of the car and struck the wall located at the right of the exit ramp, causing damage to the front end of the car, the repair of which cost the claimant the sum of $927.00. Young Gaston testified that the water was from one to two feet in depth and extended the entire width of the exit ramp for at least 15 yards. He indicated that, while he traveled this exit ramp two or three times daily, he had never seen an accumulation of water on the ramp. As a result of the accident, he suffered a laceration over his left eye for which he was treated at the Charleston Area Medical Center. He was also x-rayed by Associated Radiologists in the Medical Arts Building. The testimony established that the injury was not permanent in nature.

Officer R. R. Ranson of the Charleston Police Department, appearing on behalf of the claimant, testified that he was on duty on the night of the accident, and, in the course of his duties, had observed the accumulation of water at the accident scene. He testified that he first observed the water around 10:30 p.m. or 11:00 p.m. and again between 12:30 a.m. and 1:00 a.m., and on each

occasion, he had notified his communication center and had advised them of the hazardous condition. Officer Ranson was then radioed back that the respondent had been notified of the condition of the exit ramp. Apparently, the respondent failed to take any steps to rectify the situation or erect any type of warning device. The respondent presented no evidenced in the defense of the claim.

This Court is of the opinion that the claimant has established by a preponderance of the evidence that respondent was aware of the hazardous condition at the exit ramp, and that respondent's failure to take any action to eliminate the water or warn motorists of the presence of the same constituted a failure to keep the exit ramp in a reasonably safe condition. Therefore, the respondent was guilty of negligence. The Court further feels that the record fails to disclose any negligence on the part of young Gaston.

The claimant testified that insurance paid the bill of the Charleston Area Medical Center, but he personally paid a $15.00 charge for Associated Radiologists and the car repair bill of $927.00. For the reasons herein expressed, the Court makes an award in favor of the claimant in the amount of $942.00.

Award of $942.00.

Opinion issued December 11, 1979

ROBERT STEPHEN LOWE

VS.

DEPARTMENT OF HIGHWAYS

(CC-78-254)

Claimant appeared in person.

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

GARDEN, JUDGE:

In January of 1977, the claimant purchased a 62-acre parcel of ground from Mr. and Mrs. Gay Crihfield, which property was located on State Route 58 near Amma in Roane County, West Virginia. Situate on the property was a residence with a well, two meadows, and a pond. In May of 1977, the well, which was

claimant's only source of water, went dry. Thereafter, claimant drilled a new well, and incurred additional expenses in obtaining a temporary water supply, which came to a total amount of $634.18. Claimant seeks an award in that amount from respondent on the theory that, during the years 1970-1972, the respondent had conducted stone quarrying on the property within 70 feet of the subject well, and as a result, the well went dry in May of 1977.

Without discussing the issues of causation and statute of limitations, we must disallow this claim by reason of the complete failure of the claimant to establish, by a preponderance of the evidence, that the respondent or any of its agents conducted the quarrying operations during the years mentioned above. On the other hand, the respondent introduced the testimony of Edward L. Lee, who, during the early 70's, was employed by Black Rock Contracting, Inc. as its assistant production manager. Mr. Lee testified that on August 14, 1970, on behalf of Black Rock, he entered into a written agreement with Mr. and Mrs. Crihfield which permitted Black Rock to quarry their property for a period of one year for a consideration of $100.00 and $.05 for each ton of stone that was removed from the property. The agreement, which was introduced into evidence, further provided that Black Rock had the option to renew the agreement after the expiration of the original one-year term, but Mr. Lee was unable to recall whether this option of renewal was exercised.

Mr. Lee further testified that, at the time, Black Rock did not have the necessary equipment to crush and process that stone, and, as a result, Black Rock subcontracted the work to State Construction, Inc. It was State Construction who actually did the work. Michael Norman, a right-of-way agent for respondent in District 3, also testified on behalf of respondent and stated that he had conducted a search of the records in his office and could find no documentation of quarrying work on the Crihfield property.

While the Court suspects that the quarrying work, with its attendant blasting, caused the claimant's well to fail, we must deny this claim because of the failure of claimant to establish any actionable negligence on the part of respondent.

Claim disallowed.

Opinion issued December 11, 1979

JOSEPH H. STALNAKER

vs.

DEPARTMENT OF WELFARE

(CC-79-157)

Carlton K. Rosencrance, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GARDEN, JUDGE:

At about 6:00 p.m. on March 4, 1979, the claimant parked his 1971 Pontiac automobile in front of a residence at 930 South Henry Avenue in Elkins, West Virginia. He left the key in the ignition switch and went into the residence at the above-mentioned address to visit his girlfriend and her parents. He remained in the residence for about ten minutes, and, upon emerging from the residence, he found that his car was missing. It was later determined that two young boys, Sam Saum and Kenneth Wilson, aged 15 and 14 respectively and both residents of the West Virginia Children's Home in Elkins, had stolen the car. After stealing the car, they were involved in an accident in Elkins. Young Saum became frightened and returned to the home, but young Wilson thereafter drove the car to Morgantown. There, it was involved in another accident which totally demolished the car. Claimant was of the opinion that the car had a fair market value of $1,500.00, and seeks an award on the basis of negligence on the part of employees of the respondent at the West Virginia Children's Home.

No evidence was introduced with respect to why these two young boys were on the streets of Elkins on the evening in question. Their absence from the Home, in and of itself, does not constitute proof of negligence on the part of the respondent. In addition, the negligence of the claimant in leaving his ignition key in the switch would appear to the Court to be the proximate cause of the damage to the claimant's automobile. Keys were left in the car in the recently-decided claim of *LePera v. Dept. of Corrections,* issued on October 31, 1979, wherein Judge Ruley used the following language in disallowing the claim:

> "The Court is of the opinion that negligence on the part of the respondent's supervisors has not been proved. Even if such negligence had in fact been established, it would not be

considered the proximate cause of the damage to the claimants' vehicle. Claimant Dixie Lee LePera testified that the keys had been left in the vehicle that evening. This negligent act on behalf of the claimants, in leaving the vehicle ready for any passer-by to convert to his own use, would be the proximate cause of any subsequent harm done to the vehicle."

For the reasons expressed herein, this claim must be disallowed.

Claim disallowed.

Opinion issued December 11, 1979

JAMES P. STEMPLE

VS.

DEPARTMENT OF WELFARE

(CC-79-331)

Caton N. Hill, Jr., Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GARDEN, JUDGE:

The claimant is the owner of a farm situated near Philippi in Barbour County, West Virginia, located one-half mile from the Sugar Creek Children's Center. Among other buildings on this farm was a small shed, used principally for the storing of hay during the winter months. On the 16th of February, 1979, the shed and its contents were destroyed by fire. An investigation which followed revealed that three juveniles who were living at the Children's Center had started the fire. The claimant testified that the hay which was destroyed had a value of $350.00. Claimant also introduced into evidence two competitive estimates for the rebuilding of the shed in the amounts of $2,627.02 and $2,300.00.

Emily A. Sturm, testifying on behalf of the claimant, stated that she was a co-director of the Home, a corporate, non-profit organization. She stated that the Home was licensed to care for children between the ages of 10 to 18; that most of the children were abused or neglected, but that a few of them had

experienced trouble with the law; that the children were placed in the Home by the respondent, and that the latter paid the Home on a per diem basis for taking care of each child.

Ms. Sturm testified that, on the day of the fire, all of the children at the Home had walked a distance of about two city blocks to a point where they were picked up by a school bus to be transported to school. The three youngsters in question, instead of boarding the school bus, decided to skip school and simply walk around. It was cold that day, and the three, seeking refuge from the cold, entered the claimant's shed, started a fire to get warm, thereby setting the blaze which destroyed the shed. While some disciplinary problems had been presented by these three boys, Ms. Sturm testified that she has no idea they did not intend to go to school when they left the Home on the morning of the fire. She stated that it was not the custom at the Home to accompany the children from the Home to the point where they boarded the school bus.

This Court, in the claim of *Tyre v. Department of Corrections*, issued January 9, 1979, attempted to review all prior decisions relating to damage and personal injury perpetrated by escapees from various institutions in this State. A review of that decision will demonstrate that this Court has always required proof of negligence on the part of the particular respondent, specifically, negligence in failing to exercise due care in restraining the inmates or residents so that they cannot escape from their place of confinement and commit acts of vandalism, property damage, or personal injury. Unfortunately, the record in this case is devoid of any evidence of such negligence on the part of respondent. Accordingly, this claim must be disallowed.

Claim disallowed.

Opinion issued December 11, 1979

MARY LOUISE SZELONG

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-79-111)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GARDEN, JUDGE:

The evidence disclosed that the claimant's automobile, a 1971 Toyota, was stolen from a parking lot at a Holiday Inn in Edinboro, Pennsylvania, by three juveniles from the State of New York during the evening of January 21, 1979. The three juveniles then proceeded south into West Virginia, and, between 5:00 p.m. and 6:00 p.m. on January 22, 1979, they attempted to rob a grocery store in the Clendenin area. Later, they successfully robbed a Rite-Aid pharmacy in Elkview, West Virginia.

After robbing the pharmacy, the three juveniles, still operating claimant's vehicle, proceeded south on Route 119 toward Charleston. Corporal S. W. Booth of respondent's Big Chimney detachment, having been furnished a description of claimant's vehicle, spotted the same and activated his cruiser's emergency flashers, siren, and blue light in an attempt to stop the southbound vehicle. Realizing that the car was not going to stop, Corporal Booth requested that a roadblock be set up at Newhouse Drive near Charleston. This was done by placing a tractor trailer across both lanes of Route 119. As the Toyota approached the roadblock, it veered to the right, and Corporal Booth, realizing that the car may avoid the roadblock, intentionally struck the right rear of the Toyota with the right front of his cruiser. This caused the Toyota to strike the rear of the tractor trailer. The juveniles were then apprehended, but, in the chase, the Toyota had been heavily damaged.

The respondent filed an Amended Answer admitting the allegations contained in the Notice of Claim and joined in the claimant's request that the claim be paid. This Court made an award in *Bradfield v. Dept. of Public Safety*, 10 Ct. Cl. 130, where the claimant's car was used by officers of the respondent

in forming a roadblock, and the car was damaged when struck by a car being driven by a suspected armed robber. While the facts in *Bradfield* are dissimilar to the present factual situation, the Court is of the opinion that this claim in equity and good conscience should be paid.

Claimant's husband testified that he had paid $1,100.00 for the car three or four months prior to the incident herein described, and that he later junked the car and obtained nothing in the form of salvage. Three repair estimates were introduced into evidence, all of which exceeded what we deem to be the fair market value of the car, namely, $1,100.00.

For the reasons expressed, an award is hereby made in favor of the claimant in the amount of $1,100.00.

Award of $1,100.00.

Opinion issued December 11, 1979

JOHN WILLIAMS

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-158)

Claimant appeared in person.

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

RULEY, JUDGE:

On the evening of March 20, 1979, at approximately 9:00 p.m., the claimant was operating his 1978 Mercury automobile on Route 123 in Mercer County, West Virginia, headed toward his home in Princeton. As he came out of a curve to his right, his car struck a pothole located on the righty-hand side of his lane of travel. Claimant testified that he was unaware of the existence of the hole and did not see the same before he struck it. An estimate of repairs in the amount of $340.79 was introduced into evidence.

Claimant further testified that, on the following day, he returned to the scene of the accident and, upon measurement,

ascertained that the hole was 4 feet wide, 3½ feet long and 11 inches deep at its deepest point. He also stated that on the same day, the 21st, he called respondent's headquarters in Princeton and reported the existence of the hole. The unindentified party with whom he spoke said that "they had had several reports on the hole." No evidence was introduced as to when these reports were received by respondent in relation to the date and time of claimant's accident.

The Court has on occasion made awards in pothole cases when it has been demonstrated that the respondent had knowledge, either actual or constructive, of the existence of a particular pothole. In cases where actual knowledge is established, the Court has required that the respondent, having received this knowledge, have sufficient time to repair the particular defect. Conceivably, the several reports received by respondent in this claim could have been received within an hour or two of claimant's report, and of course, would have been subsequent to claimant's accident. Accordingly, the Court must deny this claim.

Claim disallowed.

Opinion issued December 11, 1979

ROBERT CHRISTOPHER WISE

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-223)

Claimant appeared in person.

Richard Carlton, Attorney at Law, for respondent.

GARDEN, JUDGE:

At or about 9:45 p.m. on the evening of March 28, 1977, the claimant was operating his 1974 Chevrolet Nova automobile in a southerly direction on Route 214 in Kanawha County, West Virginia, approximately 10-12 miles south of the City of Charleston. Route 214 in this area is a two-lane blacktop road, and, according to measurement, is 21 feet in width. The claimant had just negotiated a slight turn to the right on a relatively level area of the road. The weather was clear and the road was dry.

The claimant testified that, as he emerged from the right-hand turn at a speed of about 40 miles per hour, he observed a large pothole on the right-hand side of his lane of travel about 30 feet in front of him. Upon seeing this pothole, the claimant turned his car to the left and into the northbound lane of travel, but, upon observing two northbound cars almost upon him, he turned his car back to the right. As a result, his right front and rear wheels struck the pothole. The car was then thrown to the left, and, in order to avoid the oncoming northbound cars, he again steered to the right. Apparently, he reached the right berm and lost control of the car. The vehicle then went to the left side of the road again, narrowly missing the second of the two northbound vehicles, struck a cut stone mailbox, proceeded further to the east, and overturned in a creek which meandered along the east side of Route 214. Claimant's car, in his opinion, had a fair market value on the date of the accident of $2,500.00. The car was completely demolished, but he did receive $100.00 for its salvage value. Claimant further indicated that he paid to the owner of the cut stone mailbox the sum of $100.00 as restitution for the damage the claimant inflicted on the mailbox.

Claimant testified that after the accident, he inspected the pothole and found it to be about 12 inches deep, from 18 to 24 inches wide, and about 18 inches long. Claimant testified that the hole had been filled two days after the accident. He further indicated that, while he traveled the road infrequently, he had never observed the hole prior to the accident. However, one of claimant's witnesses, John Graley, III, who was operating the second of the two northbound vehicles, testified that the hole had been in existence for at least a month and a half. Contrary to the testimony of the claimant, Mr. Graley stated that the pothole was located some 120 to 125 feet south of the point where a southbound motorist would have negotiated the right-hand turn.

Lewis Caruthers, one of respondent's foremen in Kanawha County, testified that in both January and February of 1977, his crew had spot-patched Route 214. In addition, Mr. Caruthers demonstrated through foreman's time sheets for March 7, 8, 9, and 10, 1977, the respondent was engaged in spot-patching on Route 214. He further stated that he was unaware of the existence of the subject pothole on or prior to the night of claimant's accident.

This Court has held, in a litany of cases, that the respondent is not an insurer of motorists using the highways of this State, but

only owes the duty to exercise reasonable care to maintain the highways in a reasonably safe condition. Claimant, although being unrepresented by counsel, presented his claim in a very thorough and capable manner. However, the Court is of the opinion that he failed to demonstrate by a preponderance of the evidence that the respondent knew or should have known of the existence of this pothole, and the claim must accordingly be disallowed.

Claim disallowed.

Opinion issued January 15, 1980

LISA A. STEWART

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-294)

JAMES A. STEWART

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-295)

MARY JO GOETTLER

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-328)

DEBORAH K. HUNT

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-349)

IRENE W. ROSS

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-400)

DOROTHY SPRINGER

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-432)

LORENA B. HOOVER

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-497)

GINNY L. MCCOY

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-506)

CHRISTINE L. BITNER

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-507)

ELIZABETH H. FIELD

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-521)

TERESA L. ANDERSON

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-602)

TERESA A. MEINKE

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-603)

JOHN L. CAMPBELL

vs.

OFFICE OF THE STATE AUDITOR*

(CC-79-702)

No appearance by claimants.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

All of the above-styled cases were filed by court reporters who performed reporting services in mental hygiene cases pursuant to the provisions of West Virginia Code, Chapter 27, Article 5. This chapter provides for the payment for such services from the "mental hygiene fund" upon Orders issued by the circuit courts in various counties. Claimants' fees for said services were denied by the respondent because the "mental hygiene fund" was exhausted.

The factual situations in these claims are identical to that in *Richard K. Swartling, et al. v. Office of the State Auditor*, issued on November 5, 1979. Accordingly, the Court hereby makes an award to each of the claimants in the following amounts:

Lisa A. Stewart	$ 30.00
James A. Stewart	267.00
Mary Jo Goettler	61.56
Deborah K. Hunt	175.00
Irene W. Ross	500.00
Dorothy Springer	59.00
Lorena B. Hoover	60.00
Ginny L. McCoy	285.00
Christine L. Bitner	275.00
Elizabeth H. Field	496.50
Teresa L. Anderson	50.00
Teresa A. Meinke	75.00
John L. Campbell	150.00

*Other per curiam decisions granting awards to court reporters

in accordance with this decision were issued by the Court. The following is a list of the claimants and the awards granted:

Merleen B. Campbell	$ 415.30
Jacqui Sites	60.00
Jeanne S. Hall	805.00
Glen K. Matthews	310.00
Colin Miller	370.00
Stenomask Reporting Service	3,184.39
Jennifer E. Vail	53.60
Mary L. Yost	1,000.00
Jacqui Sites	300.00
Virginia Y. Smith	408.00
Stenomask Reporting Service	50.00

Opinion issued January 21, 1980

ROBERT L. FERGUSON, EXECUTOR OF
THE ESTATE OF ELIZABETH L. FERGUSON, DECEASED

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-148)

Claimant appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

WALLACE, JUDGE:

This claim was filed against the respondent in the amount of $3,500.00 for damages to a home fronting on Coonskin Drive in Kanawha County, West Virginia.

Since the hearing of the claim, Elizabeth L. Ferguson has departed this life, and her son, Robert L. Ferguson, was appointed executor of her estate by the County Commission of Kanawha County, West Virginia, on October 9, 1979. Her claim is therefore revised in the name of her executor.

Coonskin Drive is maintained by the respondent. The evidence presented at the hearing revealed that 25 to 30 years ago, Coonskin Drive was rebuilt by the respondent. The elevation of the road was raised, and the area around the claimant's home was raised to the elevation of the road. Previous to this, when the floor of the

basement was even with the road level, a catch basin was constructed at the corner of claimant's lot about 12 feet from the road to dispose of drainage in the area. The construction left claimant's home lower than the adjoining properties.

Testimony indicated that homes in the vicinity of claimant's home are serviced by septic tanks which were apparently installed with improper drainage fields at a time when the health regulations were less stringent. The record indicates that the catch basin was not open and did not function properly to carry off the area drainage. As a result, surface water from the highway and drainage from the septic tanks, instead of flowing through the catch basin, flowed onto claimant's property, causing damage to the walls and floor of claimant's basement.

It is therefore apparent that the damages were caused by the failure of the respondent to maintain proper drainage. Over the years, the problem worsened, and although complaints were made, no effort was made by the respondent to correct it.

Accordingly, the Court hereby makes an award in the amount of $5,000.00 for damages to claimant's home. Estimates of damage introduced exceeded the amount of the claim; therefore, the Court, on its own motion, amends the claim to conform with the amount of the recovery.

Award of $5,000.00.

Opinion issued January 22, 1980

JOHN S. HRKO

vs.

OFFICE OF THE STATE AUDITOR*

(CC-79-221a)

RIBEL & JULIAN

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-230a)

(CC-79-417)

J. M. TULLY

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-232a)

JAMES C. RECHT

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-233a)

HAROLD S. YOST

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-235)

ROY D. LAW

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-237)

HAROLD B. EAGLE

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-240)

GLENN O. SCHUMACHER

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-246a)

JAMES M. CASEY

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-248)

SIMMONS & MARTIN

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-249)

JOSEPH C. HASH, JR.

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-329a)

(CC-79-250)

JAMES M. COOK, JR.

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-251)

No appearance by claimants.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

These claims have been consolidated by the Court on its own motion since all of the claims are governed by the same principles of law.

The claimants are attorneys who served as counsel for indigents in mental hygiene hearings pursuant to the provisions of West Virginia Code, Chapter 27, Article 5. Claimants' fees were denied by the respondent because the fund was exhausted.

The factual situations in these claims are identical to that in *Richard K. Swartling, et al. v. Office of the State Auditor*, issued on November 5, 1979. Accordingly, the Court hereby grants awards to the claimants as follows:

John S. Hrko	$ 80.00
Ribel & Julian	327.50
J. M. Tully	62.50
James C. Recht	122.00
Harold S. Yost	135.00
Roy D. Law	459.00

Harold B. Eagle	115.00
Glenn O. Schumacher	303.33
James M. Casey	538.00
Simmons & Martin	440.00
Joseph C. Hash, Jr.	160.00
James M. Cook, Jr.	111.69

*The Court issued per curiam decisions in accordance with this decision granting awards to attorneys who served as counsel for indigents in mental hygiene hearings. The following is a list of those claimants and the awards granted:

Martin V. Saffer	$ 324.25
Roger D. Curry	884.60
T. Owen Wilkins	295.00
Dennis H. Curry	100.00
Loudoun L. Thompson	112.50
Charles E. Parsons	177.50
James T. McClure	329.00
Charles V. Wehner	35.00
Bradley H. Thompson	7,426.47
Robert E. Vital	10,370.00
Ann E. Snyder	393.75
Cynthia L. Dettman	180.00
Edgar E. Bibb, III	70.00
Peter A. Niceler	123.52
George W. Hill, Jr.	600.50
Appalachian Research and Defense Fund	387.95
David G. Palmer	511.00
James A. Matish	285.00
Philip T. Lilly, Jr.	163.50
James R. Sheatsley	50.00
Michael E. Caryl	450.56
Stephen L. Thompson	202.30
Norman T. Farley	201.12
H. F. Salsbery, Jr.	76.00
Sam E. Schafer	595.00
William E. Simonton, III	116.90
Damon B. Morgan, Jr.	321.00
William A. O'Brien	80.00
John L. DePolo	347.50
Rudolph J. Murensky, II	307.50
Robert DePue	45.00

C. Dallas Kayser	497.03
Richard Thompson	200.00
David R. Rexroad	290.50
Laverne Sweeney	207.50
Susan K. McLaughlin	180.00
Michael I. Spiker	262.25
George Zivkovich	183.79
David Lycan	215.00
Randy R. Goodrich	64.57
Michael H. Lilly	382.35
Robin C. Capehart	460.00
Paul T. Camilletti	749.50
John S. Folio	130.00
Jeffrey Corbin Dyer	233.00
Core, Atkinson & Core	143.75
James D. Terry	34.00
David Cavender	37.50
John Yeager, Jr.	873.40
John L. Bremer	1,848.00
Wayne D. Inge	407.50
Mary H. Davis	205.50
Thomas L. Butcher	1,542.50
Frank Ribel, Jr.	87.50
James C. Blankenship, III	522.50
David P. Born	145.84
David Michael Fewell	624.55
James Bradley, Jr.	793.50
David G. Underwood	292.50
Ronald F. Stein	1,842.50
James Wilson Douglas	437.50
Leslie D. Lucas, Jr.	112.50
Paul S. Perfater	764.50
Wayne R. Mielke	2,357.29
William W. Pepper	857.50
Nancy Sue Miller	351.00
Janet Frye (Steele)	525.00
H. H. Rose, III	115.00
Michael T. Clifford	631.25
William M. Miller	655.45
Robert Edward Blair	100.00
David M. Finnerin	228.75
Frank B. Everhart	68.75
Melvin C. Snyder, Jr.	45.00

Frederick M. Dean Rohrig	138.33
Robert E. Wise, Jr.	699.52
C. William Harmison	172.50
David L. Ziegler	342.50
F. Christian Gall, Jr.	1,088.00
Mark A. Taylor	205.50
John J. Cowan	703.75
Bernard R. Mauser	500.00
Jeniver J. Jones	432.25
Steven C. Hanley	1,067.50
Harry A. Smith, III	852.50
Jay Montgomery Brown	185.00
Randall K. Dunn	909.74
Timothy R. Ruckman	126.25
Dan O. Callaghan	170.00
F. Malcolm Vaughan	541.52
William W. Merow, Jr.	185.00
John W. Bennett	176.10
Samuel Spencer Stone	55.00
John G. Ours	382.58
Stobbs & Stobbs	2,368.75
Michael Buchanan	47.50
Karen L. Garrett	230.00
Robert D. Fisher	50.00
Edwin B. Wiley	1,233.55
C. Blaine Myers	235.50
Thomas C. Evans, III	222.10
Raymond H. Yackel	45.00
James A. Varner	43.50
George Zivkovich	45.00
David L. Hill	70.00
George Zivkovich	80.00
James A. Liotta	75.00
Samuel Broverman	211.00
James A. Esposito	182.50
Charles W. Wilson	808.00
Eugene R. White	600.00
Robert N. Bland	400.00
George M. Cooper	825.00
Jeniver J. Jones	345.00

Opinion issued February 13, 1980

JOHN S. HRKO

vs.

OFFICE OF THE STATE AUDITOR*

(CC-79-221b)

THOMAS L. BUTCHER

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-226b)

RIBEL & JULIAN

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-230b)

J. M. TULLY

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-232b)

JAMES C. RECHT

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-233b)

T. OWEN WILKINS

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-238)

FRANK RIBEL, JR.

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-239b)

JOHN C. HIGINBOTHAM

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-241b)

JOHN R. GLENN

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-244)

GLENN O. SCHUMACHER

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-246b)

WILLIAM H. ANSEL, JR.

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-247)

CYNTHIA L. TURCO

vs.

OFFICE OF THE STATE AUDITOR

(CC-79-256)

No appearance by claimants.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

These claims have been consolidated by the Court on its own motion since all of the claims are governed by the same principles of law.

The claimants are attorneys who served as counsel for criminal indigents in juvenile, misdemeanor, or felony proceedings pursuant to the provisions of West Virginia Code, Chapter 51, Article 11. Claimants' fees were denied by the respondent because the fund was exhausted.

The factual situations in these claims are identical to that in *Richard K. Swartling, et al. v. Office of the State Auditor,* issued on November 5, 1979. Accordingly, the Court hereby grants awards to the claimants as follows:

John S. Hrko	500.00
Thomas L. Butcher	1,133.83
Ribel & Julian	1,590.00
J. M. Tully	645.00
James C. Recht	946.50
T. Owen Wilkins	800.50
Frank Ribel, Jr.	115.00
John C. Higinbotham	176.25
John R. Glenn	45.00
Glenn O. Schumacher	1,851.75
William H. Ansel, Jr.	1,028.40
Cynthia L. Turco	1,107.52

*The Court issued per curiam decisions in accordance with this decision to claimants who served as counsel for criminal indigents. The following is a list of those claimants and the awards granted:

Paul R. Goode, Jr.	$ 395.00
Loudoun L. Thompson	3,551.75
Michael D. Sturm	850.00
Eugene D. Pecora	414.75
Charles E. Parsons	852.50
Raymond G. Musgrave	2,997.37
John S. Holy	1,500.00
Sprague Hazard	388.75
Lucien Lewin	50.00
Michael Scales	161.75
J. Wendell Reed	341.30
Stephen L. Thompson	227.00
David S. Alter, II	272.85
Charles F. Printz, Jr.	1,276.34
V. Alan Riley	1,482.00
Russell M. Clawges, Jr.	1,432.02
Royce B. Saville	643.75
John S. Kaull	1,148.80
William O'Brien	410.00
Stephen Jon Ahlgren	20.00
Robert Poyourow	2,042.88
George A. Markusic	1,169.96

Core and Core	825.35
James D. Terry	852.50
C. Elton Byron, Jr.	815.00
Carroll T. Lay	1,404.20
Joseph C. Hash, Jr.	50.00
Nancy S. Miller	486.00
P. C. Duff	1,026.25
Ray L. Hampton, II	295.00
Peter A. Niceler	317.45
Charles M. Kincaid	1,647.10
Robert E. Vital	175.00
Ronald E. Anderson	1,147.50
Robert C. Chambers	1,062.50
Paul A. Ryker	100.00
Marsha Dalton	340.00
George W. Hill, Jr.	2,146.50
Richard Starkey	168.00
John P. Anderson	964.75
Thomas S. Lilly	250.00
Appalachian Research and Defense Fund	1,002.13
Simmons & Martin	65.00
Bert Michael Whorton	968.25
Sanders & Blue	1,142.97
Paul Nagy	85.88
Paul H. Woodford, II	302.50
Philip A. Reale	444.40
R. Terry Butcher	102.50
David G. Palmer	3,767.02
James A. Matish	522.50
James R. Sheatsley	107.50
William B. Kilduff	683.85
Lane O. Austin	213.15
Derek Craig Swope	161.50
Philip T. Lilly, Jr.	170.00
James L. Satterfield	157.09
J. Burton Hunter, III	506.31
Ernest M. Douglass	182.50
Johnston, Holroyd & Gibson	7,561.55
Alan H. Larrick	87.50
William W. Merow, Jr.	438.83
Jeffrey Corbin Dyer	117.50
David L. Solomon	280.00

Jacob W. Ray	1,461.78
Brown H. Payne	350.00
Bradley J. Pyles	1,007.50
Laverne Sweeney	1,882.25
Richard W. Crews	1,240.00
R. Thomas Czarnik	1,475.95
George Zivkovich	320.78
Larry N. Sullivan	1,903.78
H. F. Salsbery, Jr.	167.00
David R. Gold	691.85
Louis H. Khourey	284.00
Patrick N. Radcliff	234.50
Charles W. Davis	322.79
Edwin B. Wiley	6,126.08
A. E. Cooper	142.50
Roy David Arrington	501.75
Ward D. Stone, Jr.	138.25
Robert B. Stone	323.75
Nicolette Hahon Granack	326.94
Robert F. Gallagher	216.50
Michael R. Cline	25.00
Paul S. Perfater	125.00
Thomas Ralph Mullins	366.25
W. Ronald Denson	660.00
David F. Greene	380.00
Charles M. Walker	1,012.00
Thomas M. Hayes	541.40
Michael T. Chaney	150.00
Phillip D. Gaujot	270.00
Thomas R. Tinder	287.70
Robert L. Twitty	712.50
Michael T. Clifford	1,990.00
Thomas C. Evans, III	851.25
Orton A. Jones	484.25
George D. Beter	805.95
Howard M. Persinger, Jr.	1,792.50
Kevin B. Burgess	534.38
T. R. Harrington, Jr.	196.75
Wayne D. Inge	306.25
Frederick A. Jesser, III	606.50
Phil J. Tissue	235.00
Steve Vickers	241.60

Janet Frye (Steele)	1,560.35
John M. "Jack" Thompson, Jr.	1,922.50
J. Robert Rogers	2,090.40
Richard Thompson	1,229.10
Boyce Griffith	1,872.50
Robin C. Capehart	571.50
Ronnie Z. McCann	1,147.50
John W. Bennett	193.60
Robert W. Vukas	766.77
Robert W. Friend	670.00
Bogarad & Robertson	340.30
W. Dean Delamater	246.63
George P. Bohach	667.75
Fred Risovich, II	437.70
David L. Shuman	1,908.02
Grant Crandall	1,000.75
Penelope Crandall	21.60
Larry D. Taylor	115.00
Mark A. Taylor	383.00
Stephanie J. Racin	130.00
Ralph C. Dusic, Jr.	265.00
Harry M. Hatfield	950.00
William C. Field	402.50
Robert E. Douglas	437.50
Stephen P. Swisher	458.50
David M. Finnerin	2,248.45
F. Alfred Sines, Jr.	871.25
James G. Anderson, III	1,369.69
Martin J. Glasser	853.97
Charles H. Brown	12.50
Lawrence L. Manypenny	243.74
Cletus B. Hanley	205.00
Billy E. Burkett	327.50
F. Christian Gall, Jr.	1,417.95
J. E. Wilkinson	740.00
J. Franklin Long	9,887.95
Robert L. Schumacher	3,722.82
Hudgins, Coulling, Brewster & Morhous	856.50
Richard A. Bush	2,447.19
John R. Frazier	3,594.15
David M. Flannery	119.90
Henry C. Bowen	503.05

Daniel A. Oliver	1,323.75
Harry A. Smith, III	133.75
C. Michael Bee	549.53
James J. MacCallum	440.00
Lary D. Garrett	715.00
Karen L. Garrett	932.50
Jerry D. Moore	79.60
Raymond G. Musgrave	1,500.00
Dan O. Callaghan	426.74
Thomas N. Chambers	230.00
Thomas G. Freeman, II	690.00
W. Henry Jernigan	50.00
John R. Lukens	485.14
Taunja Willis Miller	65.45
Forrest H. Roles	93.65
W. Warren Upton	100.15
John S. Sibray	4,106.58
Rudolph J. Murensky, II	115.00
Donald E. Santee	255.00
Alexander J. Ross	117.50
Michael H. Lilly	4,128.30
Robert N. Bland	1,460.00
Bernard R. Mauser	172.90
Jeniver J. Jones	682.50
Steven C. Hanley	1,410.00
William Mitchell	235.00
Jack L. Hickok	97.80
John C. Krivonyak	346.25
James E. Ansel	645.00
W. Del Roy Harner	110.00
G. David Brumfield	1,114.15
McGinnis E. Hatfield, Jr.	616.25
James G. Anderson, III	87.50
Charles W. Wilson	94.00
James A. Esposito	656.25
Nicolette Hahon Granack	787.50
Elizabeth M. Martin	715.00
Carroll T. Lay	123.75
Damon B. Morgan	610.00
James Michael Casey	2,148.15
Rosemarie Twomey	435.77
Ward D. Stone, Jr.	150.00

Robert B. Stone	506.25
Michael L. Solomon	1,937.50
Barry L. Casto	1,781.02
H. F. Salsbery, Jr.	57.00
L. Edward Friend, II	821.00
Raymond G. Musgrave	644.30
Francoise D. Stauber	447.00
Robert F. Gallgher	1,097.00
Peggy O'Neal Hart	338.96
William W. Merow, Jr.	35.00
Stephen C. Littlepage	1,291.60
Larry N. Sullivan	252.50
Nancy S. Miller	665.00
Daniel A. Oliver	1,098.50
Gerard R. Stowers	198.50
Robert J. Smith	125.00
Raymond H. Yackel	1,317.50
James D. Terry	1,177.50

Opinion issued February 14, 1980

BILLY CONN ADKINS

vs.

DEPARTMENT OF CORRECTIONS

(CC-77-196)

Timothy N. Barber, Attorney at Law, for claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

RULEY, JUDGE:

In August, 1975, the claimant was convicted of grand larceny upon a plea of guilty in the Circuit Court of Putnam County. Upon order of that court, he then was sent to the Diagnostic and Classification Unit of Huttonsville Correctional Center for a pre-sentence evaluation and report. While confined in that unit on October 18, 1975, he was the victim of a physical attack by another inmate. He sustained very severe injuries of his head and face for which he filed this claim in the sum of $150,000.00. The inmate who committed the attack recently had been convicted of a felony and sentenced and, at that time, was confined in that unit for post-sentence evaluation and classification. It is asserted that the respondent was negligent in intermingling inmates who were there

for pre-sentence evaluation with those who were there for post-sentence evaluation and in failing to provide adequate measures to protect the inmates.

The evidence shows that, at the time of the incident, there were 32 inmates in the Diagnostic and Classification Unit, 18 being there for post-sentence evaluation and 14 for pre-sentence evaluation. That unit and the persons confined in it were isolated from the remainder of the inmates at Huttonsville Correction Center in a room similar to an open barracks with beds down each side of a center aisle. There were television cameras in each of the four corners of the room which projected photographs on a bank of four television screens in the guard room which was located at one end of the unit. A guard, Glenn Johnson, was on duty there at the time of this incident and a guard was maintained there twenty-four hours a day. Help, in the persons of other guards, was nearby at all times. According to the undisputed testimony, there was more security on this unit than in any other part of the correctional center. There also was a television receiver in the unit for the entertainment of the inmates. It appears that, at about 9:00 p.m., there was a disagreement between some of the other inmates as to which of two programs would be viewed and the assailant, taking unwarranted offense at an inoffensive remark made by the claimant, attacked him striking him first upon the head with a "butt can" (a large coffee can converted into a receptacle for cigarette butts). Mr. Johnson first heard an unusual noise in the room and then saw what appeared to be a disturbance on one of the television monitor screens. He immediately called for assistance and then entered the unit through the manual slammer and then the electronic slammer. As it happened, Sargeant Simmons, responding to his call entered right behind him. Upon Mr. Johnson's order, the assailant stopped the attack. The entire incident appears to have lasted no more than two minutes.

As of October 18, 1975, 1800 inmates had passed through the unit for post-sentence evaluation and 325 for pre-sentence evaluation (a more recent procedure). There never previously had been an incident which involved a serious injury. W. Joseph McCoy, Commissioner of the Department of Corrections, testified that there was motivation for good behavior by inmates there for post-sentence evaluation because their conduct could affect the determination of where their sentence would be served. In any event, there seems to be no basis either in theory or experience from which it could be concluded that an attack such as this would

result as a foreseeable consequence of mixing the two categories of inmates. Similarly, the undisputed evidence precludes a finding that the respondent was negligent in failing to provide adequate measures to protect the claimant. Accordingly, the issue of liability must be resolved in favor of the respondent.

Claim disallowed.

Opinion issued February 14, 1980

AUDRA MYRLE ARMSTEAD

vs.

DEPARTMENT OF WELFARE

(CC-78-280)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

Since 1960, the claimant has lived in a house owned by her daughter and son-in-law on Cotton Tree Road in Roane County, West Virginia. On the evening of September 28, 1978, while she was baby-sitting away from her home, a neighbor, Owen Parker, reported to her that lights were on in the house. She gave him the keys and asked him to investigate. She could not leave until the parents of the children for whom she was baby-sitting returned at approximately 9:30 p.m.

It was reported that two boys had been seen around her home and that they had run away from their foster parents' home. The West Virginia State Police at Spencer were notified and Trooper Kenneth Beckett responded. Upon investigation, it was discovered that every room of claimant's home had been ransacked, contents of drawers were dumped on the floor, and beds, closets, and furniture appeared to have been slashed with a knife or other sharp instrument. Some personal items belonging to the claimant were missing.

It was determined that two children, Ronald Richards and James Jet, ages 11 and 12 respectively, who were wards of the respondent living with department-approved foster parents, were involved in

the vandalism. The foster parents, Kermit and Effie Jackson, lived about four miles from the claimant's home. On the day of the incident, the boys attended school and were supposed to be playing near their foster home. They were missed at about 5:00 p.m. Mrs. Jackson testified that she immediately started looking for the boys and notified the Department of Welfare. The search continued through the night. Finally, the boys were found and returned to their foster home. Trooper Beckett picked them up at the Jackson home, and confiscated some of the missing items the boys had turned over to Mrs. Jackson.

Peggy O'Brien, a social service worker for the respondent, testified that she was familiar with the case of Ronald Richards; that he had been abandoned by his parents and was placed with the Jacksons in July of 1975; that, socially, he was completely withdrawn; and that he had no discipline problems or any indications of violent temperament, although he did break into a house in Wood County in June of 1975. James Jet had been with the Jacksons for one to one and a half years. He had no discipline problems or any indications of violence.

The Court, although most sympathetic toward the claimant, recognizes that, in order for an award to be made, proof of negligence on the part of the respondent is required. The record in this case is devoid of any evidence of such negligence on the part of the respondent. There is nothing in the record to indicate that there was any problem or behavior pattern of the boys that would require action by the respondent. Neither the respondent nor the Jacksons could have done anything to prevent what happened. See *Tyre v. Department of Corrections*, 12 Ct.Cl. 263 (1979); *Stemple v. Department of Welfare*, 13 Ct.Cl. 94 (1979).

Accordingly, from the record, the Court is of the opinion to and hereby disallows the claim of the claimant for damage to her personal property.

Claim disallowed.

Opinion issued February 14, 1980

WILLIAM T. BLACKWELL and
KAREN M. BLACKWELL

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-63)

Claimant appeared in person.

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

GARDEN, JUDGE:

On Sunday evening at about eight o'clock on January 28, 1979, the claimants were returning from Blackwater Falls to their home in Bridgeport, West Virginia. The claimant, William T. Blackwell, was operating a Jeep Wagoneer, which was titled in his name and in the name of his wife, the claimant Karen M. Blackwell. They were traveling in a westerly direction on Route 50 about one mile east of the corporate limits of Bridgeport. Route 50 in this area is a two-lane road, one lane for westbound traffic and one for eastbound traffic. The road conditions were bad. It was snowing, and an accumulation of two to three inches covered the road. Because of this snow, Mr. Blackwell was proceeding at a slow rate of speed, between 25 and 30 miles per hour.

Mr. Blackwell testified that he had traveled over this particular road about two months prior to the night of the accident and that the road was "in pretty good shape". However, because the road was covered with snow, the left front wheel and left rear wheel of his vehicle suddenly struck a pothole, and, while there was no damage to the left front tire, the left rear tire of the vehicle was ruptured, necessitating its replacement at an expense to the claimants in the amount of $40.04. Mr. Blackwell testified that he went to the respondent's headquarters the following day, reported the incident, and was told by respondent's employees that they were aware of three potholes in the area of the accident. Several days later, after the road had been cleared of snow, Mr. Blackwell returned to the accident scene and observed the pothole that he had struck. It was located two to three inches north of the center line. The diameter measured approximately one and one-half feet, and the hole was six to eight inches deep.

In order to make an award in claims such as the one here considered, this Court must be convinced that the respondent knew or should have known of the existence of the particular pothole, and that the respondent had sufficient time within which to repair the same. While Mr. Blackwell's testimony would indicate that the respondent's employees had such knowledge the day following the incident, the record is devoid of any evidence as to exactly when this knowledge was acquired in relation to the time of the claimant's unfortunate accident. As a result, this claim must be disallowed.

Claim disallowed.

Opinion issued February 14, 1980

DAVID L. BUSH

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-118)

Claimant appeared in person.

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

WALLACE, JUDGE:

At approximately 10:30 p.m. on February 27, 1979, claimant's wife, Mona Bush, was operating his 1978 Ford Fiesta in the eastbound right-hand lane of Route 60 in Kanawha County, West Virginia. At the intersection of Kanawha Terrace and Route 60, near the Rainbow Lounge, the car struck a pothole, damaging the vehicle in the amount of $195.91.

According to the testimony of the claimant, Mrs. Bush was traveling at about 40 mph, and the hole was eight inches deep. Mrs. Bush testified that she did not see the hole, and that she was driving "in the direct line of traffic travel."

It is well established in the law of West Virginia that the State cannot and does not guarantee the safety of motorists upon its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). To be held liable, the respondent must have had either actual or constructive notice of the hazardous condition of the highway. Since no such evidence of notice was brought forth in the case, the

respondent cannot be found negligent. Therefore, this Court hereby disallows the claim.

Claim disallowed.

Opinion issued February 14, 1980

LEE W. CLAY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-164)

Claimant appeared in person.

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

WALLACE, JUDGE:

The claimant filed this claim in the amount of $114.08 for damages to his automobile antenna. In the course of the hearing, the amount of the claim was amended to $132.95.

The accident occurred between 3:30 and 4:00 p.m. on April 2, 1979. The claimant was driving his 1977 Toronado automobile southerly on West Virginia Route 33 about ten miles south of New Haven, West Virginia, in Mason County. The highway is two-laned, one northbound and one southbound.

The claimant was proceeding at less than 55 mph. There were no vehicles in front of him, and a tractor-trailer was approaching from the opposite direction. As he passed the truck, something struck the antenna located on the right front fender of the automobile, and the antenna was demolished. It had struck a tree limb protruding over the road from a recent slide.

The claimant testified that he assumed that the slide had just occurred, because he had driven the same road an hour or an hour and a half prior to the accident and did not see a slide.

John Hayman, assistant supervisor for the Department of Highways in Mason County, testified that he learned of the slide at about 4:15 p.m. on the day of the accident and that it had occurred on that day. He stated that he went to the scene of the slide with

acting foreman Fred Lanier, and someone had removed the tree from the highway.

The law of West Virginia is well established 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). To be liable, the State must have had either actual or constructive notice of the particular hazard which caused the accident. *Davis v. Department of Highways,* 11 Ct. Cl. 150 (1976). No evidence indicating notice to the respondent, or the prolonged existence of this hazard, came forth in this case. To the contrary, the claimant's testimony leads to the conclusion that the slide had occurred only a short time before the accident. Without notice of the hazard caused by the slide, and a reasonable opportunity to remove it, the respondent cannot be held liable. *Cantley v. Department of Highways,* 13 Ct. Cl. 72 (1979). Accordingly, the claim must be denied.

Claim disallowed.

Opinion issued February 14, 1980

BILLY R. COWAN

VS.

DEPARTMENT OF HIGHWAYS

(CC-79-59)

Claimant appeared in person.

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

RULEY, JUDGE:

In his Notice of Claim, the claimant alleges that the respondent had cut a drainage ditch across the driveway connecting his property to the Hurricane Creek Road, a roadway improved with blacktop pavement, causing his 1968 model Chevrolet automobile to drag when crossing the ditch and thereby damaging the muffler, tail pipe, and oil pan. Claimant says further that he is not seeking an award of damages, but wishes only to have the driveway repaired. Of course, this Court is without jurisdiction to compel any such repair, and, since there is no evidence of negligence on the part of the respondent incident to construction of the drainage

ditch, the Court cannot make an award of damages. It is observed, however, that the respondent's supervisor for Putnam County testified that, under the respondent's policy, a suitable culvert or drainpipe purchased by the claimant could be installed in the drainage ditch, and it appears that such installation would solve the problem.

Claim disallowed.

Opinion issued February 14, 1980

ARTHUR FRIEND and
PAULINE FRIEND

vs.

DEPARTMENT OF HIGHWAYS

(CC-76-35)

Claimants appeared in their own behalf.

Henry Haslebacher, Attorney at Law, for respondent.

RULEY, JUDGE:

Claimants own property adjacent to West Virginia Secondary Route 56, near Newburg in Preston County. Claimants allege that respondent's negligent installation of a 15 1/2 inch culvert and failure to maintain drainage ditches on Route 56 caused water to flow onto their property and damage their mobile home.

The evidence indicated that sometime in 1975, respondent replaced a 4 inch drain pipe with a 15 1/2 inch culvert under Route 56 directly in front of claimants' mobile home; that claimants' property was located on the east side of Route 56; that the westerly border of Route 56 is hillside; that claimants' property serves as a natural drain for the adjacent hillside area; that the claimants' mobile home which sustained the alleged damages was removed in 1977; and, that the mobile home in which claimants currently reside is built upon the concrete porch of the previously damaged mobile home and has not been subject to damages from water or mud.

The general rule for drainage cases was recited by Judge Jones in *Holdren v. Department of Highways*, 11 Ct. Cl. 75 (1975): "Under

the law of this State surface water is considered a common enemy which each landowner must fight off as best he can, provided that an owner of higher ground may not inflict injury to the owner of lower ground beyond what is reasonably necessary." There is no evidence that the 15 1/2 inch culvert installed in 1975 greatly increased the flow of water onto and across claimants' property. The Court is of the opinion that no act or omission of the respondent proximately caused the damages sustained by the claimants. Part of claimants' problem can be attributed to the natural drainage of water off the nearby hillside onto their property. It is also apparent that claimants' problems could have been remedied by the use of a more substantial foundation for their damaged mobile home, as the present concrete pad foundation has been in place for approximately one year and claimants indicate that they are not having water or mud problems with their new mobile home. Although the Court realizes the serious nature of the damage to claimants' property, the evidence precludes an award of damages against the respondent. Accordingly, the claim is denied.

Claim disallowed.

Opinion issued February 14, 1980

LARRY P. FRYE

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-124)

Claimant appeared in person.

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

PER CURIAM:

The claimant seeks an award in the sum of $211.15 for damages and injuries sustained when his 1979 Oldsmobile automobile struck a pothole in the northbound lane of Little Seven Mile in Cabell County, West Virginia, on December 25, 1979.

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). 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 February 14, 1980

GARY HALL

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-40)

Claimant appeared in person.

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

WALLACE, JUDGE:

The claimant seeks compensation in the amount of $230.00 for damage to a 1977 Oldsmobile Cutlass automobile resulting from an accident which occurred at approximately 9:30 p.m. on January 11, 1979. Claimant was driving from a grocery store to his home on Mays Branch Road in Wayne County, West Virginia, when one of the back wheels struck a pothole, throwing the rear end of the automobile to the left and forcing it to collide with a parked car. Mr. Hall testified that he was familiar with the roadway, traveling over it two or three times a day, and that the hole which was struck was about two feet wide and one foot deep.

The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for negligence on the part of the Department of Highways to be shown, proof that the respondent had actual or constructive notice of the defect in the road is required. *Davis Auto Parts v. Department of Highways,* 12 Ct.Cl. 31 (1977); *Lowe v. Department of Highways,* 8 Ct.Cl. 210 (1971); *Varner v. Department of Highways,* 8 Ct.Cl. 119 (1970). There is no evidence in the record of any notice to the respondent, and the simple existence of a defect in the road does not establish negligence per se. See *Bodo v. Department of Highways,* 11 Ct.Cl.

179 (1977), and *Rice v. Department of Highways,* 12 Ct.Cl. 12 (1977). This claim must be denied.

Claim disallowed.

Opinion issued February 14, 1980

ARLIE NEIL HUMPHREYS

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-199)

Claimant appeared in person.

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

RULEY, JUDGE:

On May 4, 1978, the claimant drove her Ford F250 pick-up truck from her place of employment in Bridgeport through Grafton to Morgantown. On the outskirts of Grafton she was stopped by a flagman where one lane traffic had been established over an old iron bridge. She then was waved forward and, while crossing the bridge, her truck was struck by a spray of flat red paint which was being used in repainting the bridge. The lower of the two estimates of the cost of repair obtained by the claimant was $398.20. The evidence also discloses that the damage to claimant's vehicle was caused by an employee of the W. R. Mollohan Painting Company, Route 3, Box 606, Elkview, West Virginia, which had been engaged by the respondent as an independent contractor to repaint the bridge. Thus it appears that this case is on all fours with *Safeco Insurance Company v. Department of Highways,* 9 Ct. Cl. 28 (1971), and that, following that precedent, this claim must be denied due to the general rule that the respondent is not liable for the negligence of an independent contractor. It is observed that the claimant still has time left within the applicable two year period of limitations to assert her claim against the contractor.

Claim disallowed.

Opinion issued February 14, 1980

WILLIAM C. LAWRENCE

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-129)

Claimant appeared in person.

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

PER CURIAM:

Claimant seeks an award in the sum of $722.08 for damages and injuries sustained when his 1971 Dodge automobile struck a rock, approximately 18 inches in diameter, located three feet from the center line of the southbound lane of West Virginia State Route 219 near Benbush, Preston County, West Virginia, on March 7, 1979. Claimant also alleges that a pothole to the right of the rock and in the southbound lane of Route 219 contributed to this accident and the damages to his automobile.

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). 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 either of the defects in question, the claim must be denied.

Claim disallowed.

Opinion issued February 14, 1980

CHESTER W. LEMASTERS

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-160)

Claimant appeared in person.

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

GARDEN, JUDGE:

On Saturday, March 24, 1979, at approximately 8:00 p.m., the claimant and his wife were proceeding in a southerly direction on West Virginia State Route 2 from the town of McMechen, West Virginia, to their home in Moundsville. Route 2 in this particular area is a four-lane, straight, level roadway. The two northbound and the two southbound lanes are separated by a narrow, raised concrete divider. As a southbound motorist approaches the southerly end of the above-described section of Route 2, there is a break in the concrete median dividing strip which allows motorists entering Route 2 from the east and west to proceed in either a northerly or a southerly direction. At the sourtherly end of the north part of the break in the concrete median, the respondent had erected a sign on a metal pole, which faced south and served as a warning to northbound motorists to keep to the right. Apparently, prior to claimant's accident, another vehicle had struck this sign, bending it so that the sign extended, according to the claimant, about one or two feet out and into the inside southbound lane.

Claimant testified that he was operating his 1977 Buick LeSabre automobile within the speed limit, that he was proceeding in the inside lane, that it was raining, that he had his headlights on, and that traffic was to his right or in the outside lane, when he suddenly observed the bent sign protruding into his lane of travel. As he attempted to avoid striking the sign, his left front fender struck it and was damaged in the amount of $100.43. A day or so later, the claimant reported the incident to officials in the McMechen city building.

Leo R. Pavlic, claims investigator for the respondent in District 6, testified that when he was driving to work the following Monday morning, he noticed that the sign was bent and projected about 12 inches into the inside southbound lane. Mr. Pavlic testified that,

upon arriving at his office, he called the "Sign Department" and notified them of this hazardous condition. He further testified that he could find no evidence at his office that the respondent had previously been notified of this protruding sign.

While the Court does not believe that the claimant was guilty of any negligence which contributed to this unfortunate incident, we also believe that the respondent did not know, nor could it have known, of the hazardous condition which certainly did exist on Route 2 the night of the claimant's accident. Accordingly, this claim must be disallowed.

Claim disallowed.

Opinion issued February 14, 1980

RALPH PAUL MAYES

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-128)

Claimant appeared in person.

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

WALLACE, JUDGE:

On the evening of March 2, 1979, claimant was operating his 1978 Chevrolet Nova in an easterly direction on Sand Hill Road in Mason County, West Virginia, a road which is owned and maintained by the respondent. As claimant rounded a curve, he saw that part of the pavement was broken off approximately six to eight inches in from the edge of the road. According to the claimant's testimony, another car was approaching in the opposite direction, and the claimant was "running on the yellow line to avoid the hole." Claimant further testified that the back end of his vehicle dropped, and the car proceeded up out of the hole and stopped. The resultant damage to the vehicle's tires, rim, hubcap, and body amounted to $168.67.

The State is neither an insurer nor a guarantor of the safety of motorists travelling upon its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). To be found liable, the respondent must

have had either actual or constructive notice of the particular hazard which caused the damage. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1976). No evidence indicating notice came forth in this case; therefore, no negligence on the part of the respondent can be established. Accordingly, the claim must be denied.

Claim disallowed.

Opinion issued February 14, 1980

MARJORIE MITCHELL

vs.

DEPARTMENT OF WELFARE

(CC-79-139)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

RULEY, JUDGE:

Sam Anderson, a minor, was placed in the custody of the West Virginia Department of Welfare for placement at the Samaritan House in Wheeling, West Virginia, on October 18, 1978, by the Ohio County Juvenile Court, pending a hearing on a charge of truancy filed with said Court on October 11, 1978. On October 25, 1978, the day before the hearing on truancy, Sam Anderson left the Samaritan House and took claimant's car from in front of her residence at 1304 Lynn Street, Wheeling, on what is commonly known as a joy ride. The facts clearly indicate that the Anderson boy previously had obtained a set of keys to claimant's vehicle, although the manner and means used by Anderson to obtain the keys remains a mystery. Claimant seeks recovery of $400.00 for damages to her 1970 Oldsmobile incident to the joy ride.

The Samaritan House is a half-way house for juveniles. At the time of this incident there were no security facilities at the Samaritan House. The record further indicates that the Samaritan House generally is utilized for rehabilitation of first time offenders, who are truants or have drug problems. Sam Anderson had committed several offenses of joy-riding and destruction of property before his placement at the Samaritan House on October

18, 1978. The Samaritan House personnel were informed of Anderson's juvenile record at the time of his placement.

Disposition of alleged juvenile offenders or convicted juvenile offenders is one of the most difficult decisions that our courts are required to make. The primary factor in determining the proper disposition of any juvenile must be rehabilitation. In this case the Ohio County Juvenile Court remanded Anderson into the care, control and custody of the West Virginia Department of Welfare at the Samaritan House. The Ohio County Juvenile Court was fully aware of Anderson's record and the nature of the Samaritan House operation at the time of disposition. This Court acknowledges the sincerity of claimant's allegations and her belief that improper disposition of the juvenile Anderson led to the damages of which she complains. However, respondent cannot be found negligent for following the Ohio County Juvenile Court's disposition order. For that reason, this claim must be denied. Although not directly applicable to this case, an excellent discussion of negligence in the placement of children may be found in 90 A.L.R. 3d 1214.

Claim disallowed.

Opinion issued February 14, 1980

BARBARA A. NEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-138)

Claimant appeared in person.

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

GARDEN, JUDGE:

Near midnight on February 21, 1979, the claimant was traveling on Route 60 from Charleston, West Virginia, to her home in Eastbank. She and two companions were returning to their homes after attending a rock concert in Charleston, and, as the claimant testified, she was reducing her speed of 55 miles per hour as she neared an area near Belle where the road narrows from four lanes to two lanes. Claimant further testified that she had traveled over the same section of the road about a week or ten days before, and

noticed a rather large pothole which appeared to have been patched.

Claimant was unable to testify as to the dimensions of the hole, but stated that both her right front and rear wheels struck the hole, rupturing both tires and bending the rims of both wheels, causing damages in the amount of $178.49. One of the passengers, James J. Shuff, who was seated in the right front seat, testified that he did not see the hole before the car struck it, but was of the opinion that the hole was from six to ten inches in depth. Mrs. Ney testified that she observed the hole when she was approximately 20 feet from it, but was unable to maneuver her car to avoid it.

No testimony was introduced from which this Court could conclude that the respondent knew or should have known of the dangerous condition of this section of Route 60. Therefore, in accordance with a multitude of prior decisions of this Court, we must disallow this claim simply on the basis that the respondent is not an insurer of the safety of motorists using the highways of our State.

Claim disallowed.

Opinion issued February 14, 1980

ROBERT R. NICKEL and BERTHA E. NICKEL

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-189)

Claimants appeared in person.

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

RULEY, JUDGE:

The claimants seek to recover the sum of $1,751.01, that being the amount expended by them for correction of a slip which occurred on the side of their residential property abutting on the Old Monongah Road in Fairmont. Mr. Nickel testified that the ditch along that road was evidenced from about 12 or 14 inches to about six feet in the summer of 1976 and that, in May, 1977, he first noticed a crack in his yard. The first complaint pertaining to the

area received by the respondent came in May, 1977, from Mr. Raspa, who was building a house on the adjoining lot. In excavating a basement in the hillside, Mr. Raspa had uncovered a spring. Water from the spring had caused a supersaturated condition of the soil on the Raspa lot which extended into the Nickel property according to the undisputed evidence. In addition, the excavated soil, being sloped over the saturated soil, placed an overburden upon it according to the respondent's evidence. In 1978, the respondent drove piling into the hillside which apparently stopped the slip. It has not been proved by a preponderance of all the evidence that the damage was caused by misconduct on the part of the respondent and, accordingly, this claim must be denied.

Claim disallowed.

Opinion issued February 14, 1980

PARAMOUNT PACIFIC, INC., ON BEHALF OF PAULEY PAVING CO., INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-76-38)

Charles E. Hurt, Attorney at Law, for claimant.

S. Reed Waters, Jr., Attorney at Law, for respondent.

RULEY, JUDGE:

Paramount Pacific, Inc., was the general contractor for the construction of a bridge on Interstate Route 77 in Mercer County. Pauley Paving Co., Inc., as a subcontractor, paved the bridge deck in June, 1972. The respondent, acting under Section 1.5.9 of the Specifications, subsequently required the removal and replacement of a section of the deck because the concrete used in it did not meet specifications. The claimant asserts that the concrete did meet specifications, that the respondent's action was arbitrary and unlawful or that, at most, must less expensive corrective action should have been required. The amount of the claim is $81,460.03 that being Pauley's computation of the cost of removal and replacement.

According to the evidence, Pauly utilized a conveyor 200 feet long and had planned to pour the deck in a single day beginning at the farthest point and working back to the nearest, removing sections of the conveyor as progress was made. The designated day was June 6, 1972, a day marked by what hopefully is an uncommon syndrome or combination of problems. Although there is some conflict in the evidence as to just what happened or who said what to whom at the job site that day, it is certain that the concrete which was used was too dry. Richard Welsh, Pauley's foreman, testified that it could not be vibrated into position because it was too stiff. When the finishing machine encountered it, it raised the wheels of the machine off its tracks rendering the machine useless. Finally, the concrete crew raked the concrete down by hand and, putting water on the surface (a practice unanimously acknowledged to be undesirable), finished it manually. Needless to say, none of those things should have happened. And, for good measure, after the conveyor broke down, it began to rain. A distance of only 43 feet was poured that day. The remainder of the deck was poured on June 12 and 13, 1972. The same problems were encountered in the second pour on June 12 until an adjustment was made in the water content of the concrete. Within thirty-six hours after it was poured, cracks appeared in the affected portion of the deck. A suspected "cold joint" (an unplanned and unspecified horizontal joint between two placements of concrete) in the first day's pour later was proved to exist by core borings. There also was evidence of deficient cement content and excessive water-cement ratio at various places in the concrete which was removed.

During the trial, it was conceded by Pauley that the amount of its claim should be reduced by the cost of replacing a 12' x 12' area occupied by the cold joint (estimated at approximately $2,000.00) and by the cost of scoring or grooving the surface area which had been watered (710 square yards at $4.00 per yard). It also was agreed that the sum of $81,460.03 inadvertently had included $2,385.49 for extra work for which Pauley had been paid. In addition, that sum included a charge for idle equipment (a crane, a back hoe and a pick-up truck) and, for overhead, taxes, etc., an addition of 30% on labor, 20% on materials and 10% on equipment was included.

Although Mr. Welsh initially undertook to place the blame for the concrete problems upon the refusal of respondent's engineer, Michael Ward, to permit the addition of water to the concrete up to

the limit allowed by the specifications, after Mr. Ward testified postively to the contrary, Mr. Welsh testified that he could not deny that Mr. Ward had advised him that water up to the maximum amount allowable could be added to each truckload of concrete. And he added, poignantly:

> "There was so much conversation going on that day, and when the concrete came so dry there was a lot of excitement. In fact, everybody was pretty well in turmoil."

Under Section 1.5.7 of the Specifications, no action by a state inspector (be he engineer or otherwise) can relieve a contractor of his duty to perform his work in accordance with plans and specifications. And, under Section 1.5.9, removal and replacement of defective work or material properly can be required. In view of all of the evidence in this case, the Court cannot find that the respondent acted either arbitrarily or unlawfully. Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued February 14, 1980

JUDY ANN SMITH PERDUE

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-255)

Claimant appeared in person.

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

PER CURIAM:

The claimant seeks an award in the sum of $1,861.41 for damages and injuries sustained when her 1972 model Chevrolet automobile struck a hole in the berm adjacent to the northbound lane of W.Va.-U.S. Route 35 in Putnam County.

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). 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 February 14, 1980

RONALD L. PERRY and
LYNDA S. PERRY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-156)

Claimants appeared in person.

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

PER CURIAM:

The claimants seek an award in the sum of $84.69 for damages and injuries sustained when their 1976 Volkswagen Rabbit struck a pothole in the eastbound lane of Big Tyler Road in Kanawha County, West Virginia, on February 26, 1979.

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). 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 February 14, 1980

KIRK ALAN RYCKMAN

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-151)

Claimant appeared in person.

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

PER CURIAM:

The claimant seeks an award in the sum of $155.75 for damages and injuries sustained when his 1978 Buick automobile struck a pothole in the southbound lane of Chapline Street at or near its intersection with 20th Street in the City of Wheeling, West Virginia, on February 20, 1979.

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). 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 February 14, 1980

JAMES R. WATSON, WHO SUES BY HIS NEXT FRIEND, HIS BROTHER, RONALD R. WATSON

vs.

DEPARTMENT OF HEALTH

(CC-77-169)

John Boettner, Jr., Attorney at Law, for claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

RULEY, JUDGE:

The claimant seeks recovery of damages in the sum of $50,000.00 for injuries which he allegedly sustained when he was "severely

and maliciously beaten" by three psychiatric aides while he was a patient at Spencer State Hospital on June 25, 1975. As the result of a brain injury which he had sustained in an automobile accident in 1968, the claimant was unable to talk and was subject to epileptic seizures when he voluntarily was admitted to Spencer State Hospital in January, 1975. There can be no doubt that he was the victim of a severe beating on the evening of June 25, 1975, and, if it was administered by the three psychiatric aides as he testified, it indeed was intentional and malicious. The evidence on behalf of the respondent was to the effect that it was administered by another patient incident to a fight between the two men. Although the claimant was a very persuasive witness and the Court certainly has compassion for him, the Court, in view of all of the evidence, cannot find that he has carried the burden of proving the extremely serious charge which he has made by a preponderance of the evidence. In addition, even if it did so find, there would be the remaining question of whether the respondent should be held liable for intentional and malicious torts committed by its employees under the circumstances of this case. In that connection, see 34A.L.R.2d 372 and 53 Am. Jur.2d *Master and Servant* §437. Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued February 14, 1980

OFFIE D. WILLIAMS

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-46)

Claimant appeared in person.

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

RULEY, JUDGE:

This claim in the sum of $1,800.00 for property damage allegedly sustained by the claimant's 1970 model Jeep vehicle grows out of a two vehicle accident which happened at about 9:20 a.m., on October 20, 1978. The accident occurred on W. Va. - U.S. Route 33 near the claimant's home in Randolph County. According to the

undisputed evidence, the claimant had entered the highway from his private driveway on the south side of the highway and had traveled about 15 feet in a general easterly direction when his vehicle was struck in its left rear end by an eastbound truck owned by the respondent and being driven by its employee, Richard Daugherty. The claimant testified that, before entering the highway, he had looked in both directions and had seen no approaching traffic. Mr. Daugherty had driven around a curve about 150 feet west of the driveway and was approaching at a speed between 45 and 50 miles per hour. He testified that the claimant entered the highway when he was only 50 feet from the driveway. He swerved to his left and almost succeeded in avoiding the collision.

West Virginia Code §17C-9-4, provides:

"§17C-9-4. Vehicle entering highway from private road or driveway.

The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on said highway."

Applying that law to the facts of this case, it appears that the claimant was himself guilty of negligence proximately causing the accident which was at least equal to such negligence, if any, as may have been committed by the respondent's driver and, accordingly, this claim must be denied.

Claim disallowed.

Opinion issued February 14, 1980

ZANDO, MARTIN & MILSTEAD, INC.

vs.

STATE BUILDING COMMISSION

(D-942)

Paul N. Bowles, Attorney at Law, and *Gary G. Markham*, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

RULEY, JUDGE:

The respondent as "Owner" and the claimant as "Architect" executed a written contract dated August 14, 1963, under the terms of which the claimant was obliged to render professional architectural and engineering services incident to the construction of "a New Office Building" to be located in the Capitol Complex in Charleston. In its Notice of Claim filed April 11, 1975, the claimant avers that it is entitled to damages in the sum of $185,984.54, consisting of the following:

(1) For a Departmental Space Study performed pursuant to paragraph 9, Article II of the contract and which was completed on September 5, 1969, the sum of $18,183.38;

(2) For "Reimbursable Expense of the Architect" incurred under Article V of the contract on the job site at Buildings 5, 6, and 7, from January, 1968, through April, 1971, the sum of $150,579.96; and

(3) For Administration, Inspections and Building Maintenance, performed pursuant to paragraph 9, Article II of the contract, the sum of $17,221.20.

At the beginning of the hearing on the claim, counsel for the claimant informed the Court that an error had been made in calculating the second item and that its correct amount was $59,610.26, thereby reducing the total claim to $95,014.84.

The defenses pleaded and relied upon by the respondent were: first, that the claim is barred by the statute of limitations; and, second, that the services to which they pertain were either within the scope of the contract and paid for, or beyond the scope of the contract. At the hearing, when the Court, for the first time, saw the

contract which was admitted into evidence as Claimant's Exhibit 3, the Court, on its own motion, raised the matter of arbitration, inasmuch as Article XI of the contract, being a standard American Association of Architects form, provides:

> "XI ARBITRATION
>
> Arbitration of all questions in dispute under this Agreement shall be at the choice of either party and shall be in accordance with the provisions, then obtaining, of the Standard Form of Arbitration Procedure of The American Institute of Architects. This Agreement shall be specifically enforceable under the prevailing arbitration law and judgment upon the award rendered may be entered in the court of the forum, state or federal, having jurisdiction. The decisions of the arbitrators shall be a condition precedent to the right of any legal action."

In their brief upon the issue of arbitration, claimant's counsel have taken the position that the parties waived their rights to arbitration, but have relied mainly on the case of *Earl T. Browder, Inc. v. County Court of Webster County,* 143 W.Va. 406, 102 S.E.2d 425 (1958) and *Independent School Dist. No. 35 v. A. Hedenberg & Co., Inc.,* 7 N.W.2d 511 (Minn. 1943). Conspicuously absent from that brief is any mention whatsoever of the case of *Board of Education, etc. v. W. Harley Miller, Inc.,* ....W.Va....., 221 S.E.2d 882 (1975) and *Board of Education, etc. v. W. Harley Miller, Inc.,* ....W.Va....., 236 S.E.2d 439 (1977). From those two decisions, it appears that, under the law of West Virginia, where the parties have expressly agreed that all disputes under their contract shall be submitted to arbitration and that arbitration is a condition precedent to litigation, arbitration is the exclusive remedy. That is not to say that it is impossible to waive arbitration, but it would seem to take more than mere inaction for a waiver to occur. See the second *Miller Case,* Footnote 7, 236 S.E.2d 439, at 450. For instance, in *Browder,* failure to arbitrate after a demand had been made was held to constitute a waiver. In *Parkersburg v. Turner Construction Company,* 442 F. Supp. 673 (N.D.W.Va. 1977), the district court, construing West Virginia law, held that arbitration was a condition precedent to litigation, and, for that reason, entered judgment for the defendant. The U.S. Court of Appeals for the Fourth Circuit rendered a decision on January 11, 1980, vacating that judgment, but remanded the case with directions to stay further proceedings in the district court pending arbitration. In its decision, the appellate court stated:

"Not to easily rejected, however, is the city's contention that Turner waived the right to arbitration by failing to assert it. Indeed, despite the clear and broad arbitration provision, neither party sought that remedy. Nonetheless, we conclude that arbitration is still available***."

The same reasoning appears to apply here, and, in order to follow the cited precedents, further proceedings in this Court will be stayed pending arbitration of the dispute between the parties.

Opinion issued March 5, 1980

RONALD L. BAILEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-195)

Claimant appeared in person.

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

RULEY, JUDGE:

The claimant seeks recovery in the amount of $280.09 for damage to the right front wheel of his 1978 Oldsmobile automobile which occurred when it struck a pothole in the outside westbound traffic lane of W.Va.-U.S. Route 460. The accident occurred at about 9:45 p.m. on March 12, 1979, at a point about 10 or 11 miles east of Princeton in Mercer County. At that time and place, Route 460 was a four-lane divided highway. Mr. Bailey was driving at approximately 50 mph and was returning from Peterstown to his home in Princeton. Immediately before the accident, he had been overtaken and passed by a tractor-trailer unit. He testified that the pothole was about 3-1/2 feet long, 2-1/2 feet wide, and 8 to 9 inches deep. He was unaware of its existence and did not see it in time to taken any evasive action. It extended from a point about two feet from the edge of the concrete pavement toward its center. Several blacktop patches were located in the same general area. Mr. Bailey also testified that one of the respondent's claim agents later told him that the hole had been in existence for about two weeks. While that evidence obviously was hearsay, it is equally apparent that it is consistent with experience in that it is probable that a hole of such size did not develop overnight. Following the precedent of *Lohan*

v. Department of Highways, 11 Ct.Cl. 39 (1975), which is on all fours, an award should be made.

Award of $280.09.

Opinion issued March 5, 1980

CARMET COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(CC-76-41)

Simon Noel, Attorney at Law, for claimant.

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

RULEY, JUDGE:

The claimant seeks an award in the sum of $1,577.61 for damage allegedly sustained by its 1974 model Plymouth automobile when it collided with the respondent's truck. The collision happened on Friday, June 6, 1975, at a point on W. Va. Route 2 near Moundsville in Marshall County. At that time and place, Route 2 was a two-lane highway and was substantially straight and level for several hundred feet. Both vehicles were northbound, and, at the time of the accident, the claimant's vehicle, driven by its employee, Ellis R. Abel, was engaged in an overtaking and passing maneuver. The respondent's truck, driven by its employee, Christopher P. Shutler, was turning left. Mr. Shutler had slowed from about 50 mph to about 30 mph but had given no signal of his intention to turn left, thereby violating West Virginia Code §17C-8-8. He testified that the rear directional signals of the truck were broken. He also testified that, before beginning the left turn, he looked in his side view mirror and saw no vehicles approaching, which impels the Court to conclude that he must not have looked effectively. On the other hand, Mr. Abel violated West Virginia Code §17C-7-3(a) by failing to give an audible signal of his intention to pass. Accordingly, both drivers were guilty of negligence which combined to proximately cause the collision and resulting damage.

Since this case was heard after *Bradley v. Appalachian Power Co.,* ....W.Va....., 256 S.E.2d 879 (1979), the Court must apply the doctrine of comparative negligence. *Atkinson v. Department of*

Highwyas, 13 Ct.Cl. 18 (1979). Applying that doctrine, it appears to the Court that the negligence should be allocated 40% to the claimant and 60% to the respondent. Inasmuch as the parties stipulated the claimed damage of $1,577.61, the claimant should receive an award of 60% of that sum, viz., $946.57.

Award of $946.57.

Opinion issued March 5, 1980

MELVIN DINGESS and CORENIA DINGESS

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-207)

Claimants appeared in person.

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

WALLACE, JUDGE:

The claimant, Corenia Dingess, owns a vacant tract of land in the Ottawa Addition about twelve miles from Madison, West Virginia. The property fronts approximately 350 feet on the east side of West Virginia Route 17 between Madison and the Logan County line and extends back to Coal River. Corenia Dingess inherited the property from her mother who had owned it for about twenty-five years. The claimants live in Portsmouth, Ohio and visit the area once or twice a year.

Mr. Dingess testified that the respondent constructed a culvert under the highway which drains the area on the opposite side of the road into the middle of claimants' land. He also stated that during the construction of the culvert, three fruit trees were cut down by the respondent. Mr. Dingess complained to the Boone County Department of Highways office and met with respondent's representatives.

Frank Ball, supervisor of Boone County, testifying for respondent, stated that there were two drains on claimants' property. One had been there for many years, and the one in question, an 18-inch galvanized drain, was installed approximately three years ago. He admitted that the respondent had no easement

for this drain and offered to install drain tile to the river in exchange for an easement for which the respondent would pay a nominal sum. The claimants refused on the grounds that it was impossible to build on the land with a drain in the middle, and a nominal sum for an easement would be insufficient.

There was no testimony offered concerning the value of the trees that were alleged to have been cut down. Mr. Dingess testified that the land was worth $5,000.00 before the drain was installed, and, since the installation, the land is now worth $2,000.00.

From the record, the Court finds that the claimants' land has been damaged by the installation of the drain by the respondent, and hereby makes an award of $2,500.00.

Award of $2,500.00.

Opinion issued March 5, 1980

ELIZABETH SMITH GRAFTON

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-26)

Fred A. Jesser, Attorney at Law, for claimant.

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

RULEY, JUDGE:

This claimant is the owner of a tract of 2.36 acres located on the east side of U.S. Route 19, Appalachian Corridor L, in Fayette County. She has resided in a cottage on that tract from time to time since 1935. A stream, which ordinarily is small, flows through the tract. The construction incident to transforming U. S. Route 19 into Appalachian Corridor L involved building a four-lane divided highway. The elevation of the land on the west side of the highway is higher than that on the east side, and it always has drained into the mentioned stream and thence through the claimant's land. The new highway construction required a long, high fill in the vicinity of the claimant's property, and surface water from an unspecified length of the highway was collected by means of drop inlets and discharged into the stream. The respondent, by eminent domain,

had acquired some portion of the claimant's land for the highway construction, but no circumstances related to that matter is urged as a defense.

The preponderance of the evidence shows that the drainage system constructed incident to the new highway caused a material increase in the volume of surface water flowing onto the claimant's land. A pedestrian bridge near her home now is buried under one foot of silt. The access road to the property often is washed out and the claimant testified that, at times, she is obliged to wear wading boots to get to her cottage. It is a general rule of law that a person who, by means of artificial channels, collects surface water in a body or mass and discharges it upon adjacent land is liable for any resulting damage. *Jordan v. Bentwood*, 42 W.Va. 312, 26 S.E. 266 (1896), *Tracewell v. County Court*, 58 W.Va. 283, 52 S.E. 185 (1905), *Lindamood v. Board of Education*, 92 W.Va. 387, 114 S.E. 800 (1922). Hence, the issue of liability must be resolved in favor of the claimant.

The only evidence on the issue of damages was that of David F. Fox, a well qualified expert, who testified that, in his opinion, the diminution in market value of the claimant's property resulting from damage attributable to the increased burden of surface water was $9,000.00. For that reason, the Court is constrained to make an award in that sum.

Award of $9,000.00

Opinion issued March 5, 1980

CLEO LIVELY MOORE

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-292)

Harold Albertson, Jr., Attorney at Law, for claimant.

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

RULEY, JUDGE:

The claimant is the owner of a lot measuring 50' x 210' located at 2518 Kanawha Boulevard East in Charleston, West Virginia. A dwelling house is located on the front of the lot, and, toward the rear, which extends to Washington Street, there is a building

containing four garages on the first floor and two apartments on the second floor. A concrete apron extends from the garages to Washington Street. Claimant purchased that property in 1965. Directly across Washington Street from the apartments there was an abutment of the old Kanawha City Bridge. The respondent entered into a contract with National Engineering Company, an independent contractor, to rebuild the bridge. Incident to that work, a subcontractor, Martin Explosives, demolished the old bridge, including the mentioned abutment, by utilizing a crane and headache ball which sometimes, according to the undisputed evidence, was dropped a distance of fifty feet. It also is undisputed that both the dwelling house and garage apartments were shaken, a fact which requires little imagination, and that damage in the form of cracking was sustained by the concrete apron and the walls and ceilings of the apartments. Apparently the work began in 1975. When it ended is not clear from the record. Claimant seeks an award in the sum of $12,000.00.

It is general rule that the employer of an independent contractor is not liable for torts committed by the independent contractor. *Safeco Insurance Company v. Department of Highways,* 9 Ct.Cl. 28 (1971). But a well recognized exception to that general rule of nonliability exists in the case of inherently or intrinsically dangerous work. *Trump v. Improvement Company,* 99 W.Va. 425, 129 S.E. 309 (1925), *Law v. Phillips,* 136 W.Va. 761, 68 S.E.2d 452 (1952), *Chenoweth v. Settle Engineers, Inc.,* 151 W.Va. 830, 156 S.E.2d 297 (1967), 41 Am. Jur.2d, *Independent Contractors,* §41. Whether work which produces vibrations sufficient to cause damage or injury is or is not so intrinsically dangerous as to render an employer liable for the tort of an independent contractor depends upon the circumstances. Under the circumstances of this case, where the work was performed in proximity to the apartment residences directly across the street, it appears that it was intrinsically dangerous, and hence, that the general rule of nonliability should not be applied. See 41 Am. Jur.2d, *Independent Contractors,* §41, 31 Am. Jur.2d, *Explosions and Explosives,* §43. See also *Whitney v. Myers Corporation,* 146 W.Va. 130, 118 S.E.2d 622, Syl. 3 (1961).

Although it virtually is impossible to reconcile the wide disparity in the evidence on the issue of damages, the estimates ranging from $2,350.00 (for replacement of the concrete apron only) to $13,300.00, the Court is of the opinion that $5,000.00 would be fair compensation for the damage sustained.

Award of $5,000.00.

Opinion issued March 5, 1980

CATHERINE NESTOR

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-296)

Robert Gallagher, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

The claimant filed this claim against the respondent for water damage to her home, which is located on ten acres of land fronting on Monown Road just off its intersection with West Virginia Route 7 near Kingwood, West Virginia. The claimant has lived in this home since 1951. The elevation of the road is higher than the claimant's home. Her driveway slopes downward from the highway to the house. Drainage along the road, maintained by the respondent, is provided by culverts under the road and ditches to and from these culverts.

One night in the spring of 1978, the claimant went to the basement, put coal in her furnace, and went to bed. The basement was dry. Sometime during the night, there was a heavy rain, and the claimant awoke to discover water in the basement. Her investigation revealed that water was coming in from the road. The claimant and witnesses in her behalf testified that there had been no water in the house before this time, and that one of the culverts under the road had been damaged by heavy truck traffic. The culvert then became stopped up and changed the flow of surface water onto claimant's property and into her home. The claimant further testified that water continued to come into her basement during subsequent rains. Complaints were made to the respondent's office in Preston County by the claimant and her daughter, who stated that there was no response to these calls. Subsequently, the respondent replaced the damaged culvert, and cleaned the ditch line and other culverts. Since this work was completed, no further water problem has occurred.

The claimant sustained damage to the walls and floor of the basement of her house. Her furnace, water heater, and septic tank had to be replaced. Personal property damaged and destroyed in the basement consisted of items of furniture, stored clothing, and canned fruit and vegtables. It was necessary to spread 30 tons of gravel on the driveway to the home at a cost of $202.50. Claimant expended $2,330.00 for a new furnace, $129.00 for a water heater, and $1,100.00 to replace the septic tank. She valued the lost items of furniture, clothing, and canned fruit and vegtables at $1,435.00. The Court directed the claimant to obtain an appraisal of her house establishing a value before and after the damage. The appraisal obtained by the claimant from Snyder Realty Company of Kingwood, West Virginia, indicated that the difference in the values was $6,000.00.

From the record, the Court is of the opinion that the failure of the respondent to properly maintain the culvert and drainage ditches servicing the road in front of claimant's home caused the damages and losses sustained by the claimant. Accordingly, based on the evidence and testimony, the Court hereby makes an award of $11,196.50 for the damages to claimant's home and personal property.

Award of $11,196.50.

Opinion issued March 6, 1980

AMERICAN HOSPITAL SUPPLY

vs.

DEPARTMENT OF HEALTH

(CC-79-575)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $424.32 for hospital supplies delivered to Welch Emergency Hospital. In its Answer,

the respondent admits the validity of the claim, and states that there were sufficient funds in respondent's appropriation for the fiscal year in question from which the claim could have been paid.

In view of the foregoing, the Court hereby makes an award to the claimant in the amount of $424.32.

Award of $424.32.

Opinion issued March 6, 1980

MARIA CATERINA ANANIA

vs.

DEPARTMENT OF HIGHWAYS

(D-553)

Michael R. Crane, Attorney at Law, for claimant.

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

RULEY, JUDGE:

This claim was submitted upon a stipulation by the parties. Respondent informed claimant in 1969 that respondent intended to condemn claimant's properties located on Eagen Street and Capitol Street, in Charleston, West Virginia. On November 19, 1970, respondent informed a proposed tenant of claimant's Capitol Street property that it would be futile to lease said property due to the upcoming condemnation. On March 9, 1971, claimant was advised by respondent that neither property would be condemned. Claimant then located a tenant for the Capitol Street property and leased it beginning January 1, 1972. As a result of the respondent's representations, the Capitol Street property remained vacant for more than a year. The parties have agreed that the reasonable value of the lost rentals on the Capitol Street property during that period is $5,950.00.

With regard to the Eagen Street property, it appears that finally the respondent did take that property in December, 1971. The parties have agreed that the reasonable value of the rentals lost during the period from August, 1970, to December, 1971, is $640.00.

The facts also indicate that respondent was in possession of 20 feet of the Capitol Street property for a temporary construction

easement from January 1, 1972, to January 1, 1978. The parties have agreed that the reasonable value for respondent's temporary construction easement is $2,410.00. The Court finds that claimant is entitled to recover the reasonable value of the temporary construction easement.

The respondent, by affirmative actions, directly caused the claimant to sustain the foregoing losses which she is entitled to recover under the precedent established in *Jones v. State Building Commission*, 9 Ct. Cl. 65 (1972).

Award of $9,000.00.

Opinion issued March 6, 1980

APPALACHIAN REGIONAL HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-697)

No appearance by claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $1,243.25 for medical care rendered to an inmate of the Beckley Work Release Center in June of 1976.

In its Answer, the respondent admits the validity of the claim and states that there were sufficient funds remaining in the respondent's appropriation for the fiscal year in question from which the obligation could have been paid.

In view of the foregoing facts, the Court hereby makes an award to the claimant in the amount of $1,243.25.

Award of $1,243.25.

Opinion issued March 6, 1980

BANK OF GASSAWAY

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-78-22)

Jack D. Huffman, Attorney at Law, for claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

RULEY, JUDGE:

This claim, submitted upon the Amended Notice of Claim with various exhibits attached, and the Answer admitting liability in the sum of $3,061.16, arises from the following facts. On March 4, 1976, the claimant made a loan represented by a promissory note in the amount of $4,114.20 to be secured by a lien upon a 1972 model Ford automobile and a 1959 model Freedom house trailer. The claimant forwarded to the respondent the title certificates to those vehicles, requesting that its lien be shown upon them. The respondent complied with the request, returning to the claimant title certificates which showed its lien. Thereafter, following default in payment of the loan, the claimant, upon attempting repossession, learned that the respondent, through some unexplained inadvertence or neglect, had provided the borrower with title certificates to the vehicle which showed no lien. In addition, the borrower had sold the vehicles to some other person or persons. The claimant then sued the borrower in the Circuit Court of Roane County, and obtained a default judgment on January 5, 1977, in the sum of $3,061.16 plus interest and costs. Execution was issued upon the judgment but was returned unsatisfied on June 28, 1979. Following the precedent of *Wood County Bank v. Department of Motor Vehicles,* 12 Ct.Cl. 276 (1979), it appears that an award in the sum of $3,061.16 should be, and it is hereby, made. An award of interest in this case is expressly precluded by West Virginia Code §14-2-12, and the Court is not aware of any authority for an award of attorney fees in a case of this type.

Award of $3,061.16.

Opinion issued March 6, 1980

JOE B. ELLER

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-485)

Claimant appeared in person.

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

WALLACE, JUDGE:

The claimant filed this claim in the amount of $120.62 for damages to his 1970 Chevrolet automobile.

On September 6, 1979, at approximately 10:00 a.m., claimant was driving his automobile on Route 275 near Cabin Creek, West Virginia, which road is maintained by the respondent. The weather was clear. Proceeding along the highway, claimant came to a wooden-floor bridge at Little Creek. The claimant testified that, as he crossed this bridge, one of the floorboards "flew up and hit the exhaust and tore it up." He further stated that he had crossed the bridge many times and knew that the floorboards were loose. His automobile sustained damage to the exhaust and cross pipe in the amount of $120.62.

While there is no evidence that the respondent had specific notice of the loose floorboards on the bridge, it is apparent that proper inspection of the bridge floor would have revealed this condition.

The law of West Virginia is well established that the State is neither an insurer nor a guarantor of the safety of travellers upon its highways. However, the condition which developed on the bridge in this case should have been anticipated by the respondent, and its failure to properly maintain the bridge floor constitutes negligence. See *Williams v. Department of Highways,* 11 Ct.Cl. 263 (1977).

Believing the respondent should have known of or discovered the loose floorboards of the bridge and made the necessary repairs, and further believing that the claimant was free from contributory

negligence, the Court is of the opinion to and does make an award to the claimant in the amount of $120.62.

Award of $120.62.

Opinion issued March 6, 1980

HANDLING, INC.

vs.

ALCOHOL BEVERAGE CONTROL COMMISSIONER

(CC-79-471)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

Claimant was the successful bidder to furnish and install a conveyor system in respondent's Store #2 in Beckley, West Virginia. The bid request was on certain specifications which involved power input to the power source for the conveyor of a 230-volt, three-phase motor. The equipment was ordered and installed according to the specifications.

This claim was filed to recover from the respondent the sum of $1,031.00, itemized as follows: $215.00 for charges made by the supplier for the return of incorrect motors, and $816.00 for expenses incurred by claimant's crew for two additional trips to Beckley to connect different motors and adjust the belting and conveyor system.

Although it was disputed by the respondent, the claimant contended that the hookup to the electrical system in the building was not included in the contract. The respondent employed an electrician to connect the system. It was determined by the electrician that the motor installed under the specifications was incorrect for the electrical system of the building. He recommended a 230-volt, single-phase motor, which the claimant installed. This motor was also improper. The respondent then had the power company and the electrician determine the correct motor for the building's power. Following their advice, the claimant installed a 115-volt, single-phase motor, which proved to be the proper one.

William J. Ransom, president of claimant company, testified that it was standard in the industry not to connect conveyor systems to the electrical systems of buildings where the conveyors are installed unless that item is specially bid in the contract. Mr. Ransom stated that when the item is specially bid, his company normally hires or subcontracts to a local electrician who knows the code requirements and is skilled in such installations.

Accordingly, it is the opinion of the Court that the claimant is entitled to recover the sum of $1,031.00 for the additional costs and expenses incurred in the installation of the new motor to accomodate the electrical system of respondent's building.

Award of $1,031.00.

Opinion issued March 6, 1980

WALTER A. HENRIKSEN

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-165)

Linda Henriksen appeared on behalf of claimant.

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

GARDEN, JUDGE:

On February 14, 1979, at about 6:30 in the evening, Linda Henriksen was operating her husband's 1974 Plymouth Fury automobile in a westerly direction on Route 50 in Harrison County, West Virginia. She had been to Bridgeport to pick up her son, and they were returning to their home in Salem. It was dusk, and Mrs. Henriksen was traveling at a speed of 50 miles per hour with her parking lights illuminated. She was crossing Salem Fork Bridge, which is located just east of the corporate limits of Salem, when her car struck not a pothole, but what apparently was a completely disintegrated section of the bridge. The bridge at the accident scene is four-laned, two lanes for westbound traffic and two lanes for eastbound traffic, with a concrete median strip separating the west and eastbound lanes. Mrs. Henriksen was traveling in the right-hand or curb lane of the bridge. According to Mrs. Henriksen, the disintegrated section of the bridge extended over the entire width of the curb lane and was at least the size of her car in length.

She was unable to describe the depth of this section of the bridge, but did testify that the reinforcing bars in the bridge deck were clearly visible. As the result of the ensuing accident, her husband's car sustained severe damage, particularly to the transmission, necessitating repairs in the amount of $458.35.

Mrs. Henriksen stated that she had not driven over this bridge since December of 1978, and, that while the bridge deck was not in good condition at that time, it certainly had not reached the state of disrepair that existed on the evening of the accident. She testified that her husband, who was affiliated with the National Guard, was aware of the bridge condition and had previously sustained damage to the alignment of a military vehicle which he was operating. On at least three occasions within a month preceeding her accident, Mrs. Henriksen had been present when her husband called respondent's local office and had complained about the condition of the bridge, but, apparently, these calls had not accomplished the intended result. Mrs. Henriksen testified that, on the evening of her accident, there were no signs posted to warn motorists of the hazardous condition of the bridge. The respondent introduced no evidence in defense of that assertion.

The Court is of the opinion that the respondent had notice of the condition of the bridge sufficiently in advance of the subject accident to have effected repairs or at least to have erected signs or other warning devices to alert motorists of the dangerous condition existing on the bridge. Being of the further opinion that the claimant's wife was not guilty of any negligence, the Court hereby makes an award in favor of the claimant in the amount of $458.35.

Award of $458.35.

Opinion issued March 6, 1980

DEBORAH J. HODGES

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-590)

No appearance by claimant.

Douglas Hamilton, Attorney at Law, for respondent.

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's vehicle in the amount of $43.21 were caused when said vehicle struck a loose board on Bridge No. 20-72/1-0.01, which bridge is part of Local Service Route 72/1 and is owned and maintained by the respondent; and to the effect that negligence on the part of the respondent was the proximate cause of said damage, the Court finds the respondent liable, and hereby makes an award to the claimant in the above-stated amount.

Award of $43.21.

Opinion issued March 6, 1980

KANAWHA OFFICE EQUIPMENT, INC.

vs.

WEST VIRGINIA BOARD OF CHIROPRACTIC EXAMINERS

(CC-79-585)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $608.00 for an Olivetti Lexikon 90C typewriter delivered to the respondent. In its Answer, the respondent admits the validity of the claim, and states that

payment was not made within the fiscal year in question, and could not be made thereafter, although funds were available.

In view of the foregoing, the Court hereby makes an award to the claimant in the amount requested.

Award of $608.00.

Opinion issued March 6, 1980

NELLIS MOTOR SALES

vs.

ALCOHOL BEVERAGE CONTROL COMMISSIONER

(CC-80-80)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $260.97 for services rendered to the respondent. In its Answer, the respondent admits the allegation set forth in the Notice of Claim that claimant's bill was misplaced and not rendered to respondent until after the close of the fiscal year in question. During that fiscal year, sufficient funds were availabe in respondent's appropriation from which the claim could have been paid. The respondent further acknowledges that the work was performed satisfactorily by claimant, and joins with the claimant in requesting that the claim be honored.

Based on the foregoing, the Court hereby makes an award to the claimant in the amount of $260.97.

Award of $260.97.

Opinion issued March 6, 1980

NORTH BEND STATE PARK

vs.

DEPARTMENT OF HEALTH

(CC-80-79)

No appearance by claimant.

David R. Brisell, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $88.12 for an unpaid restaurant bill which was incurred by respondent's Colin Anderson Center.

In its Answer, the respondent admits the allegations set forth in the Notice of Claim, and states that there were sufficient funds in respondent's appropriation for the fiscal year in question from which the claim could have been paid.

Based on the foregoing, the Court hereby makes an award to the claimant in the amount of $88.12.

Award of $88.12.

Opinion issued March 6, 1980

JOYCE PORTER

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-192)

Claimant appeared in person.

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

GARDEN, JUDGE:

At approximately 3:00 p.m. on May 14, 1979, the claimant, Joyce Porter, was operating her 1978 Ford pickup truck in a southerly

direction on W. Va. Route 10 near Dingess in Mingo County, West Virginia. Miss Porter, a dietician employed at the Logan General Hospital, was returning to her home in Dingess. At or near Dingess, Route 10 crosses 12 Pole Creek in the form of a narrow, wooden bridge which the claimant testified was too narrow to permit the passage of two cars traveling in opposite directions. According to the testimony of the claimant and her witnesses, Route 10 is the only, or at least the most direct, route from Logan to Dingess.

Apparently, a hole in the wooden deck of the bridge had developed over a period of several weeks prior to the accident, and on the date of the accident, the hole measured two feet in width and from one-half to two feet in length. The claimant testified that she was aware of the existence of this hole, since she crossed the subject bridge twice a day when going to and from her place of employment. She testified that, on her way to work on the day of the accident, she was able to cross the bridge by straddling the hole. On her return home that afternoon, she again attempted to straddle the hole, but apparently, as she attempted to do this, additional wooden planking adjacent to the existing hole collapsed, and the left front wheel of her truck dropped into the hole, causing substantial damage to the left front of her truck. Claimant testified that, while she had not personally complained of the existence of the hole, other people had notified respondent's Huntington office prior to her accident. An estimate from Paul Cooke Ford, Inc., of Logan, was introduced into evidence, reflecting the cost of repair of the truck in the amount of $503.85. Included in the estimate were the cost and labor for the replacement of the rear bumper of the truck in the amount of $197.80. Seven photographs of the truck from various angles were introduced into evidence which showed the left front wheel submerged in the bridge deck. It is impossible for this Court to see how any damage could have been inflicted to the rear bumper of the truck.

The respondent offered no evidence in defense of this claim, and, in the Court's opinion, the claimant has established by a preponderance of the evidence that the respondent knew or should have known of the existence of this hole, and was therefore guilty of negligence in failing to maintain the bridge in a reasonably safe condition. Respondent, in its Answer, asserted the defense of assumption of the risk, but, according to the evidence, there was no other reasonable route between Logan and Dingess. Therefore, the

Court is of the opinion that this defense is of no merit. Deducting from the repair estimate the labor and material relating to the rear bumper of claimant's truck, the Court hereby makes an award in favor of the claimant in the amount of $306.05.

Award of $306.05.

Opinion issued March 6, 1980

ERNEST J. SANDY

vs.

BOARD OF REGENTS

(CC-80-92)

No appearance by claimant.

Ann V. Dornblazer, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $1,459.00 which is the amount of his semi-monthly paycheck for the June 15-30, 1979 pay period which he did not receive because of a clerical error. Respondent acknowledges the validity and the amount of the claim as documented by letters from officials of West Virginia University, where claimant is employed. The Court therefore makes an award to the claimant in the amount of $1,459.00.

Award of $1,459.00.

Opinion issued March 6, 1980

JESSIE and DENSIL O. SAYRE

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-626)

No appearance by claimants.

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

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $41.01, based upon the following facts: On or about June 6, 1979, claimants' son, Densil Duane Sayre, was operating claimants' 1977 GMC automobile on West Virginia Routes 62 and 2. In the course of said operation, claimant's vehicle crossed the Shadle Bridge over the Kanawha River between the cities of Henderson and Point Pleasant, West Virginia. Said bridge is owned and maintained by the respondent.

While crossing the bridge, claimant's vehicle struck a piece of steel which punctured the right front tire. This occurred because of the negligence of the respondent, which negligence was the proximate cause of the damages suffered by the claimants. Respondent is therefore liable to the claimants for the sum of $41.01, which is a fair and equitable estimate of the damages sustained.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $41.01.

Opinion issued March 6, 1980

SHAEFFER AND ASSOCIATES

vs.

DEPARTMENT OF HEALTH

(CC-80-68)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $576.00 representing the balance due on a construction project at respondent's Weston State Hospital. In its Answer, the respondent admits the validity of the claim and joins with the claimant in requesting that judgment be rendered on behalf of the claimant in the amount requested.

The Court therefore makes an award to the claimant in the amount of $576.00.

Award of $576.00.

Opinion issued March 6, 1980

SOUTHERN WEST VIRGINIA CLINIC

vs.

DEPARTMENT OF CRRECTIONS

(CC-80-95)

No appearance by claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $185.00 for hospital services rendered to an inmate of the Beckley Work Release Center. Respondent answers and says that the services were rendered

during fiscal year 1975-76, but the bill presented for payment was not received by the respondent until after the fiscal year had expired. There were, however, funds remaining in the respondent's appropriation from which the obligation could have been paid.

In view of the foregoing, the Court hereby makes an award to the claimant in the amount requested.

Award of $185.00.

Opinion issued March 6, 1980

SPATIAL DATA SYSTEMS, INC.

vs.

BOARD OF REGENTS

(CC-80-8)

No appearance by claimant.

Ann V. Dornblazer, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $650.00 for a model 108D monitor, which was part of a Datacolor/Edge Enhancer System purchased by West Virginia University. In its Answer, the respondent admits the validity of the claim as evidenced by correspondence from the Director of Purchasing and the Assistant to the President of West Virginia University. Funds were available in respondent's appropriation for the fiscal year in question from which the claim could have been paid.

In view of the foregoing, the Court hereby makes an award to the claimant in the amount requested.

Award of $650.00.

Opinion issued March 6, 1980

STONE COMPANY, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-95)

John J. Hankins, Attorney at Law, for claimant.

Frank S. Curia, Attorney at Law, for respondent.

RULEY, JUDGE:

This claim was submitted upon a stipulation and certain documentary exhibits from which it appears that the claimant delivered certain stone aggregate to the respondent in June, 1972, pursuant to a duly issued purchase order, and that the price of the stone was $4,500.00. The only defense asserted is the four-year statute of limitations of West Virginia Code §46-2-725, a provision of the Uniform Commercial Code. It appears that the claim was filed on April 18, 1978.

West Virginia Code §46-2-725 provides, in part:

> "(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.***"

In sum, the respondent contends that the four-year period of limitations of the Uniform Commercial Code applicable to "action for breach of any contract for sale", rather than the ten-year period of limitations applicable generally to written contracts, West Virginia Code §55-2-6, applies. Assuming for the sake of discussion that such contention is correct, the equally important question is - When did the breach occur? While it appears from the evidence that there was some debate about the quality and quantity of the stone (matters which were resolved by the stipulation), it also appears that the claimant had no reason to believe that the respondent ultimately would refuse payment for the stone until January 6, 1975, when the respondent "cancelled" the purchase

order. Accordingly, the Court concludes that there was no breach before that date, and, irrespective of which period of limitations is applied, the claim is not barred. Respondent's counsel has argued that the cause of action arose as of "the date of delivery or possibly a reasonable time after the date of delivery". In response to that contention, the Court observes that, aside from the ambiguity inherent in it, it would serve only to encourage rather than discourage litigation, and such is not the policy of the law. For the foregoing reasons, an award in the sum of $4,500.00 should be made.

Award of $4,500.00.

Opinion issued March 6, 1980

FRANK TERANGO and DUEL TERANGO

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-257)

Claimants appeared in person.

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

WALLACE, JUDGE:

The claimants filed this claim for damages caused by a clogged drainage ditch and pipes maintained by the respondent.

The claimant's home is located at 5677 Hubbard's Branch Road in Wayne County, West Virginia, on a 48-acre tract of land. This tract fronts the road for about 1000 feet. The house is situated approximately 300 to 400 feet from the road and 50 to 80 feet below the road level. Ingress and egress is provided by a driveway from the raod down to the house. There is a hill on the opposite side of the road, and drainage from the hill and that general area is carried in a ditch line along the road, crossing drains under the road.

Testimony revealed that the ditch and drains were clogged with dirt, trash, and other debris. The water, instead of going through the ditch line and drains, crossed the road and flowed down the claimants' driveway, washing it out. As a result, the claimants' truck and automobile were damaged during ingress and egress.

The claimants made numerous calls in 1978 and 1979 to respondent's district office in Huntington and to respondent's office in Charleston requesting assistance in the opening of the drainage ditch and drains. After the complaints and after this claim was filed, respondent cleaned out the ditch line and opened two drains, relieving the condition.

It is the opinion of the Court that the respondent's failure to properly maintain the drainage ditch and drains servicing Hubbard's Branch Road was the cause of the damages sustained by the claimants' vehicles and driveway.

Evidence introduced by the claimants indicates that it was necessary to replace the shocks, muffler, and tail pipe assembly on their 1978 Chevrolet pickup truck at a cost of $201.68, and replace the muffler and tail pipe on their 1976 Plymouth Grand Fury automobile at a cost of $67.88. An additional $249.75 was expended for slag, limestone, and bulldozer work on the driveway. The claimant Mrs. Terango testified that an additional two loads of limestone were needed to complete the road repair at a cost of $100.40 per load for a total of $200.80.

Accordingly, from the record, the Court hereby makes an award to the claimants in the amount of $720.11.

Award of $720.11.

Opinion issued March 6, 1980

THREE PRINTERS, INC.

vs.

DEPARTMENT OF HEALTH

(CC-80-81)

No appearance by claimant.

David R. Brisell, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $2,347.27 for printing

services performed for respondent's Office of Health Planning and Evaluation.

Respondent, in its Answer, admits the allegations set forth in the Notice of Claim, and states further that there were eufficient funds in respondent's appropriation for the fiscal year in question from which the claim could have been paid.

Based on the foregoing facts, an award in the above amount is hereby made to the claimant.

Award of $2,347.27.

Opinion issued March 6, 1980

UARCO, INC.

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION

(CC-80-61)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $2,744.95 for the purchase and shipping costs of certain journal warrant forms delivered to the respondent. In its Answer, the respondent admits the validity of the claim and joins with the claimant in requesting that said claim be paid.

In view of the foregoing, the Court hereby makes an award to the claimant in the amount of $2,744.95.

Award of $2,744.95.

Opinion issued March 6, 1980

TONY J. VELTRI
d/b/a FARMERS DELIGHT CO.

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-63)

No appearance by claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $5,172.78 for goods purchased by the respondent during fiscal year 1975-76. Due to an error, the invoice was held in the Department of Finance and Administration until the funding for fiscal year 1975-76 had expired.

In its Answer, the respondent admits the validity of the claim and states that there were sufficient funds remaining in the respondent's appropriation for the fiscal year in question from which the obligation could have been paid.

Based on the foregoing, an award in the amount of $5,172.78 is hereby made to the claimant.

Award of $5,172.78.

Opinion issued March 7, 1980

CLIMATE MAKERS OF CHARLESTON, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-88)

No appearance by claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $2,568.00 for six air conditioners delivered to respondent's West Virginia State Penitentiary.

In its Answer, the respondent admits the allegations set forth in the Notice of Claim, but states also that there were no funds remaining in the respondent's appropriation for the fiscal year in question from which the obligation 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. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Advisory Opinion issued March 7, 1980

DEPARTMENT OF HIGHWAYS

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-633)

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

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for an advisory determination pursuant to Code 14-2-18. From the Notice of Claim and the respondent's Answer, it appears that during the month of June, 1979, respondent Department of Corrections received from the claimant, but made no payment for, 245.5 gallons of gasoline at a price of $.7975 per gallon, resulting in a total claim of $195.78.

The respondent, in its Answer, admits the validity of the claim, but states also that there were no funds remaining in its appropriation for 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 the further opinion that an award cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct.Cl. 180 (1971). As this is an advisory determination, the Clerk of the Court is hereby directed to file this Opinion and forward copies thereof to the respective department heads of claimant and respondent.

Opinion issued March 7, 1980

EXXON COMPANY, U.S.A.

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-647)

No appearance by claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $246.53 for gasoline furnished to the Huttonsville Correctional Center. In its Answer, the respondent admits the validity of the claim, but also states that there were no funds remaining in the respondent's appropriation for the fiscal year in question from which the obligation could have been paid.

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

Claim disallowed.

Opinion issued March 7, 1980

IBM CORPORATION

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-631)

No appearance by claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $836.64 under a service agreement entered into with the Huttonsville Correctional Center for the servicing of electric typewriters. In its Answer, the respondent admits the validity of the claim, but also states that there were no funds remaining in the respondent's appropriation for 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 the further opinion that an award cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued March 7, 1980

MEMORIAL GENERAL HOSPITAL ASSOCIATION

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-669)

No appearance by claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $46,156.75 for hospital services rendered to inmates of respondent's Huttonsville Correctional Center. In its Answer, the respondent admits the validity of the claim, but states also that there were no funds remaining in respondent's appropriation for the fiscal year in question from which the obligation 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. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued March 7, 1980

SOUTHERN WEST VIRGINIA CLINIC

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-686)

APPALACHIAN REGIONAL HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-698)

INDUSTRIAL RUBBER PRODUCTS CO.

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-709)

TOWN & COUNTRY DAIRY

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-714)

MORRIS E. BROWN

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-5)

AND

HUNTINGTON STEEL & SUPPLY COMPANY

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-12)

No appearance by claimants.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

The above claims against the Department of Corrections, which were submitted upon the pleadings, have been consolidated by the Court for purposes of this decision.

Claimants herein seek compensation for goods and services totaling $14,115.69 which were furnished to the respondent and for which claimants received no payment. Said goods and services were provided in the following amounts:

Southern West Virginia Clinic (CC-79-686)	$ 310.00
Appalachian Regional Hospital (CC-79-698)	10,355.15
Industrial Rubber Products Co. (CC-79-709)	301.47
Town & Country Dairy (CC-79-714)	2,096.08
Morris E. Brown (CC-80-5)	24.00
Huntington Steel & Supply Co. (CC-80-12)	1,028.99
TOTAL	$14,115.69

In its Answers, the respondent admits the validity of each claim, but states further that there were no funds remaining in the respondent's appropriation for the fiscal years in question from which the obligations could have been paid.

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

Claims disallowed.

Opinion issued March 7, 1980

WHEELING HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-94)

No appearance by claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $585.95 in charges for outpatient surgery performed on an inmate of the West Virginia State Penitentiary. In its Answer, the respondent admits the validity of the claim, but also states that there were no funds remaining in the repondent's appropriation for the fiscal year in question from which the obligation could have been paid.

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

Claim disallowed.

Opinion issued March 11, 1980

JAMISON ELECTRICAL CONSTRUCTION CO.

vs.

BOARD OF REGENTS

(CC-79-475b)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $21,662.27 under a purchase order agreement entered into with the respondent for labor and materials used in a project entitled "Additional Kitchen Power and Equipment Connections" at the West Virginia University Medical Center.

In its Answer, the respondent admits the validity of the claim. In addition, Respondent's Exhibit No. 1, a letter from Gene A. Budig, President of West Virginia University, states that funds were available for the fiscal year in question from which the claim could have been paid. Therefore, the Court is disposed to make an award to the claimant in the amount of $21,662.27.

Award of $21,662.27.

Opinion issued March 11, 1980

KANAWHA OFFICE EQUIPMENT, INC.

vs.

BOARD OF REGENTS

(CC-79-475a)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $2,028.00 for three Olivetti typewriters which it supplied to West Virginia University. In its Answer, the respondent admits the validity of the claim. In addition, Respondent's Exhibit No. 1, a letter from Gene A. Budig, President of West Virginia University, states that funds were available for the fiscal year in question from which the claim could have been paid.

In view of the foregoing, the Court hereby makes an award to the claimant in the amount of $2,028.00.

Award of $2,028.00.

Opinion issued March 11, 1980

DONALD J. OLIVERIO

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-240)

Claimant appeared in person.

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

RULEY, JUDGE:

The claimant seeks an award for damages allegedly sustained by certain real property in 1978 as the result of the negligent diversion of surface water through a hole in a bridge located upon W.Va.-U.S. Route 50 in Clarksburg. The real property in question is located at 112 School Street and consists of a two-story frame dwelling house divided into two rented apartments. The claimant testified that you could jump from the bridge onto the roof of the house. He also testified that water flowing through the hole in the bridge from time to time over a period of months fell onto a sloping surface underneath the bridge and thence into the basement of the house. Eventually the hole was repaired.

Based upon the evidence, it appears that the respondent is liable for such damage as may be attributed to water which, in effect, was channeled through that hole and thence onto the claimant's property but the claimant offered no evidence whatever of the amount of such damage and, although at the hearing on July 30, 1979, he was granted leave to supply that deficiency post trial, he has failed to do so to this date. Since the claimant has not been represented by counsel, the Court will grant a motion to reopen the case, if the claimant wishes to pursue it further, provided such motion is made within thirty days from the date on which this opinion is issued. See *Lafferty v. Department of Highways*, 11 Ct. Cl. 239 (1977).

Opinion issued March 18, 1980

GEORGE E. BURGESS and
MONTENA BURGESS

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-225)

Ralph C. Dusic, Jr., Attorney at Law, for claimants.

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

WALLACE, JUDGE:

The claimants filed this claim against the respondent for damages to their 1977 Ford four-wheel drive pickup truck and injuries sustained by the claimant, Montena Burgess. The accident occurred on August 19, 1977, between 10:30 and 11:00 p.m. as the claimants were returning home to Leewood, West Virginia, on Route 79/3 from Montgomery. The weather was clear. As they were proceeding home, claimant George E. Burgess observed a reckless driver in front of them. He drove off the highway at Chelyan to notify the deputies at the deputy sheriff's office but found no one there. As he began to drive back onto the highway, he drove into and across a ditch, damaging his vehicle and injuring his wife.

Along the side of the highway where the claimants turned off the road, there was a State-maintained drainage ditch. The ditch was constructed in such a manner that culverts were put in and covered to provide accesses or driveways to various businesses located on the right-hand side of the road. There were two such driveways approximately sixteen feet wide for ingress and egress to the deputy sheriff's office.

The accident was the result of the claimants' missing the driveway from the sheriff's office to the highway and driving into the ditch. Mr. Burgess testified that he had been to this office previously, that he travelled the road daily to work but had never noticed the ditch, and that there were no warning signs or lights. He further stated that the headlights on his truck were on low beam, and when he struck the ditch he was going three or four miles per hour. His foot hit the gas pedal at the time of impact, causing his truck to go over the ditch and onto the highway.

It was stipulated by the parties that the claimant, Montena Burgess, incurred medical expenses in the amount of $998.00 for

treatment of injuries sustained in the accident. Mrs. Burgess testified that her doctor had advised surgery for the injury she sustained to her back, but she refused to undergo the operation.

While Mr. Burgess contended that he did not see the ditch, the Court is constrained to believe that if he were travelling at the modest speed of three or four miles per hour and had adequate headlights, he should have seen the ditch. If the vehicle had been operated with proper care, it would not have struck the hole. See *Clarke v. Department of Highways,* 11 Ct.Cl. 15 (1975), *Davis v. Department of Highways,* 11 Ct.Cl. 150 (1976).

The Court is of the opinion, from the record, that the respondent is free from negligence and that the negligence of the claimant was the cause of the accident. Accordingly, the Court hereby denies the claim.

Claim disallowed.

Opinion issued March 18, 1980

FRANCES JEANETTE CASEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-181)

Claimant appeared in person.

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

PER CURIAM:

In this claim, submitted for decision following a hearing and the filing of a stipulation by the parties, claimant seeks payment of the sum of $350.60 for damage to her vehicle. Said damage occurred on U. S. Route 460 in the vicinity of Green Valley, Mercer County, West Virginia, which is a highway owned and maintained by the respondent. According to the testimony, claimant's daughter, Maureen Casey, was operating claimant's vehicle easterly on U. S. Route 460 on or about February 9, 1979, when she came upon a portion of snow in the traveled section of the roadway. Employees of the respondent, engaged in snow removal operations, had left this pocket of snow upon the highway, constituting a hazard. The car hit this "snow pocket" and sustained damage to the exhaust

system, alignment, and brake shoes. This occurred as a direct result of respondent's negligence in failing to properly remove the snow from the highway.

The Court finds the amount of damage resulting from the negligence of the respondent to be $217.06 and hereby makes an award to the claimant in that amount.

Award of $217.06.

Opinion issued March 18, 1980

COLEMAN OIL COMPANY, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-618)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $1,111.82, based upon the following facts: On or about October 15, 1979, claimant's bulk gasoline tanker was traveling west on Interstate 64 between the Chesapeake Exit and the West Virginia State Line, a highway owned and maintained by the respondent.

In the course of said operation on I-64, claimant's vehicle crossed the 12 pole bridge, a part of the interstate system. While crossing the bridge, claimant's vehicle struck a loose metal expansion joint, damaging the left drive axle wheel and trailer on the tractor, and damaging the spare tire carrier and left wheel and tire of the trailer. As the respondent's employees failed to properly maintain the expansion joint to prevent it from jarring loose and damaging vehicles on the bridge, the respondent was guilty of negligence which was the proximate cause of the damages suffered by the claimant. Respondent is therefore liable to the claimant for the sum of $1,111.82, which is a fair and equitable estimate of the damages sustained.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $1,111.82.

Opinion issued March 18, 1980

BERTIE K. COX

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-681)

No appearance by claimant.

Douglas Hamilton, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $180.25, based upon the following facts: On or about September 28, 1979, claimant was traveling south on West Virginia Route 2 between Belmont, Pleasants County, and the Wood County Line. On the previous two days, respondent's employees had performed repair work on State Route 2 south of Belmont by filling cracks in the highway with a tar-base substance and then covering the cracks with sand.

On the evening of September 27, 1979, a heavy rainfall occurred which prevented the tar-base material from hardening properly. The next day, claimant's vehicle passed over the substance, which splashed onto the vehicle and adhered to it. As a result, the vehicle had to be cleaned and painted. The respondent, having failed to warn travelers of the propensity of the tar to adhere to vehicles traveling thereon, or to provide personnel to remove the substance as soon as vehicles passed through the tar, was guilty of negligence which was the proximate cause of the damage to claimant's vehicle. Respondent is therefore liable to the claimant for the sum of $180.25, which is a fair and equitable estimate of the damages sustained.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $180.25.

Opinion issued March 18, 1980

DULING BROKERAGE, INC.

and

STATE FARM MUTUAL AUTOMOBILE INS. CO.,
SUBROGEE OF DULING BROKERAGE, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-670)

No appearance by claimants.

Douglas Hamilton, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages to claimant Duling Brokerage in the amount of $115.59, and to claimant State Farm in the amount of $185.70, for a total of $301.29, based upon the following facts: On or about October 4, 1979, claimant Duling Brokerage's 1977 GMC Sports Wagon was traveling west on Interstate 64 near the Kenova Exit, approximately one mile east of the Tri-State Airport. In the course of said operation on I-64, claimant Duling Brokerage's vehicle crossed a bridge which is part of the interstate system and owned and maintained by the respondent. While crossing said bridge, the vehicle struck a loose metal expansion joint, resulting in damage to the drive shaft, carrier bearing, universal joint, tire, and rim. The respondent, having failed to maintain the bridge in a reasonably safe condition, was guilty of negligence which was the proximate cause of the damages suffered by claimant Duling Brokerage.

It was further stipulated by the parties: that the sum of $301.29 is a fair and equitable estimate of the damages sustained; that claimant Duling Brokerage has received from claimant State Farm the sum of $185.70 as partial payment of this claim; that claimant State Farm has been subrogated to the claim of Duling Brokerage in the amount of $185.70, and that the amount of claimant Duling Brokerage's claim remaining unpaid is $115.59.

Therefore, the Court hereby makes an award to the claimants in the amount of $301.29, to be divided as indicated below.

Award of $115.59 to Duling Brokerage, Inc.

Award of $185.70 to State Farm Mutual Automobile Ins. Co.

Opinion issued March 18, 1980

FALLS CITY INDUSTRIES, INC.,
FORMERLY FALLS CITY BREWING CO.

vs.

NONINTOXICATING BEER COMMISSION

(CC-80-62)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $156.75 representing the cost of draft beer excise tax stamps purchased by the claimant. Said stamps were not used and became obsolete when claimant ceased to be in the brewing business.

In its Answer, the respondent admits the validity of the claim and joins with the claimant in requesting that judgment be rendered on behalf of the claimant in the amount requested.

Here the State has not been damaged, and retention of the amount paid for the unused stamps would amount to unjust enrichment on the part of the State. *Central Investment Corporation vs. Nonintoxicating Beer Commission*, 10 Ct.Cl. 182 (1975).

Based on the foregoing, the Court hereby makes an award to the claimant in the amount of $156.75.

Award of $156.75.

Opinion issued March 18, 1980

CARROLL LYNCH

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-522)

No appearance by claimant.

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

PER CURIAM:

It was stipulated by the parties in this case that damages to claimant's truck in the amount of $1,763.83 were caused when said vehicle was struck by a piece of concrete which feel from the Patrick Street Bridge in Kanawha County, a bridge owned and maintained by the respondent. It was further agreed that the failure of the respondent to properly maintain the bridge in sound condition, such that pieces of it would not fall upon vehicles passing beneath the bridge, constituted negligence which was the proximate cause of the damage to claimant's vehicles. The Court therefore grants an award to the claimant in the amount stipulated.

Award of $1,763.83.

Opinion issued March 18, 1980

BARTON MEAIGE

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-200)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $19.66, based upon the following facts: On or about May 11, 1979, claimant was operating his vehicle on West Virginia Routes 62 and 2. In the course of said operation, claimant's vehicle

crossed the Shadle Bridge over the Kanawha River between the cities of Henderson and Point Pleasant, West Virginia. Said bridge is owned and maintained by the respondent.

While crossing the bridge, claimant's vehicle struck a loose steel plate which damaged claimant's tire. Respondent, in failing to properly secure the steel plate to prevent it from bouncing against the undercarriage of vehicles crossing the Shadle Bridge, was guilty of negligence which was the proximate cause of the damages suffered by the claimant. Respondent is therefore liable to the claimant for the sum of $19.66, which is a fair and equitable estimate of the damages sustained.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $19.66.

Opinion issued March 18, 1980

ROSCOE RHODES and MAXINE V. RHODES

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-13)

No appearance by claimants.

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

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $2,000.00, based upon the following facts: Claimants are owners of property and a house on Pennsylvania Avenue in Charleston, Kanawha County, West Virginia. During 1978, when the respondent was constructing Interstate 79 in and near Charleston, said respondent, through its agents, engaged in blasting activities which produced concussions and vibrations in the earth which shook claimants' house and damaged their property.

This Court is constrained to follow the rule of law established by the West Virginia Supreme Court in the case of *Whitney v. Ralph*

Myers Contracting Corporation, 146 W.Va. 130, 118 S.E.2d 130 (1961), which recognizes that the use of explosives in blasting operations is intrinsically dangerous and extra-ordinarily hazardous; therefore, the party who undertakes the blasting is liable for any damage resulting to the property of another. Hence, the respondent in this case is liable to the claimants for the sum of $2,000.00, which is a fair and equitable estimate of the damages sustained.

Based on the foregoing facts, award in the above amount is hereby made.

Award of $2,000.00.

Opinion issued April 1, 1980

ROSE M. ALLEN

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-297)

James C. West, Attorney at Law, for the claimant.

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

WALLACE, JUDGE:

The claimant, Rose Allen, filed this claim against the respondent for damages to her home located at 57 Hanover Street in Eastview, just outside the city of Clarksburg, West Virginia. The claimant purchased the property and moved there in July of 1974. The house consisted of five rooms and a bath located on five lots. Each lot had a frontage of thirty feet on Hanover Street extending back one hundred feet, the entire parcel being 150' x 100'. The property sloped up a hill from the road. The grass lawn around the house sloped down toward the road, and the lawn was supported by a retaining wall. Hanover Street, maintained by the respondent, is part of the "orphan roads" with no established right of way.

In the fall of 1977, the respondent pulled the ditch in front of claimant's property. In doing so, respondent's equipment scraped the retaining wall, knocking down a portion of it. A month or so

later, after heavy rains, claimant's property started sliding in the area where the wall was destroyed. Respondent was notified.

In September of 1978, respondent pulled the ditch again, and the slide worsened. The refuse from the slide was removed by the respondent and dumped over the bank across the road. Claimant's house began to crack and disintegrate. Part of the house pulled apart, and the roof cracked. The claimant attempted to use jacks in the basement to alleviate the damage to the house, but to no avail. The claimant was advised to, and did, move out of the house in January of 1979.

John Charles Hempel, a principal in Environmental Exploration, a geological consulting firm, testified on behalf of the claimant. He investigated the nature of the slide and its physical extent. Mr. Hempel, as well as James M. Beard, maintenance engineer for the respondent, testified that the entire hill area where claimant's home was located was highly unstable.

Mr. Hempel stated in his testimony that, "based on our investigation, it would seem apparent and it is our opinion that the removal of the wall, the retaining wall, from in front of the house and in front of her property, would be the primary factory initiating this slide. Subsidiary factors involved in the slide would be the subsequent rains. . . ."

Sam Paletta, claims investigator for the respondent, answered claimant's complaint in November of 1978. He stated that he observed the slide on the left side of the house and the damage caused by it. He also stated that there were two slips on the right side of the house. He checked the records of the Department of Highways, and testified that the ditch had been pulled twice and that a portion of the wall had been knocked down. He responded to claimant's call five or six weeks later and furnished forms to file this claim.

From the record, it is the opinion of the Court that the respondent's removal of a portion of the retaining wall on claimant's property, and its failure to shore up the hillside, were the primary causes of the slide. Each time respondent removed the slide refuse from the road, the situation worsened.

John M. Pierpoint, a real estate appraiser, testified that he had visited the property and examined the slide and damages to the house. Mr. Pierpoint stated that the value of the house prior to the

damage was $13,900.00, and the five lots were valued at $4,000.00, for a total value of $17,900.00; that the damage to the house was so severe that it could not be repaired and should be razed, and that the portion of the lots not damaged by the slide was now worth $2,000.00, if the slide is stopped. Accordingly, the Court makes an award to the claimant in the amount of $15,900.00.

Award of $15,900.00.

Opinion issued April 1, 1980

RANDY N. BLEIGH

VS.

DEPARTMENT OF HIGHWAYS

(CC-79-389)

Claimant appeared in person.

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

WALLACE, JUDGE:

On July 3, 1979, at about 9:00 p.m., the claimant was operating his 1970 Plymouth automobile in a southerly direction on and across the East City Bridge in Parkersburg, West Virginia. The weather conditions were clear, and the surface of the bridge was dry. When the claimant had proceeded about two-thirds of the way across the bridge, his car struck a metal bar which extended from the side of the bridge and into the southbound lane. Claimant described this metal bar as being "about three inches thick and maybe six or seven inches long, sticking out into the road." When claimant's car struck this obstruction, his car was pulled into the side of the bridge, and, as a result, was damaged to an extent that the costs of repairs exceeded the fair market value of the car. Claimant testified that the car had a fair market value of $300.00 before the accident and after the accident it had no salvage value.

The testimony further established that the claimant was travelling at about 30 miles per hour and was following another vehicle. Claimant was of the opinion that the obstruction extended at least five inches into the southbound lane of this two-lane bridge. Claimant also, quite candidly, admitted that he travelled

across this bridge on a daily basis and had observed this obstruction prior to the evening of the accident.

Ray Casto, a claims investigator for respondent, testified that he had investigated this accident on July 6, 1979. He testified that the bridge roadway at the point of the accident was 20 feet in width with a 7 1/2-inch curb section on the west side. Mr. Casto stated that the obstruction, which he believed to be part of an expansion joint, had been observed by him prior to the accident but that he did not believe the same extended into the southbound lane of travel. It is difficult for the Court to accept this testimony, for, if it be true, the claimant would have had to strike the curb on the west side of the bridge in order to strike this protruding expansion joint.

We are of the opinion that both parties' negligence contributed to this accident, and we would allocate 40% of the negligence to the claimant and 60% of the negligence to the respondent. Applying our newly adopted rule of comparative negligence to the claimed damages of $300.00, we thus make an award in favor of the claimant in the amount of $180.00.

Award of $180.00.

Opinion issued April 1, 1980

JOSEPH W. CARLILE

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-287a)

John F. Sommerville, Jr., Attorney at Law, for claimant.

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

WALLACE, JUDGE:

The claimant, Joseph W. Carlile, filed this claim to recover for alleged damage to his property located adjacent to State Route 28 in Ridgely, West Virginia. The claimant maintains a home on the property which he also operated as a tavern prior to the time that the State performed construction work on Route 28. The claimant ceased operating the tavern in 1973. When the Department of Highways relocated State Route 28 in 1975, the Department used 2,225 square feet of the claimant's property for a permanent

drainage easement pursuant to an Option signed by the claimant on July 17, 1975. The claimant has alleged that, as a result of the construction of the permanent drainage easement on his property, he has lost the use of the septic system serving his home and is now unable to operate the tavern in his building. He also claims that certain trees on his property were destroyed, and he lost the use of a spring in the construction area.

Respondent's Exhibit 1 is a copy of the Option entered into by the claimant and the respondent wherein the claimant agreed to sell to the respondent a certain portion of his property for consideration recited as $450.00. At the hearing, the claimant testified that he had never received the consideration recited in the Option. He refused to accept the money because he had decided that $450.00 was insufficient consideration for the permanent drainage easement.

It would appear that the claimant, having failed to receive consideration for the permanent drainage easement constructed on his property, has an adequate remedy at law. Article 3, Section 9 of the Constitution of West Virginia provides "Private property shall not be taken or damaged for public use, without just compensation;. . .". Condemnation statutes created by the Legislature provide property owners with the means to mandamus the Department of Highways in order to obtain just compensation for property taken by the State (See W.Va. Code, Chapter 54).

Accordingly, it is the opinion of this Court that, in accordance with W.Va. Code §14-2-14(5), the Court lacks jurisdiction of this claim; therefore, the claim is hereby disallowed.

Claim disallowed.

Opinion issued April 1, 1980

EUGENE W. CONN

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-493)

Claimant appeared in person.

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

WALLACE, JUDGE:

On September 5, 1979, at about 8:15 a.m., the claimant's wife, Blenda Conn, was operating his 1973 Dodge automobile in a southerly direction on Secondary Route 50 in Putnam County. As she attempted to pass a northbound school bus, the very narrow berm on the west side of the road collapsed, and the car went into a rather deep ditch and was damaged to the extent of $449.61. The evidence revealed that claimant had collision insurance in effect at the time with a $100.00 deductible feature, and, consequently, the amount sought to be recovered here is $100.00.

Secondary Route 50 had been resurfaced in June or July of 1979 and berms had been constructed, but, because of heavy rains in August, the berm on the west side of the road had been weakened and had even been partially washed away at some points. The school bus driver, Imogene Burdette, testified that when she observed the approaching Conn car, she moved as far to her right as she could and came to a stop, and that as Mrs. Conn went onto the berm on the west side of the road, the berm simply collapsed causing the accident. A witness, Sharon Belcher, testified that she did not see the accident but passed the scene shortly after it occurred, while the Conn car was still in the ditch. She further testified that she personally had called the respondent many times and had complained of the condition of the road.

We do not believe the evidence establishes any negligence on the part of claimant's wife. The respondent having constructed a hard surface road not wide enough for two lanes, knew or should have known that motorists would be required to leave the hard surface in order to pass approaching vehicles, and, for that reason, was under a duty to see that the berms adjacent to the road were sufficient to safely accomodate vehicles. See *Wilson v. Dept. of Highways,* 11 Ct.Cl. 139 (1976).

For the reasons stated above, an award to the claimant is hereby made in the amount of $100.00.

Award of $100.00.

Opinion issued April 1, 1980

SUE H. ELLIS

vs.

BOARD OF REGENTS

(CC-79-475c)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GARDEN, JUDGE:

The record in this claim clearly reflects that during fiscal years 1977-78 and 1978-79, the claimant was employed by the respondent, and that although she was employed as a Management Systems Auditor, and paid accordingly, she in fact, during 22 months of this two-year period, was actually performing the duties of a Senior Systems Analyst, a position which entitled her to additional compensation.

The record further reveals that respondent, in failing to pay claimant her proper compensation, was violating the Fair Labor Standards Act (Section 6[d]) as amended by the Equal Pay Act of 1963. The Answer filed by respondent admits that if proper compensation had been paid to the claimant during this 22-month period, she would have received $948.00 as wages. Respondent, in its Answer to the Notice of Claim, admits that this amount is due and owing to the claimant.

With this conclusion we agree, and an award is hereby made in favor of the claimant in the amount of $948.00.

Award of $948.00.

Opinion issued April 1, 1980

JIMMIE W. FIELDS & OMA ALICE FIELDS

(D-874g)

and

SEBA TIPTON

(CC-76-39)

vs.

DEPARTMENT OF HIGHWAYS

John Boettner, Attorney at Law, for the claimants.

Nancy J. Aliff and Henry Haslebacher, Attorneys at Law, for the respondent.

WALLACE, JUDGE:

These claims, which grew out of the aftermath of the Buffalo Creek Flood Disaster of February 19, 1972, in Logan County, West Virginia, were consolidated. In the late summer or early fall of 1972, the Department of Highways commenced its Project Er-277(1) for the replacement and repair of 16 miles of Route 16 along Buffalo Creek Hollow. The Project was divided into two sections. The work began first on section two (or the northern section) because this section had sustained the worst damage and was basically unoccupied. The owners of property destroyed in this area were being relocated by HUD (Housing and Urban Development).

The appraisal work for properties in the path of the road that were to be acquired by the respondent commenced in the early part of 1973. Most of the appraisers used were independent appraisers retained by the respondent, not regular employees of the respondent.

The claimants, Fields and Tipton, contend that an independent appraiser engaged by the Department of Highways, Morris Pettit, told them that they could not repair their homes because the State was going to take their properties. Fields stated that he was told he could repair enough to protect his furnishings. Both claimants testified that they did not repair their properties and the State did not take them; as a result, the properties deteriorated. Fields subsequently sold his property, while Tipton still occupies his property.

Sometime in 1973 after the project had commenced, the decision was made not to complete section one where the claimants' properties were located. The area of section one was heavily populated, and completion of this section would have displaced too many people with no place to relocate them.

Witnesses for the respondent testified that there was considerable confusion in the area caused by the aftermath of the disaster and the movement of many agencies into the area to assist in the rehabilitation work. There were no set rules or guidelines established for the appraisers in the acquisition of property. In an attempt to alleviate the confusion, public meetings were held to appraise the people of the plans. Also, a newspaper was printed periodically. There was no individual, personal contact with the people.

Lucian Conn, a citizen member of the Disaster Committee established after the flood, testified that respresentatives of the Department of Highways told the people that they could not return to their property because it was to be taken for the highway, and that if the property were improved after being appraised, they would be wasting their money. He also testified that the respondent held public hearings advising people that their property would be acquired.

The claimant Fields testified that he wrote letters and went to the field headquarters and made inquiry, but no one told him that they were not going to take his property. The claimant Tipton stated that he did not attend any meetings or go to the site headquarters and make inquiry.

Terry Tawny, a relocation agent for the respondent, advised claimant Fields to repair only enough to protect his furnishings. He stated that his statement was strictly advice, and not a policy of the respondent. He testified, "I would say it was my own advice, what I would advise anybody, really, not to let their property directly deteriorate because of water damage or weather damage because thinking that the State's going to take because we don't always take it." Tawny further stated that if the claimants attended the acquisition meetings at which the geographical limits were discussed, they would have been advised as to the acquisitions. Explaining the necessity for the meetings, Mr. Tawny testified that "... any change that took place in this valley was known by all within a very few minutes generally. You could say something at

Mann and I'll guarantee you before you could drive to Pardee, that the people at Pardee knew it; C.B.'s, telephones, whatever. It might not be the same thing when it got to Pardee, but by the time you got up there to somebody, they knew about it."

Morris Pettit, an independent appraiser who appraised the property of both claimants, testified that anything he told the claimants was his personal opinion, and that he would not do anything more to the property until they found out the State's plans as to acquisition. He also advised the claimants that if they had any questions, they were to contact Mr. Rayburn.

William Rayburn, a right-of-way agent for the respondent, was in charge of acquisition. He maintained respondent's relocation office in the disaster area. In his testimony, he stated, "I advised all of them that the property belonged to them and we had no authority whatsoever to tell them what to do with their property. At that particular time, the only thing we had were maps telling them that it was going to be taken, but, as far as them repairing their property, it was up to them to do as they saw fit to do because it was their property."

The Director of the Right of Way Division of the Department of Highways, James E. Bailey, explained that the policy of the Department in situations where the property may be taken is basically to have the property owner maintain the property enough to keep the elements out rather than to make major improvements for which the owner may not be reimbursed by the Department if the property were to be taken at a later date.

Both claimants testified that it was a year to a year and a half they were told their property was to be taken that they found out that the project had been abandoned in section one. The evidence clearly establishes that the respondent had temporary offices in the area to render assistance and advice to the claimants and other people in the area. The evidence further establishes that the respondent had no policy, rules, or regulations which would prohibit the claimants from protecting their property. There were no condemnation proceedings commenced, no contracts entered into, and no offers to purchase the claimants' properties.

Claimants seem to have relied heavily upon statements made to them by employees of the respondent. The evidence indicates that any such statements which informed the claimants that their property would be taken were clearly erroneous, and, therefore,

not binding upon the respondent. It has been held by this Court that promises and representations of a right-of-way agent employed by the respondent, which exceed the scope of the agent's limited or apparent authority, do not create a contractual obligation on behalf of the State. *Boehm v. Department of Highways,* 10 Ct. Cl. 110 (1974). The record shows that the respondent did not authorize any of its personnel to tell the claimants herein that the State was going to take their property, and the State is not bound by the unauthorized acts of its officers. All persons who deal with such officers do so at their peril in all matters wherein such officers exceed their legitimate powers. *Armstrong Products Corp. v. Martin,* 119 W.Va. 50, 192 S.E. 125 (1937).

The Court realizes the magnitude of the Buffalo Creek Disaster and sympathizes with the claimants, but, on the basis of the record, the Court finds that no action was taken by the respondent to acquire the properties of the claimants after the appraisals were made, and that upon proper inquiry, claimants could have ascertained that their property was not to be taken. Accordingly, these claims are disallowed.

Claims disallowed.

Opinion issued April 1, 1980

CLAUDINE HINKLE

vs.

DEPARTMENT OF WELFARE

(CC-79-21)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The claimant, Claudine Hinkle, seeks to recover for damages to her vehicle caused when a foster child from the Department of Welfare took the vehicle without permission and wrecked it. The vehicle, a Blazer, was covered by insurance, and this claim is for the amount of the deductible, $250.00.

According to claimant's testimony, four foster children were placed in her care and in the care of her husband on June 26, 1978.

On October 6, 1978, one of these children, Joyce Ann Stacy, who was thirteen years old at the time, got up in the middle of the night, went down to the dining room, and took the keys out of claimant's purse. She drove downtown and was on her way back when the accident occurred.

Mrs. Hinkle testified that she always kept her purse in an unlocked china closet in the dining room and that "all the kids knew where (it) was." The claimant further stated that when the children needed money, she would either get it herself or "tell them to get it" from her purse.

In order for the claimant to recover in this case, it must be shown that the respondent State agency was guilty of some negligent act which proximately caused the damage to the claimant. We find no such negligent behavior here. The record in this case indicates that the claimant was warned of the tendency of the foster child to run away. The claimant testified that a Mrs. Groves at the Department of Welfare informed her that the child "had a history of running away from foster homes" and that claimant should "just take one day at a time and see what happens." It is clear from the testimony that Mrs. Hinkle had adequate notice of the child's untrustworthiness, and, being thus alerted, nonetheless continued to allow the child access to her purse. Claimant therefore assumed the risk of any loss which resulted, and this Court can require no more of the respondent then that it give claimant notice of pertinent facts relating to the foster children, which it did. We therefore find no liability, and hereby disallow the claim.

Claim disallowed.

Opinion issued April 1, 1980

SHEL PRODUCTS, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-76-92)

Harry N. Barton, Attorney at Law, for the claimant.

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

WALLACE, JUDGE:

The claimant, Shel Products, Inc., filed this claim against the respondent for loss of business and rents occasioned by backed-up surface water caused by a clogged drainage system maintained by the respondent.

The claimant managed and operated a business of a car wash and an apartment building consisting of two apartments on West Virginia Route 79/3, known as Cabin Creek Road, in Kanawha County.

Respondent maintained an underground storm sewer system adjoining claimant's property to carry off rain water to Cabin Creek and to prevent accumulation of water in the area. In the spring of 1976, the water started backing up. Numerous calls were made to the respondent, who sent crews to the area to attempt to open the pipes. The problem continued for several years. Water would stand on and along the road for several days at a time. Claimant lost business and tenants moved out of their apartments. Representatives of the claimant testified that, from 1976 until the problem was remedied in 1979, the claimant lost $20,178.00 in business and $900.00 in rent.

Joseph T. Deneault, assistant director of maintenance for the respondent, testified that he became acquainted with the problem as early as 1976 by reason of complaints, and that crews were dispatched to attempt to remedy the problem. He stated, "The drainage pipe was clogged at the outlet end which was very close to the creek level, causing the water to back up through the drop inlet onto the road." He stated that the respondent attempted unsuccessfully to correct the situation with an open drainage ditch, but a new underground drainage system, completed in the spring of 1979, has solved the problem.

The inability of the respondent to correct the drainage problem from 1976 until remedied in 1979 caused the claimant to sustain the damages complained of. Representatives of the claimant testified as to business receipts for these years, and a loss of rent in the amount of $900.00. It was claimed that the receipts should have been $14,000.00 for each of the years, and that the claimant lost $20,178.00. It is obvious that the claimant sustained damages caused by the respondent's failure to correct the drainage system. However, based on the record of damages presented to the Court, the claimant is hereby awarded $5,000.00 for loss of business and $900.00 for loss of rent.

Award of $5,900.00.

Opinion issued April 1, 1980

DAVID D. SMITH

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-450)

Claimant appeared in person.

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

WALLACE, JUDGE:

Claimant testified that on May 29, 1979 at about 11:00 a.m., he was operating his 1976 Mustang in a westerly direction on Route 60 in Kenova, West Virginia, and that the weather conditions were good. Route 60, in and near the scene of the accident, consists of two westbound and two eastbound lanes of traffic, separated by a concrete median strip, which the claimant estimated was between two to three feet in width. Apparently, portions of the concrete median strip had weathered and pieces thereof had broken off and were lying in the westbound passing lane, the lane in which the claimant was travelling.

When the claimant was within 10-15 feet of these broken pieces of concrete in his lane of travel, and being aware of the presence of another westbound motorist in the lane to his right and behind him, he struck one or more pieces of the broken concrete, all of

which caused his car to veer to the left, striking the concrete median strip and causing damage to claimant's car for which he paid a total of $419.98 to have the necessary repairs effected.

No evidence was introduced which would establish the fact that respondent had notice, either actual or constructive, of this dangerous condition. As a result, and without discussing the negligence of the claimant, we must again hold that the respondent is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins v. Sims,* 130 W.Va. 645 (1947). There being no actionable negligence established on the part of the respondent, this claim must be denied.

Claim disallowed.

Opinion issued April 1, 1980

NANCY J. THABET

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-206)

Claimant appeared in person.

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

RULEY, JUDGE:

The claimant was injured while jogging on the sidewalk between Jefferson Road and Springfield Avenue, adjacent to the Kanawha Turnpike in South Charleston, West Virginia, and filed this claim against the respondent. The Kanawha Turnpike is maintained by the respondent.

On Wednesday, May 9, 1979, at approximately 5:45 a.m., just before daylight, the claimant was jogging along the sidewalk in question. She had never jogged here previously as she had just recently moved into the neighborhood. She came upon a hardened pile of asphalt on the sidewalk about 1-1/2 feet in circumference and about 6 inches high. The claimant testified, ". . .by the time I saw it and tried to avoid it, I tripped on it and fell and tripped myself."

The record indicates that the respondent had been patching the road the week of the accident. The pile of asphalt, left on the sidewalk by the respondnet without any warning to the public, was removed about a week after the accident.

The claimant sustained a cut on her chin which required six stitches. She broke a tooth which required a crown and will necessitate a root canal. As a result of these injuries, the claimant incurred the following bills: hospital emergency room - $77.00; dentist - $237.00, with an additional $225.00 for a root canal; and lost two days teaching at $63.76 per day or $127.52.

The Court is of the opinion, from the record, that the negligence of the respondent in failing to remove the asphalt was the proximate cause of claimant's accident, and since the claimant was free of any negligence on her part, the Court makes an award to her in the amount of $666.52.

Award of $666.52.

Opinion issued April 1, 1980

JOSEPH VIELBIG, III

vs.

BOARD OF REGENTS

(CC-79-92)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

Claimant, Joseph Vielbig, III, filed this claim against the respondent in the amount of $93.25 for six books which disappeared from his office at Southern West Virginia Community College in Williamson.

According to claimant's testimony, he took a position as professor at the college on September 1, 1978. He and another faculty member were required to share a first-floor office due to lack of space. This office had a wooden door with a lock. On November 27, 1979, the wooden door was replaced by a metal one

for which no keys were available. Claimant went to the individual in charge of maintenance, Mr. Ronnie Joe Blackburn, and asked about getting a key. Mr. Blackburn informed Mr. Vielbig that new locks were being ordered because an entirely new building was under construction, and all locks would be ordered accordingly.

On December 27, 1979, claimant discovered six law books missing from his office. Documents which were admitted into evidence indicated that the books had a total value of $93.25.

In order for the respondent to be held liable, it must be shown that some negligent act on the part of the respondent was the proximate cause of claimant's damage. There is nothing in the record of this case that would indicate any negligent behavior on the part of the respondent. The claimant was fully aware that the door to his office could not be locked, and, although he made every effort to see that keys would be made available, he nonetheless left his books in the unlocked office after being told that keys were merely on order.

The Court believes, from the evidence, that the doctrine of assumption of the risk applies. To be guilty of assumption of risk, a voluntary exposure must take place. *Ratcliff v. Dept. of Highways*, 11 Ct.Cl. 291 (1977). Here, the claimant caused his books to be exposed to the possibility of theft. The Court realizes the difficulty claimant would have faced in moving all his possessions from the office, but a heavier burden cannot be placed upon the respondent than that of giving notice to the claimant that keys were being ordered. Having this knowledge, the claimant acted on his own in leaving his books in the unsafe place. Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued April 25, 1980

MARGARET A. KOLINSKI and
RAYMOND L. KOLINSKI

vs.

BOARD OF REGENTS and
CHARLES V. CAMPANIZZI

(CC-77-58)

David Joel, Attorney at Law, for claimants.

Henry C. Bias, Jr., Deputy Attorney General, for respondent, Board of Regents.

William E. Watson, Attorney at Law, for respondent, *Charles V. Campanizzi*.

WALLACE, JUDGE:

This matter was brought for hearing upon three motions presented to the Court. The first was a motion filed by the claimants for sanctions, requesting the entry of an Order awarding claimants costs and attorney's fees for the reason that the respondent, Charles V. Campanizzi, refused and failed to permit the taking of his deposition. The second motion, by the respondents, was to dismiss Raymond L. Kolinski as a party claimant, because the nature of his claim is that the affections of the claimant, Margaret A. Kolinski, were alienated by the actions of the respondent Campanizzi, and Chapter 56, Article 3, Section 2a of the official Code of West Virginia abolished actions for alienation of affection and that therefore, the claim filed fails to state a cause of action upon which the Court can make an award or grant any relief. The third motion, by respondent Campanizzi, was one to dismiss Campanizzi on the gound that the Court has no jurisdiction over an individual, and to quash the notice to take the deposition served upon Campanizzi by the claimants. The Court will address itself first to the last of the three motions. This Court has only such jurisdiction as is conferred upon it by statute: West Virginia Code §14-2-13, which is limited by §14-2-14. In accordance with the Code provisions, this Court has held that it has no jurisdiction over individuals. See *Evans v. Dept. of Banking*, 12 Ct.Cl. 168 (1978) and *Metz v. W.Va. State Bd. of Probation and Parole, et al.*, 13 Ct.Cl. 292 (1979). Accordingly, the motion to dismiss the respondent Campanizzi is sustained. Since the Court has no

jurisdiction over individuals and has dismissed Campanizzi as a respondent, the motion for sanctions is denied.

The motion to dismiss Raymond Kolinski as a claimant will be held in abeyance until the matter is heard on its merits.

Opinion issued May 1, 1980

CAROLYN H. ARNOLD

vs.

BOARD OF REGENTS

(CC-79-715)

No appearance by claimant.

Ann V. Dornblazer, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $38.00 for damage to her bowling ball which occurred on September 18, 1979, when claimant was bowling with the Faculty and Staff Bowling League at Glenville State College in Glenville, West Virginia. The ball became lodged in the automatic return system and was found to be damaged when removed.

In its Answer, the respondent acknowledges the validity of the claim as evidenced by correspondence from the President and the Business Manager of Glenville State College. As funds remained in respondent's appropriation for the fiscal year in question from which this claim could have been paid, the Court hereby makes an award to the claimant in the amount requested.

Award of $38.00.

Opinion issued May 1, 1980

HARLEY C. BUTLER

VS.

DEPARTMENT OF HIGHWAYS

(CC-79-711)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $132.16, based upon the following facts: On or about November 25, 1979, claimant was operating his vehicle on Amma Road in the vicinity of the Amma Exit of Interstate 79, a highway owned and maintained by the respondent. While proceeding on Amma Road, claimant's vehicle was forced to cross a small ditch line cut in the pavement parallel to Amma Road, which had been left uncovered and unmarked by respondent. As a result, both left tires on claimant's vehicle were punctured and damaged beyond repair.

This occurred because of the negligence of the respondent in failing to keep the highway in a reasonably safe condition. This negligence was the proximate cause of the damages suffered by the claimant.

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

Award of $132.16.

Opinion issued May 1, 1980

THE EYE & EAR CLINIC OF
CHARLESTON, INC.

vs.

DIVISION OF VOCATIONAL REHABILITATION

(CC-80-3)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $636.00 in unpaid charges for the hospitalization of a client of the Division of Vocational Rehabilitation. Respondent, in its Answer, acknowledges the validity of the claim as evidenced by correspondence from the Director of the Division of Vocational Rehabilitation. The Court therefore makes an award to the claimant in the amount requested.

Award of $636.00.

Opinion issued May 1, 1980

MARJORIE J. GILLISPIE

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-672)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $103.60, based upon the following facts: On or about June 15, 1979, claimant was operating her 1972 Pontiac Grandville on West Virginia Routes 62 and 2. In the course of said operation, claimant's vehicle crossed the Shadle Bridge over the Kanawha

River between the cities of Henderson and Point Pleasant, West Virginia. Said bridge is owned and maintained by the respondent.

While crossing the bridge, claimant's vehicle struck a loose steel plate, causing damage to the muffler, tail pipe, cross-over pipe, and exhaust system. This occurred because of the negligence of the respondent, which negligence was the proximate cause of the damages suffered by the claimant. Respondent is therefore liable to the claimant for the sum of $103.60, which is a fair and equitable estimate of the damages sustained.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $103.60.

Opinion issued May 1, 1980

THOMAS P. GUNNOE

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-84)

No appearance by claimant.

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

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's vehicle in the amount of $66.26 were caused when said vehicle struck a six-inch metal protrusion just off the main highway in the vicinity of Lakewood Elementary School in St. Albans, West Virginia, which is a highway owned and maintained by the respondent; and to the effect that said damages were proximately caused by the negligence of the respondent in leaving the metal protrusion, which was later identified as the remains of a "stop" sign, in such a position as to pose a hazard to motorists, the Court finds the respondent liable, and hereby makes an award to the claimant in the amount stipulated.

Award of $66.26.

Opinion issued May 1, 1980

MAURICE L. JONES

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-38)

No appearance by claimant.

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

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's vehicle in the amount of $194.70 were caused when said vehicle struck a piece of metal protruding from Camp Creek Bridge in Boone County, West Virginia, which bridge is owned and maintained by the respondent; and to the effect that said damages were proximately caused by the negligence of the respondent in failing to keep the bridge in a reasonably safe condition, the Court finds the respondent liable, and hereby makes an award to the claimant in the amount stipulated.

Award of $194.70.

Opinion issued June 4, 1980

LESTER BESS

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-372)

Stephen P. Swisher, Attorney at Law, for claimant.

Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

On July 21, 1979, between 11:00 a.m. and 11:30 a.m., the claimant was operating his 1964 Cadillac in an easterly direction on Route 25 in the City of Dunbar, West Virginia, when a large piece of asphalt struck the claimant's exhaust system. The exhaust system was later repaired by Midas Muffler of Charleston at a cost of $169.80. The testimony revealed that the eastbound lane of Route 25, a

State-maintained road, had been torn up for some time prior to the claimant's accident, but there was no evidence that respondent had created this condition, although it was established that respondent did resurface the road in the fall of 1979.

Frank B. Leone, Mayor of the City of Dunbar, testified on behalf of the claimant. From his testimony, it could be concluded that the condition of the road was caused by a contractor who had installed a storm sewer in the street of the City of Dunbar. The Mayor, while not admitting that the condition of the road was due to the acitivities of the contractor, implied that the respondent should be liable because of the presence of one of the respondent's inspectors during the installation of the storm sewer. This inspector apparently had approved the work of the contractor. Without discussing the negligence on the part of the claimant, the Court is of the opinion that the claimant has failed to establish by a preponderance of the evidence that the respondent was guilty of actionable negligence; thus, an award is hereby denied.

Claim disallowed.

Opinion issued June 4, 1980

ROBERT D. CLINE

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-548)

Betty Cline appeared in behalf of her husband, the claimant.

Douglas Hamilton, Attorney at Law, for the respondent.

GARDEN, JUDGE:

On August 27, 1979, at about 9:30 p.m., the claimant, his wife, and their daughter and son were proceeding in a westerly direction on Route 10 between Oceana and Mann, West Virginia. Mr. Cline was driving his car, his wife was in the front seat, and the children were seated in the rear of the car. Mr. Cline was traveling at a speed of 50-55 miles per hour on this two-lane asphalt highway when the right wheels of the car struck a pothole. As a result, both tires on the right side of the car were ruptured, and the wheels were bent.

An estimate of repairs from Southern Tire Sales Company in Mann in the amount of $289.24 was introduced into evidence.

The claimant did not appear, and his wife was the only witness who testified on his behalf. She stated that she was not aware of the existence of the pothole, and that she first saw it as the right wheels of the car struck it. She explained that it was located at the top of an incline in the road and that, as a result, it could not be seen by a motorist unless he were practically on top of it.

Mrs. Cline had no personal knowledge concerning the size of the pothole, how long it had been in existence, or whether the respondent had knowledge of its existence. She attempted to develop these essential elements of the claim through hearsay evidence, but upon objection by counsel for respondent, the same was not admitted into evidence.

On many occasions, this Court has held that the State is not an insurer of motorists using its highways; a listing of citations to our former decisions is unnecessary. There being no evidence in the record to establish notice to the respondent, either actual or constructive, of the existence of this pothole, which is necessary to establish a failure on the part of the respondent to exercise reasonable care in maintaining the road, this Court must refuse to make an award.

Claim disallowed.

Opinion issued June 4, 1980

VIOLET COOK

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-482)

McGinnis E. Hatfield, Jr., Attorney at Law, for claimant.

Douglas Hamilton, Attorney at Law, for respondent.

GARDEN, JUDGE:

At or about 11:00 p.m. on April 9, 1979, the claimant was operating her 1978 Oldsmobile in a northerly direction on the

Route 52 by-pass in Welch, West Virginia, when she suddenly struck a large pothole located near the right-hand side of the northbound lane. The weather conditions, according to the claimant, were poor, as it was raining and foggy. She testified that she did not see this pothole before striking it because it was filled with water, and she had no prior knowledge of its existence. As a result of this incident, the right front and rear tires were ruptured, a hubcap was lost, and the front end of the car had to be re-aligned. Total expenses for new tires and other repairs amounted to $178.87.

The following day, the claimant returned to the accident scene in an attempt to locate one of her hubcaps which had been lost, but she was unable to find it, although she did observe three other hubcaps in the area. After the incident, and while temporary repairs were being made to her car at the accident scene, another motorist struck the same pothole and ruptured one of his tires. Although the claimant did not testify as to the dimensions of the pothole, several photographs of it, taken two or three days after the accident, were introduced into evidence. From these photos, it would appear that the pothole was about three feet long, two feet wide, and six to eight inches deep. The testimony further established that this pothole had been in existence for at least three weeks prior to claimant's accident, but no evidence was introduced establishing that respondent had actual knowledge of this pothole.

In the claim of *Lohan v. Dept. of Highways,* 11 Ct.Cl. 39 (1975), this Court held that while the respondent is not an insurer of motorists using its highways, it does have a duty of exercising reasonable care in the maintenance of those highways, and if it knew or should have known of a defect, it must take steps to repair the same within a reasonable period of time. The Route 52 by-pass in Welch is one of the most heavily traveled highways in the area, and the Court is of the opinion that respondent should have been aware of this defect. The failure to repair the defect for a period of three weeks constituted negligence, which was the proximate cause of the damage to claimant's automobile. For this reason, an award in favor of the claimant in the amount of $178.87 is hereby made.

Award of $178.87.

Opinion issued June 4, 1980

G. LEE COX and JUNE F. COX

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-401)

Claimants appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

GARDEN, JUDGE:

On July 28, 1979, the claimants' automobile, a 1978 Chevrolet Chevette, was being operated by their daughter, Jessica Griffin, in a northerly direction on a State-maintained highway which runs between Winifrede and Chesapeake in Kanawha County, West Virginia. This particular two-lane asphalt road runs through a railroad underpass near Chesapeake. According to the claimants, neither of whom were accompanying their daughter, as their daughter proceeded through the underpass, she struck a pothole, rupturing both tires on the right side of the car and damaging both wheels. An estimate of repairs in the amount of $150.18, from Surface Chevrolet, Inc., of Cabin Creek, was introduced into evidence.

Mr. Cox testified that he was aware of this pothole prior to the date of his daughter's accident and that the pothole had been there for two or three months prior to July 28, 1979. He further testified that he had never complained to respondent about this pothole prior to the accident. Mrs. Cox, on the other hand, testified that she had no prior knowledge of this pothole. She also testified that her daughter complained to respondent about this pothole the day following the accident, and that the next day, employees of the respondent repaired it. The daughter, Jessica Griffin, did not appear and testify at the hearing. As a result, the record fails to contain any evidence as to the speed of the car, whether Mrs. Griffin had prior knowledge of the existence of the pothole, whether she observed the pothole prior to striking it, or whether she could have taken some evasive action to avoid striking the hole, all factual matters which bear on the issue of her negligence. In spite of the lack of the foregoing, the Court is of the opinion that the claimants have failed to establish by a preponderance of the evidence that respondent was guilty of primary negligence in

failing to exercise reasonable care to keep this particular road in a reasonably safe condition. Accordingly, this claim must be disallowed.

Claim disallowed.

Opinion issued June 4, 1980

EUGENIA CURREY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-208)

Claimant appeared in person.

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

WALLACE, JUDGE:

On March 25, 1979, around 9:15 p.m., the claimant's husband was driving a car owned by the claimant on U.S. Route 33 near Ripley when the right front wheel of the car struck a pothole, caused a tire blowout, and made it necessary for the front wheels to be realigned. Claimant seeks to recover damages in the sum of $82.35.

The State cannot, and does not, insure or guarantee the safety of motorists traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). It can only exercise reasonable care and diligence in maintaining its roads, within the limits of a fixed budget. The respondent cannot be held liable for damages caused by collisions with potholes unless the claimant proves that the respondent had actual or constructive knowledge of the particular pothole, and a reasonable time in which to repair the hole or take other suitable action. *Davis v. Dept. of Highways,* 11 Ct.Cl. 150 (1977). In this case, the claimant did not carry the burden of this proof, and, therefore, this claim must be denied.

Claim disallowed.

Opinion issued June 4, 1980

MARGARET GIBSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-648)

Claimant appeared in person.

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

WALLACE, JUDGE:

On November 7, 1979, the claimant's daughter, Helen Lilly, was operating her mother's 1972 Chevrolet Impala from her home in MacArthur to Sophia. She was accompanied by her sister, Bobbie Lilly. The claimant was not present in the automobile. As they neared Sophia, apparently on a straight stretch of road, they observed a dump truck owned by respondent approaching them from the opposite direction. Helen Lilly testified that she was able to identify the ownership of the truck because "it was written on it - 'Department of Highways'." She further testified that she was traveling at a speed of about 20-25 miles per hour, and that the speed of the truck was about 30-35 miles per hour. As the vehicles neared each other, she observed that respondent's truck was fully loaded with large stones or rocks, and that the rocks were falling from the rear of the truck. She slowed down, but as the dump truck passed her, rocks were thrown all over her mother's car. Damaged, among other things, were one of the headlights, the front bumper, and the grill. An estimate from Hall Chevrolet of Sophia was introduced into evidence reflecting estimated costs of repairs in the amount of $573.94.

The respondent did not present any evidence in defense of this claim; we therefore accept the fact that the dump truck was owned by the respondent and that the damage to the claimant's car occurred in the manner described by claimant's daughters. The Court is of the opinion that the dump truck was apparently overloaded and was being driven at an unreasonable rate of speed under the circumstances. Such conduct on the part of the respondent constituted negligence which proximately resulted in the damage to claimant's automobile. Thus, an award in the amount of $573.94 is hereby made in favor of the claimant.

Award of $573.94.

Opinion issued June 4, 1980

INTERSTATE PRINTERS & PUBLISHERS, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-133)

No appearance by claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $157.30 on an unpaid invoice for books purchased by the respondent.

Respondent admits the validity of the claim, but further states that there were no funds remaining in its appropriation for the fiscal year in question from which the obligation could have been paid.

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

Claim disallowed.

Opinion issued June 4, 1980

MALCO PLASTICS, INC.

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-80-130)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $539.58 for 15,640 driver's license cards delivered to respondent.

Respondent admits the validity of the claim as evidenced by correspondence from the Commissioner of the Department of Motor Vehicles.

As there were sufficient funds remaining in respondent's appropriation for the fiscal year in question from which the claim could have been paid, the Court hereby makes an award to the claimant in the amount requested.

Award of $539.58.

Opinion issued June 4, 1980

CHARLES F. McCALLISTER

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-371)

Claimant appeared in person.

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

WALLACE, JUDGE:

The claimant filed this claim against the respondent for damages sustained to his 1976 Super Cab 3/4 ton Ford truck caused by bad road conditions in front of his home. The claimant testified that he

lived on W.Va. Route 50 near Hurricane, West Virginia. The road is also known as Sycamore Ridge Road. The testimony of the claimant and other witnesses revealed that the road was practically impassable. The condition was so bad that mail delivery had been discontinued approximately one year prior to the hearing.

Thomas Lee Sanson, a foreman for the respondent, testified that he knew of the condition of the road and that he had received complaints from the claimant. He stated that Route 50 was a low priority, unimproved dirt road that received only routine maintenance. He further stated that there had been equipment problems and work was concentrated on high priority roads.

Estimates of damage to the claimant's truck introduced by the claimant totalled $1,099.43.

The law is well established in West Virginia that the State is not a guarantor of the safety of travellers on its roads and bridges. The State is not an insurer; its only duty to the traveler is a qualified one, namely reasonable care and diligence in the maintenance of a highway under all circumstances. *Parsons v. State Road Comm'n.*, 8 Ct. Cl. 35 (1969); *Samples v. State Road Comm'n.*, 8 Ct.Cl. 80 (1970); *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947).

In the instant case, the record establishes that the bad condition of the road had existed for over a year. Respondent's witness testified that some work had been done, but never completed. The respondent's grader and trucks became stuck in the road and had to be pulled out. As hereinabove indicated, mail delivery had been curtailed for about a year. It is obvious from the testimony that the respondent did not exercise reasonable care and diligence in the maintenance of the road in question. The failure by the respondent to make some semblance of repairs to the road to make it passable caused the damages to the claimant's vehicle. Accordingly, the Court makes an award to the claimant in the amount of $1,099.43.

Award of $1,099.43.

Opinion issued June 4, 1980

HUGHIE C. PARKS

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-128)

G. David Brumfield, Attorney at Law, for claimant.

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

PER CURIAM:

This claim was submitted upon a duly executed written stipulation which revealed the following: On March 13, 1977, a retaining wall on Route 52/14 in Maybeury, McDowell County, West Virginia, collapsed and caused damage to property belonging to the claimant. Route 52/14 and the retaining wall are owned and maintained by the respondent. The parties agree that the sum of $900 is a fair and equitable estimate of the damages sustained by the claimant.

As the respondent's negligent maintenance of its stone wall proximately caused the damage to claimant's property, the Court hereby finds that the respondent is liable to the claimant for damages in the amount stipulated.

Award of $900.00.

Opinion issued June 4, 1980

HUGHIE C. PARKS

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-107)

G. David Brumfield, Attorney at Law, for claimant.

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

PER CURIAM:

This claim was submitted upon a duly executed written stipulation which revealed the following facts: Claimant is the

owner of a residence and tract of land located on Route 52/14 in Maybeury, McDowell County, West Virginia. During the month of November, 1979, the Department of Highways was in the process of clearing a slide on and in the vicinity of claimant's property. While performing this work, an employee of the Department of Highways negligently damaged the driveway and aluminum siding of claimant's home. The parties agree that the sum of $312.50 is a fair and equitable estimate of the damages sutained by the claimant.

As the respondent's negligence in clearing the slide was the proximate cause of the damage to claimant's property, the Court hereby makes an award to the claimant in the amount stipulated.

Award of $312.50.

Opinion issued June 4, 1980

JULIE PEIFFER

VS.

DEPARTMENT OF HIGHWAYS

(CC-79-525)

Ralph C. Dusic, Jr., Attorney at Law, for the claimant.

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

WALLACE, JUDGE:

In late November, 1978, the claimant was driving her 1972 Chevrolet Corvette on U. S. Route 60 toward Charleston after dark. Her automobile struck a pothole approximately 1-1/2 feet wide and two or three inches deep, causing damage to the front of her car. The claimant seeks to recover the sum of $492.23.

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). The respondent cannot be held liable for damage caused by a collision with a pothole unless the claimant proves that the respondent had actual or constructive knowledge of the existence of the pothole, and a reasonable amount of time to repair it or take other suitable action. *Davis v. Dept. of Highways,* 11 Ct.Cl. 150

(1977). Since the claimant did not meet that burden of proof, this claim must be denied.

Claim disallowed.

Opinion issued June 4, 1980

WEIRTON DAILY TIMES

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(CC-80-147)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant herein seeks payment of the sum of $34.94 on unpaid invoices for three legal notices published in its newspaper. Respondent does not dispute the validity of the claim, and asserts that it did not receive original invoices, which are necessary in order for payment to be made.

As respondent had sufficient funds remaining in its appropriation for the fiscal year in question from which this claim could have been paid, the Court hereby makes an award to the claimant in the amount requested.

Award of $34.94.

Opinion issued June 4, 1980

ROBERT EUGENE WHITEHOUSE

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-563)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for the respondent.

GARDEN, JUDGE:

On September 27, 1979, the claimant was driving his 1979 Ford Fiesta in a northwesterly direction on W. Va. Route 87 toward Ripley when his left front and rear wheels struck a large pothole that extended into both lanes of travel. The claimant seeks to recover damages in the sum of $111.76.

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). For the respondent to be found liable for damages caused by a collision with a pothole, the claimant must prove that the respondent had actual or constructive knowledge of the pothole, and a reasonable amount of time to repair the hole or take other suitable action. *Davis v. Dept. of Highways*, 11 Ct. Cl. 150 (1977). Even if it were conceded that the respondent had constructive notice of the pothole involved in this case, there was no evidence from which the Court could infer that it had had such notice for sufficient time to repair it or take any other suitable action. Accordinly, the claim must be denied.

Claim disallowed.

Opinion issued June 4, 1980

MERWIN B. WINGO

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-537)

Herbert H. Henderson, Attorney at Law, for claimant.

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

PER CURIAM:

This claim was submitted upon a duly executed written stipulation which revealed the following: Claimant is the owner of a residence located on James River Road in Wayne County, West Virginia, between the cities of Huntington and Ceredo. In the vicinity of claimant's residence, the Department of Highways installed a 24-inch drain to carry surface water from nearby Interstate 64 to a point approximately fifty feet above claimant's residence. The Department of Highways negligently failed to maintain this ditch, thereby allowing water to drain directly onto claimant's property, causing damage to claimant's residence and the destruction of several articles of personal property. The parties agree that the sum of $1,000.00 is a fair and equitable estimate of the damages sustained by the claimant.

As the negligent maintenance of the ditch in question was the proximate cause of claimant's damages, the Court hereby finds the respondent liable and makes an award to the claimant in the amount stipulated.

Award of $1,000.00.

Opinion issued June 4, 1980

ROGER ZICAFOOSE

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-258)

Cassie Zicafoose for the claimant.

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

PER CURIAM:

On June 22, 1979, Cassie Zicafoose, while driving an automobile owned by Roger Zicafoose, struck a pothole on Route 33 in Greenbrier County. She was returning home from work around 4:00 p.m., and the weather conditions were wet and rainy. The claimant seeks damages in the amount of $70.00.

The State of West Virginia neither insures nor guarantees the safety of motorists on its highways. *Adkins v. Sims,* 130 W.Va. 645 (1947). For the respondent to be found liable, it must first have had either actual or constructive knowledge of the defect in the roadway. *Davis v. Dept. of Highways,* 11 Ct. Cl. 150 (1977). The evidence in this case is not sufficient to establish actual or constructive knowledge on the part of the respondent, and, accordingly, the claim must be denied.

Claim disallowed.

Opinion issued July 21, 1980

ASSOCIATED RADIOLOGISTS, INC.

vs.

DEPARTMENT OF HEALTH

(CC-80-217)

No appearance by claimant.

David R. Brisell, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $6.00 on an unpaid invoice

sent to the Guthrie Center for services rendered at Charleston General Hospital. Respondent acknowledges the validity of the claim as evidenced by correspondence from the Director of Administrative Services.

As there were sufficient funds remaining in respondent's appropriation for the fiscal year in question from which the obligation could have been paid, the Court hereby makes an award to the claimant in the amount requested.

Award of $6.00.

Opinion issued July 21, 1980

BECKLEY HOSPITAL, INC.

vs.

DIVISION OF VOCATIONAL REHABILITATION

(CC-80-170)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $26.95, representing the remaining portion of a bill which was omitted when the bill was being coded for payment.

Respondent admits the validity of the claim and states that there were sufficient funds in its appropriation for the fiscal year in question from which the obligation could have been paid.

Based on the foregoing, the Court hereby makes an award to the claimant in the amount of $26.95.

Award of $26.95.

Opinion issued July 21, 1980

CAPITAL CREDIT CORPORATION

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-202)

No appearance by claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $313.50, representing an unpaid bill for merchandise purchased by respondent's Anthony Center.

Respondent's Answer, although admitting the validity of the claim, states that there were no funds remaining in respondent's appropriation for the fiscal year in question from which the obligation could have been paid.

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

Claim disallowed.

Opinion issued July 21, 1980

FAIRMONT GENERAL HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-204)

No appearance by claimant.

Gray Silver, III, Assistant Attorney General, for the respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $265.95 for hospital services

rendered to an inmate of respondent's Work/Study Release Center at Grafton, West Virginia.

As the respondent admits the validity of the claim and the sufficiency of its funding for the fiscal year in question, the Court hereby makes an award to the claimant in the amount requested.

Award of $265.95.

Opinion issued July 21, 1980

GREGORY A. HARRISON

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-125)

No appearance by claimant.

W. Douglas Hamilton, Attorney at Law, for respondent.

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's vehicle in the amount of $599.09 were caused when said vehicle struck a loose metal expansion joint protruding from a bridge on Interstate 64 in South Charleston, West Virginia, which is a highway owned and maintained by the respondent; and to the effect that negligence on the part of the respondent was the proximate cause of said damage, the Court finds the respondent liable, and hereby makes an award to the claimant in the amount agreed upon by the parties.

Award of $599.09.

Opinion issued July 21, 1980

JOHNSON CONTROLS, INC.

vs.

BOARD OF REGENTS

(CC-80-151)

No appearance by claimant.

Ann V. Dornblazer, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $7,780.00 on unpaid invoices for air conditioning maintenance and repair work done at West Virginia State College.

Respondent's Answer, although admitting the validity of the claim, also states that there were not sufficient funds remaining in its appropriation for the fiscal year in question from which the obligation could have been paid.

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

Claim disallowed.

Opinion issued July 21, 1980

FRANK M. MARCHESE

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-135)

Claimant appeared in person.

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

GARDEN, JUDGE:

This claim in the amount of $95.79 was filed against the

respondent for damage to claimant's 1978 Oldsmobile Cutlass Supreme automobile.

The wife of the claimant, Ruth Ann Marchese, testified that she was driving the automobile at the time of the accident on the Fort Henry Bridge in Wheeling, West Virginia, on February 27, 1979. It was approximately 2:00 p.m. and the weather was fair. She was proceeding westerly on Interstate 70 in the northbound lane about fifteen feet from the ramp leading from the bridge to Wheeling Island. Mrs. Marchese stated that she was traveling at approximately 15-20 mph; that the traffic was heavy and no one was in front of her; and that the right front wheel struck a hole in the pavement, causing damages in the amount of $95.79. She further testified that she did not see the hole before striking it, but was familiar with the fact that potholes did exist on the bridge. She also stated that it had been necessary for her to take evasive driving action to avoid potholes prior to the accident.

The law is well established in West Virginia that the State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims,* 130 W. Va. 645, 46 S.E. 2d 81 (1947). Its only duty to the traveler is a qualified one, namely, that of reasonable care and diligence in the maintenance of a highway under all circumstances. *Parsons v. State Road Commission,* 8 Ct.Cl. 35 (1969). There being no evidence in the record establishing notice to the respondent of the existence of the pothole, which is necessary to prove a failure on the part of the respondent to exercise reasonable care in maintaining the road, the Court hereby denies the claim. *Cline v. Department of Highways,* 13 Ct.Cl. 212 (1980).

Claim disallowed.

Opinion issued July 21, 1980

CARL EUGENE McNEELY

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-143)

No appearance by claimant.

W. Douglas Hamilton, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $301.91, based upon the following facts: On or about February 13, 1980, claimant was operating his automobile in a southerly direction on State Route 3 near Madison in Boone County, West Virginia. In the course of this travel, claimant's vehicle crossed the Camp Creek Bridge, which, being a part of State Route 3, is owned and maintained by the respondent.

While crossing the bridge, claimant's vehicle struck an uncovered hole, resulting in damage to both tie-rods, a shock absorber, two tires, and two wheels. This occurred because of the negligence of the respondent in failing to maintain the bridge in a reasonably safe condition. This negligence was the proximate cause of the damages suffered by the claimant. Respondent is therefore liable to the claimant for the sum of $301.91, which is a fair and equitable estimate of the damages sustained.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $301.91.

Opinion issued July 21, 1980

CARL C. MOLES

VS.

DEPARTMENT OF HIGHWAYS

(CC-80-196)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted for decision based upon a duly executed stipulation which revealed the following facts: Claimant is the owner of a residence and tract of land located on Local Service Route 39, also known as Aaron's Fork Road, in South Charleston, Kanawha County, West Virginia. During the fall of 1979, in a slide correction procedure, the respondent Department of Highways drove pilings along Local Service Route 39, a highway owned and maintained by the respondent. In the course of this slide correction, displaced rock and dirt slid down on a two-inch gas line, damaging it. As a result of the damage, claimant incurred expenses in the amount of $583.74.

As the damage to the gas line occurred because of the negligence of the respondent, which negligence was the proximate cause of the damage, the Court finds the respondent liable, and hereby makes an award to the claimant in the amount stipulated.

Award of $583.74.

Opinion issued August 5, 1980

MR. and MRS. TAMAS A. de KUN

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-444)

Sylvan M. Marshall, Attorney at Law, for claimant.

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

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $1,711.18, based upon the following facts: On or about June 3, 1979, claimant was operating his automobile on West Virginia Route 12/17, also known as Scrable Road, in Berkeley County, West Virginia, a highway owned and maintained by the respondent. While traveling on Route 12/17, Mr. de Kun struck a rut which extended across the highway. As a result, the car's windshield, shock absorbers, axle, and oil pan were damaged in the amount of $967.68. In addition, Mrs. de Kun sustained personal injuries resulting in medical bills of $319.00, medication in the amount of $4.50, and additional expenses of $420.00 for the hiring of a housekeeper due to Mrs. de Kun's inability to do household work. The parties agree that the sum of $1,711.18 is a fair and equitable estimate of the damages sustained by the claimants.

As the respondent's negligence in failing to place warning signs in the vicinity of this hazard was the proximate cause of the damages suffered by the claimants, the Court finds the respondent liable, and hereby makes an award to the claimants in the amount stipulated.

Award of $1,711.18.

Opinion issued August 5, 1980

KENNETH M. EARY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-220)

Claimant appeared in person.

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

RULEY, JUDGE:

In early June, 1979, the claimant was driving his 1967 Plymouth automobile in a westerly direction on Interstate Route 64. At about 4:00 p.m., while crossing a bridge in Kanawha County, he hit a piece of steel, causing damage to the car's rear fender. He was traveling at approximately 40 miles per hour, having slowed because vehicles ahead were slowing. The claimant seeks to recover the amount of damage to his vehicle.

It is the claimant's contention that the loose piece of steel which damaged his vehicle was part of an expansion joint on the bridge. However, neither he nor the passenger with him returned to the place of the accident to examine either the piece of steel or the bridge, nor did they testify in detail respecting it.

A witness for the respondent, Mr. John Cavender, testified positively to the contrary of that contention. Employed by the Department of Highways as a superintendent, he traveled over the bridge in question in both directions every day during the month of June. He saw no damage whatsoever to the bridge, or, in particular, to the expansion joints of the bridge, and stated that the only maintenance done to the bridge during June was routine care of the highway, including picking up pieces of metal dropped by large trucks.

To make an award in this case, the Court would have to conclude that not only was the offending piece of steel a part of the bridge, rendering it defective, but also that the respondent had actual or constructive knowledge of the defect and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways,* 11 Ct. Cl. 150 (1979). To do this would require speculation on the part of the Court, and the Court cannot and should not base its

decisions on speculation. *Arthur, Admr. v. Dept. of Mental Health*, 12 Ct.Cl. 124 (1978). Accordingly, the claim must be denied.

Claim disallowed.

Opinion issued August 5, 1980

WILLIAM J. FOX

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-330)

Claimant appeared in person.

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

WALLACE, JUDGE:

At approximately 10:30 a.m. on a day in March or April of 1979, claimant's wife, Betty Jo Fox, was operating his 1979 Plymouth Horizon in a northerly direction on Route 20 between the cities of Meadow Bridge and Rainelle, West Virginia. Route 20 is a highway owned and maintained by the respondent.

According to the testimony of Mrs. Fox, a truck which was in front of her had straddled a pothole, obstructing Mrs. Fox's view of the hole. In a last-minute attempt to avoid striking the pothole, Mrs. Fox drove partly onto the berm of the road. As a result, the left wheel went down into the hole, damaging the tire and knocking the car's front end out of alignment. Introduced into evidence was a bill from Ansted Motors reflecting damages to the automobile in the amount of $106.74.

It is well established in the law of West Virginia that the State cannot and does not guarantee the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). Furthermore, in the instant case, claimant's wife stated that she was familiar with the road in question and "had observed (the pothole)" on other occasions. To operate a motor vehicle in the face of visible hazards, such as defects in the road, of which a driver is aware, is to assume a known risk. This bars recovery. *Swartzmiller v. Dept. of Highways*, 10 Ct.Cl. 29 (1973). Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued August 5, 1980

RUSSELL E. FREEMAN

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-122)

No appearance by claimant.

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

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's gas line in the amount of $199.53 were caused when employees of the respondent replaced a concrete culvert in the vicinity of claimant's property in Farmington, Marion County, West Virginia; and to the effect that said damages were proximately caused by the negligence of said employees in pushing the old culvert over claimant's gas line, the Court finds the respondent liable, and hereby makes an award to the claimant in the amount stipulated.

Award of $199.53.

Opinion issued August 5, 1980

CECIL RAY HAUGHT

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-140)

Kenneth P. Simons, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

Claimant Cecil Ray Haught is the owner of a modern frame residence located on Route 3 in Fairmont, Marion County, West Virginia, on what is known as the Winfield Road, near the Pricketts Creek interchange of Interstate 79.

Claimant alleges that a concrete culvert, constructed by the respondent under I-79 at the Pricketts Fork Exit, became jammed with logs and debris during heavy rains on July 3, 1978. As a result, the water backed up and flooded onto Mr. Haught's property, filling the basement of his residence with water up to the ceiling. Damaged in the flood were a furnace, washer, dryer, freezer full of food, and medications for Mrs. Haught.

Approximately two weeks later, on July 16, 1978, another heavy rainfall struck the area. Since the logjam created by the first flood still blocked the culvert, claimant's basement was once again flooded to the ceiling. The second flood, of greater force and severity, caused damage to the foundation, doors, and windows of the basement.

Testifying on behalf of the respondent was Randolph Epperly, Jr., a Design Engineer employed by the Department of Highways. Mr. Epperly checked the specifications for the culvert in question and stated that, for an interstate highway, the State and Federal requirements are "for a drainage of a 50-year design storm." He explained that a 50-year design storm is a storm that would statistically occur once every fifty years.

From the photographs which were admitted into evidence as Claimant's Exhibits 4 and 7, Mr. Epperly observed that the material blocking the culvert consisted of logs and other debris, and that it would take "more than a normal rainfall" to supply enough velocity to move such debris. Mr. Epperly stated that when the box culvert was designed, it was not designed to flow full. The nine-foot-high culvert was made to flow 7.2 feet full, leaving a 1.8-foot "free board" for the passage of the debris from a 50-year storm.

To hold the State responsible for the damage to claimant's property caused by the flooding, it is necessary to find that the respondent was negligent in failing to protect the property from foreseeable flood damage. Adequate drainage of surface water must be provided, and culverts to carry away the drainage must be maintained in a reasonable state of repair by the State. *Wotring v. Dept. of Highways,* 9 Ct.Cl. 138 (1972).

The Court finds that the unusually heavy rainfall which resulted in the flooding of claimant's property on July 3, 1978, was

adequately provided for by the respondent by its construction of the nine-foot box culvert. However, the respondent was negligent in the maintenance of this culvert, which was the cause of the second flooding two weeks later. In the Court's opinion, the respondent had notice of the first flood and resultant clogged culvert, and, having failed to take any steps to correct the situation, must be deemed liable for the damage to the claimant's property caused by the flood of July 16, 1978.

Damaged in that second flood, according to claimant's testimony, were the foundation, doors, and windows of his basement. Claimant's Exhibit 13, which lists all items destroyed or ruined in both floods, reveals that the structural damage to the basement following the second flood amounted to $2,300.00. Accordingly, the Court hereby makes an award to the claimant in that amount.

Award of $2,300.00.

Opinion issued August 5, 1980

MR. and MRS. ROBERT JONES

VS.

DEPARTMENT OF HIGHWAYS

(CC-79-73)

Claimants appeared in person.

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

WALLACE, JUDGE:

The claimants, Mr. and Mrs. Robert Jones, filed this claim in the amount of $1,051.24 for surface water damage to their home located on Reeves Road in Keyser, Mineral County, West Virginia. The claimants contend that on January 20, 1979, water from the ditch line adjacent to Reeves Road overflowed during a heavy rainfall, resulting in damage to the basement wall of their residence. Water and mud flowed from the carport into the basement, destroying water pipes and a water heater.

Claimant Robert Jones testified that, in his opinion, the water overflowed because the culvert in the ditch line adjacent to Reeves

Road crushed in on one end to the extent that the culvert was only half open for drainage purposes. He also indicated that his wife had called the Department of Highways twice to complain about the condition of the culvert, but nothing was done to correct the situation.

The respondent's witness, Gene C. Clem, the maintenance superintendent of Mineral County at that time, testified that there had been continued periods of below-freezing weather and above-average precipitation which had created an accumulation of snow and ice in the ditch line. On January 20, 1979, there was an unusually heavy rainfall, and the water overflowed from the blocked ditch line across the road onto the claimants' property, which, being lower than the roadway, was the natural drainage area.

Douglas G. Kesner, an area engineer with the construction division of the respondent, testified that his investigation revealed that claimants' property was located in a natural drainage area. He further stated that the size of the culvert would not have affected the flow of water on the night in question because the problem resulted from the frozen condition which existed in both the pipe and the ditch line. The water from the rainfall had no other place to flow except over the roadway and across claimants' property.

From the record, it is evident that the particular accumulation of water flowing onto claimants' property was largely attributable not to any clogged culvert, but to the natural flow of water over existing snow and ice, which was caused by the peculiar weather conditions experienced at that time. See *Hall v. Dept. of Highways*, CC-78-217 (Sept. 20, 1979).

The Court is of the opinion that the claimants have failed to prove by a preponderance of the evidence that the damages were directly and proximately caused by the negligence of the respondent. Accordingly, the claim is hereby disallowed.

Claim disallowed.

Opinion issued August 5, 1980

ROBERT H. C. KAY, TRUSTEE,
ESTATE OF W. F. HARLESS

vs.

ALCOHOL BEVERAGE CONTROL COMMISSIONER

(CC-80-149)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $225.00 for rent due on its lease with the Alcohol Beverage Control Commissioner.

Respondent, having admitted the validity of the claim in its Answer, states that there were sufficient funds available in its appropriation for the fiscal year in question from which the obligation could have been paid.

Based on the foregoing, the Court hereby makes an award to the claimant in the amount of $225.00.

Award of $225.00.

Opinion issued August 5, 1980

JAMES R. LAVENDER

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-141)

Claimant appeared in person.

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

RULEY, JUDGE:

The claimant seeks an award of $1,640.00 for loss of wages due to his unemployment from February 26, 1979, to May 7, 1979, caused by assurance given the claimant by George Snow, employed by the respondent as Communications Director, to the effect that the

claimant would be hired as a communications dispatcher beginning February 26, 1979. Acting on that assurance, given at an interview between the claimant and Mr. Snow at the Department of Highways Communication Center on February 13, 1979, the claimant quit his job at the Kanawha County Emergency Ambulance Authority effective February 23, 1979. On that same date the claimant called Mr. Snow, who said that although the claimant's application was still "going through channels", he thought the claimant could still begin work on February 26, 1979. The claimant called the Department of Highways Communication Center on February 26, 1979, and repeatedly thereafter, finally discovering in March that his application for employment had not been approved and that he had not been hired. On May 7, 1979, he went to work for the Marmet Ambulance Service. While he worked for the Kanawha County Emergency Ambulance Authority, the claimant's salary was $656.00 per month, and it is on that figure that this claim is based.

Emory W. Burton, employed by the respondent as a Senior Highway Personnel Officer, testified about the Department of Highways' hiring procedure. He stated that prospective employees are interviewed at the District level, then the application is forwarded to the Personnel Division and then to the Executive Division for final approval. He further testified that only the Executive Division has the authority to hire personnel, and that Mr. Snow in his capacity as a Communications Director positively did not have that authority.

"Generally, where a person deals with an agent, it is his duty to ascertain the extent of the agency * * * if the agent exceeds his authority the contract will not bind the principal." 1A M.J. *Agency*, §24. Moreover, with a public officer, the State is bound only by authority actually vested in the officer, and his powers are limited and defined by its laws. *Samsell v. State Line Dev. Co.*, 154 W.Va. 48, 174 S.E.2d 318 (1970). It is clear in this case that Mr. Snow, a public officer, did exceed his authority and had no right to hire the claimant or give assurance to that effect. While it is regrettable that the claimant believed and acted upon this assurance, the responsibility for it cannot be placed upon the respondent. Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued August 5, 1980

BARBARA L. MILLER

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-443)

No appearance by claimant.

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

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's automobile in the amount of $52.56 were caused when said vehicle struck a rut across West Virginia Route 73/24, also known as Saltwell Road, in Harrison County, West Virginia, which highway is owned and maintained by the respondent; and to the effect that negligence on the part of the respondent in failing to place warning signs in the vicinity of this hazard was the proximate cause of the damages suffered by the claimant, the Court finds the respondent liable, and hereby makes an award to the claimant in the amount stipulated.

Award of $52.56.

Opinion issued August 5, 1980

CARL MOATS and PAULINE MOATS

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-52)

Claimants appeared on their own behalf.

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

GARDEN, JUDGE:

Claimants Carl and Pauline Moats are the owners of a farm located on Route 1 in Moatsville, Barbour County, West Virginia. Mr. and Mrs. Moats allege in their Notice of Claim that a pond located upon their property was ruined when employees of the

respondent dug a ditch thereon which drained into the pond and washed it away.

According to the undisputed testimony of Mrs. Moats, a phone call was made by her to the respondent's superintendent of Barbour County, Mr. O'Neil. Mrs. Moats explained the situation to him, and two months went by without any further action on the part of the respondent. Mrs. Moats testified that she called Mr. O'Neil again, and was informed that no action at all was to be taken concerning her property.

Meanwhile, according to the testimony of the Moatses, their pond became covered with scum and unfit for the purpose of watering their livestock. Whereupon Mrs. Moats and her son took it upon themselves to place rocks and dirt in the ditch in an attempt to block the flow of water onto their land. When an employee of the respondent returned and reopened the ditch, Mrs. Moats informed him of the existence of the pond. After the ditch was reopened, however, water once again began to run into the pond. Admitted into evidenced was a check in the amount of $165.00 which claimants paid for dozer work on the ruined pond.

Testifying on behalf of the respondent was claims investigator Sam Paletta, who described the road adjacent to the claimants' property as a Delta Road, requiring only routine maintenance by the respondent. Mr. Paletta stated that the purpose of the ditch line in that area was to provide a means for water run-off from the surface of the roadway. It was Mr. Paletta's assertion that if the claimants left the ditch line open to allow the proper flow of water, there would be no problem.

Before the State can be held responsible for the destruction of claimants' property, it must be established that the respondent neglected to exercise reasonable care to protect the property from foreseeable water damage. *Wotring v. Dept. of Highways,* 9 Ct. Cl. 138 (1972).

It is apparent from the evidence in this case that the flooding of claimants' pond was the result either of negligent placement of the ditches along the road or of blockage of those ditches.

Claimant Pauline Moats' uncontradicted testimony that the property in question had been flooded and that the State had been notified of the drainage problem but refused to take action, establishes that the Moats property was damaged by the negligent

failure of the respondent to provide proper and adequate drainage of surface water along the Delta Road. The statement by respondent's witness, that the flooding occurred because of the blockage of the ditch line by the claimants themselves, did not address itself to the real issue of why the respondent refused to remedy the situation after it had been given notice of the problem. The undisputed testimony of Mrs. Moats established that the claimants took no measures to block the drainage ditch until over two months had elapsed from the time they reported the problem to the respondent.

Being of the opinion that the negligence of the respondent in failing to correct the drainage problem along the road adjacent to claimants' property was the proximate cause of the flooding and eventual destruction of the pond located upon claimants' property, the Court makes an award to the claimants in the amount of $165.00, representing the amount paid by the claimants for dozer work on the ruined pond.

Award of $165.00.

Opinion issued August 5, 1980

LINDA M. PAINTER

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-406)

Claimant appeared in person.

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

RULEY, JUDGE:

Sometime between 7:00 and 7:15 a.m. on June 21, 1979, the claimant was driving her 1975 Mercury automobile in an easterly direction on Washington Street in Charleston, West Virginia. As she was turning left toward a private driveway, it being her intention to reverse her direction, the left front side of her vehicle was struck by an eastbound automobile owned by the respondent and driven by its employee, Fred Hess. At the place where the accident occurred, there were double solid yellow lines painted in

the middle of the street. Mr. Hess testified that the claimant gave no signal of her intention to turn left, and the claimant testified that "I cannot absolutely swear that I had my directional signal on***." Apparently, the claimant had slowed and swerved to her right before beginning the left turn. The claimant seeks recovery of damages to her vehicle in the sum of $325.79.

It appears that Mr. Hess was negligent in failing to exercise reasonable control of the vehicle he was operating under the existing conditions. However, the claimant was also negligent in that she violated West Virginia Code §17C-8-8(b), which provides that "A signal of intention to turn right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning." In view of this circumstance, it appears to the Court that the claimant was guilty of negligence equal to or greater than that of the respondent; therefore, this claim must be denied. *Bradley v. Appalachian Power Co.*, ...W.Va...., 256 S.E.2d 879 (1979).

Claim disallowed.

Opinion issued August 5, 1980

JOE SNODGRASS

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-145)

Claimant appeared in person.

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

WALLACE, JUDGE:

On or about February 4, 1979, at approximately 7:00 p.m., the claimant, Joe Snodgrass, was operating his 1976 LTD in a westerly direction on U.S. Route 60 five to seven miles west of Belle, West Virginia. Route 60, in this area, is a four-lane highway. According to the claimant's testimony, the weather was very cold and it was a dark night. Mr. Snodgrass stated that the accident occurred on the Campbell's Creek Bridge. Having stopped at the stoplight on the east end of the bridge, he proceeded 60-70 yards from the light when his left front and left rear tires suddenly struck a hole which

blew out both tires and damaged the wheels. Mr. Snodgrass further testified that the hole was three feet long. There was another vehicle to his right preventing him from veering into the right-hand lane to avoid the hole.

The claimant was accompanied by his wife and her parents, and they were en route to a funeral home in South Charleston when the mishap occurred. Claimant stated that he had not driven this road and was unaware of the hole. Admitted into evidence were repair bills and estimates reflecting damages in the amount of $189.49.

The record in the instant case indicates that the hazardous condition was in existence for at least two weeks prior to the claimant's accident.

While the respondent is not and cannot be an insurer of those using its highways, it does owe a duty of exercising reasonable care and diligence in the maintenance of those highways.

The Court finds the factual situation in this claim to be similar to that in the case of *Lohan v. Department of Highways*, 11 Ct.Cl. 39 (1975). In that case, the accident took place at night on U.S. Route 60, and this Court took notice that Route 60 is one of the most heavily travelled roads in West Virginia. The Court, in granting an award, observed that since a hole three feet long on a much-used highway could not have developed overnight, the respondent should have discovered the defect and effected repairs.

The evidence in this case impels the conclusion that the Department of Highways, in the exercise of ordinary care, should have known of the existence of the hole in the bridge before this accident happened. The claimant had no choice but to drive over the hole in the bridge, resulting in damage to the tires of his vehicle.

From the record in this case, and previous decisions of this Court, the Court finds the respondent negligent in failing to properly maintain Route 60, and further finds that the claimant was not guilty of any negligence; therefore, we hereby make an award to the claimant in the amount of $189.40.

Award of $189.40.

Opinion issued August 5, 1980

JAMES EDWARD STURM

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-449)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for the respondent.

RULEY, JUDGE:

On May 15, 1979, the claimant was driving his motorcycle north on West Virginia Route 52 between Crum and Steptoe when he hit a pothole, causing him to run into a ditch. This pothole was at the end of a series of holes, and the claimant was traveling at approximately 53 miles per hour. The claimant seeks to recover damage to his motorcycle and clothes in the sum of $531.70.

According to the claimant's undisputed testimony, the pothole was three feet long, four inches wide, and several inches deep. He also testified that this particular hole was one of several holes that had been cleaned out by Department of Highways employees three days previous, prior to patching, and had been left unguarded and without any warning sign.

While the foregoing facts adequately establish negligence on the part of the respondent, it is also true that the claimant had traveled over the highway several times while the holes were there and admitted knowledge of the hazard posed by them. He even admitted knowledge of the particular hole he hit, but said that he had forgotten about it and had driven into it because he was glancing at his speedometer. In view of these circumstances, it appears that the claimant himself was guilty of negligence which equaled or surpassed that of the respondent; therefore, this claim must be denied. *Bradley v. Appalachian Power Co.,* ....W.Va....., 256 S.E.2d 879 (1979).

Claim disallowed.

Opinion issued August 5, 1980

ROBERT J. SWEDA

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-479)

Claimant appeared in person.

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

RULEY, JUDGE:

At approximately 8:00 a.m. on an unspecified day in September, 1979, the claimant was driving his 1972 Ford automobile east on City Crest Drive in Huntington, West Virginia. As he rounded a curve to his right, a truck met and passed him. At no time did the truck cross over the center line of this two-lane road. In passing the truck, the claimant dropped both right wheels off the pavement and both wheels struck a concrete culvert immediately adjacent and perpendicular to the pavement. The top of the culvert was level with the pavement, but there was a drop of six to twelve inches in the berm beside it and beside the pavement. Claimant seeks the sum of $72.97 for damages to his vehicle.

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"* §488, *Taylor v. Huntington,* 126 W.Va. 732, 30 S.E.2d 14 (1944). Maintenance of the concrete culvert or drain adjacent to and perpendicular to the paved portion of the highway, with a sheer drop of six to twelve inches between it and the pavement, certainly created an unsafe condition. In fact, it was almost a trap. Accordingly, there can be no debate about the respondent's negligence. However, the Court cannot conclude under the evidence in this case that the claimant was forced onto the berm or otherwise necessarily used it. He had nine feet of pavement in his traffic lane, and the evidence is undisputed that the vehicle which he was meeting and passing did not cross the center of the roadway. In addition, West Virginia Code §17C-7-1 provides in part: "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway", and West Virginia Code §17D-1-37 defines roadway as "that portion

of a highway improved, designed, or ordinarily used for vehicular travel, *exclusive of the berm or shoulder*." (Emphasis supplied.) In view of the statutes and the circumstance that the claimant was not forced onto the berm, it appears that the claimant himself was guilty of negligence which equaled or exceeded that of the respondent; therefore, the claim must be denied. *Bradley v. Appalachian Power Co.*, ...W.Va....., 256 S.E.2d 879 (1979).

Claim disallowed.

Opinion issued August 5, 1980

FREDERICK B. TALLAMY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-149)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for the respondent.

GARDEN, JUDGE:

After dark on February 22, 1979, the claimant was operating his 1959 Chevrolet automobile on W.Va. Route 41 within the city limits of Summersville. While making a left turn, his right wheels hit a large pothole, cracking the car's right front fender. The claimant seeks to recover damages in the sum of $311.47.

The claimant testified that the general condition of Route 41 at the time was poor, that there were many other holes in the road, and that many of the holes, including the one he hit, had been cleaned out by employees of the Department of Highways prior to patching. He saw no warning signs and was traveling within the speed limit.

A witness for the respondent, Gilbert L. Forren, employed by the Department of Highways as a maintenance technician, confirmed that the hole hit by the claimant had been squared up the day before and that stone had been put in the hole because of its depth. The exact measurements of the hole were four feet by four feet, with a depth of three inches. He testified that there were "Rough Road" signs up in Summersville, and that the claimant passed a

"Rough Road" sign approximately one quarter mile from the hole in question. He also testified that the hole had not been patched with asphalt material because the plant supplying it would not have the material available until March 1, 1979. Finally, he admitted that it is easy for the stone put in deep holes to be kicked out by traffic, thus rendering it useless.

The State is neither the insurer nor the guarantor of motorists traveling on its highways. *Adkins v. Sims,* 136 W.Va. 645, 46 S.E.2d 81 (1947). It is only responsible for maintaining a standard of reasonable care and diligence, under all circumstances. *Parsons v. State Road Commission,* 8 Ct.Cl. 35 (1969). Applying those legal propositions to the facts of this case, it appears that this claim must be denied.

Claim disallowed.

Opinion issued October 6, 1980

BETSY ROSS BAKERIES, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-265)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $687.95 on unpaid invoices representing goods purchased by the respondent. The respondent admits the validity of the claim, but further states that there were not sufficient funds on hand at the close of the fiscal year 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 also of the opinion that an award cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued October 6, 1980

ARNA CASH

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-194)

Claimant appeared in person.

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

RULEY, JUDGE:

On January 4, 1980, at approximately 11:00 p.m., the claimant's son was driving the claimant's 1979 Chevrolet automobile west on the W.Va. Route 119 bypass through West Madison, Boone County, when he hit a hole at the edge of the pavement, damaging the two right tires of the car. The hole extended approximately six inches into the pavement, was approximately one car length long and eight inches deep, and was filled with water. The amount of damage was $108.94.

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 claimant must prove that the respondent had actual or constructive knowledge of the defect and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150. Since the claimant brought forth no evidence to that effect and did not meet the burden of proof, this claim must be denied.

Claim disallowed.

Opinion issued October 6, 1980

GRAFTON CITY HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-314)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $977.69 for hospital services rendered to a resident of the Industrial School for Boys. The respondent admits the validity of the claim, but further states that there were not sufficient funds on hand at the close of the fiscal year 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 also of the opinion that an award cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued October 6, 1980

CLARENCE G. HAGER

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-101)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

RULEY, JUDGE:

At 11:40 p.m. on January 13, 1980, the claimant was driving his automobile south on W.Va. Route 119 in Kanawha County when his right front wheel struck a large pothole. The claimant seeks to

recover damages in the sum of $103.66 for a damaged tire and a lost wheel cover.

The State neither insures nor guarantees the safety of motorists traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damages caused by potholes, the claimant must prove that the respondent had actual or constructive knowledge of the existence of the pothole and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways,* 11 Ct.Cl. 150 (1976). Since the claimant did not meet that burden of proof, this claim must be denied.

Claim disallowed.

Opinion issued October 6, 1980

I. H. LUNA, M.D.

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-239)

No appearance by claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $260.00 in unpaid medical bills for an inmate of the West Virginia State Penitentiary.

Respondent, in its Answer, admits the validity of the claim, but further alleges that there were no funds remaining in its appropriation for the fiscal year in question from which the obligation could have been paid.

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

Claim disallowed.

Opinion issued October 6, 1980

DOUGLAS NEWBELL

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-186)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

RULEY, JUDGE:

On March 28, 1980, between 7:30 and 8:00 p.m., the claimant was driving his 1974 Chevrolet automobile west on W.Va. Route 60 in Fayette County when he ran into a small tree that was across the highway, damaging the front grille and windshield. The claimant seeks to recover damages in the sum of $267.37.

According to the claimant's undisputed testimony, the tree extended across three-quarters of the westbound traffic lane and was embedded in a pile of mud that held it several feet off the ground. He saw the tree when he was about fifteen feet from it, and could not avoid it because of oncoming traffic. When he saw the tree, it was almost dark, he had his headlights on low beam, and he was driving at approximately 50 mph. There had been a long, hard rain before this accident, and apparently the tree had been uprooted in a mudslide which carried it downhill to where it rested across the road. The claimant testified that he had lived in the area for nineteen years and that there had been approximately seven or eight mudslides down that particular hill. There were no warning signs of any type in the general area where the accident occurred.

The State neither insures nor guarantees the safety of motorists on its highways, but it is reponsible for maintaining a standard of reasonable care and diligence under all the circumstances. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947), *Parsons v. State Road Commission,* 8 Ct. Cl. 35 (1969). In the instant case, the claimant failed to prove that the respondent had not conformed to this standard of reasonable care. Although there have been mudslides on the hill in question before, the Court finds that this alone is not enough to show negligence on the part of the respondent. Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued October 6, 1980

SAM NICHOLS and DELLA K. NICHOLS

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-653)

Claimant appeared in person.

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

GARDEN, JUDGE:

At about 8:00 p.m. on October 20, 1979, the claimant was driving her husband's 1972 Dodge automobile east on Patteson Drive in Morgantown when she struck a large hole, causing damage to the exhaust system of the car. The claimant seeks to recover damages in the sum of $81.24.

The State is neither the insurer nor the guarantor of the safety of motorists traveling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable, it must be proven that the respondent had actual or constructive knowledge of the defect in the road and a reasonable amount of time to take corrective action. *Davis v. Dept. of Highways*, 11 Ct. Cl. 150 (1977). Since the claimant did not meet that burden of proof, this claim must be denied.

Claim disallowed.

Opinion issued October 6, 1980

M. WOOD STOUT and LOVA STOUT

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-166)

Claimant appeared in person.

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

GARDEN, JUDGE:

At approximately 7:55 a.m. on January 7, 1980, the claimant, M. Wood Stout, was driving a 1976 Plymouth automobile south on

West Virginia Route 20 in Upshur County when the windshield was struck by an object, allegedly thrown from a Department of Highways cinder-spreader, causing damage which, by March 5, 1980, developed into a twelve-inch long L-shaped crack in the windshield, making it necessary for the windshield to be replaced. The cost of that repair was $159.55.

The claimant testified that January 7, 1980 was a cold, snowy day and that it was snowing when this accident happened. There was snow on Route 20 and it had not been plowed. The claimant was moving at approximately 25 mph when he met and passed an alleged Department of Highways cinder-spreader, and something hit his windshield causing a slight nick on the inside of the glass. The truck was moving at approximately 15 mph, and the claimant identified it as a Department of Highways vehicle by its coloring and the work it was doing. The claimant never saw the object that hit the windshield. On March 5, 1980, the claimant noticed the L-shaped crack in the windshield, which ran through the nick for several inches on either side.

A witness for the respondent, Mr. Verl Gene Powers, employed by the respondent as an Assistant Superintendent in Upshur County, testified from Department of Highways records that there were no Department of Highways vehicles on Route 20 on the morning of January 7, 1980. These records were foremen's daily reports showing what equipment was used and when and where it was used. He had all of the foremen's daily reports for January 7, 1980, none of which showed cinder-spreaders on Route 20 that morning.

The Court concludes that it has not been established by a preponderance of the evidence that the object which struck the claimants' windshield came from a Department of Highways vehicle, and, for that reason, the claim must be denied.

Claim disallowed.

Opinion issued October 6, 1980

EUGENE C. SUDER

vs.

DEPARTMENT OF CORRECTIONS

(CC-79-1)

Alexander M. Ross, Prosecuting Attorney for Upshur County, for claimant.

Gray Silver, III, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted to the Court upon the pleadings from which it appears: that West Virginia and Ohio are parties to a compact concerning probationers and parolees entered into by West Virginia pursuant to West Virginia Code §28-6-1, and by Ohio pursuant to Ohio Revised Code §5149.17; that a person who had been paroled from an Ohio penitentiary was arrested, pursuant to that compact, by the Sheriff of Upshur County, West Virginia, on August 30, 1977, and was held in the Upshur County Jail from that date until October 4, 1977; and that the Sheriff of Upshur County incurred expenses in the amount of $285.25, incident to maintenance of the prisoner during that period, which amount he seeks to recover.

West Virginia Code §62-12-19 provides, in part, that the costs of confining a paroled prisoner shall be paid out of the funds appropriated for the penitentiary from which he was paroled. Since the prisoner in question was not paroled from a West Virginia penitentiary, that statute implicitly requires a denial of this claim.

Of course, the claim is meritorious and it might be prosecuted successfully in the Ohio Court of Claims.

Claim disallowed.

Opinion issued October 6, 1980

TIM H. SWOFFORD

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-174)

Claimant appeared in person.

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

GARDEN, JUDGE:

At approximately 7:30 p.m. on March 16, 1979, the claimant was driving south on W.Va. Route 2 north of Parkersburg when the right front tire struck a pothole, damaging the tire and wheel. The claimant seeks to recover damages in the sum of $135.20.

The State is neither the insurer nor the guarantor of the safety of motorists traveling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by a pothole, it must be proven that the respondent had either actual or constructive knowledge of the hole and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1977). The claimant did not meet that burden of proof, and, therefore, this claim must be denied.

Claim disallowed.

Opinion issued October 6, 1980

MARY TATE

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-153)

Claimant appeared in person.

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

RULEY, JUDGE:

At 6:00 a.m. on March 5, 1980, the claimant was driving a 1973 Chevrolet automobile across the Patrick Street Bridge in

Charleston toward South Charleston when she struck a pothole, damaging a tire. The claimant seeks to recover damages in the sum of $52.28.

The State is neither the insurer nor the guarantor of the safety of motorists traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). The respondent cannot be held liable for damages caused by collisions with potholes unless the claimant proves that the respondent had actual or constructive knowledge of the existence of the pothole and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways,* 11 Ct.Cl. 150 (1977). Since the claimant did not meet that burden of proof, this claim must be denied.

Claim disallowed.

Opinion issued October 10, 1980

APPALACHIAN POWER CO.

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-289)

Charles W. Peoples, Jr., Attorney at Law, for claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum of $47,473.00. On or about December 13, 1976, claimant was the owner of a certain 5000 KVA Station Transformer, transmission lines, guy wires, and appurtenant related electrical equipment mounted on its distribution line pole located near respondent's garage on U.S. Route 60, East, in Barboursville, Cabell County, West Virginia. On the aforesaid date, employees of the respondent were performing work in connection with the operation of said maintenance garage in the vicinity of claimant's electrical distribution equipment.

While loading certain galvanized pipes onto or with a front-end loader, respondent carelessly and negligently allowed the pipe to fall onto the guy wire of claimant's distribution line pole, causing it

to break and come into contact with the 12 KV primary line on the pole, destroying the 5000 KVA Transformer mounted thereon.

As a proximate result of the negligence of the respondent in allowing the pipe to roll onto the guy wire, the 5000 KVA Station Transformer was heavily damaged, necessitating its replacement, as well as the replacement and repair of the related electrical equipment.

As a further proximate result, claimant had to install a mobile transformer at the site in question in order to restore temporary service to its customers until repairs could be effected.

As a result of respondent's negligence, the claimant sustained damages in the amount of $47,473.00.

Accordingly, the Court makes an award in the above amount to the claimant.

Award of $47,473.00.

The Honorable John B. Garden, Judge, did not participate in the consideration of this claim.

Opinion issued October 10, 1980

RICHARD E. COZAD

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-306)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum of $100.68. On or about June 21, 1980, claimant was operating his 1975 Chevrolet Vega Station Wagon on Stilwell Road in Wood County, West Virginia, a highway owned and maintained by the respondent. The claimant was forced to cross a ditch constructed across the road by the Department of Highways, and his vehicle was damaged. There

were no warnings posted by respondent to warn motorists of the hazard.

The failure of the respondent to warn motorists of the hazard was the proximate cause of the damages suffered by the claimant, and believing that the damages are reasonable, the Court makes an award to the claimant in the amount stipulated.

Award of $100.68.

Opinion issued October 10, 1980

J. G. FINNEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-213)

No appearance by claimant.

W. Douglas Hamilton, Attorney at Law, for respondent.

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's automobile in the amount of $230.47 were caused when said vehicle struck a ditch across Posey Saxton Road in Raleigh County, West Virginia, a highway owned and maintained by the respondent; and to the effect that this occurred because of the negligence of the respondent in failing to properly maintain said highway, which negligence was the proximate cause of the damages sustained, the Court finds the respondent liable, and hereby makes an award to the claimant in the amount stipulated.

Award of $230.47.

Opinion issued October 10, 1980

SONDRA LYNN FUNK

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-256)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum of $316.00. On or about June 6, 1980, claimant was operating her 1974 Audi 100 LS on the Omar Bridge near Omar, Logan County, West Virginia, which bridge is owned and maintained by the respondent.

Claimant's vehicle struck a hole in the bridge, which had previously been covered by a metal plate. Damaged were the right front and rear tires and a rim. In addition, the vehicle was knocked out of alignment.

The respondent's negligence in failing to properly secure the metal plate was the proximate cause of the damages suffered by the claimant. Accordingly, the Court makes an award to the claimant in the amount of $316.00.

Award of $316.00.

Opinion issued October 10, 1980

LEE ROY HAMILTON

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-85)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

RULEY, JUDGE:

On December 13, 1979, at approximately 7:40 a.m., the claimant

was driving his 1978 Pontiac automobile east on Route 60 toward Huntington in Mason County when he came upon a flooded portion of the road. He applied his brakes, but his car hydroplaned into the car in front of him, which was stopped in the water. The claimant was traveling between 40 and 45 miles per hour before he hit the water, and his car was damaged to the point of being a total loss. The claimant seeks to recover $3,739.00, which is the book value of his automobile, plus towing charges, minus $500.00 the claimant received for salvage.

According to the claimant's undisputed testimony, the weather conditions on the morning of December 13, 1979, were wet and foggy, and it was raining at the time of the accident. He described the flooded portion of the road as 200 to 350 yards long and six to ten inches deep. He further testified that this condition of periodic flooding had existed for at least three years and had caused many accidents. At other times, when the road had flooded, various warning devices were erected by the Department of Highways and the State Police, but the claimant saw no such devices on this particular morning. The claimant also testified that he traveled this road every day and was very familiar with this flood hazard.

There can be little doubt of negligence on the part of the respondent in permitting such a dangerous hazard to exist for a period of years with no corrective action. However, the claimant was well aware of the hazard, had observed it often, and, in the exercise of due care, should have anticipated the hazard in view of the weather. Applying the doctrine of comparative negligence, it appears to the Court that negligence causing the accident should be allocated 25% to the claimant and 75% to the respondent. *Bradley v. Appalachian Power Co.*, ...W.Va....., 256 S.E.2d 879; *Atkinson v. Dept. of Highways*, 13 Ct.Cl. 18 (1979). As the claimant is seeking to recover $3,739.00, 75% of that sum, or $2,804.25, should be, and is hereby, awarded.

Award of $2,804.25.

Opinion issued October 10, 1980

BARNEY DALE JOHNSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-640)

Claimant appeared in person.

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

RULEY, JUDGE:

On October 20, 1979, the claimant was driving his 1974 AMC automobile east on Brounland Road in Kanawha County. As he rounded a blind curve to his left, he suddenly saw a line of cars stopped in his lane of travel. He applied his brakes and swerved to the left, but the right rear portion of his car hit the last car in line. The automobiles were stopped because Department of Highways' employees were working along the roadway and had the roadway blocked. The claimant alleges negligence on the part of the respondent and seeks to recover $439.29 in damages.

The claimant testified that although the Department of Highways' employees had halted traffic in a blind curve, they had not put up any warning signs or devices along the road. Mrs. Goldie Griffith and Mr. Jerry Wooten, drivers of the last and next-to-last cars in line, respectively, confirmed this and added that both of them were shouting at the Department of Highways' employees to warn them of the danger they were posing. Mrs. Griffith testified that she had been able to stop only because pedestrians on Brounland Road had shouted for her to slow her automobile. After the accident, a flagman was posted in the curve.

To create such a dangerous condition without any warning to motorists was irresponsible and establishes negligence on the part of the respondent. From the testimony, it appears that the claimant was exercising ordinary care and there was no evidence of contributory negligence on his part. Accordingly, an award of $439.29 is hereby made.

Award of $439.29.

Opinion issued October 10, 1980

PROGRAM RESOURCES, INC.

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(CC-80-261)

Ralph C. Dusic, Jr., Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $10,178.50 on unpaid invoices for services rendered to the Department of Finance and Administration. Respondent, in its Answer, admits the validity of the claim and further states that there were sufficient funds in its appropriation for the fiscal year in question from which the claim could have been paid.

Based on the foregoing facts, the Court hereby makes an award to the claimant in the amount of $10,178.50.

Award of $10,178.50.

Opinion issued October 10, 1980

GARY THOMPSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-179)

Claimant appeared in person.

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

GARDEN, JUDGE:

The claimant filed this claim against the respondent for damages to his 1975 Ford pickup truck.

At approximately 8:50 a.m. on April 4, 1979, the claimant was driving his truck in a northerly direction on West Virginia Route 7

north of Masontown, West Virginia. The weather was clear. Route 7, at the point of the accident, is a two-lane asphalt road, straight and level. The respondent was stockpiling limestone at a point just off the highway. One of respondent's trucks and dumped a load of limestone at the stock pile and re-entered the highway ahead of the claimant. As the truck entered the highway, it began to pick up speed. The claimant testified that pieces of limestone lodged between the dual tires of respondent's truck were thrown against his vehicle, causing damage to the windshield and the paint on the hood. There was no mudguard behind the right rear wheel of the truck.

The claimant further testified that he followed the truck to the limestone pit at Greer and informed the driver of the accident. Claimant stated that he received no satisfaction from the driver, and later reported the incident to respondent's district office in Kingwood, West Virginia, where he talked with a man named Roy Smith. Mr. Smith stated that the truck was not supposed to operate without mudguards and that insurance would take care of the claim. The insurance company later denied the claim.

The claimant obtained two estimates of the damage, one from Burgess Motor Company of Kingwood, in the amount of $313.43 plus $5.15 for making the estimate, and another in the amount of $286.87 from Elsey Ford Sales, also of Kingwood.

Respondent's truck or trucks traveling between the supply point at Greer and the stockpile created the probability that limestone would lodge between the dual tires of the trucks, creating a hazard to other vehicles on the roadway. The hazard was increased when the respondent's truck failed to maintain adequate mudguards on the truck which would have prevented rocks flying from between the dual tires onto vehicles travelling to the rear. This was negligence on the part of the respondent.

Accordingly, the Court hereby makes an award to the claimant in the amount of $286.87.

Award of $286.87.

Opinion issued October 10, 1980

DAVID J. YATES

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-180)

No appearance by claimant.

W. Douglas Hamilton, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum of $38.85. On or about March 31, 1980, claimant was operating his automobile in an easterly direction on U.S. Route 60 in Huntington, Cabell County, West Virginia. In the course of this travel, claimant's vehicle crossed a bridge at 29th Street, which bridge is a part of U.S. Route 60, owned and maintained by the respondent.

While crossing the bridge, claimant's vehicle struck an expansion joint, resulting in damage to a hubcap. This occurred because of the negligent maintenance of the bridge and was the proximate cause of the damages suffered by the claimant. Believing that the sum of $38.85 is a fair and equitable estimate of the damages sustained, the Court makes an award to the claimant in that amount.

Award of $38.85.

Opinion issued October 10, 1980

E. H. YOUNG

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-246)

No appearance by claimant.

W. Douglas Hamilton, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum of $610.48. On

or about February 8, 1980, claimant was operating his 1972 Ford Mustang in an easterly direction on Interstate 64 in South Charleston, Kanawha County, West Virginia. While traveling on I-64 claimant crossed a bridge owned and maintained by the respondent. On the bridge, claimant's vehicle struck a loose metal expansion joint which burst a rear tire, causing the vehicle to go into a spin and strike a guardrail. As a result, the left quarter panel and door were damaged. The respondent's negligence in failing to properly maintain the bridge was the proximate cause of the damages suffered by the claimant.

In view of the foregoing facts, the Court hereby finds the respondent liable, and makes an award to the claimant in the amount stipulated.

Award of $610.48.

Opinion issued October 16, 1980

PAUL BOGERT

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-27)

Walter L. Wagner, Jr., Attorney at Law, for the claimant.

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

PER CURIAM:

This claim in the sum of $14,000.00 for property damage allegedly sustained by the claimant's 1977 model Jeep pickup truck grows out of a single-vehicle accident which happened sometime after dark on July 19, 1979, at a point on the Coal River Road in Kanawha County, West Virginia. When the claim was tried on May 28, 1980, the only witnesses who testified were the claimant, who owned the vehicle but was not present at the time of the accident, and Clifton Earl Farley, a district superintendent employed by the Department of Highways, who testified on behalf of the respondent. In addition, the deposition of the deputy sheriff who investigated the accident was offered and received into evidence. In accordance with usual practice, that deposition was not read by the Court at the time of the trial. It was hoped that the deposition would supply

evidence needed by the Court in its determination of the claim. Unfortunately, it does not, and, for that reason, the Court, on its own motion, is disposed to reopen the claim for additional evidence. For the assistance of the parties, the following observations may be helpful.

Respecting the issue of liability, it appears conclusively from the evidence that, at the time of the accident, the bed of the Coal River Road, which, at the place where the accident happened, is adjacent and substantially parallel to the Coal River, had eroded into the paved portion of the highway. The result was that, at its deepest penetration, only about half of the blacktop pavement remained, and a virtual precipice descended from the pavement to the bank of the Coal River. It also appears from the evidence that that condition had been progressive and had existed for a period of two years before the accident. There was no evidence that the respondent, during that two-year period, had taken any remedial action, other than to erect various types of warning signs. While there was evidence that some of the warning signs were objects of vandalism from time to time, it is undisputed that the only warning signs in existence at the time of the accident were hazard boards, 12" wide and 36" high, painted with diagonal yellow and black stripes. These boards were erected in the pavement at various points along the irregular edge of the precipice. The Court is of the opinion that that evidence plainly demonstrates negligence on the part of the respondent, and, in connection with the matter of liability, that leaves only the question of contributory negligence on the part of the claimant. It appears that, at the time and place of the accident, the driver of the vehicle was acting as the agent of the owner so that his contributory negligence, if any, would be imputed to the owner. The facts which do not appear from any evidence presently in the record, and which the Court needs to know, include:

1. Whether the highway in the direction from which the driver approached the hazard was straight or curved;

2. Whether that highway was upgrade or downgrade; and

3. Whether or not the driver was familiar with that highway and with the existing hazard.

In addition, there was an extremely vague reference by the investigating deputy sheriff to a comment allegedly made by the driver or by a passenger in the vehicle to the effect that some

mechanical difficulty in steering might have caused, or contributed to cause, the accident. In that connection, it would be interesting to know who made the statement, what the statement was, and, if possible, what was the fact of the matter respecting mechanical difficulty in steering.

Respecting the issue of damages, the only evidence was that of the claimant, who testified to the effect that immediately before the accident the vehicle had a fair market value of $5,700.00, and that immediately after the accident, its market value was zero. No expert evidence was offered on that issue, but it appears from photographs offered by the claimant that the vehicle probably had some salvage value. The additional evidence on the issue of damages was the testimony of the claimant himself that the sum of $200.00 had been incurred in expense attributable to the loss of the vehicle.

For the foregoing reasons, this claim will be reopened.

Opinion issued October 23, 1980

FANNING FUNERAL HOMES, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-66)

No appearance by claimant.

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

WALLACE, JUDGE:

This claim was submitted for decision based upon a written stipulation to the effect that the respondent is liable for damages in the sum of $10,000.00. Claimant operates a business located adjacent to U.S. Route 52 in Welch, McDowell County, West Virginia. U.S. Route 52 is owned and maintained by the respondent, which also maintains an underpass and drain to the Tug River as a part of the highway drainage system.

On or about April 4 and 5, 1977, July 10, 1978, and July 23, 1978, the respondent negligently maintained the drain to the Tug River, resulting in the flooding of claimant's property. Damaged, among

other items, were a carpet, anchor bolts, drapes, pews, a casket display, wallpaper, baseboards, paint, and casket covers. The parties have agreed that the sum of $10,000.00 is a fair and equitable estimate of the damages sustained by the claimant.

Being of opinion that the respondent was negligent and that the damages are reasonable, an award is hereby made in the amount of $10,000.00.

Award of $10,000.00.

Opinion issued October 23, 1980

MARY K. FULLER

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-576)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

GARDEN, JUDGE:

On the morning of September 25, 1979, the claimant was driving her 1977 Camaro automobile on Campbell's Creek Drive in Malden District, Kanawha County, West Virginia, when she struck a ditch across the roadway which had been dug for the installation of a drain.

The testimony of the claimant indicated that she was driving along Campbell's Creek Drive when she came to a work area, and a flagman signaled her to drive through the ditch. The undercarriage of the Camaro struck the edge of the ditch, causing damage to the transmission of the vehicle. The claimant incurred $91.08 in repairs.

Fred Hess, the inspector for the Permits Department of the Department of Highways, testified that the project on Campbell's Creek Drive was being performed for the Malden Public Service District by the Roger Au & Son Construction Company under a contract with the Public Service District. The contractor was not employed by the Department of Highways, and its only connection

with the respondent was through a permit which the construction company had to obtain from the Department of Highways in order to perform the work. Due to the general rule that the respondent is not liable for the negligence of an independent contractor, this claim must be denied. See *Safeco Insurance Company v. Dept. of Highways,* 9 Ct. Cl. 28 (1971); *Humphreys v. Dept. of Highways,* Claim No. CC-78-199 (February 14, 1980).

Claim disallowed.

Opinion issued October 23, 1980

GRANGE MUTUAL CASUALTY, CO.,
SUBROGEE OF JACK DeGIOVANNI

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-202)

Wayne A. Sinclair, Attorney at Law, for the claimant.

W. Douglas Hamilton, Attorney at Law, for the respondent.

WALLACE, JUDGE:

The claimant filed this action to recover for damages to a 1978 Royal Delta 88 Oldsmobile which occurred when Valerie DeGiovanni, daughter of the claimant's insured, was operating the insured's automobile on June 20, 1978, while traveling from Lancaster, Ohio, to Blackwater Falls, West Virginia, on a vacation.

Valerie DeGiovanni testified that she had planned to spend the night in Parkersburg, West Virginia. As she was proceeding in a westerly direction on East Street in Parkersburg at approximately 6:00 p.m., she passed through a viaduct when "... the car just dudded down." As a result of the jolt to the vehicle, a hubcap came off a wheel and bounced against the vehicle, and the right front tire was ruptured. She did not see a hole in the road at the time of impact, nor did she return to the place of the accident after stopping the vehicle. Damages to the automobile were in the amount of $940.27.

The witness for the Department of Highways, Jaroslav Simacek, an assistant foreman, testified that he was responsible for patching

holes on the city streets, such as East Street, as part of the maintenance function of the respondent. He also testified that as part of his routine, he would travel the primary city streets at least three days a week for the purpose of patching holes as soon as they appeared in the street.

The evidence in this claim fails to establish negligence on the part of the respondent. To establish negligence, there must be proof that the respondent had actual or constructive notice of the defect in the road. Accordingly, the Court disallows this claim.

Claim disallowed.

Opinion issued October 23, 1980

JAMES M. HARPER

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-455)

Claimant appeared in person.

W. Douglas Hamilton, Attorney at Law, for respondent.

GARDEN, JUDGE:

The claimant, James M. Harper, filed this claim for damages to his automobile which occurred when his son, James Thomas Harper, was operating the vehicle.

James Thomas Harper testified the he was driving his father's car on July 18, 1979, at approximately 5:00 p.m. on Gay Road in Jackson County, heading westerly toward Ripley, West Virginia. He came to a construction area where work to widen the roadway was in progress. The witness drove onto the newly widened portion of the road as a truck approached from the opposite direction. As the car entered the widened portion, the right tires struck a rock jutting out of the berm of the road, which caused both tires on the right side of the car to rupture. The witness also testified that the construction was being performed by Shelly and Sands Company. The damage to the autombile was in the amount of $90.90.

Ray Casto, a claims investigator for the respondent, testified that his investigation of the claim revealed that Shelly and Sands Company, in the capacity of an independant contractor, was engaged in construction work on Gay Road in the vicinity of the accident.

The Court is of the opinion that the record establishes that an independent contractor was engaged in the construction work, and the respondent cannot be held liable for the negligence, if any, of such independent contractor. See *R. H. Bowman Distributing Co., Inc. v. Dept. of Highways,* 12 Ct.Cl. 156 (1978); *Safeco Insurance Company v. Dept. of Highways,* 9 Ct.Cl. 28 (1971). By reason of the foregoing, this claim is disallowed.

Claim disallowed.

Opinion issued October 23, 1980

WILLIAM JOSEPH MANNING

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-589)

Alan H. Larrick, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

On May 13, 1979, the claimant was proceeding to work at the Sioux Coal Company in Itmann, West Virginia. It was dark and somewhat hazy, but the road was dry. The claimant was traveling at approximately 45-50 miles per hour on Route 54 south of Lester, West Virginia, at about 11:15 p.m. Suddenly, his 1970 Ford Maverick automobile struck some rocks in the roadway in an area known as Jenny's Gap. The claimant lost control of his vehicle, and veered to the left-hand side of the road, hit a guardrail, and rolled down the bank. As a result of the accident, the claimant sustained personal injuries for which he was treated and released that evening at Raleigh General Hospital. He missed two weeks work because of the injuries, and the automobile was a total loss. Claimant seeks to recover for the medical expenses which he incurred, his lost wages, and damage to his automobile.

Roy Douglas McDaniel, Sr., testified that he had driven through the area where claimant's accident occurred at about 6:00 p.m. on his way to Mullens, West Virginia, and on his return trip at about 8:10 p.m., he noticed the rocks in the road in the opposite lane of travel. Mr. McDaniel indicated that he saw several medium-sized rocks and three large rocks in the lane in which claimant later encountered rocks in the road.

Jennings Martin, respondent's supervisor for Raleigh County, testified that, according to the records of the respondent, there had been no rock slides in the area of the accident of which the respondent had been notified either prior to, at the time of the accident, or later.

Jerry Paul Mitchell, Sr., a deputy sheriff with the Raleigh County Sheriff's Department, testified that he patrolled Route 54 in that area every day, and on the day of the accident, the road was wet. Also, the following testimony was elicited:

"Q. Have you ever seen any other rock falls in that area on State Route 54 from—

A. Nothing like that.

Q. When you say 'nothing like that'—

A. I mean you might see small gravel washed down from the rain but that's about it."

A careful review of the facts as established by the record in this case indicates to the Court that the respondent was not negligent in its maintenance of Route 54. This particular section of road was not known to be one where falling rocks, of the size which were encountered by the claimant, usually fell.

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 v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947).

The record in this claim does not establish negligence on the part of the respondent. Accordingly, the Court disallows the claim.

Claim disallowed.

Opinion issued October 23, 1980

VIRGINIA PAULEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-153)

Claimant appeared in person.

W. Douglas Hamilton, Attorney at Law, for respondent.

GARDEN, JUDGE:

The claimant filed this claim for damages to her 1972 Ford Maverick automobile in the amount of $50.00 which occurred when the autombile struck a pothole on MacCorkle Avenue in Chesapeake, West Virginia. The accident occurred on a day in March or April, 1979, at approximately 9:00 p.m.

The claimant alleges that the right front tire ruptured when the automobile struck a hole which was approximately one foot in diameter and six to eight inches in depth. The claimant testified that she was aware of the existence of the hole, but she had never complained to the respondent that the hole was in the highway.

West Virginia neither insures nor guarantees the safety of motorists on its highways. *Adkins v. Sims,* 130 W.Va. 645 (1947). Potholes are a persistent and unavoidable problem, of which all motorists should be aware. For the State to be held liable, it must be established that the respondent had actual or constructive notice of the particular hazard in the roadway which caused the accident. As the evidence revealed no negligence on the part of respondent, the claim must be denied.

Claim disallowed.

Opinion issued October 23, 1980

STERLING L. PULLEN, JR.

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-579)

J. David Cecil, Attorney at Law, for the claimant.

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

WALLACE, JUDGE:

The claimant, Sterling L. Pullen, Jr., filed this claim against the respondent for damages to his 1977 Harley-Davidson Motorcycle and for personal injuries resulting from an accident which occurred on June 14, 1979, at approximately 7:00 p.m., on Secondary Route 5 in Jackson County, West Virginia. At the place of the accident, Secondary Route 5 is a two-lane blacktop road. The claimant was riding his motorcycle in a southerly direction at approximately 50-55 miles per hour. A truck was approaching in the opposite lane. The claimant came upon a hole in the road surface approximately twenty-one feet long, six feet wide, and six inches deep, and the claimant was unable to avoid going through the hole because of the approaching truck in the opposite lane. The motorcycle struck the hole causing the claimant to lose control. The front wheel of the motorcycle was damaged and the tire ruptured. Claimant fell from the motorcycle into the ditch on the right side of the road, and thereafter the motorcycle ran into the ditch on the left side of the road. The claimant sustained cuts and abrasions for which he was later treated at the hospital and released. He missed a total of nine days' work because of these injuries, resulting in a wage loss totaling $437.06. An estimate of damages from Dennis Harley-Davidson, introduced in evidence, amounted to $1,711.75.

On the day of the accident, Terry Allen Clendenin was operating his motorcycle behind and to the left of the claimant. He testified that he noticed areas where the road had been patched previously and debris had been left on the edge of the road. He also confirmed the testimony of the claimant that the claimant had no choice under the circumstances but to attempt to go through the hole.

James William Casto, Jr., an area resident, testified that the respondent's employees had been patching certain areas of the

road near the section where claimant had his accident. Prior to the accident, Mr. Casto had telephoned James Brotherton, the supervisor at the Ripley office of the Department of Highways, to express concern over the fact that certain of the holes had been dug out in preparation for filling, but were left open with no warning devices placed to make the traveling public aware of the road hazard.

Willard Redman, the foreman for the Department of Highways in this particular patching operation, testified that to his knowledge none of the holes prepared for patching were left open on the roadway. The records to which he referred indicated that the patching crew performed work on the roadway between June 11 and 14 and on June 18, 1979. Mr. Redman testified that the procedure followed by the crew was to cut out the holes and then fill them with a base of gravel followed by hot mix. He stated that no holes were left once they were cut out.

Photographs of the scene where the accident occurred revealed a large unpatched hole in the road. The edges of the hole appeared to be cut out.

From the record in this case, it appears to the Court that a hazardous condition existed on the roadway of which the respondent was aware, and the respondent, having failed to place any warning devices for the traveling public, was negligent. The Court finds that the negligence of the respondent was the proximate cause of the claimant's injuries and the damages to his motorcycle, and, accordingly, makes an award to the claimant in the amount of $2,148.81.

Award of $2,148.81.

Opinion issued October 23, 1980

JAMES SISK

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-69)

Claimant appeared in person.

W. Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

On January 9, 1980, at approximately 6:00 a.m., claimant was driving across the Cow Creek Bridge of Interstate 64 west of Charleston, West Virginia, when his automobile struck a large pothole. The claimant alleges that respondent's negligence caused the resulting damage to his 1979 Mercury Monarch autmobile, and seeks an award in the amount of $164.00.

The claimant testified that he pulled off the highway after his automobile struck the hole in the bridge. He then saw a truck hit the same hole. The driver of the truck pulled over, and he and the claimant walked back to the hole.

Dallas Sowards, an employee of the respondent, testified that he discovered a hole on the Cow Creek Bridge of Interstate 64 on the morning of January 9, 1980, between 6:00 and 6:30 a.m. while he was proceeding to work. He immediately left the vehicle in which he was a passenger in order to direct traffic around the hazard. He further testified that several vehicles hit the hole as he attempted to flag them over. He also stated that he traveled that road every day, and this was the first time he saw the hole in the bridge.

Proof of actual or constructive notice is a prerequisite to the establishment of negligence on the part of the respondent. *Davis v. Dept. of Highways,* 12 Ct.Cl. 31 (1977); *Hoskins v. Dept. of Highways,* 12 Ct.Cl. 60 (1977). The evidence clearly indicates that the respondent had neither actual or constructive notice of the hole in question. Respondent's employee attempted, upon discovery of the hole, to take action to prevent accidents, but was unable to do so. The record does not establish negligence on the part of the respondent, and, since the law is well established in West Virginia that the State is neither an insurer nor a guarantor of the safety of

motorists on its highways, *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947), this claim is hereby disallowed.

Claim disallowed.

Opinion issued October 23, 1980

ERNEST WILLIAMSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-67)

Claimant appeared in person.

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

WALLACE, JUDGE:

On January 9, 1980, between 6:30 and 7:00 a.m., the claimant and his wife and baby were driving north on West Virginia Route 119 through Marmet, Kanawha County, West Virginia, to Charleston, West Virginia, where the couple was to take the baby for X rays at Charleston Memorial Hospital. As the claimant drove his 1977 Mercury Marquis through an underpass at Marmet, he attempted to swerve around a large pothole in the highway, but a large truck approaching in the opposite lane forced claimant to drive his vehicle through the hole which was located in the right portion of his lane of travel. The claimant estimated the size of the pothole at two feet in diameter and five to six inches in depth. He estimated his speed at 20 to 30 miles per hour. As a result of striking the pothole, the right front tire burst and the hubcap from that wheel was lost. The damages were in the amount of $119.75.

The claimant testified that he saw the hole in the highway when he was approximately ten feet from it as he came out of the underpass and around a sharp curve in the road but was unable to avoid hitting the hole because of the large truck passing in the opposite lane. The claimant further testified that he was unfamiliar with this section of Route 119 as he travelled it only about once a year.

This accident took place on U.S. Route 119, a heavily travelled highway just east of Charleston, West Virginia. In the Court's

judgment, this highway would deserve more attention, from a maintenance standpoint, than secondary roads in more remote areas. A hole the size of the one encountered by the claimant, which was two feet in diameter, did not develop overnight and must have been in existence for some time prior to claimant's accident. See *Lohan v. Department of Highways*, 11 Ct.Cl. 39 (1975).

Being of the opinion that the respondent should have discovered this hole and repaired it, and being of the further opinion that the claimant was free of contributory negligence, the Court hereby makes an award in the amount of $119.75.

Award of $119.75.

Opinion issued October 23, 1980

ROBERT L. ZIMMERMAN and
FEDERAL KEMPER INSURANCE COMPANY,
AS SUBROGEE OF ROBERT L. ZIMMERMAN

VS.

DEPARTMENT OF HIGHWAYS

(CC-79-421)

James M. Henderson, III, Attorney at Law, for the claimant.

W. Douglas Hamilton, Attorney at Law, for the respondent.

WALLACE, JUDGE:

The claimant and claimant's insurance carrier have filed this claim for damages to claimant's 1978 Chevrolet pickup truck, which resulted from a collision with a Department of Highway's snowplow on a secondary road known as Saturday Road in Fayette County, West Virginia.

The claimant and two passengers were traveling in claimant's truck on Saturday Road at approximately 1:30 p.m. on December 26, 1977, when they approached a snowplow being operated by Alvin Martin, an employee of the respondent. As the snowplow approached coming downhill, the claimant testified that he "immediately got off the road. My right wheels were all the way off the road." As the snowplow rounded a curve, the blade of the plow

struck the left front door of the pickup truck. Damages to the truck amounted to $1,013.01.

The claimant and John Lee Brown, a passenger in his truck, testified that the snowplow slid into the pickup truck and that the blade of the snowplow struck the truck. Alvin Martin, the opertor of the snowplow, testified that the pickup truck became hooked on the blade as the two vehicles were passing each other.

From the evidence, and upon examination of the photographs introduced, the Court is of the opinion that, through no fault on the part of the claimant, the snowplow ran into the truck, damaging it. Accordingly, the Court awards $250.00 to the claimant, Robert L. Zimmerman, and $763.01 to Federal Kemper Insurance Company.

Award to Robert L. Zimmerman of $250.00.

Award to Federal Kemper Insurance Company of $763.01.

Opinion issued November 10, 1980

APPALACHIAN POWER COMPANY

vs.

DEPARTMENT OF HEALTH

(CC-80-321)

No appearance by claimant.

David R. Brisell, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $389.55 on an unpaid electric bill for service to the West Virginia Health Medical Center in South Charleston, Kanawha County, West Virginia. Respondent admits the validity of the claim and states that there were sufficient funds in its appropriation for the fiscal year in question from which the claim could have been paid.

Based on the foregoing facts, the Court hereby makes an award to the claimant in the amount of $389.55.

Award of $389.55.

Opinion issued November 10, 1980

DAVID S. BARNETT

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-273)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum of $209.11, based upon the following facts: On or about January 15, 1980, claimant was operating his 1974 Chevrolet station wagon on Local Service Route 1/9 in Nicholas County, West Virginia.

While traveling on this, a highway owned and maintained by the respondent, claimant was forced to cross a ditch which the respondent had constructed across the road. In crossing the ditch, claimant's vehicle was damaged. This occurred because of the negligence of the respondent in constructing the ditch and in failing to warn motorists of the hazard.

The Court finds that respondent's negligence was the proximate cause of the claimant's damages, and hereby makes an award to the claimant in the amount stipulated.

Award of $209.11.

Opinion issued November 10, 1980

MICHAEL DENNIS

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-127)

Claimant appeared in person.

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

GARDEN, JUDGE:

On February 22, 1980, at about 9:30 p.m., the claimant was operating his mother's 1973 Dodge Dart automobile in a northerly direction on Route 14 between Vienna and Williamstown, West Virginia. While traveling at a speed of 40 miles per hour, claimant struck a pothole which he described as being "a foot in circumference around and probably three or maybe a little bit more inches deep."

No evidence was introduced which would establish that the respondent knew or should have known of the existence of this defect in the highway, and, since the respondent is not an insurer of motorists using its highways, this claim must be disallowed. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947).

Claim disallowed.

Opinion issued November 10, 1980

REBA C. DUNLAP

vs.

DEPARTMENT OF HIHWAYS

(CC-79-414)

Claimant appeared in person.

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

WALLACE, JUDGE:

This claim was filed by the claimant against the respondent for damages sustained by her automobile. On August 6, 1979, the

claimant was driving her 1975 Chrysler automobile westerly on West Virginia Route 21/38, also known as Fisher Ridge, from the Goldtown exit of Interstate 77. The road was dry. It was about 6:00 p.m. and still light. As she proceeded downhill, an oncoming vehicle was proceeding up the hill at a fast rate of speed.

The claimant testified that the road was narrow and the oncoming vehicle forced her off the road onto the berm. At the point of the accident, the berm was about six to eight inches below the road surface. The right front and right rear wheels of claimant's automobile went off the roadway and lodged in a ditch in the berm adjacent to the paved portion of the road. It was impossible for the claimant to move her automobile. The two right tires were destroyed and the bottom of the automobile rested on the pavement. Damages sustained included wrecker service, $24.00; two tires, $147.66; front end alignment, $15.88; hubcap replacement, $30.90, for a total of $218.44.

Ray Casto, claims investigator for the respondent, testified that the road at the point of the accident was a one-lane road fourteen feet wide and that there was a ditch on both sides.

The berm or shoulder of a highway must be maintained in a reasonably safe condition for use when the occasion requires, and liability may insue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway. See *Sweda v. Dept. of Highways*, 13 Ct.Cl. 249 (1980).

As previously stated, this accident occurred on August 6, 1979. Pictures taken at the scene of the accident on August 28, 1979, by Ray Casto show a badly maintained berm adjacent to a substantial break in the paved portion of the road.

When asked if the oncoming vehicle was crowding her, the claimant replied, "Yes, he was crowding me. In order to pass there, you should get off the berm of the road to avoid an accident."

From the record the Court finds that the claimant was forced off the narrow one-lane road onto a berm six to eight inches below the surface of the road which, from the photograph exhibits, appeared to have been in a bad state of repair. If the berm had been properly maintained by the respondent, the claimant's automobile would not have sustained damages. Accordingly, the Court makes an award to the claimant in the amount of $218.44.

Award of $218.44.

Opinion issued November 10, 1980

VICTOR FRISCO and
JANET FRISCO

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-80-121)

Daniel C. Staggers, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The pleadings in this case establish that on or about May 20, 1977, hydacid uranine (fluorescein) dye was placed in the well of the Gary Hipp residence in Mineral County, West Virginia, in an attempt to trace underground water to a surface mine site. The dye damaged the well. Respondent drilled a new well, but the dye migrated to and contaminated the new well.

In the fall of 1977, the claimants purchased the Gary Hipp property with the assurance that the dye was temporary and not detrimental. However, the State Health Department has advised the claimants not to drink water from the well.

On February 25, 1980, the claimants filed this claim in the amount of $1,956.00 for the cost of the installation of a third well. On June 11, 1980, respondent filed its Answer admitting that the claimants' well had been damaged by respondent's action. Respondent waived a hearing. On June 23, 1980, respondent filed its Amended Answer containing the same admissions as the first, with the added defense that this claim was barred by the Statute of Limitations.

The claimants then filed their Motion to Strike and/or Dismiss Respondent's Answer and Amended Answer as being untimely filed, citing rules of this Court and Rules of Civil Procedure.

This matter came on for hearing on June 26, 1980. There was no appearance on behalf of the claimants. Counsel for respondent represented to the Court that, although respondent was sympathetic toward the claimants, respondent was relying on the fact that the claim was barred by the Statute of Limitations. Counsel further represented that he had talked with claimants'

counsel who stated that he wanted to contest the matter on the basis of the matter set forth in claimants' Motion to Strike. Since there was no appearance on behalf of the claimants, counsel for the respondent requested that the claim be continued for thirty days to allow counsel for claimants to determine what action he wished to pursue. The Court granted this request, and the matter was continued. Over thirty days have elapsed and no further action has been taken by the parties. The Court understands the plight of the claimants, but it is bound by its statutory authority. West Virginia Code §14-2-21 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... and such period of limitation may not be waived or extended." The statute must be applied by the Court, independent of respondent's Answers. The negligent act, having taken place on May 20, 1977, and the claimants' failure to file their claim within a two year period from that date, requires this Court to dismiss the claim.

Claim dismissed.

Opinion issued November 10, 1980

CHARLES W. GARLAND

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-99)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum of $60.00, based upon the following facts: On or about January 7, 1979, Phyllis A. Garland was operating a 1974 Chevrolet Monte Carlo titled in the name of Charles W. Garland on West Virginia Route 62 and 2. In the course of this travel, the automobile crossed the Shadle Bridge over the Kanawha River between the cities of

Henderson and Point Pleasant, West Virginia, which bridge is owned and maintained by the respondent.

While crossing the bridge, the vehicle struck a loose piece of steel, resulting in damage to a tire. This occurred because of the respondent's negligence in failing to properly maintain the bridge, which negligence was the proximae cause of the resultant damages.

Based on the foregoing facts, the Court hereby makes an award to the claimant in the amount stipulated.

Award of $60.00.

Opinion issued November 10, 1980

EMIT JENNINGS, JR. and
VICTORIA JENNINGS

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-216)

Eugene D. Pecora, Attorney at Law, for claimants.

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

WALLACE, JUDGE:

In this case the claimants seek recovery in the amount of $1,050.00 from respondent for damages sustained to their property caused by excessive surface water.

The claimants had owned two lots in a rural subdivision in Raleigh County, West Virginia, for approximately three years. They were designated as Lots 4 and 5 in a subdivision known as Baylor Subdivision. The lots faced on an unimproved road in the subdivision and were about ninety feet below West Virginia Route 41 on Badoff Mountain. They were also below the level of the subdivision road. Owners of adjacent lots had filled in their lots to the road level.

Claimants had commenced the construction of a house. The foundation was complete and a septic tank had been installed.

There was a slide area running approximately 120 feet on Route 41 on the mountain above claimants' property. The respondent had

attempted to stabilize the slide to no avail. An 18" culvert was installed about 20 feet above an existing stopped-up drain in the slide to carry off drainage water.

On May 10, 1979, there was a violent rainstorm in the area washing out the shoulder on Route 41. Water came down the hollow and also down the mountain along and over the subdivision road flooding claimants' property, washing out the septic tank and claimants' garden.

Claimants contend that the installation of the 18" culvert in the slide area to replace the clogged one was the cause of their damage; that there was no water problem until the new one was installed. However, no complaint was made until the storm of May 10th.

From the record the Court finds that the damage was a result of a combination of natural conditions. The location of claimants' property lower than the adjoining lots and the natural flow of surface water down the subdivision road as well as down the mountain side were all contributory factors. To hold that the drainpipe installed in the slide area was the direct and proximate cause of the damage sustained would be an untenable finding of fact, unwarranted by the evidence. See *Wotring v. Dept. of Highways,* 12 Ct. Cl. 162 (1978). The water from the heavy rain followed its natural course down the slope of the mountain as well as through the hollow onto the subdivision road and onto claimants' property. For the reasons herein stated, the Court disallows the claim.

Claim disallowed.

Opinion issued November 10, 1980

GARY L. KNOWLTON

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-110)

Claimant appeared in person.

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

GARDEN, JUDGE:

On the evening of February 27, 1979, the claimant, a resident of Sistersville, was returning to his home after attending a basketball game in Morgantown. He was operating his 1978 Honda Accord automobile in a westerly direction on Route 7. It was cold, but the road was free of any ice or snow, and he was travelling at a speed of 35 miles per hour in a posted speed limit area of 55 miles per hour.

After the claimant had proceeded approximately 20 miles west of Morgantown, he suddenly came upon a badly deteriorated portion of pavement in the westbound lane of Route 7. This particular area covered the entire width of the westbound lane and extended approximately the length of an automobile. As a result, damage in the amount of $145.03 was sustained by the vehicle. While the evidence reflected that respondent had erected a "Rough Road" sign some 15 or 16 miles from the scene of the accident, it was equally apparent that no warning signs had been erected near the accident site.

This is not the usual claim of a motorist striking an isolated pothole in a highway. The testimony clearly established that the claimant's vehicle was damaged when it struck a deteriorated section of the highway covering the entire width of the westbound lane of travel and extending somewhere between 10 to 15 feet in length. It may have been that respondent, due to the winter weather, had chosen not to repair this area, but this Court is of the opinion that at least some type of warning sign should have been erected, and the failure to do so constituted negligence. An award in the amount of $145.03 is thus made.

Award of $145.03.

Opinion issued November 10, 1980

LEWIS DALE METZ

vs.

WEST VIRGINIA STATE BOARD OF
PROBATION & PAROLE and
DEPARTMENT OF CORRECTIONS

(CC-77-155)

Ernest M. Douglass, Attorney at Law, for claimant.

Frank M. Ellison, Deputy Attorney General, for respondents.

WALLACE, JUDGE:

According to the Stipulation of Facts filed by the parties to this claim, the claimant, Lewis Dale Metz, issued a worthless check in the amount of $130.00 and was sentenced by the Circuit Court of Ritchie County, West Virginia, to serve a term of 1-5 years effective August 25, 1974. The claimant served two years at the Huttonsville Correctional Center and was released on parole March 31, 1976. The following year he was arrested for parole violations. A parole revocation hearing was conducted, resulting in the revocation of his parole, and he was returned to Huttonsville on May 26, 1977.

A hearing was held on a petition for a writ of habeas corpus on August 19, 1977, and Judge Hey of the Circuit Court of Kanawha County issued the writ and released the claimant from further confinement.

On August 25, 1977, this claim was filed by the claimant seeking $5,000.00 in damages allegedly sustained "as a result of his illegal and unjust confinement" at Huttonsville Correctional Center.

West Virginia Code §53-4-10 provides, in part: "Any judgment entered of record shall be conclusive, unless the same be reversed, except that the petitioner shall not be precluded from bringing the same matter in question in an action for false imprisonment."

The gist of an action for false imprisonment or false arrest is the illegal detention of a person without lawful process, or by an unlawful extension of such process. *Finney v. Zingale,* 95 S.E. 1046, 82 W.Va. 422 (1918). According to the Stipulation, claimant Metz was arrested by Parole Officer Bob Willis on April 1, 1977. He was served with seven parole violations.

The want of lawful authority is an essential element in an action for false imprisonment. *Vorholt v. Vorholt*, 160 S.E. 916, 111 W.Va. 196 (1931). There was no allegation by the claimant of the lack of lawful authority in his arrest and detention. The parole officer served the claimant with the parole violations, and the law provides that no action for false imprisonment will lie if "the arrest, detention and imprisonment complained of were incident to the execution of a warrant for arrest issued by a public official having authority to issue the same." *Vorholt*, supra.

If there is no warrant, or an insufficient warrant, backing an arrest and imprisonment, there can be an action for false imprisonment. In *Williamson v. Glen Alum Coal Company*, 78 S.E. 94, 72 W.Va. 288 (1913), the warrant issued charged no offense and was void on its face. Claimant in the instant case was served with seven violations of his parole. The precise listing of alleged offenses validly supports the subsequent arrest.

An arrest is not necessarily unlawful so as to afford ground for an action of false imprisonment because the plaintiff was innocent of the offense for which the arrest was made, if the forms of law were observed. *Finney v. Zingale*, 95 S.E. 1046, 82 W.Va. 422 (1918). It is true that a writ of habeas corpus was granted to the claimant in this case, and that Judge Hey released him from confinement, reversing the decision of the Board of Probation and Parole. But, as said in *Polonsky v. Penn. R. Co.*, 184 Fed. 558:

> "That the arrest of one who is innocent must be unlawful is naturally an attractive statement; but, if the forms of law be observed, such statement is not necessarily true. An arrest and consequent imprisonment may be unjust and mistaken, but, if it be lawful (i.e., in compliance with the technical requirements of statute or common law, as the case may be), then no trespass was committed..."

The Court finds that the process was lawful and that there was no illegal detention of the claimant. However, an abuse of a lawful arrest can also be false imprisonment; such as cruelly treating the arrested person, insulting him, imposing on him undue hardships. *Gillingham v. Ohio Riv. R'd. Co.*, 35 W.Va. 588 (1891). The record in the instant case reveals no ill treatment of claimant Metz, either at the time he was arrested by the parole officer or during his period of detention.

Accordingly, the Court finds that the claimant has failed to establish the elements constituting false imprisonment, and disallows the claim.

Claim disallowed.

Opinion issued November 10, 1980

CHARLES H. PAGE and DOROTHY PAGE

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-122)

Claimant appeared in his own behalf.

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

WALLACE, JUDGE:

The claimants filed this action to recover damages to their property located on Klondike Road in Jackson County, West Virginia. The claimants allege that a portion of their property was improperly taken when the respondent Department of Highways widened Klondike Road, moved the ditch line, and replaced claimants' driveway. They also allege damages to the house from heavy truck traffic during the construction period.

Claimant Charles Henry Page testified that he and his wife, Dorothy Page, by instrument dated August 26, 1978, granted a "Construction Easement" to the respondent after which the widening work and ditch construction on Klondike Road was performed.

Mr. Page stated that a crack which appeared in a front window of his home was caused by vibration from a piece of heavy equipment traversing Klondike Road and that the vibrations also caused the separation of a drainpipe from the house and the formation of cracks in the driveway.

William Dahl Burbank, right-of-way agent for the Department of Highways, testified that the right of way on Klondike Road was 40 feet. According to the as-built cross sections introduced in evidence the top of the cut on the back slope of the ditch line was

20 feet from the center of the road adjacent to claimants' property. The 20 feet from center line would place the ditch within the State's right of way.

Edward Neal Keffer, construction superintendent for the respondent on this particular project, testified that the Department of Highways did not use any heavy equipment on the project in the vicinity of the claimants' property.

In view of the evidence concerning the allegation by the claimants that the respondent used a portion of claimants' property for the ditch line of Klondike Road, the as-built cross sections demonstrate that the respondent was within its right of way. In addition, if the respondent had taken a portion of the claimants' property, they have an adequate remedy at law through condemnation proceedings. This Court does not have jurisdiction where the claimants have an adequate remedy at law. See *Carlile v. Department of Highways,* 13 Ct.Cl. 192 (1980).

From the record, the claimants have failed to prove that Klondike Road was not built within the right of way nor that the negligence of the respondent caused the damages to claimants' house and driveway.

Accordingly, the Court disallows the claim.

Claim disallowed.

Opinion issued November 10, 1980

PATRICIA PORTER

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(CC-79-646)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GARDEN, JUDGE:

At about 8:00 a.m. o'clock on November 7, 1979, the claimant, an employee of the State Tax Department, drove her 1978 Ford LTD into her assigned parking space in the car pool parking lot at the State House. Upon returning to her car after work in the afternoon,

she started her car and moved forward slightly when her car struck a cinder block which had been placed in close proximity to the front of her car by a person or persons unknown to her. As a result, damage was sustained to the right front fender and emission control system. An estimate from Turnpike Ford for repair of the damages in the amount of $55.10 was introduced into evidence.

The claimant testified that when she pulled into her assigned parking space in the morning, the cinder block was not present. After work, she approached her car from the rear and did not observe the obstructing cinder block. Cars were parked at that time on both sides and to the rear of her car, and thus her only means of exiting from her parking space was to pull forward. Following this incident, the claimant contacted General Services which operates the parking lot and was advised that none of its employees had placed the cinder block in front of her car, and that they had no knowledge as to who was responsible for the same.

It is the Court's understanding that employees of the State of West Virginia, such as the claimant, are not required to pay a monthly fee for the privilege of parking in the car pool parking lot. This fact becomes exceedingly important, for in the Court's opinion, what was created was a gratuitous bailment, and the law is clear that in such situations the bailee is required to exercise only slight diligence and is only liable for gross neglect. Being of opinion that the claimant's testimony falls far short of establishing gross neglect, the claim is disallowed.

Claim disallowed.

Opinion issued November 10, 1980

ROY PORTERFIELD and
DONNA F. PORTERFIELD

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-98)

Claimant, *Donna F. Porterfield*, appeared in person.

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

GARDEN, JUDGE:

Around noon on November 8, 1979, the claimant, Donna F. Porterfield, was operating a 1974 Fiat automobile in a northerly direction on I-79 in Monongalia County. The automobile was titled in her name and in the name of her husband, the claimant, Roy Porterfield. The weather was clear, the roads were dry, and she was travelling at a speed of about 25 to 30 miles per hour in a posted 55 mile per hour area.

Mrs. Porterfield was returning from Morgantown to her home in Waynesburg, Pennsylvania. She had apparently driven to Morgantown earlier that morning for she testified that on the trip down to Morgantown she had noted the presence of employees of respondent doing some type of work on the southbound lanes of the highway. On her return trip, and about 500 feet from the scene of the accident, she stated that she observed two signs warning of construction work and the fact that flagmen were ahead. As a result she reduced her speed and started looking ahead for the flagmen. Suddenly she came upon a section of the concrete highway where apparently the concrete had been broken up, presumably by the use of jackhammers. This broken-up concrete extended over both northbound lanes and was as long as it was wide. As a result of striking this section of the highway, a radiator hose was destroyed and required repairs totalling $38.69.

The Court is of the opinion that respondent's failure to have flagmen in the area to warn motorists of the hazardous condition of the highway, particularly after erecting a sign indicating that such personnel were ahead, constituted negligence. Being of the further opinion that Mrs. Porterfield was not guilty of any negligence under the facts and circumstances then and there existing, an

award in favor of the claimants in the amount of $38.69 is hereby made.

Award of $38.69.

Opinion issued November 10, 1980

MARGARET K. RICHARDSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-235)

Grover C. Goode, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

Claimant is the owner of a residence on Lake Drive in the City of Welch, McDowell County, West Virginia. Situate above and behind claimant's dwelling is Riverside Drive, also known as U.S. 52 business route. Above Riverside Drive is another road, known as U.S. Route 52 by-pass.

On the evening of October 7, 1977, a boulder rolled down from the area behind claimant's house, crashed through the back of the house, and rolled all the way through it, causing extensive damage. The boulder, which weighed several hundred pounds, barely missed striking Mrs. Richardson, who had taken just seven steps through the door of the breakfast room before the rock came crashing through the living room where she had been sitting. The boulder was so large that it had to be broken into pieces before it could be removed from the house. Claimant seeks reimbursement for structural damage, furniture repair and replacement, carpeting, painting, plaster and tile replacement, and items of personal property damaged by the boulder.

This Court has decided several "falling rock" cases involving the Department of Highways, some adverse to the claimants and some in favor of the claimants where the Court found proof of sufficient negligence to constitute the proximate cause of an injury. The rule in such cases was enunciated by the Court in *Hammond v. Department of Highways*, 11 Ct.Cl. 234 (1977): "The unexplained

falling of a rock or boulder... without a positive showing that the Department of Highways knew or should have known of a dangerous condition and should have anticipated injury to person or property, is insufficient... to justify an award." 11 Ct.Cl. at 236. The State must have had actual or constructive notice of the danger posed by a certain hazard before the respondent can be found negligent.

Testifying on behalf of the respondent was Charles Lane, Assistant Supervisor of McDowell County. Mr. Lane stated that, prior to October 1, 1977, no work was done by the Department of Highways on Route 52 and Route 52 by-pass. He added that they had no problems with rocks falling on Route 52, but, on the by-pass, "we get rocks... that we have to pick up quite often."

Another witness for the respondent, Jesse H. Gravely, a District Construction Engineer, testified from various photographs that there was some danger from rock falling out of the area behind and above claimant's house and that some cracked rock existed there. Mr. Gravely also said that the type of traffic which uses the by-pass was generally "the heavier traffic that does not want to go through the City of Welch, larger trucks, etc."

Nothing in the evidence, however, indicated that any complaints were ever registered with the respondent regarding falling rocks in the area. But the record does disclose that employees of the respondent were aware of the problem, for in response to a question as to how often a check for falling rock was made there, the McDowell County Assistant Supervisor stated, "We usually have men that goes across the by-pass every day. I mean, if there is any rock in the road, they pick it up."

This Court, in finding the Department of Highways liable in the case of *Varner's Adm'n. v. State Road Commission,* 8 Ct.Cl. 119 (1970), held that there was evidence of a dangerous condition and "no showing that the respondent did anything beyond the routine cleaning of ditches and the removal of rocks which previously had fallen on the highway."

As the evidence in the instant case tends to show that the respondent had constructive notice of the hazardous condition existing behind claimant's residence, respondent's failure to take remedial action constituted negligence which proximately caused the damage suffered by the claimant. Equity and good conscience dictate that claimant be compensated for her extensive losses.

Therefore, based upon written estimates and repair bills filed with the claim, the Court hereby makes an award to the claimant in the amount of $4,581.05.

Award of $4,581.05.

Opinion issued November 10, 1980

STAUNTON FOODS, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-294)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $1,842.65 on unpaid invoices for merchandise sold to respondent's Work/Study Release Center at Beckley, West Virginia. Respondent admits the validity of the claim and states that there were sufficient funds on hand at the close of the fiscal year in question from which the claim could have been paid. Accordingly, the Court hereby makes an award to the claimant in the amount requested.

Award of $1,842.65.

Opinion issued November 10, 1980

STEWART-DECATUR SECURITY SYSTEMS, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-225)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $6,755.70 on an unpaid invoice for the replacement of locking devices at the West Virginia State Penitentiary. Respondent admits the validity of the claim and states that there were sufficient funds on hand at the close of the fiscal year in question from which the claim could have been paid. Accordingly, the Court hereby makes an award to the claimant in the amount requested.

Award of $6,755.70.

Opinion issued November 10, 1980

AYERS THOMAS

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-179)

Claimant appeared in peson.

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

GARDEN, JUDGE:

The claimant's 1979 tow truck was damaged when he struck a pothole on Route 52 in Williamson, West Virginia, in September of 1979. After striking the pothole, the truck struck a stone wall located immediately to the right-hand side of Route 52, causing damages to the truck in excess of $700.00. Claimant testified that he

had known of the existence of this hole, but did not see it prior to impact because it was filled with water.

Some confusion is apparent from the record. The claim was filed on April 11, 1980, and the claimant, while testifying that the incident occurred in September of 1979, was unable to state the exact date. A witness, Albert Hall, testified that he was a passenger in the truck and that the hole had been in existence since December (presumably, December of 1978).

The law is well settled in West Virginia that the respondent is not an insurer of motorists using its highways, and, absent a showing that respondent knew or should have known of the existence of the subject defect in the highway, there can be no recovery.

Claim disallowed.

Opinion issued November 10, 1980

MYRTLE CHAFFINS WATTS
and ELBERT "EB" WATTS

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-210)

Richard M. Allen, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

The claimants own a residence and property on Ten Mile Road also known as State Route 52, in Lincoln County, West Virginia. The road is located adjacent to and below their property. A slide area developed in the road in front of the claimants' property which claimants allege resulted in damage to their property in the amount of $4,652.56.

Claimant Elbert Watts testified that the claimants built their home in 1975, but were forced to have the house moved in 1978 due to the slide condition. During this time, employees of the respondent placed stone and tar on the road in an attempt to maintain the road for local traffic. The claimants contacted the

respondent several times in 1979, and, two drainpipes were placed under the road in an attempt to prevent further sliding. This action did not cure the slide condition. Surface water did not drain properly but continued to remain in the ditch line adjacent to claimants' property.

Larry Adkins, county maintenance supervisor for the respondent in Lincoln County until August, 1978, testified that he observed the slide condition in the winter of 1977-78. He stated that the road was slipping toward another road cut below the State road. He recommended that "sheet piling or something" be placed to stabilize the condition, but this work was not performed.

Stanford Verdayne Shelton, an employee of the respondent, testified that he put fill stone on the road in the vicinity of claimants' property during the winter and spring of 1978.

James Armenta, a soils geologist with the Materials and Control Soil and Testing Division of the Department of Highways, investigated the slide area in March, 1978. As a result of his observations, a program of drilling holes in the slide area was undertaken for the gathering of informaton to help determine the corrective measures to be taken on the slide area. He stated that, in his opinion, the slide condition existed due to several factors, including the saturation of water in the ground and the casting over and failing to compact the tallis material upon which claimants' house was built when it was relocated.

From the record, it appears to the Court that the drainage problem created by the failure of the respondent to maintain the ditch line and the condition of the soil of the slope on claimants' property created the condition which encouraged the slide. The Court is of the opinion that the negligence on the part of the respondent in failing to take remedial action caused the slide condition to progress, and that the claimants were also negligent in failing to properly compact the slope on their property when their house was relocated. Applying the doctrine of comparative negligence, the Court believes that the negligence should be allocated 20% to the claimants and 80% to the respondent. *Bradley v. Appalachian Power Co.*, ...W.Va....., 256 S.E.2d 879; *Adkins v. Department of Highways,* 13 Ct.Cl. 355 (1979). As $4,652.56 is the amount sought by the claimants, 80% of that sum or $3,722.05, should be, and is hereby, awarded.

Award of $3,722.05.

Opinion issued November 10, 1980

WESLAKIN CORPORATION

vs.

DEPARTMENT OF HEALTH

(CC-80-315)

No appearance by claimant.

David R. Brisell, Attorney at Law, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $139.80 for merchandise purchased by Denmar Hospital.

Respondent, having admitted the validity of the claim, states that there were sufficient funds available in its appropriation for the fiscal year in question from which the obligation could have been paid.

Based on the foregoing, the Court hereby makes an award to the claimant in the amount of $139.80.

Award of $139.80.

Opinion issued November 10, 1980

EARL A. WHITMORE, JR.
and BARBARA A. WHITMORE

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-181)

Claimants appeared in person.

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

WALLACE, JUDGE:

At 2:45 p.m. on March 6, 1980, claimant was operating his 1972 Chevrolet van on 5th Street Hill in Huntington, West Virginia, a road which is owned and maintained by the respondent. According

to the claimant's testimony, there was a pothole on the right-hand side of his lane of travel. The van struck the hole, went out of control, and overturned. Introduced into evidence was an estimate from Larry Lite of Galigher Ford, Inc., which indicated that the value of the van on the day of the accident was $1,600.00. Claimant sold the salvage for $300.00, leaving a net loss of $1,300.00.

The State is neither an insurer nor a guarantor of the safety of motorists travelling upon its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). Furthermore, in the instant case, claimant stated that he was familiar with not only the road in question, but the pothole itself: "I knew it was there because I'd hit it before." To operate a motor vehicle in the face of visible hazards, such as defects in the road, of which a driver is aware, is to assume a known risk. This bars recovery. *Swartzmiller v. Dept. of Highways,* 10 Ct.Cl. 29 (1973). Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued November 10, 1980

ALBERT TED WOOD

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-580)

Claimant appeared in person.

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

GARDEN, JUDGE:

On May 13, 1979, in the late afternoon, the claimant, Albert T. Wood, was operating his 1977 Mercury Monarch in a southwesterly direction on Route 93 about 7 miles north of Scherr in Grant County when he lost control of his car, as a result of striking a large rut in the edge of his lane of travel and in the berm, ran off the road, and struck a tree. Neither the claimant nor his wife, Brenda Gail Wood, were injured, but the car was damaged extensively. Two estimates for repair were introduced into evidence, one reflecting that the car was a total loss and the other indicating a cost of repair in the amount of $1,743.29.

According to the claimant, Route 93 in the area of the accident is a two-lane asphalt road, the two lanes being separated by a double

yellow line, and the edge of the road on the claimant's right was marked with a white line. The claimant was travelling at a speed of about 40 miles per hour and was entering a curve to his left when he observed a truck approaching him which appeared to be moving left of center and into his lane of travel. Claimant turned slightly to the right in order to pass the truck safely, but, in so doing, he struck a rut seven to nine inches deep in the right edge of the pavement. As a result, the right wheels of the car left the paved portion of the road and went onto the berm which, according to the officer who investigated the accident, was five to six inches below the paved surface of the road. Claimant thereupon lost control of his car, which then came back on and across the road, ran up on an embankment on the left, and then proceeded back on and across the road, finally striking a tree on the right side of the road.

The investigating officer, Trooper Leslie D. Sharp, testified that he had not made any measurements at the time because he had made them earlier. Pressed on this point, Trooper Sharp testified that on April 20, 1979, less than a month before the claimant's accident, he had investigated an accident that occurred in exactly the same place and in the same manner. He further testified that, after the first accident, he called respondent's local headquarters, advised them of the berm condition, and suggested that the same be repaired to avoid a further accident. No repairs were effected prior to the accident involving the claimant.

The Court, being of the opinion that claimant has established that he was forced off the road onto the berm by the truck approaching from the opposite direction, that the berm was in a defective condition and that respondent had actual notice of the berm's defective condition, hereby makes an award in favor of the claimant in the amount of $1,743.27.

Award of $1,743.29.

Opinion issued December 3, 1980

R. C. ADKINS

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-207)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

GARDEN, JUDGE:

On an unspecified date, the claimant was operating his 1969 Camaro automobile in a westerly direction on Will's Creek, a State maintained secondary route near Elkview, West Virginia, when the roof of his car was struck by a large boulder which apparently rolled from the hillside adjacent to this two-lane asphalt road. It was estimated that this boulder weighed from 200 to 250 pounds. As a result, claimant's car, which had a value of $800.00, was demolished, and claimant received a neck injury. He was accompanied by his daughter and granddaughter, neither of whom was injured.

Claimant stated that he was travelling at a speed of 25 miles per hour, and was very familiar with the road as a result of travelling it on a daily basis. He indicated that he had never before experienced falling rocks in the area, but assumed that the respondent, who had been doing some grading in the area, had loosened the boulder, which later fell on the roof of his car.

This Court has previously held that evidence of an unexplained falling of a rock onto a highway without a positive showing that the Department of Highways knew or should have known of a dangerous condition or could have anticipated injury to personal property is insufficient to justify an award. *Hammond v. Department of Highways*, 11 Ct. Cl. 234 (1977).

By reason of the foregoing, the requested award is disallowed.

Claim disallowed.

Opinion issued December 3, 1980

DAVIS AND ELKINS COLLEGE

vs.

DIVISION OF VOCATIONAL REHABILITATION

(CC-80-111)

Sarah Mongold and Natalie Barb appeared on behalf of the claimant.

Henry C. Bias, Jr., Deputy Attorney General, for the respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations of the Notice of Claim and, following a hearing before the Court, the respondent's Amended Answer.

According to the facts of the case, a client of the Division of Vocational Rehabilitation, David Lynch, enrolled for the spring 1978 semester at Davis and Elkins College, but stayed in school only a few days. Mr. Lynch had enrolled for 10-15 credit hours, thereby incurring an obligation to pay the full tuition charge of $1,487.50, the amount of this claim.

The evidence discloses that a financial plan was made between Mr. Bill Fuller, a representative of the West Virginia Department of Vocational Rehabilitation, and Mrs. Natalie Barb, the Director of Financial Aid at Davis and Elkins College. According to the plan, $700.00 out of the original tuition fee of $1,487.50 was to be paid through a Basic Education Opportunity Grant (BEOG). This left a total of $787.50 to be paid by the Department of Vocational Rehabilitation.

Apparently, David Lynch did not apply for the Basic Education Opportunity Grant, and the college financial aid office did not pursue the matter.

The original agreement between the respondent and the college obligated the respondent to pay the sum of $787.50, and, as the Amended Answer filed in this claim admits such liability, the Court hereby makes an award to the claimant in that amount.

Award of $787.50.

Opinion issued December 3, 1980

RANDY B. FRY

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-332)

Larry A. Bailey, Attorney at Law, for claimant.

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

PER CURIAM:

This claim was submitted for decision based upon a written stipulation which reveals that the claimant is the owner of a residence and tract of land on Asbury Road, State and Local Service Route 52/44, near Wayne, in Wayne County, West Virginia. During the winter of 1979, the respondent created a large stockpile of snow removal and ice control chemicals along the southerly end of respondent's Wayne County Maintenance Headquarters.

As a result of this stockpile, chemicals flowed across Asbury Road and onto the claimant's land, destroying three large trees. This occurred because of respondent's negligence in stockpiling the material and installing improper drainage along the road.

It is further stipulated by the parties that the sum of $900.00 is a fair and equitable estimate of the damages sustained by the claimant.

Accordingly, the Court hereby makes an award to the claimant in the amount of $900.00.

Award of $900.00.

Opinion issued December 3, 1980

MARK ALLEN HICKS

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-190)

Claimant appeared in person.

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

GARDEN, JUDGE:

On March 31, 1980, at about 9:00 p.m., the claimant was operating his 1973 Javelin automobile on Route 17 at High Truck Bypass in Stollings, Logan County, West Virginia, when he struck a rather large pothole, resulting in damages to his car in a total repairable amount of $333.94. He testified that he had no previous knowledge of the existence of the pothole and that he did not observe it prior to the accident because it was filled with water. No testimony was presented that respondent know or should have known of the existence of this particular pothole.

This Court has consistently held that the respondent is not an insurer of the safety of motorists using its highways and that before an award can be made in cases such as this, proof, either actual or constructive, that the respondent was aware of a defective condition must be presented. *Davis v. Dept. of Highways*, 12 Ct.Cl. 31 (1977); *Hoskins v. Dept. of Highways*, 12 Ct.Cl. 60 (1977).

By reason of the foregoing, this claim is disallowed.

Claim disallowed.

Opinion issued December 3, 1980

HIGHWAY ENGINEERS, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-76-37)

E. Joseph Buffa, Attorney at Law, for claimant.

Stuart Reed Waters, Jr., Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant filed this claim against the respondent in the amount of $350,000.00 for additional compensation and the payment of certain unpaid invoices for work performed under a contract with the respondent hereinafter discussed.

By a Stipulation dated April 20, 1978, the matter of the unpaid invoices was settled. The Stipulation filed by Order of this Court entered on April 25, 1978, acknowledges payment to the claimant by the respondent of $26,108.02, representing the balance due on unpaid invoices, and a further agreement that the contract was 77.48 per cent completed when cancelled by respondent.

The claim grows out of a contract between the claimant and the respondent dated December 26, 1966, wherein respondent employed claimant as consulting engineer to provide construction and right-of-way plans in the design of the Appalachian Corridor G Highway between Holden, West Virginia, and Logan, West Virginia. The contract of December 26, 1966, was the result of negotiations between the claimant and the respondent over a period of several months.

At the first meeting, held on August 24, 1966, to establish a fee for claimant's services, claimant submitted a price for design alone of $799,900.00. Respondent advised that the fee was excessive based on its estimated cost of $12,418,000.00. The parties met again on October 14, at which time claimant re-studied the proposal and resubmitted a figure of some $608,000.00, which was also considered too high. After a third meeting, claimant and respondent arrived at a fee of $432,000.00. The parties then entered into the contract of December 26, 1966, to do the design work for this lump sum fee.

As the design plans progressed, it became apparent that the

construction costs of the highway would exceed the $12,000,000.00-plus as estimated by the respondent. The claimant contends that there was a change in scope and character of the project, and, under the terms of the contract, it was entitled to additional compensation.

Mr. Richard Schoenfeld, testifying on behalf of the claimant, stated that respondent's estimate of costs of $12,400,000.00 was perhaps artificial, and that the project would cost considerably more. He stated: "We were well aware that there were problems in this particular section because we had been working the section for two years." Claimant contends that it would not have entered into the contract if the protection of Section 6-F had not been included in the contract. This section provided, "In the event of a substantial change in the scope and character of the work, such as the addition or deletion of interchanges, bridges or any other changes requiring an increase or decrease in fee payments, when ordered by the commission in writing, the fees will be adjusted accordingly by a supplemental agreement as the basis of a lump sum fee or the actual cost of direct technical labor plus overhead and expenses and a fixed fee to cover profit only."

By letter dated May 12, 1969, the claimant made an effort to obtain a supplemental agreement with the respondent claiming a change in the scope and character of the work. The respondent replied to the claimant to the effect that its letter of May 12, 1969, did not support a substantial change in the scope and character of the work as there were no definite items that had been changed. The claimant later withdrew its proposal and did not pursue its effort thereafter.

The respondent later cancelled the contract after it was 77.48 per cent completed and before the work on the Logan Interchange was completed.

The record in this case does not disclose a change in the scope and character of the work as would justify a supplemental agreement for additional compensation. However, the Court finds that the claimant is entitled to additional compensation for design work entailed in the extension of the length of the roadway and the additional design required for 2.1 miles of frontage road.

At the outset of the hearing, the claimant and the respondent requested that this matter be heard only on the issue of liability, and, in the event that the Court found liability, the parties be

permitted to negotiate the matter of the amount of recovery. Accordingly, the Court directs that the parties consider the findings herein, and within a period of time not to exceed 120 days from the date of this Opinion, file their recommendations for the amount of recovery for the approval of the Court.

Filed with Court of Claims on January 20, 1981

IN THE COURT OF CLAIMS
OF THE STATE OF WEST VIRGINIA

HIGHWAY ENGINEERS, INC.,
a corporation

Claimant,

v. Claim No. CC-76-37

WEST VIRGINIA DEPARTMENT
OF HIGHWAYS, a corporation,
and THE STATE OF WEST
VIRGINIA,

Respondent.

ORDER AND RECOMMENDATION

This day came the claimant, Highway Engineers, Inc., by counsel, E. Joseph Buffa, Jr., and the West Virginia Department of Highways and The State of West Virginia, respondent, by counsel, Stuart Reed Waters, Jr., and jointly represented to the Court that as directed by the Court in its opinion issued in the above styled claim, the parties have agreed to an amount of recovery for approval by the Court.

It is hereby jointly recommended by Highway Engineers, Inc., claimant, and the West Virginia Department of Highways and The State of West Virginia, respondent, that the claimant is entitled to recover from the respondent, the following sums of money on the following items:

I. EXTENSION OF LENGTH OF ROADWAY

A. Increased Length of Roadway	.43 miles
B. Divided by Original Length of Project as per agreement	6.4 miles
C. Multiplied by Original Lump Sum Fee as per agreement	$432,300.00

D. Multiplied by Percentage of Contract Completed	77.48
E. Additional Compensation Recommended	$22,504.19
II. ADDITIONAL DESIGN OF FRONTAGE ROAD	
A. Original Lump Sum Fee for Frontage or Side Road as per agreement	$3,281.00
B. Divided by Original Contemplated Length of Frontage or Side Road as per agreement	.5 miles
C. Multiplied by Additional Length of Frontage or Side Road	2.1 miles
D. Multiplied by Percentage of Contract Completed	77.48
E. Additional Compensation Recommended	$10,676.90
TOTAL RECOMMENDED AWARD	$33,181.09

It is further agreed by and between the claimant and the respondent hereto that all other items of claim and parts of items of claim not agreed to be paid in this recommendation or by previous stipulation, as set out and alleged in claimant's Notice of Claim filed in this action, are to be disallowed and not considered by the Court for any award and are to be dismissed.

Upon consideration of the claimant's and respondent's representations, the Opinion of the Court heretofore filed in deciding the subject claim and the recommendation set out aforesaid, the Court is of the opinion to and does sustain the same and the same are hereby received, filed and accepted; and it is hereby further ordered that the claimant be and it is hereby granted an award against the respondent in the amount of Thirty-Three Thousand One Hundred Eighty-One Dollars and Nine Cents ($33,181.09).

It is hereby further ordered that all other items of claim and parts of claim set out and alleged in claimant's Notice of Claim, which were not previously stipulated or allowed in the above award, are hereby disallowed.

Entered this 21st day of January, 1981.

George S. Wallace, Jr.
Judge

APPROVED BY:

HIGHWAY ENGINEERS, INC.,
a corporation

By
E. Joseph Buffa, Jr.
Its Counsel

WEST VIRGINIA DEPARTMENT
OF HIGHWAYS, a corporation,
and THE STATE OF WEST
VIRGINIA

By
Stuart Reed Waters, Jr.
Its Counsel

Opinion issued December 3, 1980

IDA M. HINER and NORMAN F. HINER,
D/B/A HERCULES CONSTRUCTION COMPANY

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-80-150)

Fred A. Jesser, III, Attorney at Law, for the claimants.

Henry C. Bias, Jr., Attorney at Law, and *Leonard Knee*, Attorney at Law, for the respondent.

PER CURIAM:

This claim is based upon the allegation that certain employees of the respondent entered a conspiracy as a result of which the claimants sustained the forfeiture of a bond which had been posted as security for a strip mining permit and also were deprived of their privilege to mine coal located upon certain land owned by them.

The matter now is before the Court upon the respondent's motion to dismiss based upon the following grounds:

1. The alleged conspiracy could not have been committed by the employees while acting within the scope of their employment; and

2. The claimants failed to exhaust their administrative remedy which provided an appeal from the order forfeiting the bond and, for that reason, jurisdiction of this Court is excluded under West Virginia Code, §14-2-14(5).

Due to the extremely vague nature of the allegations relating to conspiracy, the Court is unable to determine the applicability of either of those grounds. In connection with the matter of appeal, the Court observes, however, that the time requirement pertaining to the appeal might be viewed as directory rather than mandatory. See 2 Am. Jur. 2d *"Administrative Law"*, §544.

In 16 Am. Jur. 2d *"Conspiracy"*, §67, it is stated:

"The rules governing pleadings in conspiracy actions are not materially different from those applicable to other actions. The complaint must state facts that constitute a cause of action, that is, the complaint must allege the formation and operation of the conspiracy, the wrongful act or acts done pursuant thereto, and the damage resulting from such act or acts. Facts, not legal conclusions, must be pleaded, including facts showing damages."

While this Court may or may not go as far as that text, it is disposed to hold that it is not sufficient merely to allege that a conspiracy has occurred. See 2A Moore's Federal Practice, §8.17[5], and 5 Wright and Miller, Federal Practice and Procedure, §1233. Since the claimants' complaint alleges only the legal conclusion that a conspiracy occurred, the Court, for that reason, is disposed to dismiss the complaint for failure to state a claim upon which relief can be granted but will grant to the claimants leave to file an Amended Notice of Claim within thirty (30) days after the entry of this decision.

Opinion issued December 3, 1980

EUGENE J. SAPP

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-324)

Claimant's wife, *Mrs. Eugene Sapp*, appeared in person.

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

GARDEN, JUDGE:

On May 22, 1970, the claimant's wife was operating his 1977 Mercury Marquis in an easterly direction on Route 33 near the westerly corporate limits of Buckhannon. Route 33 at and near the point of the accident is a two-lane asphalt road and is bisected near the accident scene by a railroad track. Mrs. Sapp testified that she was proceeding at a speed of about 25 miles per hour as she crossed the railroad track, and immediately thereafter, she struck a pothole which was located, according to her estimate, about two feet east of the railroad crossing. As a result of striking this pothole, the hubcap on the right rear wheel was displaced and was not recovered. An expense of $72.00 was incurred.

Mrs. Sapp testified that she was very familiar with this particular section of Route 33, having used it every working day in traveling to and from her place of employment. She also testified that she was aware of the existence of the pothole, but, being distracted by laughing and talking children in her car, she simply had forgotten about its presence. The respondent contended, among other things, that the pothole was within the railroad right of way and that the respondent thus had no duty to maintain Route 33 within the railroad's right of way.

Assuming that the pothole was not within the railroad right of way, the testimony was insufficient to predicate liability on the respondent. No evidence was presented to establish that respondent had knowledge, either actual or constructive, of the existence of the pothole. On the other hand, Mrs. Sapp testified that she was aware of the existence of the pothole, and, being of the opinion that her failure to avoid striking the hole constituted negligence which equalled or exceeded any negligence on the part of respondent, the Court must deny an award.

Claim disallowed.

Opinion issued December 3, 1980

CHARLES TABIT and
GLORIA TABIT

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-112)

Harold S. Albertson, Jr., Attorney at Law, for claimant.

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

WALLACE, JUDGE:

Claimants are the owners of a two-story brick residence located at 2524 Kanawha Boulevard East in Charleston, West Virginia, adjacent to the new Kanawha City Bridge. Directly across Washington Street from claimants' house there was an abutment of the Old Kanawha City Bridge. The respondent Department of Highways entered into a contract with National Engineering Company, an independent contractor, to rebuild the bridge. Incident to that work, a subcontractor, Martin Explosives, demolished the old bridge, and the mentioned abutment was demolished, by utilizing a crane and headache ball which, according to the undisputed evidence, was sometimes dropped a distance of 100 feet. It is also undisputed that the claimants' house experienced vibrations which caused cracks in the walls, damage to the foundation, and flooding in the basement. In addition, the paved parking area was damaged due to the heavy equipment and heavy vehicles parked in and around claimants' driveway. Claimants seek damages in the sum of $17,000.00.

The facts of the instant case are almost identical to those in the claim of *Cleo Lively Moore v. Dept. of Highways*, Claim No. CC-78-292 decided by the Court on March 5, 1980. In fact, the claimants in the *Moore* case and the claimants herein are neighbors whose property damages were caused by the same construction project.

In the *Moore* case this Court held, "It is a general rule that the employer of an independent contractor is not liable for torts

committed by the independent contractor. But a well recognized exception to the general rule of non-liability exists in the case of inherently or intrinsically dangerous work. Whether work which produces vibrations sufficient to cause damage or injury is or is not so intrinsically dangerous as to render an employee liable for the tort of an independent contractor depends upon the circumstances."

Under the circumstances of the instant case, where the work was, as in *Moore*, performed in proximity to the claimants' residence directly across the street, it appears that it was intrinsically dangerous, and the general rule of non-liability should not be applied.

Based on the testimony of an independent field appraiser, Gerald Terry, and an estimate from a general contractor, C. A. Branham, the Court awards the claimants $6,950.00.

Award of $6,950.00.

Opinion issued December 3, 1980

VIRGINIA WILLIAMS

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-119)

Larry G. Kopelman, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

The record in this claim reveals that there are no factual disputes, the salient and operative facts being as follows: In the early part of May, 1979, the claimant was contacted by Frederic McGinnis, a right-of-way agent of respondent. Mr. McGinnis was interested in acquiring a portion of the claimant's and her husband's property in Chesapeake for the purpose of upgrading the West Virginia Turnpike. Upon being advised by Mrs. Williams that her husband, William Cecil Williams, was incompetent, Mr. McGinnis advised the claimant that she should consult her attorney for the purpose of instituting a summary proceeding leading to the appointment of a committee for her incompetent husband. Mr. McGinnis further

advised the claimant that the respondent would pay the expenses of such a proceeding, including the payment of a reasonable attorney fee, although at the hearing he admitted that he had made a mistake in imparting this information to her.

Nevertheless, acting upon the representations of Mr. McGinnis, Mrs. Williams engaged the services of Attorney Larry G. Kopelman, who, in turn, filed the necessary legal proceedings which culminated in the appointment of the claimant as committee for her husband by the County Commission of Kanawha County on August 16, 1979. As a result, undisputed expenses, including a $400.00 attorney fee, in a total amount of $647.50 were incurred.

James B. Bartlett, an attorney for respondent's Right of Way Division, testified on behalf of the respondent. He indicated that under limited circumstances the respondent would agree to pay such expenses, that it would be only in situations where the appointment of a committee was incident to the agreed acquisition of a particular parcel of property, and that this policy had been adopted pursuant to the Federal Uniform Relocation Assistance and Real Property Acquisition Act of 1970, Public Law 91646.

While this Court is not unmindful of the fact that the State cannot be held liable under the doctrine of respondeat superior for the unlawful or illegal acts of its servants and agents, *Kondos v. West Virginia Board of Regents*, 318 F.Supp. 394 (1970), this Court is of the opinion that equity and good conscience mandate an award in this claim.

Award of $647.50.

Opinion issued December 23, 1980

KIMBERLY ALLEN

vs.

BOARD OF REGENTS

(CC-79-121)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

While a student at West Virginia University, claimant Kimberly Allen lived in Room 277 of Arnold Hall, a freshman dormitory. On the night of January 5, 1979, fire broke out in claimant's room, damaging her personal property in the amount of $1,637.00.

According to the testimony of Bert Spencer, the Assistant Director of Housing at WVU, an investigation undertaken in conjunction with the Morgantown Fire Department, University Fire Department, and the University security police revealed that the cause of the blaze was a defective lamp cord. Mr. Spencer stated that the cord's insulation had been rubbed from it due to the location of the cord between the bed and the wall. The cord then "shorted out." Mr. Spencer further testified that, while a regular inspection of lamp cords is not conducted by the University, they are checked during the summer when the rooms are being prepared for occupancy.

Claimant's father, Carlton Allen, stated that his homeowner's insurance policy covered any dependent children away at school for loss of goods. He therefore submitted this claim for $1,637.00 to his insurance carrier, which settled the claim for $1,050.00 taking into account the depreciation of goods lost in the fire.

In a previous decision of this Court, involving another dormitory resident at West Virginia University, the Court found that the legal relationship which existed between the claimant and the respondent was that of landlord and tenant. *Dalessio v. Board of Regents*, 12 Ct. Cl. 242 (1979). The law on the subject was cited from 49 Am.Jur.2d §881 Landlord and Tenant (1970): "The prevailing view is that (the landlord) may be found liable where negligence is shown in the construction, maintenance, or repair of the

appliances even though he is not under a contractual or statutory duty to repair...".

From the evidence presented in this case, the Court is of the opinion that respodent's failure to properly inspect and maintain the lamp cord in claimant's room constituted negligence and that such negligence proximately caused the fire which damaged the claimant's personal property. However, the evidence also reveals that claimant has been reimbursed for her loss by her father's insurance carrier, and, given this fact, the Court cannot make an award.

Claim disallowed.

Opinion issued December 23, 1980

M. MERRICK & ASSOCIATES, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-350)

No appearance by claimant.

Joseph C. Cometti, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $108.38 for the repair of hearing aids for inmates of the West Virginia State Penitentiary. Respondent's Answer indicates that the claim is valid, but that there were no funds remaining in respondent's appropriation for the fiscal year in question from which the obligation could have been paid.

While we feel that this claim should, in equity and good conscience, be paid, we are further of the 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 December 23, 1980

PEGGY MAYHORN

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-157)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant filed this claim against the respondent in the amount of $163.77 for damages to the exhaust system of her 1979 Z-28 Camaro automobile.

The claimant testified that the accident occurred on the 16th or 17th day of March, 1980, at 5:00 p.m., on old Route 12 on the Henlawson Bridge in Henlawson, West Virginia. She further testified that the respondent was working on the bridge; that there was a big sign there but she didn't recall what it said; that there were three steel plates stacked on the bridge which struck the undercarriage of her automobile as she crossed the bridge, and that she saw the plates when whe was a thousand feet or more from them. She also stated that the respondent had used steel plates for repairing the bridge on previous occasions.

The claimant's testimony establishes the fact that she proceeded through a marked one-way traffic construction area, and her automobile struck steel plates apparently used in respondent's work. It is the opinion of the Court that the claimant's negligence in striking the plates was equal to or exceeded the negligence of the respondent; therefore, an award cannot be made.

Claim disallowed.

Opinion issued December 23, 1980

REBA DIXIE PERRY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-509)

Brown H. Payne, Attorney at Law, for claimant.

Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant filed this claim against the respondent for damages to her automobile and physical injuries received by her in an accident which occurred on October 6, 1977, at approximately 2:30 p.m. The claimant was driving to work in her 1977 Chevrolet automobile at approximately 25 miles per hour, proceeding from Beckley, West Virginia, to the Rawlings mine at Clear Creek on W. Va. Route 1, also known as Spruce Mountain Road. The road surface was dry and the weather was clear. The road at the point of the accident was 16 to 18 feet wide. Two vehicles could pass if neither crowded the other. However, the berm on the claimant's right-hand side had been washed out by the erosion of a stream adjacent to the road, and a truck forced the claimant off the road into the creek.

The claimant testified, "Well, I was traveling the highway to work and there is a little, sort-of a little curve, and I come around through there and there was a big long bed truck like hauls steel to the mines and it was coming toward me and it was over on my side swinging around and I had no choice but either to let the truck hit me or try to get away. I thought, well maybe I'll make it around it, and I dropped off the road. The hole was there and I couldn't hold it."

Henry Bowyer, a resident of the area, testified that the shoulder of the road had been washed away for about two months prior to the accident and that there were no warning signs or devices.

John Crawford, foreman for the respondent, testified that he was familiar with the road and that he had no prior notice of the condition, but repaired it the day after the accident. He stated that such washouts were common along creek roads.

Claimant's vehicle sustained damages in the amount of $2,387.07. Her insurance coverage paid this amount less $100.00 deductible. The parties stipulated that the claimant incurred doctor and hospital bills in the amount of $128.75 at Raleigh General Hospital at Beckley, West Virginia, and $368.50 at Southern West Virginia Clinic, also in Beckley. She lost 120 days of work, for which she would have been paid $67.18 per day.

The record does not establish negligence on the part of the claimant, and the Court finds that the respondent knew or should have known, from the type of road involved and the nearness of the creek to the road, that washouts could occur. It was, therefore, the duty of the respondent to see that the berm adjacent to the road was sufficient to safely accommodate vehicles using the highway. See *Sweda v. Dept. of Highways,* 13 Ct.Cl. 249 (1980), *Con v. Dept. of Highways,* 13 Ct.Cl. 194 (1980).

The claimant, through her claim and amended claim, seeks recovery of the sum of $2,887.07. As the record establishes more than adequate proof of the damages, the Court makes an award to the claimant in the amount claimed.

Award of $2,887.07.

Opinion issued December 23, 1980

ZONA RUTH PETERS

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-218)

Claimant appeared in person.

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

WALLACE, JUDGE:

This claim was filed by the claimant against the respondent for damages to her automobile which occurred on May 28, 1978, at about 8:00 p.m.

Rose Cathline Shaffer, a niece of the claimant, was driving claimant's 1969 Buick Sports Wagon in an easterly direction on

West Virginia Route 13 near Simpson, West Virginia, in Tyler County. The claimant was a passenger in the vehicle. Mrs. Shaffer testified that the road was fairly straight and level, and that she was proceeding at approximately 15 to 20 miles per hour when she encountered an oncoming vehicle with bright lights coming toward her over the center line of the road. Mrs. Shaffer attempted to drive on the berm, which was nonexistent, and the automobile turned upside-down in the creek adjacent to the road. In her testimony, Mrs. Shaffer stated, "Well the road is real narrow, very narrow, and I thought there was a little bit of berm on that road, maybe a foot or a foot and a half, but when we came to this place and the car ahead of me had their lights on me I just tried to get over about a foot or a foot and a-half and there were no berm at all, so we just went right straight over on our top in the creek."

Paul Currey, Maintenance Supervisor for the respondent, testified that the road was about 20 feet wide in the area of the accident, that a stream ran parallel to the road, and that there was a ditch on the opposite side. He stated that there was no berm for approximately 20 feet due to stream erosion, and that there were no guardrails because there was no place to put them. He further stated that West Virginia Route 13 was a heavily-traveled feeder road and that no signs existed to warn of the danger. Mr. Currey also testified that it would be necessary for the respondent to acquire additional right of way and relocate the stream in order to construct a berm.

There was no professional evidence introduced pertaining to damages to the vehicle.

The claimant testified that she purchased the automobile about three months prior to the accident for $500.00 plus tax and title cost, that it was a total loss, and that she had it towed to her home for $51.00. She had made no effort to sell the salvage, and she had no insurance.

The evidence does not establish any negligence on the part of the driver of the automobile. The respondent knew or should have known that Route 13 was a narrow road and that motorists might be required to leave the hard surface in order to pass approaching vehicles. It was the duty of the respondent to see that the berm adjacent to the road was sufficient to safely accommodate such vehicles. See *Conn v. Dept. of Highways,* 13 Ct.Cl. 194 (1980);

Wilson v. Dept. of Highways, 11 Ct.Cl. 139 (1976); *Sweda v. Dept. of Highways,* 13 Ct.Cl. 249 (1980).

Accordingly, the Court makes an award to the claimant in the amount of $451.00, taking into consideration the possible salvage value of her automobile.

Award of $451.00.

Opinion issued December 23, 1980

SARGENT-WELCH SCIENTIFIC CO.

vs.

DEPARTMENT OF HEALTH

(CC-80-343)

No appearance by claimant.

David R. Brisell, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $663.50 for merchandise delivered to respondent's Tri-State Red Cross Blood Center in Huntington, West Virginia. Respondent, in its Answer, admits the validity of the claim and states that there were sufficient funds remaining in its appropriation for the fiscal year in question from which the claim could have been paid.

In view of the foregoing, the Court hereby makes an award to the claimant in the amount requested.

Award of $663.50.

Opinion issued December 23, 1980

RICKIE ALLEN SAUNDERS

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-205)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimant is the owner of a residence at 5241 Big Tyler Road in Kanawha County, West Virginia. The house is on a corner lot measuring 100' x 150'. It fronts on Big Tyler Road and is flanked by Ridgecross Drive, both of which are maintained by the Department of Highways.

On April 14, 1980, following a heavy rainfall, water backed up in a storm sewer located on Ridgecross Drive approximately three or four feet from claimant's house, resulting in the flooding of his property. An estimate of repair from A-Action Plumbing Co. was introduced into evidence, reflecting damage to the property in the amount of $939.56 for insulation replacement, furnace repair, and water removal.

Testifying on behalf of the respondent was Kenneth W. Rumbaugh, a district maintenance assistant. Mr. Rumbaugh testified that Ridgecross Drive was incorporated into the State highway system in January of 1980. He further stated that the respondent had not done any drainage construction on that road, nor was the respondent aware of any drainage problems when the road was added to the State system.

The duty imposed on the Department of Highways is one of "reasonable care and diligence in the maintenance of a highway under all the circumstances." *Parsons v. State Road Commission,* 8 Ct.Cl. 35 (1969).

In order for the State to be found liable in cases such as this, it must be established that the respondent had notice, either actual or constructive, of the condition of the road in question. *Davis v. Dept. of Highways,* 11 Ct.Cl. 150 (1976). There was complete failure to establish such notice in the instant case. No evidence was presented indicating that the respondent had been contacted

concerning the drain or sewer blockage prior to April 14, 1980, and the fact that Ridgecross Drive had so recently become a part of the State highway system erases any allegation that the respondent had constructive notice of the problem. Therefore, the claim must be denied.

Claim disallowed.

Opinion issued December 23, 1980

TROJAN STEEL COMPANY

vs.

DEPARTMENT OF HEALTH

(CC-80-323)

No appearance by claimant.

David R. Brisell, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $9,200.00 for the installation of fire doors at Pinecrest Hospital in Beckley, West Virginia.

Respondent's Answer admits the validity of the claim and states that there were sufficient funds in its appropriation for the fiscal year in question from which the obligation could have been paid. Accordingly, the Court makes an award to the claimant in the amount requested.

Award of $9,200.00.

Opinion issued December 23, 1980

GARY VILAIN

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-123)

Claimant appeared in person.

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

WALLACE, JUDGE:

On May 14, 1979, between 1:00 p.m. and 3:00 p.m. the claimant was operating his 1979 GMC four-wheel drive vehicle in an easterly direction on Rutledge Road in Kanawha County, West Virginia. The weather was clear and dry. While traveling from Campbell's Creek to Route 114, he struck a large pothole resulting in damages to his vehicle in the amount of $97.85. Claimant testified that he had no previous knowledge of the existence of the pothole and that he did not see it prior to the accident. The last time he had traveled the road was three to five months prior to the accident.

There was no evidence introduced which would establish that the respondent knew or should have known of the existence of this particular pothole.

The law in West Virginia is well established that the State is not an insurer of the safety of motorists using its highways. *Adkins v. Simms*, 130 W.Va. 645, 46 S.E.2d 81 (1947). Before an award can be made in cases such as this, proof, either actual or constructive, that the respondent was aware of the defective condition, must be presented. *Davis v. Dept. of Highways*, 12 Ct.Cl. 31 (1977); *Hoskins 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 in this case, the claim must be denied.

Claim disallowed.

Opinion issued Janauary 27, 1981

WILLIAM R. BARTON, M.D.

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-403)

No appearance by claimant.

Joseph C. Cometti, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $153.00 for medical services rendered to an inmate of the West Virginia Penitentiary.

Respondent admits the validity of the claim, but further states that there were no funds remaining in its appropriation for the fiscal year in question from which the obligation could have been paid.

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

Claim disallowed.

Opinion issued January 27, 1981

GREENBRIER PHYSICIANS, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-399)

No appearance by claimant.

Joseph C. Cometti, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $104.00 for medical services rendered to an inmate of the Huttonsville Correctional Center.

Respondent admits the validity of the claim, but further states that there were no funds remaining in its appropriation for the fiscal year in question from which the obligation could have been paid.

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

Claim disallowed.

Opinion issued January 27, 1981

OHIO VALLEY MEDICAL CENTER, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-414)

John L. Bremer, Attorney at Law, for claimant.

Joseph C. Cometti, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $12,457.00 for medical services rendered to an inmate of the West Virginia Penitentiary.

Respondent admits the validity of the claim, but further states that there were no funds remaining in its appropriation for the fiscal year in question from which the obligation could have been paid.

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

Claim disallowed.

Opinion issued January 27, 1981

WALTON LEE SNYDER

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-230)

Claimant appeared in person.

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

WALLACE, JUDGE:

At dusk on May 4, 1980, the claimant's son was driving the claimant's 1973 Ford automobile north of W.Va. Route 33 towards Ripley when he struck a large pothole, damaging the right front tire, rim, and fender. The claimant seeks to recover $175.00 for that damage.

The State neither insures nor guarantees the safety of motorists traveling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damages caused by road defects of this type, the claimant must prove that the respondent had actual or constructive knowledge of the existence of the defect and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1976). Since the claimant did not meet that burden of proof, this claim must be denied.

Claim disallowed.

Opinion issued January 27, 1981

ROBERT R. WEILER, M.D.

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-404)

No appearance by claimant.

Joseph C. Cometti, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings,

claimant seeks payment of the sum of $1,259.00 for medical services rendered to an inmate of the West Virginia Penitentiary.

Respondent admits the validity and amount of the claim, and states that no payment had been made because no billing had been received. The fiscal year then expired, and the amount could not be paid. In addition, no funds remained in the accounts of the Penitentiary out of which the obligation could have been paid.

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

Claim disallowed.

Opinion issued January 27, 1981

XEROX CORPORATION

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-425)

No appearance by claimant.

Joseph C. Cometti, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $120.00 for one month's rental of its equipment at the Beckley Work Release Center.

Respondent admits the validity of the claim, but further states that there were no funds remaining in its appropriation for the fiscal year in question from which the obligation could have been paid.

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

Claim disallowed.

Opinion issued January 28, 1981

APPALACHIAN POWER COMPANY

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-80-410)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $272.11 on an unpaid electric bill. As the respondent admits the validity of the claim, and as there were funds remaining in its appropriation for the pertinent fiscal year from which the claim could have been paid, the Court grants an award to the claimant in the amount requested.

Award of $272.11.

Opinion issued January 28, 1981

BRACKEN CONSTRUCTION COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-24)

James R. Watson, Attorney at Law, for claimant.

Stuart Reed Waters, Jr., Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision based upon a Stipulation filed by the parties which revealed the facts which follow.

On December 30, 1971, the respondent Department of Highways awarded a contract to the claimant for the construction of the I-79 - U.S. Route 50 Interchange in Harrison County, West Virginia. This contract incorporated by reference the *State Road Commission of West Virginia Standard Specifications Roads and Bridges*

(adopted 1968) which provided that the respondent would be responsbile for securing "all necessary rights of way" in advance of construction.

The Department of Highways, in accordance with the righty-of-way statement of the contract and the above-cited *Specifications*, represented that it either had acquired, or would acquire, title, rights of way, or rights of entry to all parcels involved in the project in question.

Pursuant to the terms of the contract, claimant began excavating and removing earth. During this excavation, claimant came upon certain seams of coal and began removing it from the project site.

An application for temporary injunction was filed against the claimant by plaintiffs Louis and Mary Roda and James and Betty Lee Thompson in the Circuit Court of Harrison County, at which time the Department of Highways announced that it was prepared to institute condemnation proceedings for the coal land and rights for public use.

The separate condemnation actions were thereupon initiated, and the Circuit Court of Harrison County denied the temporary injunction prayed for by the plaintiffs.

Because the respondent failed to obtain all the necessary easements and rights of way involved in the project, the claimant was forced to obtain legal services to oppose and defend the subsequent action for a temporary injunction. The legal fee incurred by claimant amounted to $1,928.30, which was paid to the law firm of Steptoe and Johnson.

In view of the foregoing stipulated facts, the Court makes an award to the claimant in the amount of $1,928.30.

Award of $1,928.30.

Opinion issued January 28, 1981

GLORIA M. CRISSI

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-341)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted for decision upon a written stipulation to the effect that the respondent is liable for damages in the sum of $180.00, based upon the facts which follow.

On or about August 12, 1980, at approximately 7:00 p.m., claimant was operating her 1971 Cadillac on West Virginia Route 208, a highway owned and maintained by the respondent. In the course of this travel, claimant's automobile crossed a ditch in the road which had been constructed, and not properly filled, by employees of the respondent. As a result, claimant's vehicle incurred damage to the exhaust system, cross-over pipe, and motor mounts.

Respondent's failure to place warning signs at the location of the ditch, or to properly fill the ditch, constituted negligence which was the proximate cause of the damages suffered by the claimant. Accordingly, the Court makes an award to the claimant in the amount agreed upon by the parties.

Award of $180.00.

Opinion issued January 28, 1981

MICHAEL J. DAVOLI

vs.

INSURANCE DEPARTMENT

(CC-80-363)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $9,734.00 for his services as financial examiner for the Insurance Department. Respondent, in its Answer, admits the validity of the claim, and asserts that sufficient funds remained in its appropriation for the fiscal year in question from which the claim could have been paid.

Accordingly, the Court makes an award to the claimant in the amount requested.

Award of $9,734.00.

Opinion issued January 28, 1981

SAM EPLING

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-424)

No appearance by claimant.

W. Douglas Hamilton, Attorney at Law, for respondent.

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's truck in the amount of $292.04 were caused when said vehicle struck a mound of dirt across claimant's driveway; that the mound of dirt was created when employees of the respondent trespassed onto claimant's property and dug a ditch across his driveway; that this occurred in the course of respondent's maintenance and repair

work on County Route 2/18, Mobil City Road, in Cabell County, West Virginia, on December 16, 1980; and to the effect that the trespass occurred because of the negligence of the respondent, which negligence was the proximate cause of the damages suffered by the claimant, the Court finds the respondent liable, and makes an award to the claimant in the amount of $292.04.

Award of $292.04.

Opinion issued January 28, 1981

ERIE INSURANCE EXCHANGE,
SUBROGEE OF CHARLES E. SCHOOLEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-271)

Robert B. Black, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

This Court issued an Opinion on November 1, 1977, in the case of *Charles E. Schooley v. Department of Highways* (CC-76-131). In that Opinion, an award of $7,000.00 was made to the claimant, and a Release for payment thereof was subsequently issued and delivered to the claimant. This Release was never executed, and time for payment of the claim expired as of midnight, June 30, 1979.

Testimony in this claim established that the prior claim should have been a subrogation claim entitling the claimant herein to the proceeds of the prior award. Accordingly, this Court makes an award to the claimant in the amount of $7,000.00.

Award of $7,000.00.

Opinion issued January 28, 1981

IRENE E. FRAGALE

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-301)

Claimant appeared in person.

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

RULEY, JUDGE:

At about 5:00 p.m., on July 31, 1980, the claimant was driving her 1974 Chevrolet automobile on Greenbrier Street in Charleston at approximately 45 miles per hour when she struck a piece of concrete and damaged the transmission in the sum of $93.68. At the place where the accident occurred, Greenbrier Street is a four-lane road. The claimant was returning to Pinch, West Virginia, in the outside lane. Traffic was heavy. Photographic evidence offered by the claimant showed that, for a distance of several feet along a seam of concrete in the vicinity of the accident, the pavement had broken and eroded, and it is a fair inference that the piece of concrete which the claimant's car struck had been flipped out of that location. Testimony was to the effect that the condition had existed for a month or more, which certainly was consistent with the other evidence. In view of those circumstances, the Court is constrained to find that the respondent was guilty of negligence which caused the damage claimed. It does not appear that the claimant committed contributory negligence, and, accordingly, an award of $93.68 is hereby made.

Award of $93.68.

Opinion issued January 28, 1981

MODERN PRESS, INC.

vs.

BOARD OF REGENTS

(CC-80-277)

John Clark appeared for the claimant.

Ann V. Dornblazer, Assistant Attorney General, for respondent.

WALLACE, JUDGE:

In April of 1979, claimant was asked by representatives of Marshall University to quote a price for the printing of 3,000 Student Handbooks for 1979-80. Claimant complied with this request, citing a figure of $2,846.77. There was a revision after that, consisting of an additional 30 pages, so claimant quoted a new sum of $3,785.77, which represents the amount of this claim.

John Clark, president of Modern Press, testified that his company did not require purchase orders when dealing with Marshall University, and that they had worked with the school "quite a bit." He stated that the Student Handbooks were set, printed, collated, stapled, trimmed, and hand-delivered by Modern Press to Marshall University, and that no payment was made.

Mary Ann Thomas, Associate Dean at Marshall University, testified that she visited the office of Modern Press in June of 1979 to determine "where things stood" because it would be her budget that was to pay the bill for the handbooks, and she had seen "nothing in writing" from the Student Government.

It is clear from the record in this case that proper procedures were not followed in the procurement of claimant's services by the respondent. It is also clear, however, that the respondent did receive the benefit of these services. In a prior decision of this Court, the "unusual and regrettably improper" handling of a printing agreement was not a bar to recovery by the claimant. *Dunbar Printing Company v. Dept. of Education, Div. of Vocational Education*, 11 Ct.Cl. 282 (1977).

Claimant herein, in all good faith, performed an agreement upon the representations of the Student Government of Marshall University. While it is true that a vendor who deals with a

representative of a State agency has the duty of ascertaining whether that representative has the authority to contract for the agency, and further, that the existence of a valid purchase order is essential in order to bind the State, we are of the opinion that to deny an award to this claimant would be unconscionable. *Sinclair v. Office of Economic & Community Development,* 12 Ct.Cl. 19 (1977). The respondent accepted and used the handbooks, and for it now to escape paying for them would constitute unjust enrichment. We therefore make an award to the claimant in the amount of $3,785.77.

Award of $3,785.77.

Opinion issued January 28, 1981

GLEN L. RAMEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-87)

David Grabill, Attorney at Law, for the claimant.

Douglas Hamilton, Attorney at Law, for the respondent.

WALLACE, JUDGE:

This claim came on for rehearing after the Court had granted a Motion for Rehearing wherein the claimant alleged that lack of counsel had resulted in a decision against him in the original proceedings. The Court reopened the claim so that further testimony and evidence could be presented.

The facts of the claim concern claimant's residential property located on Beech Fork Road in Wayne County, West Virginia. Damage was sustained by claimant's residence and property when water flowed from the upper side of Beech Fork Road onto the property. The testimony established that stopped up ditch lines and culverts caused water to flow from the upper side of Beech Fork Road, down claimant's driveway, and then under the house, and, at times, even through the front room of the residence.

Claimant testified that there was a blocked culvert located on the upper side of Beech Fork Road above claimant's property and

another blocked culvert on the lower side of the property, both of which drained into a creek behind claimant's property.

In the summer of 1979, employees of the respondent cleaned one of the drainpipes and dug a ditch on claimant's property to try to solve the water problem. These efforts were in vain. It was not until December, 1979, that employees of the respondent graded the ditch line and alleviated most of the water problems on claimant's property.

The damages to claimant's property included loss of gravel on the driveway as well as damage to the foundation of the residence, the hot water tank, furnace, porch, patio, walls, and garage apartment. The total amount of damages as indicated in the record was $4,933.13.

Alexander Thomas, a registered civil engineer, testified that his investigation revealed that the water problem was the result of "inadequate drainage facilities" above the property on Beech Fork Road, which tended to divert and accumulate the natural drainage off Beech Fork Hill toward the property of the claimant.

David Bevins, Assistant Maintenance Engineer for the respondent, testified that, according to his investigation, claimant's property is located below a natural drainage area and is at a lower elevation than the road. Photographs of the claimant's property and surrounding properties show a natural drain adjacent to claimant's property, which failed to carry all of the water run-off.

From the record, the Court finds that the clogged culverts and ditch lines created a situation wherein the volume of water running off the hillside onto the road was too great to flow entirely through the natural drainage area, causing the water to flow down the road to the lowest area, which happened to be claimant's driveway, resulting in extensive damage to claimant's home and road. Accordingly, the Court makes an award to the claimant for the damages to his property caused by the respondent's negligent maintenance of the ditch line and culverts on Beech Fork Road in the amount of $4,933.13.

Award of $4,933.13.

Opinion issued January 28, 1981

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY SUBROGEE FOR JAMES A. McDOUGAL and JAMES A. McDOUGAL

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-250)

Scott E. Wilson, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

The claimant filed this claim against the respondent for damages to his 1974 Vega station wagon on October 15, 1976, at approximately 11:00 a.m. On the date of the accident, the claimant was proceeding in his vehicle in a northerly direction on West Virginia Route 19 from Shinnston, West Virginia, to his home. The weather was clear. The claimant was driving at a reduced speed because he had seen the respondent's workers removing dirt from the highway earlier that day. As he approached the area where the men were working, he observed an oncoming vehicle negotiating a curve ahead. When the driver of the other vehicle, later determined to be Anthony Tassone, saw the men in the road, he veered into the claimant's lane of traffic. The claimant attempted to drive onto the berm to avoid an accident, but was struck by the Tassone vehicle, causing damage to the front and left front of the claimant's automobile in the amount of $1,433.81.

Both the claimant and Mr. Tassone testified that they saw no signs or flagmen to warn of the workmen on the highway.

William Aliveto, Jr., one of the respondent's workmen, testified that he and James Kessler had been assigned to remove the dirt and debris from the highway; that they were dispatched to the work area without any warning signs or flagmen; and that he had sent his coworker, Kessler, to the curve to warn oncoming motorists, but when Kessler arrived at the curve, the Tassone vehicle was approaching. Kessler shouted to Aliveto, who jumped into a ditch to avoid being struck.

From the record, it is the opinion of the Court that the respondent's failure to post proper warning signs and flagmen at

the scene of the accident constituted negligence which was the proximate cause of the accident.

It appears that, of the total amount of $1,433.81 claimed, $1,333.81 was paid by State Farm Mutual Automobile Insurance Company, who thereupon became subrogated, and the sum of $100.00 represented the deductible portion of McDougal's collision insurance. Accordingly, the Court awards State Farm Mutual Automobile Insurance Company the sum of $1,333.81, and James A. McDougal, the sum of $100.00.

Award of $100.00 to claimant James A. McDougal.

Award of $1,333.81 to claimant State Farm Mutual Automobile Insurance Company.

Opinion issued January 28, 1981

VARIAN ASSOCIATES — INSTRUMENT DIVISION

vs.

BOARD OF REGENTS

(CC-80-419)

No appearance by claimant.

Ann V. Dornblazer, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $193.78 for freight costs for merchandise furnished to West Virginia State College. The bill for freight was not submitted within the 1979-80 fiscal year, and, therefore, could not be paid by the respondent. As the respondent admits the validity of the claim and that there were sufficient funds with which to pay the invoice in the proper fiscal year, the Court makes an award to the claimant in the amount requested.

Award of $193.78.

Opinion issued January 28, 1981

WENTE CONSTRUCTION COMPANY, INC.

vs.

BOARD OF REGENTS

(CC-80-171)

William W. Booker, Attorney at Law, for claimant.

Ann V. Dornblazer, Assistant Attorney General, for respondent.

WALLACE, JUDGE:

This claim was filed by Wente Construction Company, Inc., against the Board of Regents, in the amount of $93,769.08 for task orders performed by the company on the Personal Rapid Transit (PRT) Phase II Implementation in Morgantown, West Virginia.

At the outset of the hearing, the claimant revised the amount of its claim to $70,249.78, task order #5 was voided, and task orders #17, #21, and #23 were found not accomplished.

Phase II of the PRT was constructed under the authority of the respondent through Daniel, Mann, Johnson, & Mendenhall (DMJM), its agent and general consultant. Funds were provided by a capital grant from the Urban Mass Transportation Authority (UMTA), a division of the United States Department of Transportation. At the time the construction was almost complete, DMJM unsuccessfully attempted to negotiate a contract with the general contractor to complete certain construction tasks not covered by the initial contract. DMJM then negotiated a cost-plus maximum price contract with Schoolfield-Harvey Electric Co., a division of the claimant. This company had been a subcontractor on the project.

An instrument dated 4-19-79, titled "Agreement For Construction For The Implementation Of Phase II Morgantown Personal Rapid Transit System," was entered into and executed by one Earl T. Andrews for the respondent and a representative of the claimant company. Work was commenced on the task orders, and, between May of 1979, and January of 1980, nineteen were completed. Invoices for the completed work were then submitted and approved by the respondent. The Department of Finance and Administration refused to authorize disbursement of the capital grant funds provided by the UMTA due to the respondent's failure to secure approval of the contract by that agency.

Miles Dean, Commissioner of Finance and Administration, testified that he had reviewed the agreement in detail, that the respondent had no authority to unilaterally enter into the agreement, that it was an open-ended agreement, and that it was void.

Glenn R. Cummings, Director of Purchases for the State of West Virginia, testified that the agreement was open-ended, that no competitive bids were required, and that the provisions of Chapter 5A of the Code of West Virginia were not complied with.

Mr. Jones J. Schneider, Financial Research Coordinator for respondent, testified that UMTA approved the agreement between the claimant and the respondent and that the respondent has "set aside sufficient funds in the grant budget to cover any obligation which the Board has obligated itself to under the task orders issued."

Mr. Schneider further stated that the task orders were performed in a satisfactory manner and that the amount owing for the work was fair and reasonable for the service performed by the claimant.

The State of West Virginia received the funds from UMTA to complete the PRT in Morgantown, West Virginia, and the respondent was charged with the responsibility of completing the project. In this particular claim, the respondent sought the contract for the completion of certain task orders not covered by the original contract. The resultant agreement was not properly approved, and no purchase order was approved by the Department of Finance and Administration. However, the respondent received the benefit of the services performed by the claimant, and the State has funds earmarked for the payment for the work. The record indicates that the work was accepted as satisfactory and that the amount owing for the work was reasonable.

The respondent received the benefit of the work performed, and a denial of this claim would constitute unjust enrichment to the respondent. Accordingly, the Court makes an award to the claimant in the amount of $70,249.78. See *Cook v. Department of Finance and Administration,* 11 Ct.Cl. 28 (1975), and *Hedges v. Board of Regents,* 11 Ct.Cl. 156 (1976).

Award of $70,249.78.

Opinion issued January 28, 1981

ERNEST N. and PATRICIA K. WOLFORD

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-268)

Claimants appeard in person.

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

RULEY, JUDGE:

This claim grows out of an accident that occurred on May 20, 1980, when a live red oak tree fell across Waldo Run Road, in Doddridge County, and damaged two automobiles owned by the claimants. The automobiles, a 1976 Buick Regal and a 1973 Fiat, were parked in proximity to the road and in front of the claimants' home. The tree was approximately 75 feet high.

Ernest N. Wolford, claimant, testified that approximately nine months before the accident occurred another large tree had fallen into the aforementioned red oak tree and caused it to lean toward the highway. At that time both his wife and the president of his housing development notified Mr. Gilbertsen at the District Office of the Department of Highways of the tree's condition. He also testified that there had been a lot of rain for two weeks prior to the tree's fall and that the ground was wet at the time of the accident. Finally, he testified that the tree had been fourteen feet, two inches from the middle of the highway and thus on the public right of way.

Mr. James M. Beer, II, employed by the respondent as an Area Maintenance Engineer, testified that by his measurement the red oak tree that fell was 22 feet, 3 inches from the middle of the highway and thus was not on the right of way. He also testified that the respondent was not responsible for maintaining the slope the tree was on because the respondent had not constructed the slope.

Because of the conflicting testimony, it is impossible for the Court 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. The respondent was informed of this hazard nine months before this

accident occurred and failed to take any corrective action whatsoever. Thus the respondent was negligent.

However, there also is evidence of contributory negligence on the part of the claimants. Though aware of the hazard posed by the tree, they parked their automobiles opposite it. In view of these circumstances, the Court is disposed to allocate negligence 70% to the respondent and 30% to the claimants.

On the issue of damages, the 1976 Buick automobile sustained damage in the sum of $2,459.74. The Fiat automobile was a total loss, and the claimants estimated its value before the accident at $400.00, with a salvage value of $200.00 after the accident. Therefore, the total amount of damages is $2,659.74, and the proper award is 70% of that sum, or $1,861.82.

Award of $1,861.82.

Opinion issued February 13, 1981

APPALACHIAN HOMES, INC.

vs.

DEPARTMENT OF HEALTH

(CC-81-4)

No appearance by claimant.

David R. Brisell, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $1,908.00 for rent due on a lease for a day-care center at Rainelle, West Virginia. Sufficient funds expired in respondent's appropriation for the fiscal year in question from which the obligation could have been paid, and a negotiated settlement of $1,908.00 was reached by the parties.

As the respondent's Answer admits the validity and amount of the claim, the Court makes an award of $1,908.00 to the claimant.

Award of $1,908.00.

Opinion issued February 13, 1981

APPALACHIAN MENTAL HEALTH CENTER

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-402)

No appearance by claimant.

Joseph C. Cometti, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $4,875.00 for services provided by the claimant to Huttonsville Correctional Center.

The respondent, in its Answer, admits that the claim is valid, but further states that there were no funds remaining in its appropriation for the fiscal year in question from which the obligation could have been paid.

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

Claim disallowed.

Opinion issued February 13, 1981

THE CITY OF CHARLESTON

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION

(CC-80-398)

Robert R. Harpold, Jr., Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $31,699.20 for fire service fees owed by the respondent.

Respondent's Answer admits the validity of the claim, but also states that there were not sufficient funds in its apppropriation 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 also of the opinion that an award cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued February 13, 1981

CLINE DISTRIBUTING COMPANY

vs.

NONINTOXICATING BEER COMMISSION

(CC-80-362)

Robert N. File, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

Claimant seeks damages of $3,464.09 in taxes paid on beer destroyed in a flash flood at claimant's warehouse in Mabscott, Raleigh County, West Virginia.

The general manager of Cline Distributing Company, James P. Fraley, testified at the hearing that on the morning of August 21, 1980, a flash flood occurred in Mabscott, West Virginia. White Stick Creek overflowed and came down onto claimant's warehouse grounds and into the warehouse itself. When the waters receded, an official from the Raleigh County Health Department, Clarence Christian, determined that anything below the water line was contaminated and would have to be destroyed. Consequently, the claimant used an endloader and dump truck to transport 8,273 cases of beer to a land fill where they were deposited and crushed. A letter from John Hoff, Nonintoxicating Beer Commissioner, verified the destruction of the beer and supported the claim for a State tax refund.

The issue presented here has been before this Court numerous times. See *Central Investment Corporation v. Nonintoxicating Beer Commission,* 10 Ct.Cl. 182 (1975), *The F. & M. Schaefer Brewing Co. v. Nonintoxicating Beer Commission,* 11 Ct.Cl. 73 (1975), and *The Queen City Brewing Company v. Nonintoxicating Beer Commission,* 11 Ct.Cl. 100 (1976). The Court has consistently held that the State's retention of taxes in situations such as this would constitute unjust enrichment. Therefore, an award is made to the claimant in the amount of $3,464.09.

Award of $3,464.09.

Opinion issued February 13, 1981

CAROL A. DEMERSMAN

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-1)

No appearance by claimant.

W. Douglas Hamilton, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum of $225.48, based upon the following facts: On or about November 1, 1980, claimant was operating her 1977 Chevrolet Vega station wagon in an easterly direction on State Route 61, also known as MacCorkle Avenue, in Charleston, West Virginia. Suddenly, a light pole fell across the highway, striking the left front fender of claimant's car. Negligent maintenance of Route 61 by the respondent caused the light pole to fall and was the proximate cause of the damages suffered by the claimant.

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

Award of $225.48.

Opinion issued February 13, 1981

EDWARD J. HAMILTON

vs.

DEPARTMENT OF BANKING

(CC-80-394)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of the sum of $167.93 for reimbursable expenses incurred while he was employed as a bank examiner for the West Virginia Department of Banking. As the respondent admits the validity and amount of the claim, the Court makes an award to the claimant in the amount requested.

Award of $167.93.

Opinion issued February 13, 1981

ROBERT W. MICK

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-387)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum of $69.49, based upon the following facts: On or about October 20, 1980, Betty Sue Mick was operating a 1979 Camaro, titled in the name of Robert W. Mick, on West Virginia Route 2 in the vicinity of West Virginia Route 87. At that time and location, employees of the Department of Highways had spilled yellow paint on the roadway.

In passing through the area, claimant's vehicle was splattered with paint. The negligence of the respondent in spilling the paint on the highway was the proximate cause of the damages suffered by the claimant.

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

Award of $69.49.

Opinion issued February 13, 1981

ZANDO, MARTIN & MILSTEAD, INC.

vs.

STATE BUILDING COMMISSION

(D-942)

Paul N. Bowles, Attorney at Law, and *Gary G. Markham*, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

RULEY, JUDGE:

The respondent as "Owner" and the claimant as "Architect" executed a written contract dated August 14, 1963, under the terms of which the claimant was obliged to render professional architectural and engineering services incident to the construction of "a New Office Building" to be located in the Capitol Complex in Charleston. In its Notice of Claim filed April 11, 1975, the claimant alleged that it was entitled to damages in the sum of $185,984.54, consisting of the following:

(1) For a Departmental Space Study performed pursuant to paragraph 9, Article II of the contract and which was completed on September 5, 1969, the sum of $18,183.38;

(2) For "Reimbursable Expense of the Architect" incurred under Article V of the contract on the job site at Buildings 5, 6, and 7, from January, 1968, through April, 1971, the sum of $150,579.96; and

(3) For Administration, Inspections and Building Maintenance, performed pursuant to paragraph 9, Article II of the contract, the sum of $17,221.20.

At the beginning of the hearing on the claim, counsel for the claimant informed the Court that an error had been made in calculating the second item and that its correct amount was $59,610.26, thereby reducing the total claim to $95,014.84.

Pursuant to the opinion of this Court heretofore rendered on February 14, 1980, and pursuant to the contract made by the parties, this dispute was submitted by the parties to arbitration and the parties now have filed a stipulation reflecting their mutual agreement to accept the decision of the arbitrators to the effect that the respondent is obligated to pay the first item delineated above but is not obligated to pay either the second or third item.

Furthermore, it was determined by the American Arbitration Association that the parties should bear equally the administrative fees of $1,300.14, and, it appearing to the Court that claimant paid the full amount of these expenses, the claimant is entitled to the sum of $650.07 as that portion of the fees advanced to the Association on behalf of the respondent. In view of the stipulation, an award should be, and it is hereby, made to the claimant in the sum of $18,183.38 plus $650.07, a total sum of $18,833.45.

Award of $18,833.45.

Opinion issued February 25, 1981

TIMOTHY ADKINS

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-470)

Gregory W. Evers, Attorney at Law, for the claimant.

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

RULEY, JUDGE:

This claim grows out of a single-vehicle accident which happened between 10:30 and 11:00 p.m. on April 4, 1979, at a point upon W. Va. Route 10, near the village of Melissa in Cabell County, when the claimant drove his 1968 model Chevrolet Camaro automobile into collision with a huge boulder. The boulder was estimated to be 14 feet high and covered both traffic lanes of the

two-lane highway. It had fallen out of the hillside above the highway only a few minutes before the accident occurred, and a nearby resident who heard it fall had gone to the scene with a flashlight which he vainly used to try to flag down the claimant. The accident occurred in an area where rock falls were common, a circumstance known both by the claimant and respondent, and near which a "Falling Rock" sign was located. There was credible evidence from which the Court must infer that there were indications in the hillside, for a substantial time before the accident occurred, that a substantial rock fall was probable, a circumstance which the respondent should and would have known had its routine observations been reasonably effective. In that respect, the case is similar to *Smith v. Department of Highways,* 11 Ct. Cl. 221 (1977), and *Varner, Admr. v. State Road Commission,* 8 Ct. Cl. 119 (1970), and is distinguishable from *Bolyard v. Department of Highways,* 12 Ct. Cl. 344 (1979). In addition, there was some evidence that complaints about the dangerous condition of the hillside had been made to the respondent before the accident occurred. For those reasons, the Court concludes that the respondent was guilty of negligence proximately causing the accident.

The claimant testified that, as he approached the place where the accident occurred, he was traveling at about 35 miles per hour and was unable to recall whether the headlights of his automobile were on high beam or low beam. Respecting multiple beam headlights, West Virginia Code §17C-15-20 provides, in part:

"* * *

(a) There shall be an uppermost distribution of light, or composite beam, so aimed and of such intensity as to reveal persons and vehicles at a distance of at least three hundred and fifty feet ahead for all conditions of loading.

(b) There shall be a lowermost distribution of light, or composite beam, so aimed and of sufficient intensity to reveal persons and vehicles at a distance of at least one hundred feet ahead; * * *"

Of course, the boulder was not a person or vehicle, and, though much larger, it may or may not have been as conspicuous but the Court is constrained to conclude that the claimant himself must have been devoting something less than a reasonable lookout to the highway ahead of his vehicle or was not maintaining it under

proper control, and, for that reason, concludes that he himself was guilty of negligence which proximately contributed, to the extent of 25 per cent, to cause the accident and his resulting injuries and damages.

Respecting property damage, it appears that the claimant's vehicle had a fair market value of about $1,600.00 immediately before the accident, and $150.00 immediately afterward. He sustained a broken nose and multiple lacerations, bruises, and contusions for which he incurred medical expense aggregating $289.00 as follows: Cabell-Huntington Hospital, emergency room and pharmacy, 4-5-79, $39.00; x-rays, 4-6-79, $105.00; Radiology, Inc., x-rays, 4-5-79, $70.00; Ali A. Garmestani, M.D., reduction of fracture, nasal bones, 4-9-79, and office visit, 4-13-79, $75.00. He lost wages in the sum of $129.00 for two full days and 5.5 hours of a third day. Aside from relatively minor scars, he sustained no permanent injury. In view of all of the evidence, the Court determines the claimant's damages to be $3,000.00, which sum must be reduced by 25 per cent to reflect his contributory negligence.

Award of $2,250.00.

Opinion issued February 25, 1981

AMERICAN SCIENTIFIC PRODUCTS

vs.

DEPARTMENT OF HEALTH

(CC-81-34)

No appearance by claimant.

David R. Brisell, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $6,626.00 for merchandise delivered to the Tri-State Red Cross Blood Center in Huntington, West Virginia.

Respondent's Answer admits the validity of the claim, and states that there were sufficient funds in its appropriation for the fiscal

year in question from which the obligation could have been paid. Accordingly, the Court makes an award to the claimant in the amount requested.

Award of $6,626.00.

Opinion issued February 25, 1981

WILLIAM FRANK BALL, d/b/a
BALL TRUCKING, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-234)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum of $948.00, based upon the following facts: On or about May 5, 1980, claimant was operating a 1974 Mack Truck titled in the name of Ball Trucking, Inc., on Route 44 in Logan County, West Virginia. (The Court, on its own motion, amended the style of this claim to reflect the ownership of the vehicle.) In the course of this travel, claimant's vehicle crossed the Omar Bridge, which is owned and maintained by the respondent.

While crossing said bridge, the vehicle struck a loose steel plate, damaging the fuel tank, crossover bar, exhaust system, fuel lines, and saddle bar. The negligent maintenance of the bridge by the respondent was the proximate cause of the damages suffered by the claimant. Respondent is therefore liable to the claimant in the amount of $948.00.

Award of $948.00.

Opinion issued February 25, 1981

CHARLES L. COFFMAN

vs.

BOARD OF REGENTS

(CC-81-11)

No appearance by claimant.

Ann V. Dornblazer, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $22.41 for damages sustained by her vehicle on the campus of Potomac State College.

Claimant alleges that newly-installed speed bumps on the campus were abnormally high, and as her 1971 Pinto Sedan proceeded over them, the vehicle's transmission line was bent and began to leak, causing damages in the amount of $22.41.

Respondent's Answer admits the validity and amount of the claim; that the accident occurred by reason of improperly installing the speed bump; and, that the height of the speed bump has now been reduced to avoid future accidents; therefore, the Court makes an award to the claimant of $22.41.

Award of $22.41.

Opinion issued February 25, 1981

E. I. du PONT de NEMOURS & CO.

vs.

DEPARTMENT OF HEALTH

(CC-81-42)

No appearance by claimant.

David R. Brisell, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $6,959.70 for the sale and delivery to the respondent of biomedical material and equipment.

As the respondent's Answer admits the validity and amount of the claim, and states that sufficient funds remained in its appropriation for the fiscal year in question from which the obligation could have been paid, the Court makes an award to the claimant in the amount requested.

Award of $6,959.70.

Opinion issued February 25, 1981

J. ROBERT EVANS
d/b/a MOTOR CAR SUPPLY CO.

vs.

DEPARTMENT OF HEALTH

(CC-81-21)

No appearance by claimant.

David R. Brisell, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $60.94 for vehicle parts purchased by the respondent. Respondent's Answer admits the validity and amount of the claim, and states that there were sufficient funds in its appropriation for the fiscal year in question from which the obligation could have been paid.

Based on the foregoing, the Court makes an award to the claimant in the amount of $60.94.

Award of $60.94.

Opinion issued February 25, 1981

PATRICIA K. GARRIDO

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-227)

Claimant appeared in person.

W. Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant filed this claim against the respondent for personal injuries and for damages sustained by her automobile.

On February 26, 1980, at approximately 7:50 a.m., the claimant was driving to work in her 1974 American Motors Javelin automobile on Camden Avenue, which is also W. Va. State Route 95, in Parkersburg, West Virginia. The weather was snowy and cloudy. Camden Avenue, or Route 95, is a four-lane highway maintained by the respondent. At the time of the accident the highway was slick and covered with snow.

The claimant had stopped at the stoplight at Pike Street. After the light turned green, she proceeded through the intersection, and, about 100 feet beyond the intersection, her automobile struck a manhole cover in the right-hand, or curb, lane of the highway.

When asked why she did not see the manhole cover, she replied, "Well, the roads were still snow-covered and the plow had just gone through and plowed, and it was still snow-covered and, of course, it was hazy out and cloudy and it was still a little bit of snow falling." She further stated that the manhole and cover were raised above the surface of the roadway; that this condition had existed as long as she had lived in the vicinity (approximately five years), and that the respondent had patched around the hole in the past, but the manhole was still above the level of the highway.

As a result of the accident, damages occurred to the automobile's transmission, oil pan, and front suspension in the amount of $1,598.75, all of which was paid by the claimant's insurance carrier, except the $100.00 deductible.

The impact threw the claimant around in her vehicle, causing her to hit the ceiling and rearview mirror. As a result, she sustained

injuries to the cervical area of her neck. After she was taken home, she experienced severe headaches, whereupon she went to see her doctor, Dr. F. J. Natolis, who diagnosed her injury as a whiplash. He manipulated her neck and advised her to obtain a cervical collar, which she felt unnecessary. She saw the doctor on three occasions for which he charged $24.00 for his services. The claimant stated that she was in pain for about a month, and that she was without her car for about three months while the garage attempted to get the necessary parts with which to repair it. During this time she was forced to use her husband's truck to get to and from work.

Gilbert F. Riley, an employee of the respondent, was the operator of the grader that plowed the highway the morning of the accident. He testified that while he was plowing the snow, he suddenly noticed the manhole cover sliding in the snow. After he pushed the cover with the grader blade back to the manhole, he got out and maneuvered the cover back over the hole. He reported the incident when he returned to the garage and was informed that the accident had already occurred. In his testimony he stated that he knew the surface "was elevated to an extent, and I knew this condition existed, so approaching this, of course, I automatically feathered my blade up as I came up onto it, letting the blade drag but making sure that I had no down pressure."

George Davis, Assistant Superintendent of Maintenance for Wood County, testified that they had had problems with the cover coming out previously and had to weld it in place, and it was necessary to weld it in place again after the accident. Since that time, the respondent has repaired the entire area, correcting the defective condition.

The record indicates that this manhole and cover were elevated above the surface of the highway. Witnesses for the respondent and the claimant knew of this prior to the accident. The claimant stated that she had driven over it on previous occasions without any problem. The grader operator attempted to replace the cover after striking it with the blade of the grader, and, apparently, he was not successful. The claimant, proceeding through the intersection without warning, struck the improperly set manhole cover, suffering damage to her automobile and injuries to herself.

The Court finds that the negligence of the respondent was the proximate cause of claimant's personal injuries and the damages to

her vehicle; therefore, the Court hereby makes an award for the medical bills, insurance deductible, loss of use of the vehicle, and pain and suffering in the total amount of $1,500.00.

Award of $1,500.00.

Opinion issued February 25, 1981

GENERAL MOTORS ACCEPTANCE CORPORATION

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-80-388)

Sarah G. Sullivan, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant herein seeks to recover the sum of $9,147.03 for damages it has suffered due to respondent's failure to record claimant's lien on a West Virginia Certificate of Title.

On March 21, 1979, Julius Kinser entered into an installment sales contract payable to Bobby Layman Chevrolet in Columbus, Ohio, for the purchase of a 1979 Chevrolet van. That same day, the contract was transferred and assigned to General Motors Acceptance Corporation ("GMAC") through its office in Columbus. An Ohio Certificate of Title was issued to Mr. Kinser on which GMAC was designated first lien holder.

In June of 1979, Mr. Kinser took the Ohio title to the West Virginia Department of Motor Vehicles where he applied for a West Virginia Certificate of Title. A title was then issued, omitting GMAC's lien, which had been recorded on the Ohio title. Mr. Kinser defaulted on his sales contract, at which time it was discovered by GMAC that Mr. Kinser was holding a clear title to the vehicle.

On September 7, 1979, the Department of Motor Vehicles revoked and canceled the West Virginia title, and on March 3, 1980, GMAC brought suit on the installment sales contract against Mr. Kinser, obtaining a default judgment in Mingo County Circuit

Court in the amount of $9,147.03. A Writ of Execution was issued and returned no property found; claimant now seeks this amount from the Department of Motor Vehicles.

Where the respondent negligently issues title to a vehicle without the claimant's lien being recorded thereon, and the claimant sustains a loss as the result of said negligence, this Court has made an award to the claimant. See *Wood County Bank v. Department of Motor Vehicles*, 12 Ct. Cl. 276 (1979). As the facts of this case are uncontested, and the respondent presented no evidence contrary thereto, the Court makes an award to the claimant in the amount requested.

Award of $9,147.03.

Opinion issued February 25, 1981

J. F. ALLEN COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-98)

W. Warren Upton, Attorney at Law, and *Julian D. Bobbitt, Jr.*, Attorney at Law, for claimant.

Stuart Reed Waters, Jr., Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant filed this claim against the respondent for recovery of $25,500.00 assessed against it as liquidated damages and for interest due on other payments delayed after the prescribed statutory period.

The claimant was the successful bidder and was awarded a contract to construct a portion of U.S. Route 48 extending from Morgantown, West Virginia, into the State of Maryland. The contract was for two projects, APD-483(21) and APD-483(22), hereinafter referred to as Project 21 and Project 22. The contract was let on April 27, 1971, and awarded May 3, 1971.

Project 21 connected with the A. J. Baltes job, Project 15 at the Laourel Run Bridge (See *A. J. Baltes, Inc. v. Department of Highways*, 13 Ct.Cl. 1 [1979]), and extended easterly, joining

Project 22 at Hopewell. The terrain of Project 21 was similar to the Baltes job, mountainous, containing sandstone and silt material. The terrain on Project 22 was rolling farmland, and the material was more shale-like and easier to handle. Project 22 was completed within the prescribed contract time.

The completion date for Project 21 as provided in the contract was July 31, 1973. The actual completion date was December 7, 1973, after which the respondent assessed the claimant 85 days liquidated damages.

The claimant contends that the assessment of liquidated damages was improper and the delay in the completion of Project 21 was caused by events beyond its control and which were mainly caused or contributed to by the respondent.

The contract was awarded to the claimant on May 3, 1971. Claimant requested an early pre-construction conference and notice to proceed. The pre-construction conference was not held until May 27, 1971, at which time the claimant was advised that it must have a pollution control plan, a CPM, and a training program. Claimant was advised that as soon as the training program was completed and approved, and all facilities to the field office trailer had been accepted, it could start to work. Work commenced on June 10, 1971.

Claimant contends that the delay between the award date and commencement of work was excessive, and it was unable to take advantage of the May weather.

At the pre-construction conference, claimant advised that the design of the detour between Projects 21 and 22 could be in error and that the detour designed over Project 22, to work effectively, should be over Project 21. After the detour was constructed, respondent approved the change for the detour to be constructed over Project 21. The change was completed by the claimant at its expense and time for which the respondent allowed a half day time extension.

During the construction, weather conditions were more severe than normal, causing the claimant to work under extremely poor conditions. Because of the difference in the terrain between Projects 21 and 22, the weather conditions affected Project 21 more adversely than 22. Over 50,000 cubic yards of fill bench excavation was performed that was not originally anticipated. The respondent

granted an additional nine days' extension for this additional work. The claimant contends that this added time was insufficient because the conditions were such that it was impossible to move more than 1500 to 2000 yards per working day.

Further delay was caused by design error on the Laurel Run Bridge (2833). Inability to complete the bridge until design changes were made by the respondent delayed the claimant in the construction of the highway portion of the project.

Claimant contends that these various delays caused more delays in obtaining stone for the roadway and shoulders, and in completing the paving portion of the contract. Holiday Construction Company was to furnish the stone, which was at first accepted and then refused when samples failed to meet specifications. Efforts by claimant to obtain other sources of stone were not satisfactory due to previous commitments of the suppliers. Later, the stone from Holiday was accepted. When the road was eventually ready for paving, the paving contractor was delayed by a strike of the cement truckers.

The claimant cites a meeting held on May 21, 1973, which it attended with other contractors holding contracts with respondent. At the meeting, attended by Department of Highways Commissioner W. S. Ritchie, Jr., Governor Arch A. Moore, Jr., announced that due to severe weather conditions and other conditions, each contractor would be allowed a ninety-day extension to complete its contract. The extension was not granted the claimant.

Although Project 21 was completed on December 7, 1973, the road could not be opened and used because the Baltes project on the west was not completed and there were no exits to provide ingress and egress to the new portion. Because the highway portion represented by Project 21 could not be opened for public use, claimant contends the respondent was not damaged; hence, another reason that assessment of liquidated damages was improper.

Irrespective of Governor Moore's oral proclamation on May 21, 1973, granting a ninety-day extension to the various contractors, the Court, after reviewing the record, is of the opinion that the enforcement of the liquidated damage clause in the contract was unjustifiable. The failure to complete Project 21 was caused by weather and other conditions beyond the control of the claimant

and by delays caused by the respondent. As this Court stated in *Whitmeyer Brothers, Inc. v. Department of Highways*, 12 Ct.Cl. 9 (1977), "The plaintiff cannot recover liquidated damages for a breach for which he is himself responsible or to which he has contributed...". Inasmuch as the highway could not be opened until the Baltes project was completed, no substantial damages resulted to the respondent that would justify liquidated damages. See *Hass v. State Road Commission*, 7 Ct.Cl. 209 (1969), *Frederick Engineering Co. v. State Road Commission*, 8 Ct.Cl. 26 (1969).

Project 21 was completed on December 3, 1973, and finally accepted by respondent on February 13, 1975, some two years later. At the time of the acceptance by the respondent, there was a balance due to the claimant of $159,769.62 in addition to the $25,500.00 retained as liquidated damages. The payment of this balance was unduly delayed. The indecision and inaction of the respondent should have been resolved within a reasonable time after the completion of the contract work.

Provisions of West Virginia Code §14-3-1 provide for the payment of 6% interest per annum on amounts not paid within 150 days after final acceptance of a completed project. Under the statute, the claimant is entitled to interest caused by respondent's delay in payment of funds due. See *Vecellio & Grogan, Inc. v. Department of Highways*, 12 Ct.Cl. 294 (1979). The time that elapsed between the completion date, December 3, 1973, and the acceptance date, February 13, 1975, is excessive. To establish a reasonable acceptance date for the purpose of determining interest due the claimant, the Court accepts the date suggested by the claimant of February 1, 1974. Interest would then begin to accrue on the 151st day thereafter, or July 1, 1974.

The respondent paid the balance due on the contract in installments: $73,251.02 on May 29, 1975; $80,567.98 on May 1, 1976; and the balance of $5,950.62 on March 29, 1977. The Court is of the opinion that in accordance with W.Va. Code §14-3-1, interest should be charged to the respondent on the above payments as follows:

Interest on $73,251.02 from July 1, 1974, to May 29, 1975, in the amount of $4,017.08.

Interest on $80,567.98 from July 1, 1974, to May 1, 1976, in the amount of $8,846.36.

Interest on $5,950.62 from July 1, 1974, to March 29, 1977, in the amount of $981.86.

Interest should be charged on the $25,500.00 retained as liquidated damages from July 1, 1974, to February 25, 1981, the issuance date of this opinion, calculated to be $10,174.50.

Accordingly, the Court makes an award of the retained $25,500.00 in liquidated damages and the interest thereon in the amount of $10,174.50, plus the interest calculated on the three payments above in the amount of $13,845.30, for a total award of $49,519.80.

Award of $49,519.80.

Opinion issued February 25, 1981

JOE L. SMITH, JR., INC.
d/b/a BIGGS-JOHNSTON-WITHROW

VS.

OFFICE OF THE GOVERNOR

(CC-80-368)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $24,126.92 on unpaid invoices relating to the publication of the official papers of former Governor Arch A. Moore, Jr.

The claim is based upon the fact that extra pages and color work were furnished by the claimant. A letter from Arnold T. Margolin, Commissioner of the Department of Finance and Administration, verifies the amount of the claim, and indicates that the extra work was authorized by the original Purchase Order. However, there were not sufficient funds available in respondent's appropriation for 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 also of the opinion that an award cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued February 25, 1981

JOHNSON CONTROLS, INC.

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-80-274)

Don R. Sensabaugh, Jr. and *Stephen A. Weber,* Attorneys at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The claimant filed this claim to recover $4,323.67, representing the cost for the replacement of two air conditioning compressors and the Trane unit at the State Police Headquarters in South Charleston, West Virginia. Representatives of the claimant testified that their company was called to the Department of Public Safety building in South Charleston to service the air conditioning by Ronald Milam, the maintenance supervisor. Claimant had been called on previous occasions by Milam, who signed the service orders which were paid after being submitted for payment. Claimant replaced four compressors in six months' time. The cost of the installation of the last two installed March 9, 1979, and April 18, 1979, is the subject of this claim.

The respondent claims that its maintenance contract with the claimant, for which it paid claimant semiannual installments of $1,041.50, should cover the work in question. Claimant contends that this work was not covered under the maintenance contract with the respondent, and that the contract was for the temperature control system in the headquarters, involving the fire alarm system and the pneumatic temperature control system.

The claimant advised Mr. Milam and others that the compressors would continue to burn out unless the respondent installed low ambient control devices. Mr. Milam testified that he reported this fact to his superiors, but nothing was done because respondent had not experienced any problems for eight years.

Larry Allen Ranson, testifying for the claimant, testified that the air conditioning system was not defective, but that it was not installed to operate 24 hours a day, each day of the year, nor was it installed as a wintertime operation. He further testified that

". . .without any low ambient control we get the problem of a refrigerant floodback when the ambient temperature outside is lower than the temperature inside where the evaporator is. The liquid refrigerant tends to migrate as a liquid back to the compressor where it mixes with the oil and then the oil becomes nonlubricant and it foams, and when the compressor starts up, the foam mixed with the refrigerant is pumped through the system, therefore, leaving the system, the compressor, dry of oil and the compressor operates with bearings, and bearings, when they get hot with no lubrication, tend to expand and they lock up. When they do, that causes an overload on the motor. When this happens two or three times, what happens next is the motor winding starts to break down and this causes a burnout."

He stated that this can happen at any temperature below 33°, depending on how many times the system is shut on and off on its own controls.

Master Sergeant Robert Sturms, director of supply for the Department of Public Safety, testified that after the difficulty experienced with the burnt out compressors, a new system was installed by Gulf Distributing Company to handle the air conditioning and heating, which, according to a purchase order, included the installation of low ambient control.

Mr. Milam, when questioned pertaining to his calls to the claimant to repair or replace the compressors, answered that he called them to do the work, that the work was listed as an emergency purchase order, and that there was no signed agreement, just verbal. In his testimony he stated:

"Q. Okay, you told them to go to work?
A. Right.
Q. All right, now, when you authorized them to go to work, did it concern you whether it was under a contract of any kind or did you just tell them to go to work?
A. Well, I didn't think, well, in fact that I knew that air conditioner work didn't come under the service contract.
Q. You knew that it didn't?
A. Yes."

The record establishes that the maintenance contract covered the temperature control system, and not the cost of the replacement of the compressors in the air conditioning system, as contended by the respondent. Further, the maintenance contract

states that it is a "temperature control maintenance contract related to heating and cooling equipment and fire alarm system. . . and electrical service connected with the above-mentioned system." The work performed was on the air conditioning system and was separate and distinct from the temperature control unit. The claimant warned that the compressors were being used beyond their intended use, and that without ambient controls they would continue to burn out. The unit has worked satisfactorily since it was upgraded with ambient controls as recommended by claimant.

Accordingly, the Court makes an award to the claimant in the amount of $4,323.67.

Award of $4,323.67.

Opinion issued February 25, 1981

SARA H. McCLUNG

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-188)

Carl D. Andrews, Attorney at Law, for claimant.

W. Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimant filed this claim against the respondent for damages sustained by her 1976 Volkswagon Rabbit automobile.

On Saturday, March 1, 1980, between 4:00 and 4:30 p.m., the claimant was driving her automobile in an easterly direction on Interstate 64 in Greenbrier County, West Virginia. The claimant testified that snow was falling heavily and that visibility was very poor. The highway had been plowed and additional snow was accumulating. The claimant stated she was proceeding at about 25-30 miles per hour and attempted to exit the highway at the Alta Exit when her automobile struck a snow bank approximately 24 inches high in the exit. The snow bank was created by the snowplow passing the exit. Although the plow crews had worked on the highway, the exit had not been cleared of the snow. When

the claimant's automobile struck the snow, the impact forced the snow under the hood, immobilizing the vehicle. The vehicle had to be towed away. The claimant incurred expenses in the amount of $86.58 for towing and repairs and the additional cost of long-distance telephone calls in the amount of $28.39. Claimant, in her testimony, stated there were tracks in the exit which were made by a vehicle that had preceded her.

When asked if she saw the snow bank before she struck it, the claimant replied, "No, because really, I mean, I've driven up there for seven years and I've never, I don't think, seen the visibility as bad. I've driven in snow a lot and by the road being scraped down to the exit, you know, all I saw was the scraped portion, and then when I proceeded, because the road was snow-covered and I assumed the exit was the same, I did not really see that there was that much snow in front of the exit until I was on top of it."

Due to weather conditions at the time of the accident, it was difficult for the respondent to have completed its snow removal work, but, nevertheless, the exit had not been cleared sufficiently for the claimant's automobile to proceed safely under the weather conditions present. However, the claimant failed to drive at a speed consistent with the prevailing conditions. W.Va. Code §17C-6-1(a) provides:

> "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards, then existing. . .".

In view of these circumstances, the Court is disposed to allocate negligence 70% to the respondent and 30% to the claimant.

On the issue of damages, the claimant's automobile sustained damages in the amount of $86.58, and, the claimant, as a result of the accident, incurred long-distance telephone expenses in the amount of $28.39. Therefore, the total amount of damages is $114.97, and the proper award is 70% of that amount, or $80.48.

Award of $80.48.

Opinion issued February 25, 1981

McJUNKIN CORPORATION

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-377)

No appearance by claimant.

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

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's 1980 Oldsmobile 98 were caused when the vehicle struck a loose steel plate on a bridge which is part of Route 60 in Kanawha County, West Virginia, and is owned and maintained by the respondent; and to the effect that the respondent's negligent maintenance of the bridge proximately caused the damages sustained by the claimant, which damages consisted of repairs to the vehicle in the amount of $1,114.50 and rental car expenses of $240.00, totaling $1,354.50, the Court finds the respondent liable, and makes an award to the claimant in the amount agreed upon by the parties.

Award of $1,354.50.

Opinion issued February 25, 1981

MEMORIAL GENERAL HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-358)

Bonn Brown appeared on behalf of claimant.

Joseph C. Cometti, Attorney at Law, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment for hospital services, inpatient and outpatient, rendered to inmates of the Huttonsville Correctional

Center. Based upon its records, the respondent has determined, and the claimant has agreed, that the amount owed to the claimant is $96,328.93. The Answer filed by the respondent admits the validity of the claim, but further states that there were no funds remaining in its appropriation for the fiscal year in question from which the obligation could have been paid.

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

Claim disallowed.

Opinion issued February 25, 1981

HARRY S. SPECTRE d/b/a
COMMONWEALTH CASTINGS COMPANY

vs.

BOARD OF OCCUPATIONAL THERAPY

(CC-80-392)

Harry S. Spectre appeared on behalf of the claimant.

Thomas N. Trent, Assistant Attorney General, and *Henry C. Bias, Jr.,* Deputy Attorney General, for respondent.

RULEY, JUDGE:

This claim was filed by Commonwealth Castings Company to recover the cost of producing a long-reach, cast-iron desk seal which had been ordered by the respondent, the Board of Occupational Therapy.

Linda C. Johnston, Chairman of the Board of Occupational Therapy, telephoned Mr. Harry S. Spectre in Falmouth, Massachusetts, in February, 1980, to place an order for the production of a seal. The seal was to be used on certificates to license occupational therapists in West Virginia. Ms. Johnston either failed to understand the cost of the seal ordered, or did not make inquiry as to the cost of the seal.

The seal was produced by Commonwealth Castings Company and then shipped to the respondent on April 22, 1980.

Subsequently, an invoice in the amount of $997.50 was mailed to the respondent for the cost of the seal.

The respondent did not have sufficient funds with which to honor the invoice, and, as a result, the claimant was not paid for the seal.

It appears to the Court that the claimant undertook, in good faith, the task of producing this seal, which was accepted and used by the respondent. The price of the seal was reasonable and reflects the fair market value of the materials and workmanship.

Although the Court feels that this is a claim which in equity and good conscience should be paid, we are compelled by our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct. Cl. 180 (1971), to disallow the claim.

Claim disallowed.

Opinion issued March 5, 1981

ALLSTATE CONSTRUCTION & ROOFING CO.

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-3)

No appearance by claimant.

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

PER CURIAM:

Upon written stipulation to the effect that claimant is the owner of a 1979 Ford F-600 truck which was parked on the right of way of State Route 13/14, also known as Willow Drive, during the month of March, 1980; and to the effect that the truck fell through a culvert on the right of way and sustained damage in the amount of $2,068.15, due to the respondent's negligent maintenance of the culvert, the Court finds the respondent liable, and makes an award to the claimant in the amount stipulated.

Award of $2,068.15.

Opinion issued March 5, 1981

JEFFREY A. BAILEY and
MARY JO BAILEY

vs.

DEPARTMENT OF HIGWAYS

(CC-79-692)

Claimant Jeffrey A. Bailey appeared in person.

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

WALLACE, JUDGE:

The claimants, Jeffrey A. Bailey and Mary Jo Bailey, husband and wife, filed this claim against the respondent seeking compensation for damages to the automobile of Mary Jo Bailey and compensation for personal injuries and loss of work sustained by Jeffrey A. Bailey.

At approximately 3:30 p.m. on March 17, 1978, the claimant, Jeffrey A. Bailey, was driving his wife's 1972 Plymouth Satellite automobile northerly on Willowdale Road near Morgantown, West Virginia. The weather was clear and dry. The road is two-laned, running north-south. Jeffrey Bailey testified that he was ascending a hill at approximately 25 miles per hour, and as he crested the hill, he came upon a torn-up portion of the road containing some fairly good-sized potholes. The right front wheel struck a pothole, and the automobile was thrown out of control and into a drainage ditch in the right berm, striking a tree. The vehicle was demolished. Jeffrey Bailey struck his chin on the steering wheel, requiring stitches and plastic surgery two years later. He lost two days' work and an additional three days when he underwent the plastic surgery. Mr. Bailey testified that the accident occurred on Friday, and on Monday he went to the respondent's office on Sabraton Avenue in Morgantown and inquired if anyone had complained about the potholes at the scene of the accident. He testified, ". . . I proceeded to the State Road district garage the Monday following the accident and asked the lady up there if anyone had complained about the pothole, and she said, 'Oh yes, people have been calling all the time about that road out there.' I did not get her name. I asked her if she wrote down the calls as they came in. She said no and she had no form of documentation that they had been

notified. . . All that they knew was that the people had been calling and complaining about that particular pothole."

Mr. Bailey stated that his wife's automobile had been purchased for $2,800.00 in November 1975, that at the time of the accident it was in good repair and worth $1,700, and that it was sold for salvage for $10.00. He further testified that he underwent plastic surgery at St. Francis Hospital in Charleston two years after the accident, where he incurred charges of $296.87 plus the surgeon's fee of $600.00. He also lost $500.00 in wages for two days' work at the time of the accident, and three days while undergoing the plastic surgery.

The respondent introduced no testimony, and from the record, the Court is of the opinion that the respondent was negligent in failing to properly maintain the road and in failing to post signs to warn of the condition of the road. Accordingly, the Court makes an award to the claimant, Mary Jo Bailey, in the amount of $1,690.00 for her demolished automobile, and to the claimant, Jeffrey A. Bailey, in the amount of $1,396.87 for hospital and doctor bills and wages, as herein set out.

Award of $1,690.00 to Mary Jo Bailey.

Award of $1,396.87 to Jeffrey A. Bailey.

Opinion issued March 5, 1981

JANET AULTZ CASTO

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-263)

Larry L. Skeen, Attorney at Law, for claimant.

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

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the amount of $8,000.00, based upon the following facts: Claimant is the owner of property and certain commercial buildings situate at Fairplain, Jackson County, West Virginia. During the period of

October through December, 1978, the respondent was conducting blasting operations on or near property adjacent to claimant's property. The blasting operations produced concussions and vibrations in the earth which resulted in damages to claimant's commercial buildings and property.

This Court is constrained to follow the rule of law established by the West Virginia Supreme Court in the case of *Whitney v. Ralph Myers Contracting Corporation,* 146 W.Va. 130, 118 S.E.2d 130 (1961), which recognizes that the use of explosives in blasting operations is intrinsically dangerous and extraordinarily hazardous; therefore, the party who undertakes the blasting is liable for any damage resulting to the property of another. Hence, the respondent in this case is liable to the claimant in the amount of $8,000.00, which is a fair and equitable estimate of the damages sustained.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $8,000.00

Opinion issued March 5, 1981

DEAN R. GRIM

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-124)

Ralph C. Dusic, Jr., Attorney at Law, for claimant.

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

RULEY, JUDGE:

This claim, for damages for personal injuries and property damage, grows out of a single-vehicle accident which occurred at about 3:45 p.m. on September 21, 1977, upon West Virginia Route 9 at Fishers Bridge in Morgan County. The concrete surface of Fishers Bridge is 428 feet long and 28 feet wide. Between 12:30 and 1:00 p.m. on that date, the bridge surface was sprayed by the respondent's employees with a mixture of linseed oil and mineral spirits, which, according to the evidence, is used as a protective

coating to prevent salt from penetrating concrete. Small, abrasive "skid stone" then was placed upon the surface. Warning signs and flagmen were posted at each end of the bridge and directed to remain there until the bridge surface was dry. The preponderance of the evidence is that they did not.

The claimant, who then was employed by the National Park Service doing repair and maintenance work in the Paw Paw Tunnel on the B & O Canal at $7.63 per hour, left work at about 3:25 p.m., intending to drive his 1976 model Triumph TR-7 to his parents' home in Dargan, Maryland, where he then resided. According to his own testimony and that of another National Park Service employee who was traveling in the same direction and about 300 feet behind the claimant, the claimant entered the bride at a speed of between 40 and 50 miles per hour. And, according to both, their testimony being undisputed on this point, there was no flagman or sign warning them of any hazard as they approached the birdge. The highway on both sides of the bridge is relatively straight and it was a clear, dry day. After the claimant entered the bridge, his automobile slid to the right, then to the left, and, finally, almost 180 degrees so that it left the bridge backwards. It then went off the highway and travelled down an embankment, coming to rest upside-down at a point between 100 and 125 feet from the road. An engineer, who testified for the respondent, stated that, on an ideal day, the mixture which had been used would require two to three hours to dry. Under these facts, the Court must conclude that the accident and resulting injuries and damages were caused solely by negligence on the part of the respondent. See *Coen v. Department of Highways,* 12 Ct.Cl. 119 (1978).

Damage to the claimant's vehicle, a total loss, was $5,050, but he was compensated by his collision insurer for all but $250.00 of that loss. The principal injury to his person was a fracture of the talus bone in his left foot which required an open reduction and the insertion of two metal screws. Relatively minor injuries to his head and one shoulder also were sustained. His left foot and ankle remained in a cast, with intermittent changes, until January 24, 1978. He was released to return to work on July, 1978, and did so on September 1, 1978. He was 21 at the time of the accident, and, considering the serious nature of the injury to his foot and ankle, has made a good recovery. At the time of hearing, his only complaints were of occasional pain in his left ankle and foot and other relatively minor disabilities, but his attending physician, in a

report dated October 17, 1979, stated that, in his opinion, the claimant had a 20% pemanent impairment of function in his right ankle. There was evidence that, at some future time, the screws should be removed, and the cost of that procedure was estimated to be $775.00. It was stipulated that the medical expense in the sum of $2,296.80 had been incurred, and it appears from the evidence that the claimant's loss of earnings attributable to his injury was approximately $8,000.00. From these facts, the Court concludes that $25,000.00 would be a suitable award.

Award of $25,000.00.

Opinion issued March 5, 1981

ESTHER JOHNSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-664)

Claimant appeared in person.

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

WALLACE, JUDGE:

In this claim, the claimant contends that the respondent negligently maintained a culvert under the road in front of her home, causing water to back up and flood her basement. The claimant had lived in her home on Jack Run Road in Lumberport, West Virginia, for forty years. Adjacent to her property is a ravine which is drained by a culvert under the road maintained by the respondent. In February, 1979, water in the ravine began backing up, and, on March 5, backed up in claimant's sewer line and flooded her basement. This was the first time that this had ever occurred. When the water first began to back up in the ravine in February, the claimant had made numerous calls to the respondent pertaining to the problem.

John J. Malone, respondent's Harrison County Superintendent, testified that he was employed by the respondent on March 1, 1979, at which time he became acquainted with the claimant. He testified that he went to the claimant's property and found that the berm of

the road next to claimant's property had sunk two to three inches and that the culvert was operating at about one-third of its capacity. The culvert had either collapsed because of heavy traffic, or was clogged.

No action was taken by the respondent at that time, but after the flooding of claimant's basement, a new culvert was installed in November, 1979.

The claimant introduced into evidence an itemized account of the damages she sustained, including medical expenses incurred by reason of the tension and pressure she suffered as a result of the flooding. Damages included a motor for the washing machine; loss of articles and supplies; re-painting of the basement; and phone calls to the respondent, all of which total $523.68.

The Court is of the opinion that respondent's negligence in failing to correct the condition of the damaged culvert caused the claimant's damages and expenses. Accordingly, an award of $523.68 is made to the claimant.

Award of $523.68.

Opinion issued March 5, 1981

LEE ROY ROBERTSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-302)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation which revealed that on or about July 11, 1980, claimant was operating a 1969 Chevrolet Corvette titled in the name of Susan R. Feist on West Virginia Route 20 at Green Valley, Nicholas County, West Virginia. The vehicle was purchased by the claimant, Lee Roy Robertson, but was not titled in his name for insurance purposes.

It was also stipulated that, while traveling on Route 20, claimant's vehicle crossed an uncovered culvert around which no

warning signs had been placed by the Department of Highways. The vehicle was damaged in the amount of $1,700.00, which sum was paid by Lee Roy Robertson.

As the stipulation further declares that the negligent maintenance of West Virginia Route 20 by the respondent was the proximate cause of the damages suffered by the claimant, the Court makes an award to the claimant in the amount agreed upon by the parties.

Award of $1,700.00.

Opinion issued March 5, 1981

JOHN SLONE, ADMINISTRATOR OF THE ESTATE OF MAUDE SLONE, DECEASED

vs.

DEPARTMENT OF HEALTH, DIVISION OF MENTAL HEALTH

(CC-78-273)

Robert J. Smith, R. Edison Hill, and Henry Wood, Attorneys at Law, for the claimant.

Henry C. Bias, Jr., Deputy Attorney General, for the respondent.

RULEY, JUDGE:

In this claim, damages in the sum of $300,000.00 are sought for the alleged wrongful death of Maude Slone.

In November, 1977, Mrs. Slone began to have noticeable mental problems, and by March 6, 1978, they were of sufficient severity for an involuntary commitment to Spencer State Hospital on that date. She had been afflicted with diabetes mellitus for a considerable time before that date and had been taking oral medication once daily for that disease. Upon admission, the examining physician ordered routine laboratory tests which would have disclosed her diabetic affliction, but, remarkably, they never were performed. In addition, at a March 8, 1978, social service interview, her husband, John Slone, told the social worker that his wife was a diabetic and that she had "to take a blue pill every morning," and he so

informed a physician but the physician, whose hearing was impaired, denied having heard it. The social worker noted this critically important item on the "blue social history sheet" but could not recall whether she ever mentioned it to any staff member. In some of the hospital units, at that time, the social history sheet was placed in the patient's chart but, in others, it was not. Mrs. Slone was in one of the latter units. Mrs. Slone never received any diabetic medication at Spencer State Hospital and on the night of April 9, 1978, she went into shock. On the following day, April 10, 1978, she died. The cause of death was "cardiorespiratory arrest, shock and coma due to or the consequence of diabetes mellitus and arteriosclerotic heart disease". It would be difficult to conceive a plainer case of negligence on the part of the respondent and it is equally clear that such negligence proximately caused or certainly accelerated the decedent's death. Accordingly, we will turn to the issue of damages.

At the time of her death, Maude Slone was 76 years of age. She left surviving her, as heirs-at-law, her husband, John Slone, and three sons, Melvin S. Campbell, Kenneth Ray Campbell and James Earl Campbell. When the claim was heard on December 9, 1980, the sons were 52, 46 and 43, respectively. The first two were married and all three were gainfully employed in Illinois where they had resided for several years. All three, however, had maintained some contact and communication with their mother. Subsequent to the demise of her first husband, who was the father of the three sons, the decedent married John Slone on December 3, 1965. It was his second marriage also. It is undisputed that they enjoyed a mutually pleasant marital relationship. The decedent's only income was a social security pension of $123.00 per month and a black lung benefit derived through her husband. Mr. Slone was born on June 8, 1911. He was employed as a coal miner until 1956 when he was placed upon disability retirement. He also is diabetic and is afflicted with black lung, arthritis and poor circulation. On July 3, 1978, he remarried his first wife. There are legal authorities to the effect that remarriage of a surviving spouse cannot properly be considered in determining damages, because to do so would afford the wrongdoer a windfall, but that question has not yet been addressed by the Supreme Court of Appeals of West Virginia and this Court, at this time, has mixed feelings about the wisdom of the rule. Funeral expense in the sum of $1,155.00 was incurred.

In relation to damages, West Virginia Code §55-7-6, provides, in part:

"* * *

In any such action for wrongful death the jury may award such damages as to it may seem fair and just, and may direct in what proportion they shall be distributed to the surviving spouse and children, including adopted children and stepchildren, and grandchildren of the deceased,* * *"

Determining damages under facts such as those of this case, from any point of view, is an extremely difficult and nebulous task. Precedents are of little, if any, value because there is great disparity among them. Having endeavored to give suitable weight to all relevant facts and the applicable statute, the Court concludes that damages should be awarded as follows:

1. To John Slone, the sum of $7,500.00;

2. To John Slone, Administrator of the Estate of Maude Slone, Deceased, the sum of $1,155.00 for funeral expense;

3. To Melvin S. Campbell, the sum of $1,500.00;

4. To Kenneth Ray Campbell, the sum of $1,500.00; and

5. To James Earl Campbell, the sum of $1,500.00.

Award of $13,155.00.

Opinion issued March 12, 1981

MILLICENT KUMAN

vs.

BOARD OF REGENTS

(CC-79-445)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

RULEY, JUDGE:

On August 27, 1979, the claimant filed a notice of claim seeking recovery of $656.04 which it is alleged was earned by her husband,

a professor of Sociology at West Liberty State College, during the last month of his employment before his death on October 30, 1964. The respondent filed a motion to dismiss for failure to state a claim upon which relief can be granted.

Since the longest period of limitations which could apply to this claim is ten years and since West Virginia Code §14-2-21, provides, in part:

"* * *

> The court shall not take jurisdiction of any claim, whether accruing before or after the effective date of this article [July 1, 1967], 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,* * *",

it is clear that the Court has no jurisdiction of this claim and it must be dismissed.

Claim dismissed.

Opinion issued March 23, 1981

VIRGIL E. MOORE

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-280)

Claimant appeared in person.

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

WALLACE, JUDGE:

Claimant filed this claim against the respondent for damages to his well, well house, and five Norway spruce trees.

The claimant's home is located at the mouth of Islands Branch in Kanawha County, West Virginia. His home is situate on a 34-acre tract of land that abuts a quarter of a mile on both sides of Islands Branch Road, also known as the Ciccerone Mail Route. The road was constructed in 1956 and paved with blacktop in 1972. In 1977, a slip started on the north side of the road and spread to the south side where claimant's home is located. There is a drain in the

middle of the slide area which claimant contends has been stopped-up for approximately three years. Although claimant testified that he did not know the cause of the slide, he stated that the plugged-up drain caused the area of the slide to become saturated with water, and the hill was gradually moved. The movement of the ground has caused the well furnishing his home with water to cease producing an adequate supply. When the well was drilled, it was drilled to a depth of seventy feet, and a fifty-five-foot casing installed. It produced forty gallons of water per hour. Testimony revealed that water from deeper wells from claimant's property and adjoining property is non-palatable and has to be treated to be useful.

Claimant's wife testified that she had complained to respondent's North Charleston Office on numerous occasions and had also complained to respondent's employees doing maintenance work on the road, all to no avail.

Photographs introduced at the hearing show the movement of the earth and the cracking of the walls of the well house. No evidence was introduced by the claimant concerning the amount of his damages. As to the spruce trees, he testified that they were alive and probably could be saved by replanting.

James Smith testified that he had drilled the well for the claimants. He indicated that a well producing sufficient water would have to be drilled to a depth of 80 feet which would result in a well with water of a strong mineral content which would be non-palatable. In the event that the mineral content of the water rendered the water non-palatable, a filtering system would be necessary at a cost of approximately $1,000.00. He further stated that the cost of drilling a new well would cost $350.00, and the casing would cost $357.50. A new well house could be constructed for $175.00.

The respondent introduced no testimony, and from the record, the Court is of the opinon that the respondent's failure to correct the slide condition was the cause of the claimant's damages. The Court has concluded that the cost of repair to claimant's property is the proper measure of damages. See *Jarrett v. E. L. Harper & Sons, Inc.*, ...W.Va. ...., 235 S.E.2d 362 (1977). Accordingly, the Court makes an award to the claimant for the well, well house, and filtering system in the amount of $1,882.50.

Award of $1,882.50.

Opinion issued March 24, 1981

MARY McLAUGHLIN, BY RALPH McLAUGHLIN, HER SON

VS.

DEPARTMENT OF HIGHWAYS

(CC-79-143)

ROBERT B. JOHNSTON

VS.

DEPARTMENT OF HIGHWAYS

(CC-79-114)

JAMES R. SKINNER, d/b/a JIM'S GROCERY

VS.

DEPARTMENT OF HIGHWAYS

(CC-79-27)

Claimants appeared in person.

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

RULEY, JUDGE:

Due to the fact that these three claims arose, at least in part, from the same alleged misconduct, they were consolidated for hearing.

In order to relocate County Route 33 at Bendale, which is two miles south of Weston, in Lewis County, West Virginia, the respondent made a cut approximately 70 feet deep through a hill. That work was done in the first six months of 1977 and required blasting for removal of rock. The properties of the claimants all front on that road near the cut and not far from the West Fork River. The claimant Skinner alleges that his property was damaged by the blasting. That will be considered further.

All three claimants allege that their properties were damaged on January 28, 1978, by West Fork River flood waters which they claim would not have reached them had the cut not been made. The evidence fails completely to support that allegation, and, for that reason, it cannot be considered further.

The blasting involved in this case was the same blasting involved in *Heater v. Department of Highways,* 12 Ct.Cl. 310 (1978), and, of

course, the same absolute liability for damages proximately caused by it obtains. The respondent concedes that the last shot detonated caused a rock to be thrown through the roof of Mr. Skinner's store, but it also is undisputed that the Department of Highways repaired the roof. Mr. Skinner testified, without contradiction, as to other damages and their cost of repair, estimated by him to be $3,000.00. In addition, he claims damages for alleged loss of profits in the operation of his store, but such evidence as there is on that subject is so uncertain that it cannot provide the basis of an award.

Accordingly, Claim No. CC-79-143 is disallowd, Claim No. CC-79-114 is disallowed, and, in Claim No. CC-79-27, an award of $3,000.00 is made.

Award of $3,000.00 to James R. Skinner, d/b/a Jim's Grocery.

Claim No. CC-79-143 is disallowed.

Claim No. CC-79-114 is disallowed.

Opinion issued May 11, 1981

LARRY ALLEN BAYER

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-327)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

On August 19, 1980, at about 2:00 p.m., the claimant was operating his Oldsmobile automobile in a southerly direction on Kites Run Road in Wood County, West Virginia. Kites Run Road in this area is a one-lane gravel road, about 10 feet wide, maintained by the respondent. Near the road, to the west, is a creek that frequently overflows its banks. To the east of the road is an embankment that has slid partially into the road due to the washing action of the overflowing water from the creek. Additionally, the overflowing waters have created a ditch across Kites Run Road measuring 14 to 16 inches in depth.

The claimant testified that he had frequently called respondent's headquarters in Parkersburg to complain about the condition of the road, and was told, in effect, that the respondent was not going to do any more to the road. The Department of Highways had actual notice of the condition of the road, but the claimant, too, was fully aware of the condition, and in fact had proceeded through this area earlier in the day. Nevertheless, that afternoon, while traveling at a speed of 10 to 15 miles per hour, the claimant struck the ditch in the road and ruined two tires, incurring an expense of $131.01 for comparable replacements.

There is little doubt that the respondent was negligent in its maintenance of Kites Run Road, but the Court believes that the claimant, with his prior knowledge of the road's condition, was likewise negligent. Under the doctrine of comparative negligence, the Court allocates negligence as follows: claimant, 20%, respondent, 80%. Reducing the claimed damages by 20%, the Court makes an award in favor of the claimant in the amount of $104.81.

Award of $104.81.

Opinion issued May 11, 1981

DAYTON C. BEARD and
JEANNE BEARD

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-412)

Claimant, *Jeanne Beard,* appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

On November 21, 1980, at about 7:30 p.m., the claimants were proceeding in an easterly direction on Seventh Avenue near 35th Street in Charleston, West Virginia. It was dark, but the weather conditions were normal. Mr. Beard was operating their 1977 Oldsmobile at a speed of about 30 miles per hour, and Mrs. Beard was seated in the front passenger seat. Seventh Avenue near 35th Street is a four-lane highway, the two lanes for eastbound traffic separated from the two westbound lanes by a median strip.

Apparently, some construction work was taking place in the area, for both inner lanes were blocked off, and east and westbound motorists were limited to one lane of traffic, which was the outer, or right, lane.

Although there was traffic immediately in front of claimants, obscuring Mr. Beard's vision, the left front wheel of their car struck a pothole located in the left portion of their lane of travel. After the accident, the claimants examined the hole, and Mrs. Beard testified that it was about 2 1/2 feet wide and 4 to 6 inches deep. According to Mrs. Beard, the wire mesh reinforcing material was visible in the bottom of the hole. As a result of striking this hole, the claimants incurred a total expense of $48.98. Mrs. Beard also testified that her husband drove Seventh Avenue on a daily basis to and from his place of employment in Charleston; however, Mr. Beard neither testified nor appeared at the hearing, and, consequently, there is no evidence in the record which would indicate his prior knowledge, or lack thereof, of the existence of this particular hole. Claimants further failed to establish that the respondent knew or should have known of the existence of this pothole prior to the subject accident.

The Court is of the opinion that the claimants have failed to carry the burden of proof necessary to establish a prima facie case of liability against the respondent. Therefore, the claim must be denied.

Claim disallowed.

Opinion issued May 11, 1981

DAVID A. CAMPBELL

and

HOBERT A. CAMPBELL

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-176)

Robert V. Berthold, Jr., Attorney at Law, for claimant.

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

RULEY, JUDGE:

On March 10, 1979, claimant David A. Campbell was operating a 1974 Porsche 911 Targa automobile on State Route 39 near Swiss in Nicholas County, West Virginia. The automobile was titled in the name of Campbell's Coal Company, owned by claimant's father, Hobert A. Campbell. Claimant David A. Campbell testified that it had begun to rain, to sprinkle, after he left Charleston. He was traveling between 20 and 25 miles per hour, and accelerated to 45 or 50 miles per hour in attempting to pass the vehicle in front of him. As claimant drove up beside this vehicle, he saw a large pothole in the passing lane. It was too late to stop his car, and claimant hit the hole, lost control of the vehicle, hit an embankment, went off a 35-40 foot cliff, and landed on his wheels on a railroad track.

David A. Campbell suffered personal injuries as a result of this accident, and the automobile was a total loss. The parties in this claim have filed a written stipulation with the Court, indicating that claimant incurred medical expenses in the amount of $2,187.60, and towing and storage charges for the automobile in the amount of $350.00. Claimant Hobert A. Campbell testified that his insurance company paid, for the damage to the car, the sum of $11,000.00, allowing claimant the salvage value.

Testifying on behalf of the respondent was Claude Blake, a claims investigator. Mr. Blake stated that the following signs were posted along Route 39: a "Rough Road" sign 3.6 miles from the scene of the accident, a "Road Work Ahead" sign 3.5 miles from the accident site, and a speed sign showing 40 miles per hour and a curve arrow, located in the vicinity of the pothole in question.

Lloyd Sanford, another claims investigator, testified that the signs indicating "Road Work Ahead" and "Rough Road" were placed along Route 39 on February 28, 1979. Gilbert L. Forren, a highway maintenance engineer, stated that a pothole problem existed on Route 39 every winter due to heavy truck traffic and the freezing and thawing of the pavement. He further stated that the Department of Highways had begun patching work on Route 39 in February of 1979.

It is well established in the law of West Virginia that the State cannot and does not guarantee the safety of motorists upon its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). However, the respondent does owe a duty of exercising reasonable care and diligence in the maintenance of the highways.

It is the opinion of this Court that the respondent has met its duty of reasonable care under the circumstances of this case. Adequate warning signs were placed by the respondent in the area of claimant's accident, and repair work had begun the month before the accident. Claimant, however, did not use reasonable care in the situation. He was traveling on a wet, two-lane road along which warning signs were evident, yet he attempted to pass a vehicle, which required an acceleration beyond the posted speed limit. For the foregoing reasons, the claim must be denied.

Claim disallowed.

Opinion issued May 11, 1981

LEONARD A. CERULLO

vs.

ALCOHOL BEVERAGE CONTROL COMMISSIONER

(CC-80-390)

No appearance by claimant.

Gene H. Williams, Deputy Attorney General, for respondent.

GARDEN, JUDGE:

During the June, 1980 term of the Circuit Court of Marion County, the grand jury returned a felony indictment against the claimant, an employee of the respondent, for allegedly violating

the State election laws. As a result, the Alcohol Beverage Control Commissioner, Norwood Bentley, III, suspended the claimant without pay as of June 5, 1980. At the time of his suspension, the claimant had been an employee of the respondent for 19 1/2 years and had advanced to the position of manager of State Store Number 100 in Fairmont. On September 15, 1980, the claimant voluntarily resigned from his position. The claimant was thereafter found not guilty of the felony charge, by a jury in the Circuit Court of Marion County, on October 17, 1980.

Claimant contends that his suspension on June 5, 1980, was improper and that the Commissioner had no jurisdiction to take such action. The claimant is thus seeking an award of $4,271.52, representing the total amount he would have earned from June 5, 1980, to September 15, 1980. In addition, during this period the claimant paid a total of $287.72 in health insurance premiums which would have been paid by the respondent had claimant not been suspended, and he is seeking recovery of this amount. Respondent, in its Answer, admits the allegations of the Notice of Claim, but further alleges that suspension of the claimant was necessary after the indictment was returned against him.

This Court has been unable to find any decision of the West Virginia Supreme Court of Appeals relating to the issue presented in this claim, and none has been presented to us by counsel for the respondent. Had the claimant been a "classified service" employee as defined in Code 29-6-2, he could have very easily appealed his suspension to the Civil Service Commission pursuant to Code 29-6-15. Then, if the Commission found that the suspension was without good cause, it could, among other things, return the claimant to his former position without loss of pay. However, managers and clerks of liquor stores are not covered by Civil Service; as a matter of fact, Code 29-6-4 specifically prohibits them from being so covered. There is no comparable statutory provision establishing an appellate procedure for the dismissal, demotion, or suspension of a State employee who is not covered by Civil Service.

The Commissioner advised the claimant of his suspension by letter dated June 5, 1980, stating that the reason for the suspension was claimant's arrest on a felony charge for violation of the election laws. In that letter, the Commissioner also quoted, in part, Section 4.18 of the General Rules and Regulations of the West Virginia Alcohol Beverage Control Commissioner as follows:

"(a) Employees of state Alcohol Beverage Control Commission stores and agencies will be expected at all times, on duty and off, to conduct themselves with propriety, and (b) Employees committing a breach of law... may be suspended... while a report is made to the central office for investigation..."

The Commissioner further advised that, as a direct violation of these regulations, the claimant was suspended for a period of six (6) months or until such time as the pending charge was resolved.

We believe that the respondent, in suspending the claimant on June 5, 1980, shortly after his arrest, acted permaturely and without jurisdiction. The arrest of anyone for the commission of a felony or any other crime is not tantamount to a conviction. The words of the Rules and Regulations, "committing a breach of law," must be interpreted to include a conviction for such breach of law. A mere accusation of a felony charge is and was not sufficient to trigger the respondent's suspension authority. For these reasons, an award is made in favor of the claimant in the amount of $4,559.24.

Award of $4,559.24.

Opinion issued May 11, 1981

GEORGE M. COOPER

vs.

ADMINISTRATIVE OFFICE OF THE SUPREME COURT OF APPEALS

and

OFFICE OF THE STATE AUDITOR

(CC-80-287)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In February of 1980, the claimant, an attorney at law, was assigned by the Judge of the Circuit Court of Gilmer County to represent Kenneth Eugene Murphy and Kenny Drew Sayre both of whom were charged with the commission of felonies, the

appointments having been made pursuant to the provisions of Article 11 of Chapter 51. At the conclusion of the respective representations the claimant presented itemized vouchers and affidavits reflecting that at the hourly rates as set forth in Code 51-11-8 he was entitled to fees of $2,027.50 in the Murphy matter and $1,352.50 in the Sayre matter. Respondent however paid the claimant only $1,000.00 in each matter pursuant to Code 51-11-8 which reads in part as follows:

> "In each case in which an attorney is assigned under the provisions of this article to perform legal services for a needy person, he shall be compensated for actual and necessary services rendered at the rate of twenty dollars per hour for work performed out of court, and at the rate of twenty-five dollars per hour for work performed in court, *but the compensation for services shall not exceed one thouand dollars...*". (Emphasis supplied.)

Claimant is seeking an award for the difference between his fees based on the hourly rates as set out above and the $1,000.00 fee actually paid to him by the respondent in each of these matters. While claimant recognizes the provision of the statute relating to the maximum of the fee, he argues that the number of hours devoted by him to these matters requires this Court in the exercise of equity and good conscience to make an award. While it is true that jurisdictionally this Court can make awards when equity and good conscience dictate the same, this Court does not perceive that equitable principles can justify the circumvention of the plain and unambiguous language of the above quoted statute.

Claim disallowed.

Opinion issued May 11, 1981

JAMES H. CURNUTTE, JR.
and DEBORAH L. CURNUTTE

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-176)

Claimants appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimants received an award in the sum of $4,604.73 for damage to their real property in *Curnutte v. Dept. of Highways*, 12 Ct.Cl. 290 (1979).

In the present claim, the claimants seek $3,640.00 for additional damages for out-of-pocket expenses, including $2,500.00 for annoyance and inconvenience caused by the respondent's delay in repairing Buffalo Creek Road.

The respondent, as part of its Answer to the claim filed by the claimants, invoked the affirmative defense of res judicata. The respondent raised, by motion, the same defense at the beginning and at the end of the hearing on the basis that the present claim is based on the same negligence of the respondent in the prior hearing, and the award made in that hearing bars any further award.

From the record the Court is of the opinion that under the doctrine of res judicata the claimants are barred from recovering additional damages by the former adjudication.

"An adjudication by a court having jurisdiction of the subject matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits..." *Sayre's Admin'r v. Harpold, et al.*, 33 W.Va. 553, 11

S.E. 16 (1890); *In re Estate of McIntosh, Sr.*, 144 W.Va. 583, 109 S.E.2d 153 (1959).

Accordingly, this claim is disallowed.

Claim disallowed.

Opinion issued May 11, 1981

ARLEY DON DODD

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-383)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

On September 5, 1980, at about 10:45 p.m., the claimant, Arley Don Dodd, was operating his 1976 Chevrolet van in a westerly direction on Secondary State Route 43 approximately 5 miles north of Frame in Kanawha County, West Virginia. Route 43 in this area is a narrow, two-lane, blacktop road. The claimant testified that, with the exception of a little fog, the weather conditions for that time of the year were normal. Mr. Dodd, accompanied by his wife, was travelling at a speed of 25 miles per hour en route to his home in Elkview. As an approaching vehicle was about to pass, Mr. Dodd moved to the right, very close to the edge of the blacktop. Suddenly, he struck a large rock located on the berm about one or two inches from the blacktop. The claimant testified that he had seen this particular rock, which was five to six feet in length and one to one and one-half feet in height, on prior occasions, but its presence was obscured on the night of the accident by high weeds.

As a result of the accident, three tires and three rims on the van were destroyed, the vehicle was knocked out of alignment, and the transmission was damaged. Bills and estimates were introduced into evidence reflecting cost of repairs totalling $351.74. After the accident, the claimant was taken by ambulance to the Charleston Area Medical Center where he was examined, treated, and released. No claim was asserted for personal injuries, but the claimant did incur an ambulance charge of $55.62 and a hospital

bill of $126.50. Thus, Mr. Dodd's out-of-pocket expenses amounted to $533.86.

The claimant contends that the respondent, in its regular maintenance of the road, had deposited the rock near the edge of the road and permitted it to remain there in spite of many complaints by residents of the area. Respondent, on the other hand, denies placing the rock in that position and asserts that the claimant was guilty of contributory negligence. No admissible evidence was introduced at the hearing to establish that the respondent had placed the rock in its position near the edge of the road or had received complaints about it. Kay Wehrle, testifying on behalf of the claimant, stated that she resided in the area of the accident and that the rock had been in its position near the edge of the road for about one year. The claimant's wife, Evelyn Dodd, confirmed her husband's testimony as to the location of the rock. Calvert Mitchell, testifying on behalf of the respondent, said that he was employed by the respondent as general foreman in the area between Elkview and the Clay County line, an area which would embrace the accident scene. Mr. Mitchell testified that, although he was thoroughly familiar with the area in question, he had never seen the subject rock in the particular location testified to by the claimant and his witnesses.

The Court is of the opinion that the claimant has established by a preponderance of the evidence that, while the respondent did not have actual notice of the existence and location of the rock, it certainly, over a period of one year, had constructive notice. The failure of the respondent to remove this rock constituted negligence. By the same token, the claimant, having prior knowledge of the location of the rock and failing to avoid striking it, is likewise guilty of some negligence. Under the *Bradley* doctrine, we would assess 80% negligence to the respondent and 20% to the claimant. Acocordingly, an award is made to the claimant in the amount of $427.09.

Award of $427.09.

Opinion issued May 11, 1981

CYNTHIA DONAHUE

vs.

BOARD OF REGENTS

(CC-80-108)

PATSY SPATAFORE

vs.

BOARD OF REGENTS

(CC-80-109)

No appearance by claimants.

Ann V. Dornblazer, Assistant Attorney General, for respondent.

GARDEN, JUDGE:

These two claims were submitted for decision on the pleadings and exhibits attached thereto. They have been consolidated for decision purposes because of the similarity of facts and the identical issue of law.

Claimant Cynthia Donahue was employed by the respondent at West Virginia University as a Clerk II at a salary of $562.00 per month. On November 1, 1979, she was promoted to the position of Chief Accounting Clerk at a salary of $736.00 per month, and she immediately assumed her new duties. Her supervisor was discharged shortly thereafter, and the paperwork to effect her promotion was delayed. As a result, the claimant did not receive a paycheck commensurate with her promotion until January 1, 1980. Claimant seeks an award of $348.00, representing the difference in salary between the two positions for the two-month period.

Claimant Patsy Spatafore was likewise employed by the respondent at West Virginia University as an Accounting Clerk II at a salary of $874.00 per month. On November 1, 1979, she was promoted to the position of Business Manager at a salary of $1,371.00 per month. Again, the necessary paperwork was not processed in a timely fashion, and the claimant did not receive a paycheck representing her salary increase until January 1, 1980. The claimant therefore seeks an award of $994.00, representing the difference in salary between the two positions for the two-month period.

Dr. Gene A. Budig, President of West Virginia University, directed a letter, dated February 12, 1980, to the Attorney General's office confirming the facts set out above. The respondent, in its Answers, likewise admitted the facts as stated. However, the respondent also filed, as an exhibit, a copy of an Attorney General's advisory opinion letter dated December 2, 1977, directed to the Chairman, Joint Committee on Government and Finance, indicating that retroactive pay increases are illegal after the services have been rendered. The letter cited as authority Article VI, Section 38 of the Constitution of West Virginia, and Code 6-7-7.

Initially, we would point out that we do not consider this Court to be bound by advisory opinions of the Attorney General. More importantly, we do not feel that making awards in these claims would constitute an illegal retroactive pay increase. These promotions, with their attendant salary increases, became effective on November 1, 1979, and on that date the claimants entered into their new positions, which no doubt carried with them increased responsibilities. We believe that the intent of the constitutional and statutory provisions was to prevent the giving of merit salary increases which are retroactive for any given period of time, and, possibly, to prevent "lame duck" retroactive salary increases.

These claimants performed and carried out the duties of their new positions for the two-month period in question. To deny them awards would be inequitable and would constitute unjust enrichment to the State. Awards are therefore made to the claimants in the amounts requested.

Award of $348.00 to the claimant, Cynthia Donahue.

Award of $994.00 to the claimant, Patsy Spatafore.

Opinion issued May 11, 1981

KENNETH E. DUSKEY and
LOIS V. DUSKEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-182)

Claimants appeared in person.

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

WALLACE, JUDGE:

The claimant filed this claim against the respondent for damages sustained to his automobile.

On Saturday, March 8, 1980, at approximately 6:30 p.m., the claimant was driving his 1977 Pontiac Catalina automobile on Rosemar Road between Route 68 north and Route 14 in Vienna, West Virginia. Accompanied by his wife, he was proceeding to the Grand Central Mall. It was dark and rainy. Rosemar Road is a two-lane blacktop access road to the mall. The claimant testified that he was travelling at approximately 20 miles per hour. While attempting to avoid hitting a puddle of water, which he thought to be a pothole, the right rear wheel of his vehicle struck a pothole causing damages in the amount of $188.37.

The record revealed that the claimant did not travel the road frequently and did not know the hole existed.

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 the highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947); *Parsons v. State Road Comm'n.,* 8 Ct.Cl. 35 (1969). For negligence of the respondent to be shown, proof of actual or constructive notice of the defect in the road is required. *Davis Auto Parts v. Dept. of Highways,* 12 Ct.Cl. 31 (1977). There is no evidence in the record of any notice to the respondent, and the simple existence of a defect in the road does not establish negligence per se. See *Bodo v. Dept. of Highways,* 11 Ct.Cl. 179 (1977); *Light v. Dept. of Highways,* 12 Ct.Cl. 61 (1977). Since negligence is not proven, this claim must be denied.

Claim disallowed.

Opinion issued May 11, 1981

ERNIE E. ELLER, ADMINSTRATOR OF THE ESTATE OF ISAAC ELLER

(CC-78-10a)

ERNIE E. ELLER, ADMINISTRATOR OF THE ESTATE OF SHIRLEY FAYE ELLER

(CC-78-10b)

ERNIE E. ELLER, ADMINISTRATOR OF THE ESTATE OF ROSA LEE ELLER

(CC-78-10c)

ERNIE E. ELLER, ADMINISTRATOR OF THE ESTATE OF ISAAC JAMES ELLER

(CC-78-10d)

vs.

DEPARTMENT OF HIGHWAYS

A. David Abrams, Jr., Attorney at Law, for claimant.

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

WALLACE, JUDGE:

These claims resulted from the same accident and were consolidated for hearing. It was agreed that the testimony be bifurcated and the matter of liability be determined initially.

Ernie E. Eller is the administrator of the Estates of Isaac Eller, Shirley Faye Eller, Rosa Lee Eller, and Isaac James Eller. All of the claimant's decendents died in the same accident on January 25, 1976. On the day of the accident, the claimant's decedents and Myrl Inez Eller, the only survivor of the accident, were proceeding in a pickup truck southerly on U.S. Route 19/41 in the vicinity of McCreery and Prince, West Virginia. Myrl Inez Eller told the State trooper who investigated the accident that her stepfather, Isaac Eller, was driving the vehicle. It was approximately 6:00 p.m. and the road was dry. Route 19/41 is a two-lane blacktop highway eighteen feet wide. The road at the scene of the accident is relatively straight. The driver of the vehicle was familiar with the road, having driven it on numerous occasions.

It is the contention of the claimant that the Eller vehicle struck a pothole on the right side of the highway next to the berm, causing the driver to lose control. The truck proceeded through guard posts and over the bank into the New River, drowning the occupants.

Myrl Inez Eller and her sister were riding in the back of the truck under a sleeping bag. Myrl was thrown out of the vehicle and survived. In her evidentiary deposition, when she was asked how the accident occurred, Myrl testified:

"Q. ...describe as best you can to me how the accident happened.

A. I really don't know. All I remember was hearing the railroad tracks, but it wasn't railroad tracks. I mean thinking it was railroad tracks, but it wasn't.

Q. Okay. Why don't you explain?

A. Well, me and my sister were in the back, and we were laying down under a sleeping bag, and I don't know, I do remember hearing railroad tracks, but they weren't railroad tracks. It was going over the hill, but I thought it sounded like railroad tracks. It sounded like something, you know, hitting something going over."

She further testified, "there was one big bump and then...I don't know, kind of like we was going over something."

Trooper B. A. Vaughan of the West Virginia Department of Public Safety investigated the accident. He was able to locate the vehicle by following its course from the pothole through the underbrush to the river. One guard post had been uprooted by the truck. He testified that he traveled Route 19/41 frequently in the course of his duties, and that there were potholes in the highway, but he had never seen the particular one which, it is alleged, the truck hit. Trooper Vaughan stated that he had no knowledge that the pothole had been reported to the respondent.

James Robert Ramsey testified that he had struck this particular pothole on November 23, 1975, but he did not report it to the respondent.

Since the case of *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2nd 81 (1947), the law is well established in West Virginia that the State is not an insurer of the safety of a traveler on its highways. See also *Parsons v. State Road Commission,* 8 Ct.Cl. 35 (1969); *Lowe v. Dept. of Highways,* 8 Ct.Cl. 210 (1971). Anyone who sustains damage must prove that the neglience of the State caused the damage in

order for the State to be liable. There is nothing in the record in the instant case to show that the respondent had noted any dangerous condition in the highway, nor was there any evidence that the existence of the pothole was the proximate cause of the accident and the resulting deaths. The accident could have occurred as the result of many other circumstances, and not solely by reason of the existence of a pothole. See *Jeter v. Dept. of Highways,* 11 Ct.Cl. 154 (1976); *Riffle et al. v. Dept. of Highways,* 11 Ct.Cl. 244 (1977).

The Court is not unmindful of the terrible tragedy involved in this case, nor of the inherent impulse for compassion. However, we believe that our findings and our view of West Virginia law require the disallowance of these claims. On the basis of the record, we find that the claimant has failed to carry the burden of proof. Accordingly, these claims are disallowed.

Claims disallowed.

Opinion issued May 11, 1981

HOBERT FRIEL

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-81)

William C. Miller, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

The claimant is the owner of property, located on the west side of Route 15 north of Marlinton in Pocahontas County, upon which he constructed a home, moving into it on Christmas Day, 1961. The elevation of claimant's home is about three feet below the elevation of Route 15, which, in this area, is a one-lane asphalt road about ten feet in width, straight, and relatively level. On the east side of Route 15 the ground is fairly level, but the natural drainage is to the west and into a ditch line located on the east side of Route 15. From this ditch line, surface water would flow to a culvert and then through a drainpipe installed beneath Route 15. The lower end of the drainpipe would then discharge the surface water down over a hill south of the claimant's home.

The claimant testified as to the manner he had consructed his basement and the various drain tiles that he had installed around the footers. The basement of the home had been finished and a bedroom, kitchen, and living room were located there. The home obviously had been properly constructed, for no trouble with surface water had been experienced from 1961 until the spring of 1977 when the claimant noticed dampness on the interior of his front basement wall on the north side of his home. In the spring, following the severe winter of 1977-78, the claimant testified that, in addition to the continuing dampness, a large crack in the cinder blocks had developed along the entire south side of the basement. On Easter Sunday, as a result of a heavy rain, surface water flooded the basement, and the claimant further testified that this condition recurs following every heavy rain.

The claimant and his wife clearly established, through their testimony, that in the fall of 1976 the respondent dumped dirt in the ditch line on the east side of Route 15. The exact number of loads was not specified, but both testified that the volume was sufficient to fill the former ditch line. As a result of this filling, surface water, instead of flowing into the ditch line and then into the culvert and drainpipe, would simply flow across Route 15 onto claimant's property and then down to and against the home, causing the problems in the basement. Claimant, a retired employee of the respondent, stated that soon after this filling had taken place, he had spoken to one of the respondent's foremen at the Marlinton headquarters, Cammy Wade, and advised him that the filling operation might cause a drainage problem. After the initial flooding, Mr. and Mrs. Friel complained to respondent's employees, but no attempt was ever made by respondent to reopen the former ditch line.

Claude Blake, a claims investigator for respondent, testified that he visited the area on September 4, 1979, and took various photographs which were introduced into evidence. However, as that was his first and only trip to the area, Mr. Blake was unable to testify as to whether or not a ditch line had previously existed on the east side of Route 15. Mr. Blake did testify that there was a ditch line further south of the area on the east side of Route 15. The photographs vividly reflect that the ditch line had been filled and that grass had been planted and mowed almost to the east edge of the pavement of Route 15, presumably by the owner of the property on the east side of the road. Ray Corbett, a machine

operator for respondent, testified that he had participated in pulling this particular ditch line some four years earlier, but he admitted that about a month before the hearing, he had been in the area, and it appeared that someone had dumped dirt in the former ditch line.

The respondent is under a legal duty to use reasonable care to maintain ditch lines in such condition that they will carry off surface water and prevent it from being cast upon the property of others. *Stevens v. Dept. of Highways,* 12 Ct.Cl. 180 (1978), *Taylor v. Dept. of Highways,* 12 Ct.Cl. 261 (1979). We believe that satisfactory proof was introduced at the hearing to establish that, not only did respondent fail to properly maintain the ditch line, but it did, in fact, take affirmative action to destroy the ditch line, resulting in damage to claimant's home. Evidence was presented that it would cost $3,500.00 to make the necessary repairs to claimant's home, and an award to claimant in that amount is hereby made.

Award of $3,500.00.

Opinion issued May 11, 1981

NANCY C. GRAHAM

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-316)

Claimant appeared in person.

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

RULEY, JUDGE:

On July 30, 1980, at about 1:30 p.m., the claimant was riding in her 1965 Buick automobile which was being driven by her nephew, David Brady Bragg. Earlier, the claimant had visited her doctor in Hinton, and was being driven to her home in Sandstone. They were proceeding in an easterly direction on Route 7, a narrow, one-lane, blacktop road which the claimant estimated to be the width of a large car and which her nephew estimated to be 10 to 12 feet wide. The speed of the claimant's vehicle was between 10 and 20 miles per hour when they entered a blind curve. Suddenly, they met a westbound vehicle which forced them partially out of the eastbound lane.

As a result, the right wheels of the claimant's vehicle struck, in quick succession, four potholes located on the berm but in close proximity to the improved portion of Route 7. According to the claimant, one of the holes was 18 to 19 inches in diameter and 8 inches in depth. While the claimant testified that she was aware of the existence of the holes, since they had been present in the berm since the preceeding winter, she had never notified or complained to the respondent about these holes prior to the accident. Young Bragg, on the other hand, testified that he had no prior knowledge of the existence of the holes.

According to the claimant, the impact of striking the holes caused the left rear wheel of her vehicle to "flew out", destroying the bearing and exposing the brake shoes. Claimant introduced into evidence various bills reflecting that a total expense of $237.27 was incurred by her in order to restore her car to running condition and to compensate her for lost wages in an amount of $70.50 due to a lack of transportation to work.

Berms are constructed along roads for various purposes, one of which is to provide a haven for vehicles when drivers are confronted with emergency situations, such as that which occurred in this case. As a result, a duty has devolved upon the respondent to exercise ordinary care to maintain berms in a reasonably safe condition. However, in order to predicate liability upon the respondent for a defective berm, it is necessary to establish that the respondent knew or should have known of the defective condition. In the instant case, no evidence was introduced which would establish that the respondent had actual knowledge of the condition of this berm, and there was no attempt to establish that this road was heavily travelled, which evidence would tend to indicate that the respondent should have been aware of the condition of this particular berm. As a matter of fact, the evidence of the narrowness of this road would certainly seem to indicate the contrary. For these reasons, the Court must deny this claim.

Claim disallowed.

Opinion issued May 11, 1981

ALEX HULL

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-238)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimant seeks compensation from the respondent for damages sustained to his boat trailer after striking a pothole.

The claimant lives south of Chelyan, West Virginia, on W.Va. Route 61/3. At approximately 2:30 p.m. on April 6, 1980, he drove out of his driveway and proceeded southerly on Route 61/3, pulling his boat on a trailer. There was a pothole extending from the berm into the highway approximately 12 inches and located 126 feet south of his driveway. The claimant testified that he drove into the hole at two miles per hour and that the trailer sustained damages in the amount of $328.00. The claimant further testified that he travelled the road daily and knew of the existence of the hole. He further testified that he had called the respondent many times, but quit calling when no action was taken to remedy the road condition.

The State is neither an insurer nor guarantor of the safety of persons travelling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For negligence of the respondent to be shown, proof of notice of the defect in the road is required. *Davis Auto Parts v. Dept. of Highways*, 12 Ct.Cl. 31 (1977). In this case the claimant testified that he had reported the road condition on numerous occasions and no action was taken. This was not denied by the respondent. However, the Court believes the claimant, with his prior knowledge of the road's condition, was likewise negligent. He travelled the road daily and knew of the existence and location of the pothole which he drove into. Under the doctrine of comparative negligence, the Court is of the opinion that the claimant's negligence was equal to or greater than the respondent's and disallows the claim. See also *Bayer v. Dept. of Highways*, 13 Ct.Cl. 388 (1981).

Claim disallowed.

Opinion issued May 11, 1981

COLLIE JETER, GUARDIAN OF
KERMIT JETER and KERMIT JETER

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-183)

Martin J. Gaughan, Attorney at Law, for claimant.

Henry Haslebacher, Attorney at Law, for respondent.

WALLACE, JUDGE:

On May 26, 1977, at about 5:30 p.m., David Jeter, aged 18, was operating an automobile belonging to his father, Collie Jeter, in an easterly direction on Alternate Route 22 in the City of Weirton in Hancock County, West Virginia. He was accompanied by his brother, Kermit Jeter, aged 13, who was seated on the passenger side of the front seat. The right front window was down, and young Jeter had his right arm resting on the windowsill with his elbow protruding from the car. Alternate Route 22 is a three-lane road, with two lanes reserved for traffic moving uphill or in an easterly direction, and one lane for traffic moving downhill or in a westerly direction. As a motorist proceeds in an easterly direction or uphill, an almost vertical wall of stone and rock is passed. The evidence established that this wall is about 10 feet from the paved portion of the right-hand, eastbound lane, and is about 50 feet in height.

As David Jeter was passing this area, a large boulder became dislodged from the cliff and struck the hood of the car, the right front door, and the center post of the car. Unfortunately, it also struck the claimant, Kermit Jeter, in the right arm, fracturing it at the wrist and elbow. The testimony indicated that the boulder apparently split when it struck the car, and only half of it was found in the back seat of the car. It was estimated that the half found in the car was about 2 1/2 feet in diameter and was too heavy to be removed by one man.

A passing City of Weirton policeman was flagged down. He took young Jeter to the hospital, where the boy was confined for a period of two days. During that time, the fractures were reduced, and his right arm was placed in a cast. The claimant, Kermit Jeter, testified that the cast remained on his arm for seven weeks, during

which he experienced pain. After the cast was removed, he was restricted in his activity for a period of three weeks. No evidence was presented to establish any permanent injury, and young Jeter testified at the hearing that he was not experiencing any problems with this right arm. Total medical expenses in the amount of $703.90 and damage to claimant Collie Jeter's car in the amount of $1,586.00 were stipulated.

Cathy Sobel, the senior clerk in respondent's Hancock County headquarters, testified that she had reviewed all her records during the month of May, 1977, and that they failed to reveal that any complaints of falling rocks had been received. She did indicate that during her 9 1/2 years as an employee of the respondent, road crews would, on occasion, be required to pick up a few rocks that had fallen along Alternate Route 22. Elmer Shepherd, respondent's general foreman in Hancock County, testified that the respondent had not conducted any activities, construction or otherwise, in the area of the accident scene, which could have precipitated the falling of the subject rock; that he was familiar with the area of the accident; and that "Falling Rock" signs had been erected immediately to the east and west of the scene. Mr. Shepherd further stated that no regular patrols were assigned to check roads in Hancock County for the possibility of falling rocks, but that he, his superintendent, and his foreman did, in the course of their regular activities, act as patrols for any impending dangers.

In *Hammond v. Department of Highways,* 11 Ct.Cl. 234 (1977), this Court held, "The unexplained falling of a rock or boulder onto a highway, without a positive showing that the Department of Highways knew or should have known of a dangerous condition and should have anticipated injury to person or property, is insufficient... to support an award." Likewise, in *Collins v. Department of Highways,* Claim No. CC-79-41 (1979), a recovery was denied when a rock fell from an embankment and struck the claimant's car.

Counsel for the claimants, in order to distinguish the present factual situation from those in the claims cited above, called John L. Velegol, Jr., as a witness. Mr. Velegol testified that he was a licensed surveyor in the State of West Virginia, and that he had done excavation and strip mining work. He stated that he had visited the accident scene and made certain measurements which revealed that the rock wall was about 50 feet high and practically vertical, and that the wall consisted essentially of three areas. The

lower third consisted of sandstone, the middle third, shale, and the upper third, sandstone. According to the witness, the layer of shale had become oxidized and had eroded away in small pieces, thus removing the support for the top layer of sandstone. It was from this area that the large boulder had broken away, striking the claimant's car and the claimant, Kermit Jeter. The witness further stated that, in order to prevent events such as the one which occurred in this claim, the respondent could have constructed a retaining wall 100 feet high along the entire face of the rock wall. In the alternative, a masonry wall could be constructed over the face of the shale and thus shield the shale from the weather's eroding effect.

Counsel for the claimants introduced into evidence various excerpts from the West Virginia Department of Highways Maintenance Manual. The Manual sets forth various methods for controlling rock falls, such as the formation of a bench in dangerously cut slopes, the removal of overhanging rock fragments before they are dislodged by natural forces, the construction of a masonry wall as referred to above, and finally, the erection of wire mesh fencing of suitable height to stop falling rocks before they can reach the road. The Manual also provides that, while the standards set forth are established, it is possible that such factors as volume and type of traffic, limitations on funds, or local conditions might render exact compliance with the standards impractical. Considering the thousands of comparable areas existing in this State, where rock falls might take place, and the millions of dollars that would have to be spent in order to comply with the Manual, we are not prepared to hold that the failure of the respondent to strictly comply with those standards constitutes negligence. See generally *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947), *Lowe v. Department of Highways,* 8 Ct.Cl. 210 (1971).

The Court is of the opinion that the claimants have failed to establish by a preponderance of the evidence that the respondent, on May 26, 1977, knew or should have known that a dangerous condition existed on Alternate Route 22 in the City of Weirton. Therefore, the respondent was not guilty of negligence, and without proof of actionable negligence, there can be no recovery.

Claims disallowed.

Opinion issued May 11, 1981

DR. LOURDES LEZADA

vs.

DEPARTMENT OF HEALTH

(CC-79-305)

Robert C. Chambers, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GARDEN, JUDGE:

The claimant, a physician, was first employed by the respondent in 1973 as a staff physician at the Huntington State Hospital, but in April of 1975 she was transferred to the Barboursville State Hospital in a similar capacity. This transfer was necessitated by a severe shortage of physicians at the latter institution. Soon after claimant's arrival at Barboursville in June of 1975, another staff physician, a Dr. Sebastion, suffered a stroke and had to take sick leave. As a result, the claimant was the only staff physician at Barboursville. Consequently, in addition to performing her regular duties, she was on call each day for 24 hours, including weekends and holidays. This continued through August of 1975, when an additional staff physician was assigned. Even after that date, the claimant, on many occasions, was required to be on call beyond what was ordinarily required of her until November of 1977. It was undisputed at the hearing that during this period of time the claimant had accumulated 838 hours of unpaid compensation.

At that time, the regulations of the West Virginia Civil Service System were virtually silent in respect to overtime compensation for professional employees, as were the provisions of the U.S. Department of Labor with regard to executive, administrative, and professional employees. As a result, the respondent's Deputy Director, James R. Clowser, issued a directive on September 1, 1975, for the purpose of establishing guidelines for compensatory time off for professional employees, which provided, in part, as follows:

> "4(c)**Twenty-four hour on-call duty on weekends (Saturday or Sunday) entitles the employee to Friday or Monday off. (A given physician does not have to be on call for the entire weekend.)

**Apply only to Physicians. For those unusual circumstances in which there may be only one or two Physicians on the staff, other compensatory time arrangements will be needed. Such arrangements are to be reviewed and approved by the lcoal Superintendent or Administrator and by the Director and Deputy Director."

Claimant testified that she had discussed her situation with many of her superiors, including respondent's Director, Dr. Mildred Bateman, and Deputy Director, James R. Clowser, and had been assured that she would be paid for her overtime hours. Nothing in writing to this effect was introduced into evidence. To the contrary, George Pozega testified that he was Superintendent at Barboursville State Hospital from November of 1972 to January 15, 1979, and stated that he was unaware that any arrangement with the claimant had been made in accordance with the Deputy Director's directive. However, Mr. Pozega readily admitted that the claimant had worked many overtime hours and had been on call during weekends and holidays.

The Court is of the opinion that to deny this claim would have the effect of unjustly enriching the respondent, and that the claim is one which certainly, in equity and good conscience, should be paid. The 838 days divided by the usual 40-hour work week would reflect unpaid overtime for a period slightly in excess of 5 months. Since the claimant testified that she was earning $1,200.00 per month during the period in question, an award of $6,000.00 is hereby made.

Award of $6,000.00.

Opinion issued May 11, 1981

WILLIAM R. MILLER and
CAROLYN MILLER

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-518)

William C. Miller, II, Attorney at Law, for the claimants.

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

RULEY, JUDGE:

The claimants in this case seek recovery of $4,070.00 for damages to their dwelling house located at 1590 Alexandria Place, in Charleston, caused by surface water in the year 1979.

Alexandria Place is located upon a hillside. The claimants' dwelling house was built in 1971. Connell Road, a public road, then was and still is located upon the hillside above the dwelling, a distance of more than 100 feet. That the house was damaged by water which, at times in 1979, flowed down the hillside in a stream, is not disputed. But it also is undisputed that Connell Road now exists just as it did before the house was built with the exception of the circumstance that a slide or slip upon its downhill side exists at a point above a nearby dwelling, the construction of which involved excavation into the hillside about 45 feet from and below the road. Connell Road is and has been ditched along its uphill side but not on its downhill side, and the evidence is undisputed that such is customary engineering practice.

West Virginia adheres to the basic common law rule that each landowner may fight surface water in whatever manner he chooses, but the rule is modified by the principle that one must so use his own property so as not to injure the rights of another. 20 M.J., *Waters and Watercourses*, §4, p. 22. Nor can one collect surface water in a body or mass and discharge it upon lower land. 20 M.J., *Waters and Watercourses*, §5, p. 23. See also *Whiting v. State Board of Education*, 8 Ct.Cl. 45 (1969).

Liability for surface water damage has been imposed upon the State by this Court when the Department of Highways had improperly diverted surface water or collected it in a mass and caused it to flow onto a claimant's land in situations where:

culverts were improperly maintained or inadequate in size, *Adkins v. Dept. of Highways,* 12 Ct.Cl. 185 (1978), *Allison v. Dept. of Highways,* 12 Ct.Cl. 84 (1978); drainpipes were negligently maintained, *Brown v. Dept. of Highways,* 12 Ct.Cl. 125 (1978), *Maynard v. Dept. of Highways,* 12 Ct.Cl. 4 (1977); and ditch lines were not properly maintained, *Stevens v. Dept. of Highways,* 12 Ct.Cl. 180 (1978), *Taylor v. Dept. of Highways,* 12 Ct.Cl. 261 (1979), but there is no evidence in this case of any such misconduct. In order to reach a conclusion as to what caused the accumulation of surface water on the claimant's property, the Court would have to resort to speculation or conjecture, which, of course, is prohibited. For that reason, the claim must be denied.

Claim disallowed.

Opinion issued May 11, 1981

ANDREW NOSHAGYA

vs.

ADMINISTRATIVE OFFICE OF
THE SUPREME COURT OF APPEALS

(CC-80-226)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The claimant filed this claim in the amount of $250.00 against the respondent for the loss of his leather jacket or coat from a public coat rack in the Marion County, West Virginia courthouse.

Claimant had been subpoenaed for jury duty. On February 28, 1980, while on jury duty, he hung his jacket on a coat rack outside the courtroom door provided for those attending court sessions. At approximately 3:00 p.m., the claimant, having completed his jury duty for the day, returned to obtain his coat and discovered that it was missing. He testified that his coat had never been found and that he had purchased it for $250.00.

The maintenance and custodial care of county courthouses of West Virginia is the responsibility of the respective county

commissions. The respondent, Administrative Office of the Supreme Court of Appeals, has no jurisdiction over these matters and cannot be held liable for the loss of claimant's coat. No act or omission of the respondent caused the loss, and, accordingly, the Court disallows the claim.

Claim disallowed.

Opinion issued May 11, 1981

PAWNEE TRUCKING COMPANY, INC.

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-80-354)

Thomas R. Parks, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The claimant asserted this claim for a refund of 75% of the fees paid by it to the respondent for the registration of five trucks. The claimant was a trucking company based in Logan County, West Virginia, primarily engaged in the business of hauling coal. On June 18, 1980, it paid registration fees to the respondent in the amount of $3,042.52 for the fiscal year commencing July 1, 1980. Subsequent to this date, the claimant terminated its business. Leonard Hovis, Secretary-Treasurer of the claimant company, testified that on September 12, 1980, the stockholders met and agreed for financial reasons to terminate all contracts and to liquidate the assets of the corporation.

The claimant correctly contends that registrations may be obtained to cover a period less than a full year for a proportionately reduced fee, and, therefore, it is entitled to a refund of the fees it paid for that part of the year in which it ceased business.

The record established by the evidence does not sustain the claimant's contention. The claimant registered its vehicles and then voluntarily ceased business for financial reasons and offered its trucks for sale. West Virginia Code, Chapter 17A, Article 3, Section 16, provides that vehicles shall be registered for a full

twelve-month period. The statute makes no provisions for a refund.

The Court finds, from the record, that there is no basis for a refund, and disallows the claim.

Claim disallowed.

Opinion issued May 11, 1981

MARY ALICE ROBERTS

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-199)

Claimant appeared in person.

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

WALLACE, JUDGE:

This claim in the amount of $142.12 was filed against the respondent for the damaged tire and rim of a 1977 Chevrolet Van owned by Mary Alice Roberts.

Richard Roberts, husband of the claimant, testified that he did not know exactly when the accident occurred, but it was on the 16th or 17th of April, 1980, that he drove the van to a meeting in the evening and struck a pothole, and that his wife drove to work the next morning where the damaged tire and rim were noticed after she parked in the parking lot. He stated, "It was me that night or she did it that morning. I couldn't tell you exactly which."

Mr. Roberts was driving the van westerly on West Virginia Route 25 in Nitro, West Virginia. He proceeded through a series of potholes. He testified that he knew they were there, that he slowed down to four to five miles per hour, that he notified the respondent after the damages were discovered, and that the respondent repaired the road the next day. He further stated that the pothole had existed since Christmas of 1979, but that he had made no complaints.

Mrs. Roberts did not testify at the hearing.

This claim originally was filed by Richard Roberts, but in the course of the hearing, Mr. Roberts testified that the van was

registered in the name of Mary Alice Roberts. As a result, the Court amended the claim to reflect that Mary Alice Roberts was the claimant.

The evidence is not conclusive as to when and how the damages actually were sustained by the van, nor is there any evidence that the respondent had notice of the defective condition of the road. For the State to be found negligent, it must have had actual or constructive notice of the particular road defect which allegedly caused the accident. *Davis v. Department of Highways,* 12 Ct.Cl. 31 (1977). The record in this case contains no evidence of any notice to the respondent or failure to act on the part of the respondent. The State is neither an insurer nor guarantor of the safety of travelers on its highways (*Adkins v. Sims,* 130 W.Va. 645 [1947]), and no award can be made without proof of negligence; therefore, the Court disallows the claim.

Claim disallowed.

Opinion issued May 11, 1981

THOMAS H. SICKLE

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-167)

Claimant appeared in person.

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

WALLACE, JUDGE:

In 1976, the claimant purchased a farm in Taylor County, West Virginia, which fronts approximately 201 feet on West Virginia Route 3/2 of Corbin Branch Road. Very few people lived on the road and it had been abandoned for maintenance purposes by the respondent.

In 1977, the claimant contacted the respondent's Taylor County Office to remove some trees from the road so that he could get to his farm. Claimant contends that the respondent agreed to assist him in the upgrading of the road. He testified that he expended his own funds to remove the trees, do certain bulldozing work, and

install culverts furnished by the respondent. He further testified that if he did this work and furnished rock for part of the road, the respondent had agreed to furnish rock for a portion of the road. The claimant contends that he is entitled to a refund of the $3,859.00 he expended because the respondent did not do its share of upgrading the road.

Jim Beer, II, testified that he told the claimant that he would try to stablize the road and promised stone, "but never gave...a figure on how much or anything like that". He stated that the respondent's policy at the time was that a person could grade a road to the extent he wanted and the respondent would then maintain the road to that point. Mr. Beer further testified that the respondent put a total of 935 tons of stone on the road and furnished culverts which were installed by the claimant.

Paul Curry, Taylor County Maintenance Supervisor, testified that his responsibility was to work all roads in the county on a priority basis. When asked what work his crew did on the road, he replied, "...it has had some brush cut, like what we call blading in; we use existing road materials and just blade in and try to smooth up the ruts that would be there; we have spot stabilized it, added stone in places that needed shored up; we went in and extensively ditched it and modified some curves for some sight distances; really did more for the road than the amount of people on it, the priority of it. We did an excessive amount, really."

The record does not establish claimant's contention that the respondent did not aid in the upgrading of the road. On the contrary, the record establishes that the respondent did more than it would have done on similar rural roads. Accordingly, the Court denies the claim.

Claim disallowed.

Opinion issued May 11, 1981

ARDEN LEON STULL

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-60)

William G. Whisnand, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

Shortly after 6:00 p.m. on August 10, 1979, the claimant was proceeding in a southerly direction on Secondary Route 9/1, commonly referred to as Coal River Road. He was proceeding from his place of employment to his home located six miles beyond and south of the scene of the accident. The road at the accident scene had been a two-lane asphalt roadway and ran generally parallel to Coal River located east of the road, but sometime earlier a slip had occurred on the east side of the road which eliminated the berm and had, in fact, undermined the northbound lane on Route 9/1, and, as a result, has reduced the width of the road to a one-lane roadway. According to the evidence, appropriate, permanent warning signs had been erected by respondent warning motorists of the one-lane area. A conflict in the evidence developed in respect to the existence of speed limit signs, but the testimony of one of the investigating officers from the Department of Public Safety established that the speed limit in the area was 25 miles per hour.

To correct the situation, the respondent had purchased a portion of land on the west side of Route 9/1 and on August 8, 1979, commenced repairs by removing trees from the purchased property and on the following day had started to excavate into this property on the west side of the road in order to create a new southbound lane. Consequently, on the evening of the accident, the surface of the partially completed southbound lane consisted of dirt. After completing work around 4:00 p.m. the southbound lane was dry, but, apparently, between then and the time of the accident, a heavy rain had fallen turning the new southbound lane into a sea of mud. This muddy and very hazardous condition was vividly portrayed in photographs taken shortly after the accident and were introduced in evidence.

As the claimant approached the scene of the accident he was required to negotiate a turn to the right, and, according to his

testimony, it was not until he was well into the right-hand turn that he had an opportunity to observe the condition of the road in the construction area. As a result of striking this very muddy and slippery area, the claimant lost control of his car, and it went left of center and over the embankment immediatly next to the northbound lane, a sheer drop of 40 feet to the river bank below. The car landed on its roof on the river bank, and it was truly miraculous that the claimant was not more seriously injured than he was. He was later taken from the accident scene to the emergency room by his wife but was not admitted to the hospital. He was off from work for a period of one week, and while he suffered no loss of salary, he did lose, as a result, one-week paid vacation. According to the claimant, while he suffered pain for two or three months after the accident, at the time of the hearing he had fully recovered from all injuries.

Claimant contends that the respondent failed to exercise reasonable care in maintaining the construction area in a reasonably safe condition during the construction and that it also failed to erect the necessary signs or warning devices necessary to warn a southbound motorist that he was approaching an area of danger. Respondent, however, contends that the claimant was travelling at an unreasonable rate of speed under the conditions then and there existing, that he failed to observe the permanent warning signs that had been erected, and that his automobile was in a defective condition in that its tires were bald. A review of the testimony and exhibits introduced in evidence at the hearing leads the Court to the conclusion that the evidence preponderates in favor of the claimant, but that the claimant was also guilty of some negligence which contributed to the accident. This negligence on the part of the claimant amounted to 10%, with 90% being attributable to the respondent.

Medical expenses incurred by the claimant amounted to $313.39; indirect wage loss of $225.00 was sustained; and property damages sustained were in the amount of $510.00. Considering the pain and suffering experienced by the claimant, the Court is of the opinion that an award of $2,300.00, reduced by 10%, would provide adequate and fair compensation to the claimant for his injuries, damages and losses.

Award of $2,070.00.

Opinion issued May 11, 1981

MILDRED VAN HORN

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-231)

Claimant appeared in person.

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

WALLACE, JUDGE:

The claimant seeks compensation for damages sustained by her 1969 Cutlass automobile which was struck by a fallen tree. In early June, 1979, the claimant was driving her automobile easterly on West Virginia Route 30/5 from her home in Gerrardstown, West Virginia, to the orchard where she was employed. It had been raining, and on the previous night there were heavy winds. The claimant had proceeded about a mile and a half to two miles when a large tree on the left side of the road fell without warning across her automobile. The roof and hood were damaged. The windshield and the windows on the left side of the automobile were broken. Damage to the vehicle amounted to $603.70. The accident occurred at about 9:45 a.m. The claimant traveled this road frequently going to and from work, and testified that she knew the trees were along the side of the road, but never observed the particular tree which fell.

West Virginia Route 30/5 is not a primary highway, but a dirt and gravel road which, years ago, was a lane to get from one orchard or farm to another, and over the years, it has been slowly upgraded. Today it runs between farms from one main county road to another county road.

Employees of the Department of Highways testified that they believed the tree to be within the road right of way, that they had experienced no difficulty with trees falling the area, and that they had received no complaints.

Carroll D. McDonald, Sr., claimant's employer, testified that he was familiar with the facts surrounding the accident. He stated that he went to the scene of the accident after it occurred and pulled the tree from the road with his vehicle. He said that the tree was not dead or rotten, that it covered both sides of the road, and that it was

a sumac tree, which is a very soft, brittle, and undesirable tree. He further testified that there was nothing about this particular tree that would give the Department of Highways notice that it could suddenly snap and fall.

From the record, the Court finds that there is no explanation for the tree's falling and that there is no evidence that it was caused by the negligence of the respondent. See *Hersom et al. v. Department of Natural Resources*, 12 Ct.Cl. 312 (1979), *Shortridge v. Department of Highways*, 11 Ct.Cl. 45 (1975). Recognizing that the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways (*Adkins v. Sims*, 130 W.Va. 645 [1947]), and that no award can be made without proof of negligence, the Court disallows the claim.

Claim disallowed.

Opinion issued May 11, 1981

LOUIS B. VARNEY, d/b/a
TRI-STATE INSPECTION SERVICE

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION
and DEPARTMENT OF HEALTH, DIVISION OF MENTAL HEALTH

(CC-77-203)

Dewey Kuhn, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondents.

GARDEN, JUDGE:

The claimant, Louis B. Varney, contends that in November, 1976, he was employed by the respondent, Department of Mental Health, to act as "clerk of the works" in respect to the construction of the Central Mental Health Complex located at or near Pocatalico, Kanawha County, West Virginia; that his contract specified that an annual salary of $16,000.00 would be paid to him, or the equivalent of $1,333.00 per month; and that he initiated his duties on November 29, 1976, and thereafter terminated his activities on April 25, 1977, by reason of that administration's closing down of the project in late January of 1977. On the other side of the coin, the

respondents contend that a valid contract was never executed, nor was any purchase order ever issued authorizing the claimant's services. Respondents further contend that the alleged services performed by claimant were minimal in nature and that the respondents received little value as a result of those services.

The facts surrounding the formation of the alleged contract are somewhat confusing. The claimant testified that on or about November 15, 1976, he conferred with the Department of Mental Health's Deputy Commissioner, James R. Clowser, and at that time, the services to be performed by claimant and the salary to be paid were agreed upon. Claimant further testified that he, the claimant, was advised to contact Fred Parker, chief engineer of the Department of Mental Health. This conference was held two or three days later in Charleston. After some discussion concerning salary, the $16,000.00 annual figure was agreed upon, but because the necessary contractual forms were not available, claimant was told that they would be mailed to him and that he should contact Dan Smithson, the Department of Health's chief engineer for the project, in order that their activities might be coordinated. Blank contract forms, three in number, were thereafter sent to claimant, who in turn signed them and returned all of them to the Department of Mental Health. The claimant testified that he began his duties on November 29, 1976, and continued until April 25, 1977.

According to the claimant, his principal duty was to inspect the work of the contractors to insure that the project was being constructed according to the plans and specifications and to submit daily reports as to the progress of the work to Mr. Smithson. It was admitted by the claimant that he did not report to the job site on a daily basis due to inclement weather, but on those occasions he would obtain a temperature reading from the Kanawha County Airport and submit a daily report reflecting that no work was done due to the weather. It should be noted that during the time frame in question, the claimant resided in Huntington.

Mr. Parker testified with respect to the contractual agreement and stated that in fact an agreement had been reached, but he was unable to recall the salary. He did recall sending the blank contract forms to the claimant, and after they were returned to him, signed by the claimant, he simply put them in the "mill" for futher processing. Mr. Smithson also testified on behalf of the claimant

that he had conferred with the claimant possibly once a week on the job site, and that, during the period in question, he had numerous phone conferences with the claimant, and the claimant had in fact submitted daily reports reflecting the activity or non-activity at the job site. Mr. Clowser, the final witness called on behalf of the claimant, testified that he had indeed agreed to employ the claimant at an annual salary of $16,000.00, and that he did recall signing a contract to that effect and sending the same through channels for the issuance of a purchase order. However, he was unable to recall whether or not a purchase order had ever been issued.

On behalf of the respondent, Miles Dean, the Commissioner of the Department of Finance and Administration, testified that his Department had no record of any contract entered into with the claimant, and that there could be no valid contractual arrangement until such an instrument was signed by his department and approved by the Attorney General. He further stated that the records in his office reflected that the contractors on this project had only fifty working days on the project site from the latter part of November, 1976, to the latter part of April, 1977. This would amount to about half the normal working days during this period of time.

The Court is of the opinion that the evidence fails to disclose that a valid contract was entered into between the claimant and the respondent, the Department of Mental Health. The record does clearly establish that the claimant began his duties under the impression that he had been legally employed, and that he did discharge his duties in a satisfactory manner. To deny the claimant relief would, in our opinion, unjustly enrich the State. Had the contract been executed in accordance with the statutes made and provided, the claimant would have been entitled to an award of $6,665.00; however, under the circumstances and as a result of less than maximum work on the part of the claimant during the period in question, we believe that an award of $4,250.00 would provide adequate compensation to him.

Award of $4,250.00.

Opinion issued May 11, 1981

WEST VIRGINIA TELEPHONE COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-161)

Michael A. Albert and Sarah G. Sullivan, Attorneys at Law, for claimant.

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

GARDEN, JUDGE:

During the early afternoon on March 10, 1980, Horst A. Lindner was operating a 1980 Chevrolet Citation in an easterly direction on State Route 16 in Pleasants County, West Virginia, when his automobile struck a rather large rock in his eastbound lane of travel causing substantial damage to the automobile in the stipulated amount of $1,437.03. Mr. Lindner was an employee of claimant and was driving an automobile leased to Continental Telephone System, the claimant's parent company, by the D. L. Peterson Trust. Under the terms of the lease, the claimant was responsible for any damage to the automobile.

Route 16 in this particular area is a two-lane blacktop road, about 22 feet in width, relatively straight but punctuated with hills and dales. The evidence established that a rather severe slide had taken place on the north side of Route 16, and that respondent had been engaged for several months in making repairs to the slide area. These repairs were being effected by hauling fill material from a donor site located about a quarter of a mile west of the slip area and on the north side of Route 16. Between the donor site and the slip area to the east was a hill, and, as a result, an eastbound motorist would be ascending this hill as he passed the donor site, crest the hill and then pass the area of the slip as he descended the hill. The evidence further established that the respondent was using open-ended trucks to transport the fill material from the donor site to the slip area. It was not using trucks with mounted tailgates, and it explained its failure to do so because of problems that would be encountered in dumping the fill material had the trucks been equipped with tailgates. Claimant contends that the failure of respondent to use tailgate-equipped trucks constituted negligence.

Mr. Lindner was following a large four-axle dump truck (owned by an independent party) on the afternoon of the accident at a distance of about 50 feet and at a speed of about 45 miles per hour. The truck ahead of him was successful in stradling the rather large rock located towards the center of the eastbound lane, but Mr. Lindner was not, and, as a result, the undercarriage of the car was extensively damaged. There was a conflict in the testimony as to the existence and content of any warning signs, warning eastbound motorists of the work area ahead.

The Court, however, is of the opinion that the failure of respondent to use dump trucks equipped with tailgates or the presence, or lack thereof, of warning signs is not determinative of the liability issue in this claim because of the testimony of James M. Hinton, a witness called by the claimant. Mr. Hinton testified that he was employed as a dump truck driver by the respondent on the day of the subject accident and, about 10 minutes before the accident, was proceeding in an easterly direction on Route 16 between the donor site and the fill area. Mr. Hinton stated that he had observed the subject rock near the center of the eastbound lane, but was able to pass over it by stradling it. His only explanation for not taking some steps to remove the rock or alert eastbound motorists of its presence was that if he had stopped on this ascending hill, he could have, in re-starting his truck, dumped additional debris and rocks onto the road. This failure on the part of respondent's employee to take any action in respect to this rock borders on incredible conduct, and, if no more, certainly constituted negligence which was a proximate cause of the accident.

However, the Court does believe that some degree of negligence must be attributed to the claimant's employee, Horst H. Lindner, in either proceeding through this area at a speed that was too great under the conditions then and there existing, and/or failing to keep a proper lookout. The stipulated damages are reduced by a 10% contributory negligence factor, and an award in favor of the claimant is hereby made in the amount of $1,293.33.

Award of $1,293.33.

Opinion issued May 11, 1981

CHARLES E. WILLIAMS

vs.

DEPARTMENT OF HIGHWAYS

(D-749)

Guy R. Bucci and Allan Masinter, Attorneys at Law, for claimant.

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

GARDEN, JUDGE:

At about 9:00 a.m. on Saturday, December 1, 1973, the claimant was operating his 1972 Ford pickup truck in a southerly direction on U.S. Route 119 in Kanawha County. It was a clear, sunny day, and the road was dry. Mr. Williams was proceeding from his home in Hernshaw to his place of employment in Peytona, Boone County. He was very familiar with this road, having travelled it on an almost daily basis in going to and from his place of employment. The claimant was about two miles south of Hernshaw, travelling at a speed of 45 to 50 miles per hour on this heavily travelled road, estimated to be 20 feet in width, when, in negotiating a turn to his right, he observed a pickup truck stopped in the southbound lane about 40 feet ahead of him. Rather than go across the double yellow center line and into the usually busy northbound lane, Mr. Williams applied the brakes and turned his truck to the right. As a result, the truck skidded, turned over onto its left side, and slid into the rear of the stopped pickup truck, later determined to be owned and operated by Herschel O. Davis. The claimant's vehicle was totaled, and he received personal injuries, hereinafter described.

Apparently, severe flooding had taken place in that area of U.S. Route 119 three days prior to December 1, 1973, and respondent's employees were engaged in effecting repairs on the morning of the accident. Claimant testified that, as he approached the scene of the accident, he did not observe any warning signs, signal devices, or flagmen warning him of the work activities ahead. Deputy Sheriff Eisenmenger, who arrived at the scene to investigate the accident, confirmed the testimony of the claimant in this regard, and, in fact, testified that during the course of his investigation he advised respondent's foreman that he, the foreman, should station flagmen both north and south of the accident scene to prevent another accident. The deputy further stated that the speed limit in the area of the accident was 55 miles per hour.

Herschel O. Davis, whose pickup was struck in the rear by claimant, testified that he had come from Sissonville that morning and had not observed any warning signs, signal devices, or flagmen prior to being required to stop in the line of traffic in the southbound lane. Mr. Davis testified that, after stopping, he could see a dump truck about a quarter of a mile south of him blocking traffic in both lanes while it dumped gravel in a creek bed which had been washed out in addition to the berm on the east side of the road. He stated that he observed a flagman near the dump truck, and that, in his opinion, 30 or 40 vehicles were stopped in the southbound lane.

Harold Lee Wolfe, an employee of respondent, testified that he lived in Boone County and travelled U.S. Route 119 to and from work five days a week. Mr. Wolfe stated that he recalled the flooding, the work performed by the respondent, and the warning signs erected both north and south of the work area. On cross-examination, he stated that he would be called out to work on some Saturdays and that he was not sure whether he had been through the area on the morning of claimant's accident. Claude Bartley testified that on December 1, 1973, he was a heavy maintenance foreman for the respondent and was directing the dumping of gravel on U.S. Route 119 south of Hernshaw; that the dumping was being done by a dump truck owned by Mountain Trucking Company and operated by one of its employees; that he had a flagman about 100 feet north and south of the site of the dumping operation; that, while he did not see the accident, he heard it and then observed a pickup truck on its side 200 or 400 feet north of him; and that, while he did not observe warning signs that morning, he was confident that they were erected.

We believe that the evidence as a whole clearly preponderates in favor of the claimant, and that he has established that the respondent failed to take the necessary steps to warn motorists, particularly southbound motorists, of the obstructive road work taking place. We further believe that this failure constituted negligence which was the proximate cause of the accident and ensuing losses and injuries to the claimant. We find no evidence from the record reflecting negligence on the part of the claimant, and, as a result, contributory negligence will not be discussed.

After the accident, the claimant was taken to the emergency room of the Charleston Area Medical Center (CAMC) where, for six or seven hours, he received treatment for his injuries. He was not

admitted but did return on December 13, 1973, and was discharged on December 17, 1973, during which time Dr. Augusto Portillo, a specialist in plastic and reconstructive surgery, performed an operation to reduce three fractures in the maxilla and zygoma bones on the left side of the claimant's face. In addition, Mr. Williams suffered a laceration in the left eyebrow and one below the left eye which has left a permanent scar. The infra-orbital nerve was also damaged, causing numbness in his lips and teeth, which Dr. Portillo indicated will be permanent in nature. Dr. Portillo last saw the claimant on October 7, 1978, and testified that, beyond the numbness in the lips and teeth, the claimant complained of headaches, discomfort when pressure was applied to the left side of his face, and pain when he exposed himself to cold weather. There was also some question regarding an injury to the left eye; however, the respondent obtained an independent examination of the claimant by Dr. George E. Toma, an ophthalmologist practicing in South Charleston, who testified to a reasonable degree of medical certainty that the claimant had not sustained any disability to the left eye, which evidence was not contradicted.

Except for the $100 deductible feature of his collision insurance policy, the record would indicate that the claimant has been made whole for the loss of his truck. Surprisingly, Mr. Williams testified that he lost only six days of work, and that this loss amounted to $480.00; however, on cross-examination he testified that he was a salaried employee and that no deductions from his salary were made. He further stated that, prior to the accident, he worked a considerable amount of overtime, but since the accident, he has not done as much overtime work because of his physical inability to do so. Mr. Williams indicated that, in either 1971 or 1972, he had kept a record which revealed that he had worked 50 overtime days, but he had not kept such a record since the accident. We do not believe that any loss of wages was established, and, as to loss of overtime, any attempt to include this as an item of damage would require speculation, in which we will not indulge. On the other hand, it was stipulated that a hospital bill of $504.18 and Dr. Portillo's charge of $650.00 were incurred.

Based on the total special damages and the nature and extent of the injuries, some of which are permanent in nature, we feel that an award of $13,500.00 is fair, adequate, and just. However, the record discloses that, in addition to filing this claim, the claimant filed a civil action against Mountain Trucking Company in the Circuit

Court of Kanawha County, which case was settled out of court for $1,500.00, the claimant reserving his right to continue to pursue his claim against the respondent in this Court. Believing that the respondent is entitled to a pro tanto credit for this settlement involving a joint tort-feasor, our award is reduced by $1,500.00.

Award of $12,000.00.

Opinion issued May 15, 1981

DAVID M. FINNERIN

VS.

OFFICE OF THE STATE AUDITOR

(CC-80-14)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $6,570.00. Claimant, an attorney at law, was appointed by the Circuit Court of Pleasants County to represent Jack Stephen Hart, who was charged with the commission of a felony. For his services, claimant was paid no more than the statutory limit imposed by West Virginia Code §51-11-8. This claim is for the amount exceeding the statutory limit and not paid by the respondent.

The Court has reviewed the facts here presented, and is of the opinion that the law governing these types of situations was enunciated by the Court in the case of *George M. Cooper v. Administrative Office of the Supreme Court of Appeals,* Claim No. CC-80-287 (1981). In denying an award in that claim, the Court refused to circumvent the "plain and unambiguous language" of Code 51-11-8:

> "In each case in which an attorney is assigned under the provisions of this article to perform legal services for a needy person, he shall be conpensated for actual and necessary services rendered at the rate of twenty dollars per hour for work performed out of court, and at the rate of twenty-five dollars per hour for work performed in court, but the

compensation for services shall not exceed one thousand dollars...".

For the foregoing reasons, this claim must be denied.

Claim disallowed.

Opinion issued May 15, 1981

JOSEPH R. MARTIN

vs.

OFFICE OF THE STATE AUDITOR

(CC-81-16)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $140.00. Claimant, an attorney at law, was appointed by the Circuit Court of Braxton County to represent Marlon Hinkle, who was charged with the commission of a felony. For his services, claimant was paid no more than the statutory limit imposed by West Virginia Code §51-11-8. This claim is for the amount exceeding the statutory limit and not paid by the respondent.

The Court has reviewed the facts here presented, and is of the opinion that the law governing these types of situations was enunciated by the Court in the case of *George M. Cooper v. Administrative Office of the Supreme Court of Appeals*, Claim No. CC-80-287 (1981). In denying an award in that claim, the Court refused to circumvent the "plain and unambiguous language" of Code 51-11-8:

> "In each case in which an attorney is assigned under the provisions of this article to perform legal services for a needy person, he shall be compensated for actual and necessary services rendered at the rate of twenty dollars per hour for work performed out of court, and at the rate of twenty-five dollars per hour for work performed in court, but the

compensation for services shall not exceed one thousand dollars...".

For the foregoing reasons, this claim must be denied.

Claim disallowed.

Opinion issued May 15, 1981

MONTIE VANNOSTRAND

vs.

OFFICE OF THE STATE AUDITOR

(CC-81-17)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $761.65. Claimant, an attorney at law, was appointed by the Circuit Court of Braxton County to represent James Lee Earley, who was charged with the commission of a felony. For his services, claimant was paid no more than the statutory limit imposed by West Virginia Code §51-11-8. This claim is for the amount exceeding the statutory limit and not paid by the respondent.

The Court has reviewed the facts here presented, and is of the opinion that the law governing these types of situations was enunciated by the Court in the case of *George M. Cooper v. Administrative Office of the Supreme Court of Appeals,* Claim No. CC-80-287 (1981). In denying an award in that claim, the Court refused to circumvent the "plain and unambiguous language" of Code 51-11-8:

> "In each case in which an attorney is assigned under the provisions of this article to perform legal services for a needy person, he shall be compensated for actual and necessary services rendered at the rate of twenty dollars per hour for work performed out of court, and at the rate of twenty-five dollars per hour for work performed in court, but the

compensation for services shall not exceed one thousand dollars...".

For the foregoing reasons, this claim must be denied.

Claim disallowed.

Opinion issued June 3, 1981

MITCHELL F. ADKINS

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-68)

No appearance by claimant.

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

PER CURIAM:

Upon written stipulation to the effect that, on or about March 4, 1981, respondent's blasting activities resulted in damage to a telephone cable in the vicinity of claimant's property; and to the effect that claimant was unable to be notified for work and lost $82.47 in income as a direct result of respondent's negligent blasting operations, the Court finds the respondent liable, and makes an award to the claimant in the amount stipulated.

Award of $82.47.

Opinion issued June 3, 1981

KATHERINE H. BOYD

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-64)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum of $57.64 as the result of an accident which occurred on or about November 6, 1980.

Claimant was operating her 1977 Dodge Aspen automobile on Route 7 in the vicinity of the Market Street Bridge in Wheeling, West Virginia, where Department of Highways crews were performing maintenance work. In the process of this work, employees of the respondent dropped a steel section from the Market Street Bridge onto Route 7 below. The claimant was unable to avoid the section of steel, and damaged a tire on her vehicle.

Respondent's negligence in effecting repairs to the bridge proximately caused the damages suffered by the claimant.

Accordingly, the Court makes an award to the claimant in the amount stipulated.

Award of $57.64.

Opinion issued June 3, 1981

BERT KESSLER

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-109)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted for decision upon a written stipulation to the effect that the respondent is liable for damages in the sum of $262.98, based on the following facts: On or about November 12, 1980, claimant was operating his 1980 AMC Eagle automobile on Route 7 in the vicinity of Gore, West Virginia, when a truck owned by the Department of Highways spilled limestone on claimant's car. Respondent's negligent operation of its truck was the proximate cause of the damages suffered by the claimant, and the Court makes an award to the claimant in the amount stipulated.

Award of $262.98.

Opinion issued June 3, 1981

FRANKLIN D. MULLINS
and SARAH Y. MULLINS

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-198)

Robert W. Lawson, Attorney at Law, for the claimants.

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

RULEY, JUDGE:

On September 8, 1977, at about 5:15 p.m., the claimant, Franklin D. Mullins, his wife and his brother were walking upon a temporary wooden sidewalk along the 36th Street Bridge over the Kanawha River in Charleston. The boardwalk was constructed

with wooden slats 2-½" wide, ¾" thick and 36" long. The weather was clear and dry.

As they neared the north end of the boardwalk, they encountered a gap about 12" wide. Mr. Mullins stepped across it, but the slat on which he placed his foot broke and Mr. Mullins fell through the boardwalk, catching himself upon his arms. He was pulled out by his brother, went home and three hours later went to Charleston Area Medical Center, where he was treated for multiple abrasions and contusions. He remained there as a patient for three days. His only subsequent medical treatment was a single office visit on or about September 13, 1977. However, at the hearing on April 23, 1980, the claimant testified that he still suffered from neck pain, numbness in the right leg and general nervousness. The expense of hospitalization and medical treatment was $631.50. In addition, he incurred an indefinite amount of expense for valium.

While there was no evidence that the rexpondent had actual notice of any defect or weakness in the slat which broke under the claimant's weight and precipitated his fall, it had constructive notice of the same because the temporary boardwalk had been in existence for two years and on two separate occasions before September 8, 1977, the respondent had been obliged to replace other broken slats. From those facts, the Court must conclude that negligence of the respondent proximately caused the accident. And, although the claimant crossed the boardwalk daily to get to and from his place of work, and knew of its general condition, he cannot be required to have forseen or anticipated that this particular slat would break since there was no evidence that it contained a defect which should have been apparent to a pedestrian exercising ordinary care.

In view of the evidence relating to the nature and extent of the claimant's injuries, the Court is disposed to make an award in the sum of $1,500.00.

Award of $1,500.00.

Opinion issued June 3, 1981

CHARLES E. TEDROW

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-28)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted for decision upon a written stipulation to the effect that the respondent is liable for damages in the sum of $220.00 as the result of an accident which occurred on or about January 6, 1981. At that time, claimant's truck was parked in front of his home on Route 2 in Littleton, Wetzel County, West Virginia. A truck owned by the Department of Highways passed in front of claimant's home and negligently spread cinders on his vehicle, breaking the windshield in two places.

Respondent's negligent operation of its truck was the proximate cause of damages suffered by the claimant, and the Court makes an award to the claimant in the amount stipulated.

Award of $220.00.

Opinion issued June 3, 1981

UNITED STATES POST OFFICE

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-78)

No appearance by claimant.

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

PER CURIAM:

Upon written stipulation to the effect that, some time prior to August, 1980, an employee of the claimant was operating a lawn

mower which struck a portion of a stop sign post in the vicinity of Route 9 in Kearneysville, Jefferson County, West Virginia; that this occurred because of the respondent's negligence in leaving the post so exposed; and that claimant's lawn mower was damaged in the amount of $61.30 as a direct result thereof, the Court finds the respondent liable, and makes an award to the claimant in the amount stipulated.

Award of $61.30.

REFERENCES

Advisory Opinions
Arbitration
Assumption of Risk
Bailment
Blasting
Board of Regents
Bridges
Building Contracts
Colleges and Universities — See Board of Regents
Comparative Negligence
Condemnation
Conspiracy
Contracts — See also Building Contracts
Damages
Department of Motor Vehicles
Drains and Sewers — See also Waters and Watercourses
Electricity
Expenditures — see also Office Equipment and Supplies
Falling Rocks — See also Landslides
Flooding
Foster Children
Hospitals
Independent Contractor
Insurance
Interest
Jurisdiction
Landlord and Tenant
Landslides — See also Falling Rocks
Limitation of Actions
Motor Vehicles — See also Negligences; Streets and Highways
Negligence — See also Motor Vehicles; Streets and Highways
Notice
Office Equipment and Supplies
Pedestrians
Personal Services
Physicians and Surgeons — See also Hospitals
Poisons
Prisons and Prisoners
Public Institutions
Public Officers
Real Estate
Res Judicata
Scope of Employment
State Agencies
Statutes
Stipulation and Agreement
Streets and Highways — See also Falling Rocks; Landslide; Motor Vehicles; Negligence
Taxation
Trees and Timber
Trespass
Wages
Waters and Watercourses — See also Drains and Sewers; Flooding
Wells
W. Va. University — See Board of Regents

ADVISORY OPINIONS

An advisory determination was made in a claim where one State agency alleged that it was owed money by another State agency. *Department of Highways vs. Department of Corrections,* (CC-79-633) 173

ARBITRATION

The claimant and the respondent filed a stipulation reflecting their agreement to accept the decision of arbitrators to the effect that the respondent is obligated to pay a certain portion of the claim which was arbitrated in accordance with a previous decision of the Court. Therefore, the Court made an award in accordance with the arbitrators' decision. *Zando, Martin & Milstead, Inc. vs. State Building Commissioner* (D-942) 354

The proceedings in a contract claim were stayed pending arbitration of the dispute between the parties as arbitration was one of the provisions of the contract. *Zando, Martin & Milstead, Inc. vs. State Building Commission* (D-942) 142

ASSUMPTION OF RISK

To operate a motor vehicle in the face of visible hazards of which a driver is aware, or, in the exercise of reasonable care, should be aware, is to assume a known risk which bars recovery. The Court therefore denied a claim where the claimant alleged damage to his windshield when he passed a salt-spreading truck. *Erie Insurance Group, Subrogee of Frank R. Godbey vs. Department of Highways* (CC-79-89) 88

To operate a motor vehicle in the face of visible hazards of which the driver is aware is to assume a known risk, which bars recovery; therefore, the Court denied a claim where the claimant struck a pothole causing damage to his vehicle. *William J. Fox vs. Department of Highways* (CC-79-300) 236

Where the claimant housed a foster child in her home and had adequate notice of the child's untrustworthiness, the claimant assumed the risk of any loss which resulted when the claimant gave the child access to her purse. *Claudine Hinkle vs. Department of Welfare* (CC-79-21) 199

The defense of assumption of the risk, put forth by the respondent in a situation where claimant's vehicle was damaged when it went into a hole which claiment knew existed on a bridge, was of no merit as there was no other reasonable route for the claimant to take. *Joyce Porter vs. Department of Highways* (CC-79-192) 161

The doctrine of assumption of the risk was applied where the claimant alleged the loss of certain books from his office when he left those books in an unlocked office on the premises of respondent's institution. *Joseph Vielbig, III vs. Board of Regents* (CC-79-92) 204

To operate a motor vehicle in the face of visible hazards such as defects in the road, of which the driver is aware, is to assume a known risk which bars recovery. *Earl A. Whitmore, Jr. and Barbara A. Whitmore vs. Department of Highways* (CC-80-181) . 304

BAILMENT

Where a vehicle was damaged while being driven by a bailee, the Court adhered to the general rule that the contributory negligence of a bailee will not be imputed to the bailor, and an award was made to the owner of the vehicle. *Jonathan E. McDonald, Administrator of the Estates of Norma Jean McDonald, et al. vs. Department of Highways* (CC-77-38a-d) 13

Where the claimant alleged that damage to her vehicle occurred when she parked in a parking lot under the control of the respondent, the Court denied the claim on the basis that only a gratuitous bailment was created. *Patricia Porter vs. Department of Finance and Administration* (CC-79-646) 295

BLASTING

Claimant was granted an award for loss of work resulting from negligent blasting operations performed by the respondent. *Mitchell F. Adkins v. Department of Highways* (CC-81-68) 434

Where respondent's blasting activities caused damage to a telephone cable, which prevented claimant from being notified of work and he lost income as a result, the Court made an award for the claimant's loss. *Mitchell F. Adkins vs. Department of Highways* (CC-81-68) 434

Where blasting operations of the respondent produced concussions and vibrations in the earth which resulted in damage to claimant's commercial buildings and property, the Court followed the established rule that the use of explosives in blasting operations is intrinsically dangerous and extraordinarily hazardous, and the party who undertakes the blasting is liable for any damage resulting therefrom. *Janet Aultz Casto vs. Department of Highways* (CC-79-692) 377

Failure of the claimant to establish that the respondent or any of its agents conducted quarrying operations which caused the claimant's well to fail resulted in a denial of the claim. *Robert Stephen Lowe vs. Department of Highways* (CC-78-254) 91

The respondent was held absolutely liable for damages proximately caused by blasting operations, and the Court made an award to the claimant. *Mary McLaughlin, et al. vs. Department of Highways* (CC-79-143) 387

Where claimants' property was damaged as the result of blasting activities by an agent of the respondent, the Court made an award for said damages as the use of explosives is intrinsically dangerous and extraordinarily hazardous, and the party who undertakes said blasting is liable for any resultant damages. *Roscoe Rhodes and Maxine V. Rhodes vs. Department of Highways (CC-79-13)* *188*

BOARD OF REGENTS

Respondent's failure to properly inspect and maintain a lamp cord in claimant's room constituted negligence which proximately caused a fire damaging claimant's personal property. *Kimberly Allen vs. Board of Regents* (CC-79-121) 321

Where the evidence revealed that the claimant had been reimbursed for the loss which she sustained in a fire in her dormitory room, the Court disallowed the claim. *Kimberly Allen vs. Board of Regents* (CC-79-121) 321

Claimant sought payment for damage to a bowling ball. As the automatic return system of the respondent damaged the ball, the Court made an award to the claimant. *Carolyn H. Arnold vs. Board of Regents* (CC-79-715) 207

Where claimant's vehicle was damaged on newly-installed speed bumps on the campus of Potomac State College, and said speed bumps were abnormally high, the Court made an award for the damage. *Charles L. Coffman vs. Board of Regents* (CC-81-11) 359

Where it appeared to the Court that the respondent failed to pay the claimant proper compensation for work performed, the Court made an award for the wages which she should have received. *Sue H. Ellis vs. Board of Regents* (CC-79-475c) 195

Where the claimant performed air-conditioning maintenance and repair services for West Virginia State College, and the respondent indicated that it did not have sufficient funds to pay the obligation, the Court disallowed the claim based upon the *Airkem* doctrine. *Johnson Controls, Inc. vs. Board of Regents* (CC-80-151) 230

Claimant sought payment for three typewriters which it had supplied to West Virginia University, and, as the respondent admitted the validity of the claim and that funds were available, the Court made an award. *Kanawha Office Equipment, Inc. vs. Board of Regents* (CC-79-475a) 179

The Court sustained a motion to dismiss an individual respondent named in a complaint, as this Court has held that it has no jurisdiction over individuals. *Margaret A. Kolinski and Raymond L. Kolinski vs. Board of Regents* (CC-77-58) 206

The claimant, in good faith, performed an agreement for the student government of Marshall University, and the respondent accepted and used the merchandise. The Court held that, for the respondent to escape paying for the merchandise would constitute unjust enrichment; therefore, the Court made an award to the claimant. *Modern Press, Inc. vs. Board of Regents* (CC-80-277) 341

Claimant sought payment for a monitor which was purchased by West Virginia University, and, as the respondent admitted the validity of the claim and that funds were available in the proper fiscal year, the Court made an award. See also *Varian Associates - Instrument Division vs. Board of Regents,* 13 Ct.Cl. 345 (1981). *Spatial Data Systems, Inc. vs. Board of Regents* (CC-80-8)..... 166

The doctrine of assumption of the risk was applied where the claimant alleged the loss of certain books from his office when he left those books in an unlocked office on the premises of respondent's institution. *Joseph Vielbig, III vs. Board of Regents* (CC-79-92) 204

Where the respondent received the benefit of services performed by the claimant, even though no purchase order was approved by the Department of Finance and Administration, the Court held that denial of the claim would constitute unjust enrichment, and made an award to the claimant. *Wente Construction Company, Inc. vs. Board of Regents* (CC-80-171) ... 346

BRIDGES

Where the negligent maintenance of a bridge by the respondent resulted in a vehicle striking a loose steel plate on a bridge, the Court made an award for the damage to the vehicle. *William Frank Ball, d/b/a Ball Trucking, Inc. vs. Department of Highways* (CC-80-234) 358

The Court made an award for damage to claimant's vehicle which struck an obstruction on a bridge, but the doctrine of comparative negligence was applied as there was negligence on the part of both parties. *Randy N. Bleigh vs. Department of Highways* (CC-79-389) 191

Where an employee of the respondent dropped a steel section from a bridge onto a vehicle on the roadway below, the Court made an award for damages to the vehicle. *Katherine H. Boyd vs. Department of Highways,* (CC-81-64) 435

Where the respondent failed to maintain the Shadle Bridge over the Kanawha River, and the disrepair caused damage to claimants' vehicles, the Court made an award to each of the claimants. See also *Garland v. Dept. of Highways,* 13 Ct.Cl. 288 (1980); *Sayre v. Dept. of Highways,* 13 Ct.Cl. 164 (1980); and *Gillispie v. Dept. of Highways,* 13 Ct.Cl. 209 (1980). *Virginia Burton, et al. vs. Department of Highways* (CC-79-225) 44

Where the negligent maintenance of an expansion joint on a bridge caused damage to claimant's vehicle, the Court made an award. See also *Duling Brokerage, Inc. vs. Highways,* 13 Ct.Cl. 185 (1980). *Coleman Oil Company, Inc. vs. Department of Highways,* (CC-79-618) 183

As the Court may not base its decision upon speculation, the Court denied a claim in which it was alleged that a piece of steel on a bridge damaged claimant's vehicle. *Kenneth M. Eary vs. Department of Highways* (CC-79-220) 235

The Court made an award to the claimant for damage to his vehicle which occurred while crossing a wooden floor bridge. One of the floorboards flew up and damaged the vehicle, and the Court found that the respondent should have known of or discovered the loose floorboards of the bridge and made the necessary repairs. *Joe B. Eller vs. Department of Highways* (CC-79-485) 155

Where respondent's negligence in failing to properly secure a metal plate on a bridge was the proximate cause of the damage to claimant's vehicle, the Court made an award. *Sondra Lynn Funk vs. Department of Highways* (CC-80-256) 263

Where the respondent sprayed a bridge surface with a mixture of linseed oil and mineral spirits and then placed small abrasive

"skid stone" upon the surface, but did not erect warning signs or post flagmen to warn of the condition of the bridge surface until it was dry, the Court found the respondent negligent and therefore liable for the damages sustained by the claimant who had an accident on the bridge. *Dean R. Grim vs. Department of Highways* (CC-78-124) 378

An award was made to the claimant for damage to a vehicle which occurred when the vehicle passed over a disintegrated section of a bridge on a four-lane highway as the Court held that the respondent had notice of the condition of the bridge and should have effected repairs or erected warning devices. *Walter A. Henriksen vs. Department of Highways* (CC-79-165) 157

An award was made to the claimant for damage to her vehicle which occurred when the vehicle struck a loose board on a bridge and the parties stipulated the claim. *Deborah J. Hodges vs. Department of Highways* (CC-79-590) 159

Claimant was granted an award for damage to her vehicle when it dropped into a cut-away section of the Fort Henry Bridge. The respondent had removed sections of asphalt from the surface of the bridge and negligently left an exposed area with no warning signs. *Theresa Kurucz vs. Department of Highways* (CC-79-173). 30

Where claimant's vehicle was struck by a piece of concrete which fell from a bridge owned and maintained by the respondent, the Court made an award as the respondent failed to properly maintain the bridge. *Carroll Lynch vs. Department of Highways* (CC-79-522) 187

The Court denied a claim for damage to claimant's vehicle which occurred when said vehicle struck a pothole on a bridge. There was no evidence in the record to establish notice of the existence of the pothole on the part of the respondent. *Frank M. Marchese vs. Department of Highways* (CC-79-135) 230

Where claimant's vehicle struck a loose plate on a bridge owned and maintained by the respondent, the Court determined that the respondent's negligent maintenance of the bridge was the proximate cause of the damage to claimant's vehicle. *McJunkin Corporation vs. Department of Highways* (CC-80-377) 373

When claimant's vehicle struck an uncovered hole in a bridge resulting in damage to the vehicle, the Court made an award, as the negligence of the respondent in failing to maintain the bridge in a reasonably safe condition was the proximate cause of the damages. *Carl Eugene McNeely vs. Department of Highways*(CC-80-143) 232

The Court made an award to the claimant for damage to his vehicle when it was struck by a loose steel plate on a bridge owned and maintained by the respondent. *Barton Meaige vs. Department of Highways* (CC-79-200) 187

An award was made to the claimant for personal injuries sustained when he fell through a slat on a bridge. The Court determined that the respondent had constructive notice of the condition of the bridge. *Franklin D. Mullins and Sarah Y. Mullins vs. Department of Highways* (CC-78-198)..... 436

Even though the evidence was that the claimant crossed the bridge daily and knew of its general condition, there was no evidence that the particular slat which broke should have been apparent to a pedestrian exercising ordinary care. *Franklin D. Mullins and Sarah Y. Mullins vs. Department of Highways* (CC-78-198) 436

The defense of assumption of the risk, put forth by the respondent in a situation where claimant's vehicle was damaged when it went into a hole which claimant knew existed on a bridge, was of no merit as there was no other reasonable route for the claimant to take. *Joyce Porter vs. Department of Highways* (CC-79-192) 161

Where claimant's vehicle sustained damage when the planking of a bridge collapsed adjacent to an existing hole which claimant was attempting to staddle, the Court made an award to the claimant for the damage. The claimant established, by a preponderance of the evidence, that the respondent knew or should have known of the existence of the defect. *Joyce Porter vs. Department of Highways* (CC-79-182) 161

The Court made an award to the claimant for damage to his vehicle which occurred when the vehicle struck a steel rod protruding from a bridge on Interstate 79 as the damages were proximately caused by the negligence of the respondent. *A. O. Secret vs. Department of Highways* (CC-79-66) 37

Leaving a jagged piece of steel protruding from the sidewalk of a bridge constituted negligence on the part of the respondent which was the proximate cause of the damage sustained by claimant's vehicle. An award was made to the claimant. See also *Vinson v. Dept. of Highways*, 13 Ct.Cl. 40 (1979). *Gary Cline Spurgeon vs. Department of Highways* (CC-79-191) 39

Where the claimant's vehicle struck an expansion joint and was damaged, the Court made an award because of the negligent maintenance of the bridge. See also *Young v. Dept. of Highways*, 13 Ct.Cl. 268 (1980). *David J. Yates vs. Department of Highways* (CC-80-180) 268

BUILDING CONTRACTS

Where a changed condition on a contract project caused additional cost to the claimant, the Court held that the equitable adjustment entitles the contractor to compensation for those expenses resulting directly from the changed condition, but does not entitle him to profit on the additional work. *A. J. Baltes, Inc. vs. Department of Highways* (D-1002) 1

Where the Court determined that a changed condition occurred in a contract, it held that the "actual cost" theory should be the appropriate measure of damages. *A. J. Baltes, Inc. vs. Department of Highways* (D-1002) 1

Because the respondent failed to obtain the necessary easements for the right of way on a construction project, and the claimant was forced to obtain legal services to oppose and defend a subsequent legal action involving the property, the Court made

an award for the legal fees incurred by the claimant. *Bracken Construction Company vs. Department of Highways* (CC-78-24) . 335

Where the claimant alleged a change in the scope and character of the work involved in a design contract with the respondent, the Court denied this portion of the claim as the record did not disclose such a change as would justify a supplemental agreement for additional compensation. *Highway Engineers, Inc. vs. Department of Highways* (CC-76-37) 311

Where the claimant performed additional work in the design of a highway, the Court made an award for the additional work. *Highways Engineers, Inc. vs. Department of Highways* (CC-76-37) 311

Where construction work performed by the claimant was accepted as satisfactory, and the amount owing for the work was reasonable as indicated by the respondent, the Court made an award for the work perfomed even though the claimant and the respondent had entered into an agreement that was not properly approved, and no purchase order had been issued by the Department of Finance and Administration. *Wente Construction Company, Inc. vs. Board of Regents* (CC-80-171)..... 346

Where the respondent received the benefit of services performed by the claimant, even though no purchase order was approved by the Department of Finance and Administration, the Court held that denial of the claim would constitute unjust enrichment, and made an award to the claimant. *Wente Construction Company, Inc. vs. Board of Regents* (CC-80-171) ... 346

COLLEGES AND UNIVERSITIES—See Board of Regents

COMPARATIVE NEGLIGENCE

Where the evidence indicated that the claimant was not maintaing a careful outlook to the highway ahead of his vehicle, or was not maintaining the vehicle under proper control, the Court found the claimant guilty of negligence to the degree of 25%, and therefore reduced the award by that percentage. *Timothy Adkins vs. Department of Highways* (CC-79-470) 355

The Court applied the doctrine of comparative negligence where the respondent failed to properly maintain a road, but the claimant proceeded along the road on his motorcycle when he knew of the condition of the roadway. *Russell Lee Barkley vs. Department of Highways* (CC-78-187) 83

Where the claimant had prior knowledge of the hazardous condition of the road, the Court held that he was negligent, and applied the doctrine of comparative negligence. *Larry Allen Bayer vs. Department of Highways* (CC-80-327) 388

The Court made an award for damage to claimant's vehicle which struck an obstruction on a bridge, but the doctrine of comparative negligence was applied as there was negligence on the part of both parties. *Randy N. Bleigh vs. Department of Highways* (CC-79-389) 191

The doctrine of comparative negligence was applied in a claim wherein claimant's vehicle sustained damage and the evidence indicated that the driver of claimant's vehicle was not as careful

as he should have been when respondent's vehicle struck claimant's vehicle. *Carmet Company vs. Department of Highways* (CC-76-41) 145

Where the claimant was aware of the location of the rock which caused his accident, the Court applied the doctrine of comparative negligence and reduced the amount of the award. *Arley Don Dodd vs. Department of Highways* (CC-80-383) 397

Where negligence on the part of the respondent in permitting a dangerous hazard to exist was the proximate cause of the damage to claimant's vehicle, but the claimant was aware of the hazard and in the exercise of due care should have anticipated it, the Court applied the doctrine of comparative negligence in making an award to the claimant. *Lee Roy Hamilton vs. Department of Highways* (CC-80-85) 263

A claim for damage to a vehicle which struck a pothole was denied as the claimant knew of the existence and location of the pothole; therefore, under the doctrine of comparative negligence claimant's negligence was equal to or greater than the respondent's negligence. *Alex Hull vs. Department of Highways,* (CC-80-238) 408

Where claimant's vehicle sustained damage when claimant attempted to drive it off a snow-covered exit of the interstate, the Court determined that the doctrine of comparative negligence applied. The respondent had not sufficiently cleared the exit of snow, but the claimant failed to drive at a speed consistent with the prevailing conditions. *Sara H. McClung vs. Department of Highways* (CC-80-188) 371

Where the claimant failed to give a signal of her intention to turn, and, as a result, the employee of the respondent drove into the claimant's vehicle, the Court held that the claimant was guilty of negligence equal to or greater than that of the respondent, and denied the claim. *Linda M. Painter vs. Department of Highways* (CC-79-406) 245

Where a hazardous condition existing on a road in an area where the respondent was conducting construction operations resulted in claimant's accident, the Court reviewed the testimony and exhibits and determined that the respondent had failed to maintain the construction area in a reasonably safe condition. As the claimant was also guilty of some negligence, the Court applied the doctrine of comparative negligence. *Arden Leon Stull vs. Department of Highways* (CC-80-60) 420

Where the claimant admitted that he had travelled over the defect in the road several times, the Court held that the claimant was guilty of negligence which equalled or surpassed that of the respondent, and denied the claim. *James Edward Sturm vs. Department of Highways* (CC-79-449) 248

The Court applied the doctrine of comparative negligence to a drainage claim where it appeared that the drainage problem was created by the failure of the respondent to maintain the ditch line, but actions on the part of the claimant also contributed to the problem. *Myrtle Chaffins Watts and Elbert "Eb" Watts vs. Department of Highways* (CC-79-210) 302

CONDEMNATION

Where respondent's representations to the claimant were that the property belonging to the claimant would be condemned by the respondent, but such condemnation did not materialize and the claimant lost rent as the result of these representations, the Court made an award for the lost rentals. *Maria Caterina Anania vs. Department of Highways* (D-552) 152

CONSPIRACY

The Court granted leave to the claimants to file an amended notice of claim, as an allegation of conspiracy is a legal conclusion only and is not sufficient to allege that a conspiracy has occurred. *Ida M. Hiner and Norman F. Hiner, d/b/a Hercules Construction Company vs. Department of Natural Resources* (CC-80-150) 315

CONTRACTS

As the contract entered into by the claimant and the respondent did not provide for the recovery of interest, the Court had no statutory authority to make an award for interest, and, therefore, denied recovery of interest and finance charges. *A. J. Baltes, Inc. vs. Department of Highways* (D-1002) 1

As the primary purpose of equitable adjustment is to protect the contractor from the risk of loss, it may be viewed as a recovery in quantum meruit. *A. J. Baltes, Inc. vs. Department of Highways* (D-1002) 1

The Court determined that the claimant failed to provide adequately for common delays encountered in construction projects; and declined to grant a total recovery of the assessed liquidated damages. *A. J. Baltes, Inc. vs. Department of Highways* (D-1002) 1

The Court granted a recovery for 22 days of liquidated damages assessed by the respondent based upon the date that the project was substantially completed and not the date of the formal opening of the highway. *A. J. Baltes, Inc. vs. Department of Highways* (D-1002) 1

Where the facts of a contract claim indicated that there was a changed condition in sub-surface conditions and material on a project, the Court held that, where the conditions encountered during excavation differ materially from those indicated in the plans, the claimant should be compensated. *A. J. Baltes, Inc. vs. Department of Highways* (D-1002) 1

Where the respondent State agency contested a claim for an equitable adjustment due to differing site conditions, the Court held that the two-month delay was reasonable, as the claimant made the request as soon as it became apparent that a substantial change existed. In determining the damages caused by a changed condition, recovery must be limited to those damages which claimant can prove to have been directly and proximately caused by the changed condition. *A. J. Baltes, Inc. vs. Department of Highways* (D-1002) 1

The Court made an award to a contractor who furnished extra work but was not paid due to the lack of a purchase order. The

respondent admitted that the work was done and that sufficient funds remained in its appropriation to pay for the work. *Consolidated Contractors vs. State Tax Department* (CC-79-343) 45

The Court held that the enforcement of a liquidated damage clause in a contract was unjustifiable as the respondent sustained no substantial damages to justify liquidated damages. *J. F. Allen Company vs. Department of Highways* (CC-77-98) 364

The Court made an award of interest due a contractor on certain balances remaining after completion of a contract based upon the installment paid to the claimant contractor. *J. F. Allen Company vs. Department of Highways* (CC-77-98) 364

An award was made to the claimant who had performed work under a purchase order agreement for which the respondent had failed to pay. The Court determined that there were sufficient funds available with which to pay the claim in the proper fiscal year. *Jamison Electrical Construction Company vs. Board of Regents* (CC-79-475b) 178

Where the respondent contended that its maintenance contract with the claimant covered the installation of certain compressors for an air-conditioning system, but the record established that the maintenance contract covered only the temperature control system, the Court made an award to the claimant for the replacement of the compressors. *Johnson Controls, Inc. vs. Department of Public Safety* (CC-80-274) 369

Where the claimant contractor was required to remove and replace a section of deck as the concrete did not meet specifications, the Court held that the respondent acted neither arbitrarily nor unlawfully, and denied the claim. *Paramount Pacific, Inc. on behalf of Pauley Paving Co., Inc. vs. Department of Highways* (CC-76-38) 135

The Court made an award to the claimant for the balance due on a construction project performed at respondent's Weston State Hospital when the respondent admitted the validity and amount of the claim. *Shaeffer and Associates vs. Department of Health* (CC-80-68) 165

The Court held that, in a written contract for the purchase of stone by the respondent, the contract was breached at the point when the respondent "canceled" the purchase order; therefore, the period of limitations did not bar the claim, and the Court made an award for the stone. *Stone Company, Inc. vs. Department of Highways* (CC-78-95) 167

Although the evidence failed to disclose that a valid contract had been entered into by the parties, the Court made an award to the claimant for the work performed, because to deny the claimant relief would unjustly enrich the State. *Louis B. Varney, d/b/a Tri-State Inspection Service vs. Department of Finance and Administration and Department of Health* (CC-77-203) 423

The claimant and the respondent filed a stipulation reflecting their agreement to accept the decision of arbitrators to the effect that the respondent is obligated to pay a certain portion of the claim which was arbitrated in accordance with a previous

decision of the Court. Therefore, the Court made an award in accordance with the arbitrators' decision. *Zando, Martin & Milstead, Inc. vs State Building Commission* (D-942) 354

The proceedings in a contract claim were stayed pending arbitration of the dispute between the parties as arbitration was one of the provisions of the contract. *Zando, Martin & Milstead, Inc. vs. State Building Commission* (D-942) 142

DAMAGES

As the primary purpose of equitable adjustment is to protect the contractor from the risk of loss, it may be viewed as a recovery in quantum meruit. *A. J. Baltes, Inc. vs. Department of Highways* (D-1002) 1

The Court determined that the claimant failed to provide adequately for common delays encountered in construction projects; and declined to grant a total recovery of the assessed liquidated damages. *A. J. Baltes, Inc. vs. Department of Highways* (D-1002) 1

The Court granted a recovery for 22 days of liquidated damages assessed by the respondent based upon the date that the project was substantially completed and not the date of the formal opening of the highway. *A. J. Baltes, Inc. vs. Department of Highways* (D-1002) 1

Where the respondent State agency contested a claim for an equitable adjustment due to differing site conditions, the Court held that the two-month delay was reasonable, as the claimant made the request as soon as it became apparent that a substantial change existed. In determining the damages caused by a changed condition, recovery must be limited to those damages which claimant can prove to have been directly and proximately caused by the changed condition. *A. J. Baltes, Inc. vs. Department of Highways* (D-1002) 1

Where the evidence revealed that the claimant had been reimbursed for the loss which she sustained in a fire in her dormitory room, the Court disallowed the claim. *Kimberly Allen vs. Board of Regents* (CC-79-121) 321

Where the claimant had to rent a vehicle as a replacement car when his vehicle was damaged as the result of the negligence of the respondent, the Court determined that a fair and reasonable amount for the rental of the vehicle would be $15.00 per day, and granted claimant an award based upon that amount. *Homer Bush vs. Department of Highways* (CC-79-72) 21

As contributory negligence of a driver will not be imputed to the owner of the vehicle who was not present at the time of the accident, the Court made an award to the owner of the vehicle for damages which the vehicle sustained in a accident on a highway where the respondent State agency was found to be negligent. An award was made for the fair market value of the vehicle. *Johanthan E. McDonald, Administrator of the Estates of Norma Jean McDonald, et al. vs. Department of Highways* (CC-77-38a-d) 13

As the West Virginia wrongful death statute, §55-7-6, as amended on January 15, 1976, provides that an award of damages cannot exceed $10,000.00 plus funeral and hospital expenses, the Court limited the awards to the estates of two individuals to $10,000.00 plus funeral expenses. *Jonathan E. McDonald, Administrator of the Estates of Norma Jean McDonald, et al. vs. Department of Highways* (CC-77-38a-d) 13

In the absence of proof that dependent distributees sustained a financial or pecuniary loss, the West Virginia wrongful death statute, §55-7-6, in effect of that time, provides that an award of damages cannot exceed $10,000.00 plus funeral and hospital expenses. The Court limited the awards to the estates of two individuals to $10,000.00 plus funeral expenses. *Jonathan E. McDonald, Aministrator of the Estates of Norma Jean McDonald, et al. vs. Department of Highways* (CC-77-38a-d) 13

The Court made an award for wrongful death in accordance with the provisions of West Virginia Code §55-7-6, which provides that there may be awarded such damages as may seem fair and just. *John Slone, Administrator of the Estate of Maude Slone, deceased vs. Department of Health* (CC-78-273) 382

Where the respondent left a portion of a stop sign post exposed, resulting in damage to the claimant's lawnmower, the Court made an award for said damage. *United States Post Office vs. Department of Highways* (CC-81-78) 438

DEPARTMENT OF MOTOR VEHICLES

Where the respondent provided a borrower with the title to a vehicle which failed to show the lien of the claimant thereon, the Court made an award to the claimant for the loss thereby sustained. *Bank of Gassaway vs. Department of Motor Vehicles* (CC-78-22) 154

The claimant sought recovery for damages sustained due to respondent's failure to record claimant's lien on a West Virginia certificate of title. The Court determined that the respondent negligently issued the title without the lien being recorded thereon, and made an award to the claimant. *General Motors Acceptance Corporation vs. Department of Motor Vehicles* (CC-80-388) 363

The Court made an award for driver's license cards which were delivered to the respondent but for which the claimant was not paid. *Malco Plastics, Inc. vs. Department of Motor Vehicles* (CC-80-130) 219

As West Virginia Code §17A-3-16 provides that vehicles shall be registered for a full twelve-month period, and the statute makes no provision for refunds, the Court denied a claim for the registration of vehicles for a period less than a full year. *Pawnee Trucking Company, Inc. vs. Department of Motor Vehicles* (CC-80-354) 416

Where an administrative error on the part of the respondent resulted in the loss of claimant's license and loss of work, the Court made an award in favor of the claimant. *Randy Lee Shamblin vs. Department of Motor Vehicles* (CC-79-252) 53

Where the claimant's license was taken from him as the result of a clerical error on the part of the respondent, the Court made an award to the claimant for the resultant losses he sustained. *Randy Lee Shamblin vs. Department of Motor Vehicles* (CC-79-252) 53

DRAINS AND SEWERS—See also Waters and Watercourses

Where the claimant failed to receive consideration for a permanent drainage easement which was constructed on his property, and then filed in the Court of Claims for damages to his property, the Court disallowed the claim as the claimant had an adequate remedy at law in condemnation. *Joseph W. Carlile vs. Department of Highways,* (CC-78-287a) 192

A claim for the repair of a driveway was denied as this Court is without jurisdiction to compel any such repair, and there was no evidence of negligence on the part of the respondent in the construction of the drainage ditch complained of by the claimant. *Billy R. Cowan vs. Department of Highways* (CC-79-59) 124

Where the installation of a drain by the respondent caused damage to the claimants' land, the Court made an award to the claimants for said damage. *Melvin Dingess and Corenia Dingess vs. Department of Highways* (CC-78-207) 146

Where negligent maintenance of a drain resulted in flooding of claimant's property and damage thereto, the Court made an award to the claimant. *Fanning Funeral Homes, Inc. vs. Department of Highways* (CC-80-66) 271

Where the respondent not only fails to properly maintain a ditch line, but takes affirmative action to destroy the ditch line, causing damage to a claimant's property, the Court will make an award. *Hobert Friel vs. Department of Highways* (CC-79-81) 404

The respondent Department of Highways is under a legal duty to use reasonable care to maintain ditch lines in such condition that they will carry off surface water and prevent it from being cast upon the property of others. Where the respondent fails to properly maintain a ditch line, which results in damage to a claimant's property, an award will be made for said damage. *Hobert Friel vs. Department of Highways* (CC-79-81) 404

Where the respondent stockpiled material and installed improper drainage along a roadway, which resulted in damage to claimant's trees, the Court made an award to the claimant. *Randy B. Fry vs. Department of Highways* (CC-80-332) 309

Where claimant's property was damaged as the result of the construction of a drainage system incident to a new highway, which caused a material increase in the volume of surface water flowing onto claimant's land, the Court made an award based upon the diminution of the market value attributed to the increased burden of water. *Elizabeth Smith Grafton vs. Department of Highways* (CC-79-26) 147

Where a culvert constructed by the respondent under I-79 became clogged with debris of which the respondent was aware, and this condition of the culvert caused a second flood onto the

claimant's property, the Court made an award for the damages sustained by the claimant in the flood. *Cecil Ray Haught vs. Department of Highways* (CC-79-140) 237

Where respondent's failure to maintain a culvert caused the flooding of claimant's basement, the Court made an award for the damages sustained by claimant's property. *Esther Johnson vs. Department of Highways,* (CC-79-664) 380

Where an accumulation of ice and water on the highway was due to a clogged culvert, the continuous flow of water onto the highway constituted an unusually dangerous condition. *Jonathan E. McDonald, Administrator of the Estates of Norma Jean McDonald, et al. vs. Department of Highways* (CC-77-38a-d) 13

Where the evidence in the claim was such that the flooding of claimants' pond was the result of the negligent placement of ditches along the road or the failure to maintain the ditch, the Court made an award for the damage to claimants' property. *Carl Moats and Pauline Moats vs. Department of Highways* (CC-79-52) 243

Where claimant's property sustained damage as the result of a clogged culvert which changed the flow of surface water onto claimant's property and into her home, the Court made an award for the damage. *Catherine Nestor vs. Department of Highways,* (CC-78-296) 150

The Court denied a claim based upon property damage from pooling water as there was no evidence that the respondent was negligent in the placement or care of the culvert alleged to have caused the damages. *Gail and Ora Pitsenbarger vs. Department of Highways* (CC-77-222) 35

Where clogged culverts and a ditch line caused the volume of water running onto the road to be too great to flow through the natural drainage area, and it flowed onto claimant's property and damaged it, the Court held that the negligence of the respondent in failing to maintain the ditch line was the proximate cause of the damage. *Glen L. Ramey vs. Department of Highways* (CC-79-87) 342

A claim for water damage was denied where the evidence indicated that the respondent had not been contacted concerning the blocked drain, and there was no constructive notice of the problem as the road had just been taken over for maintenance by the respondent. *Rickie Allen Saunders vs. Department of Highways* (CC-80-205) 328

The Court made an award for property damage caused by respondent's failure to correct a drainage system adjacent to the property. *Shel Products, Inc. vs. Department of Highways* (CC-76-92) 201

Claimants alleged that failure of the respondent to maintain the ditch line along the road adjacent to their property caused a washout of claimants' driveway, and the Court made an award based upon the respondent's failure to properly maintain the drainage ditch. *Frank Terango & Duel Terango vs. Department of Highways* (CC-79-257) 168

The Court applied the doctrine of comparative negligence to a drainage claim where it appeared that the drainage problem was created by the failure of the respondent to maintain the ditch line, but actions on the part of the claimant also contributed to the problem. *Myrtle Chaffins Watts and Elbert "Eb" Watts vs. Department of Highways* (CC-79-210) 302

Where the respondent negligently failed to maintain a ditch which was installed above claimant's residence, and this failure to maintain caused damage to claimant's residence and personal property, the Court made an award to the claimant. *Merwin B. Wingo vs. Department of Highways* (CC-79-537) 225

ELECTRICITY

When employees of the respondent negligently and carelessly allowed a pipe to fall onto a guy wire of claimant's distribution line pole, causing damage to claimant's property, the Court made an award for said damage. *Appalachian Power Co. vs. Department of Highways* (CC-78-289) 260

An award for an unpaid electric bill was made to the claimant as the respondent admitted the validity of the claim and that funds were available in the proper fiscal year to pay the bill. *Appalachian Power Company vs. Department of Public Safety,* (CC-80-410) 335

The claimant sought payment for an unpaid electric bill for service to the respondent, and the Court made an award where the respondent admitted the validity of the claim and had sufficient funds with which to pay it. *Appalachian Power Company vs. Department of Health* (CC-80-321) 283

EXPENDITURES—See also Office Equipment and Supplies

Claimant sought payment for hospital supplies delivered to Welch Emergency Hospital, and, as the respondent admitted the validity of the claim and that sufficient funds were available to pay the claim, the Court made an award to the claimant. See also *American Scientific Products vs. Dept. of Health,* 13 Ct.Cl. 357 (1981). *American Hospital Supply vs. Department of Health* (CC-79-575) 151

The Court made an award for engineering and consultant services performed for the respondent where the respondent admitted the validity of the claim, and sufficient funds were available for the payment of the claim. *Appalachian Engineers, Inc. vs. Department of Health* (CC-79-502) 82

Where the claimant sought payment for rent due on a lease, and the respondent admitted the validity of the claim, stating that it had sufficient funds with which to pay it, the Court made an award to the claimant. *Appalachian Homes, Inc. vs. Department of Health* (CC-81-4) 349

The claimant sought payment for an unpaid electic bill for service to the respondent, and the Court made an award where the respondent admitted the validity of the claim and had sufficient funds with which to pay it. *Appalachian Power Company vs. Department of Health* (CC-80-321) 283

Where the claimant sought payment for services rendered to a State institution, the Court made an award for said services. *Associated Radiologists, Inc. vs. Department of Health* (CC-80-217) 226

Where the respondent admitted the validity of the claim and that there were sufficient funds in its appropriation from which the obligation could have been paid, the Court made an award to the claimant. *Beckley Hospital, Inc. vs. Division of Vocational Rehabilitation* (CC-80-170) 227

The Court disallowed a claim for goods purchased by the respondent where the respondent indicated that it did not have sufficient funds to pay the claim, and therefore, the *Airkem* doctrine applied. *Betsy Ross Bakeries, Inc. vs. Department of Corrections* (CC-80-265) 251

An award was made to the claimant who served as a Mental Hygiene Commissioner because the funds to pay for his services were exhausted, and the Court followed the *Swartling* decision. *F. William Brogan, Jr. vs. Office of the State Auditor* (CC-79-229) 67

Where the respondent admits the validity of the claim but indicates that there were no funds remaining in the respondent's appropriation for the fiscal year from which the obligation could have been paid, the Court will deny the claim based upon the *Airkem* doctrine. *Capital Credit Corporation vs. Department of Corrections* (CC-80-202) 228

Where the claimant sought payment for a fire service fee owed by the respondent, and the respondent admitted the validity of the claim but stated that it did not have sufficient funds with which to pay it, the Court applied *Airkem* doctrine and denied the claim. *The City of Charleston vs. Department of Finance and Administration* (CC-80-398) 350

Claimant sought payment for air conditioners delivered to respondent, and, as the respondent admitted the validity of the claim, but indicated that no funds remained in the appropriation with which to pay the claim, the Court disallowed the claim as an over-expenditure based upon the previous decision of *Airkem Sales and Service, et al. v. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971). *Climate Makers of Charleston, Inc. vs. Department of Corrections* (CC-80-88) 172

The Court made an award to a contractor who furnished extra work but was not paid due to the lack of a purchase order. The respondent admitted that the work was done and that sufficient funds remained in its appropriation to pay for the work. *Consolidated Contractors vs. State Tax Department* (CC-79-343) 45

Where the West Virginia Code provides for a maximum amount payable to attorneys for representing indigents in criminal actions, the Court will not hold that equitable principles can justify the circumvention of the plain and unambiguous language of the statute. A claim for an amount over and above the statutory limit was therefore denied. See also *Finnerin vs. State Auditor*, 13 Ct. Cl. 431, (1981); *Martin vs. State Auditor*, 13 Ct.Cl. 432, (1981); and *Vannostrand vs. State Auditor*, 13 Ct.Cl. 433, (1981). *George M. Cooper vs. Administrative Office of the Supreme Court of Appeals and Office of the State Auditor* (CC-80-287) 394

Claimant sought payment for services rendered under a contract with Huttonsville Correctional Center, but, as there were no funds available in respondent's appropriation for the fiscal year in question, the Court disallowed the claim under the *Airkem* decision. See also *Xerox Corp. v. Dept. of Corrections*, 13 Ct.Cl. 334 (1981). *Dacar Chemical Co. vs. Department of Corrections* (CC-79-356) 69

Where the claimant and the respondent indicated that the respondent owed a sum of money to the claimant for the tuition of one of claimant's clients, the Court made an award for said tuition. *Davis and Elkins College vs. Division of Vocational Rehabilitation* (CC-80-111) 308

The claimant sought payment for hospital services rendered to inmates of respondent's Huttonsville Correctional Center, but, as the *Airkem* principle applied, the Court disallowed the claim. See also *Ohio Valley Medical Center, Inc. v. Dept. of Corrections*, 13 Ct.Cl. 332 (1981) and *Memorial General Hospital vs. Dept. of Corrections*, 13 Ct.Cl. 373 (1981). *Davis Memorial Hospital vs. Department of Corrections* (CC-79-388) 46

An award was made for merchandise sold to the respondent where the respondent admitted the amount of the claim and that sufficient funds were available in the proper fiscal year with which to pay the same. See also *J. Robert Evans d/b/a Motor Car Supply Co. vs. Health*, 13 Ct.Cl. 360, (1980). *E. I. Du Pont de Nemours & Co. vs. Department of Health*, (CC-81-42) 359

The claimant was granted an award for milk cases and bread cases which the respondent State agency failed to return to the claimant in accordance with an areement between the parties. *Empire Foods, Inc. vs. Office of the Governor–Emergency Flood Disaster Relief* (CC-79-447) 87

A claim for gasoline furnished to Huttonsville Correctional Center was disallowed under the *Airkem* doctrine. *Exxon Company U.S.A. vs. Department of Corrections* (CC-79-647) 174

Where the claimant incurred additional costs and expenses in the installation of a new motor to accomodate the changed electrical system of respondent's building, the Court made an award for these additional costs. *Handling, Inc. vs. Alcohol Beverage Control Commissioner* (CC-79-471) 156

Claimant sought payment for services rendered at the West Virginia Penitentiary, and the respondent admitted the validity of the claim but alleged that there were not sufficient funds from which the claim could have been paid in the proper fiscal year; therefore, the Court applied the doctrine set forth in the *Airkem* decision and disallowed the claim. See also *Weiler vs. Dept. of Corrections*, 13 Ct.Cl. 333 (1981). *George L. Hill, Jr. vs. Department of Corrections* (CC-79-133) 47

Claimants were granted awards for serving as counsel for indigents in mental hygiene hearings where the claimants' fees were denied by the respondent because the fund to pay the same was exhausted, and the Court determined that the factual situations were identical to that in *Swartling, et al. vs. Office of*

the State Auditor, 13 Ct.Cl. 57 (1979). *John S. Hrko, et al. vs. Office of the State Auditor* (CC-79-221a et al.) 104

The Court granted awards to attorneys who served as counsel for criminal indigents in juvenile, misdemeanor, or felony proceedings where the attorney fees were denied by the respondent because the fund was exhausted. The factual situations in these claims were identical to that of *Swartling, et al. vs. Office of the State Auditor*, 13 Ct.Cl. 57 (1979). *John S. Hrko, et al. vs. Office of the State Auditor* (CC-79-221b et al.) 110

Where claimant sought an award for the amount due on a corrected water bill issued to the respondent, and the respondent admitted the validity of the claim, the Court made an award to the claimant. *Huntington Water Corporation vs. Department of Health* (CC-79-452) 47

A claim for payment for a service agreement was denied by the Court when it appeared that the *Airkem* doctrine applied. *IBM Corporation vs. Department of Corrections* (CC-79-631) 174

Claimant sought payment for liquidation charges as set forth in a lease agreement, and, as the respondent admitted the validity of the claim and that there were sufficient funds with which to pay it, the Court made an award. *IBM Corporation vs. Department of Culture and History* (CC-79-189) 48

An award was made to a claimant who had performed work under a purchase order agreement for which the respondent had failed to pay. The Court determined that there were sufficient funds available with which to pay the claim in the proper fiscal year. *Jamison Electrical Construction Company vs. Board of Regents* (CC-79-475b) 178

Where the claimant sought payment for unpaid invoices relating to the publication of the official papers of former Governor Arch A. Moore, Jr., the Court indicated that, as sufficient funds were not available in the fiscal year in question from which the claim could have been paid, the *Airkem* doctrine applied, and the claim was disallowed. *Joe L. Smith, Jr., Inc., d/b/aBiggs-Johnston-Withrow vs. Office of the Governor* (CC-80-368) 368

Where claimant performed air-conditioning maintenance and repair services for West Virginia State College, and the respondent indicated that it did not have sufficient funds to pay the obligation, the Court disallowed the claim based upon the *Airkem* doctrine. *Johnson Controls, Inc. vs. Board of Regents* (CC-80-151) 230

Where the claimant sought payment for the balance due on a purchase order for equipment, and the respondent admitted the validity of the claim, but could not make payment for the services rendered as the invoice was not received in the proper fiscal year, the Court made an award to the claimant for the equipment purchased. *Law Enforcement Ordnance Company vs. Department of Corrections* (CC-79-227) 49

The claimant, in good faith, performed an agreement for the student government of Marshall University, and the respondent

accepted and used the merchandise. The Court held that, for the respondent to escape paying for the merchandise would constitute unjust enrichment; therefore, the Court made an award to the claimant. *Modern Press, Inc. vs. Board of Regents* (CC-80-277) 341

Where the respondent admitted that the claimant's bill was not paid within the proper fiscal year because it was misplaced, the Court made an award, as funds were available with which to pay the claim. *Nellis Motor Sales vs. Alcohol Beverage Control Commissioner* (CC-80-80) 160

The Court made an award for a restaurant bill incurred by respondent's Colin Anderson Center, as the respondent admitted the validity of the claim and that it had sufficient funds with which to pay the claim. *North Bend State Park vs. Department of Health* (CC-80-79) 161

Where claimant hospital sought payment for services rendered to an inmate of the West Virginia institution and the respondent indicated it did not have sufficient funds with which to pay for the said services, the Court applied the *Airkem* doctrine and disallowed the claim. *Ohio Valley Medical Center, Inc. vs. Department of Corrections* (CC-79-398) 42

Where the claimant sought payment for services rendered to the respondent and the respondent admitted the validity of the claim and that there were sufficient funds available, the Court made an award for said services. *Program Resources, Inc. vs. Department of Finance and Administration* (CC-80-261) 266

Where the claimant undertook, in good faith, the task of producing a seal for the respondent State agency, but the agency did not have the funds to pay for the seal, the Court was bound by the *Airkem* doctrine to deny the claim. *Harry S. Spectre, d/b/a Commonwealth Castings Company vs. Board of Occupational Therapy* (CC-80-392) 374

As the respondent admitted the validity of the claim and that there were sufficient funds in the proper fiscal year with which to pay the same, an award was made to the claimant for merchandise sold to the respondent. See also *Stewart-Decatur Security Systems, Inc. vs. Department of Corrections*, 13 Ct.Cl. 301 (1980). *Staunton Foods, Inc. vs. Department of Corrections* (CC-80-294) 300

The Court made awards to court reporters who performed reporting services in mental hygiene cases pursuant to the West Virginia Code, Chapter 27, Article 5, but who were denied payment by the respondent because the "mental hygiene fund" was exhausted, as the factual situations were identical to that in *Swartling, et al. vs. Office of the State Auditor*, 13 Ct.Cl. 57 (1979). *Lisa A. Stewart, et al. vs. Office of the State Auditor* (CC-79-924 et al.) 100

The Court made awards to individuals in payment of services under the Mental Hygiene Fund and the Needy Persons Fund. Those funds became inadequate to pay for the services, but the Court held that the claims were distinguishable from the *Airkem* principle and were clearly claims which the State, in equity and

good conscience, should discharge and pay. *Richard K. Swartling, et al. vs. Office of the State Auditor* (CC-79-211) 57

Where claimant sought payment for installation of fire doors at a State Hospital and the respondent admitted the amount of the claim and that sufficient funds were available, the Court made an award. *Trojan Steel Company vs. Department of Health* (CC-80-323) 329

The Court made an award for purchase and shipping costs of journal warrant forms delivered to the respondent, as the respondent admitted the validity of the claim. *Uarco, Inc. vs. Department of Finance and Administration* (CC-80-61) 170

Where the claimant furnished goods or services to the respondent and failed to receive payment because there were no funds remaining in the respondent's appropriation for the proper fiscal year from which the obligation could have been paid, the Court denied the claims based upon the *Airkem* decision. *Union Oil Company of California, et al. vs. Department of Corrections* (CC-79-412) 43

The Court made an award to the claimant for goods purchased by the respondent where the invoice was held improperly until funding for the proper fiscal year had expired. *Tony J. Veltri d/b/a Farmers Delight Co. vs. Department of Corrections* (CC-80-63) .. 171

Claimant sought payment for three legal notices published in its newspaper, and, as the respondent did not dispute the validity of the claim and had sufficient funds remaining in the proper fiscal year, the Court made an award for the notices. *Weirton Daily Times vs. Department of Finance & Administration* (CC-80-147) 223

Claimant sought payment for services rendered to an inmate of the Hancock County Jail who was in custody of the respondent. As the respondent admitted the allegations, and sufficient funds were available, the Court made an award. *Weirton General Hospital vs. Department of Corrections* (CC-79-292) 66

An award was made for merchandise purchased by a State Hospital where the respondent admitted the validity of the claim and that sufficient funds were available in the proper fiscal year in which to pay the claim. See also *Sargent-Welch Scientific Co. vs. Health,* 13 Ct.Cl. 327, (1980). *Weslakin Corporation vs. Department of Highways,* (CC-80-315)..... 304

Claimant sought payment for an amount due on two invoices for the rental of equipment, and, as the respondent indicated that it did not have sufficient funds with which to pay the claim, the Court disallowed it under the *Airkem* principle. See also *M. Merrick & Assoc., Inc. v. Dept. of Corrections,* 13 Ct.Cl. 322 (1981). *Xerox Corporation vs. Department of Corrections* (CC-79-588)... 70

FALLING ROCKS—See also Landslides

Evidence of the falling of a rock without a positive showing that the respondent knew or should have known of the dangerous condition is insufficient to justify an award. *R. C. Adkins vs. Department of Highways* (CC-80-207) 307

Where there was credible evidence that the respondent should and would have known from routine observations that a substantial rock fall was probable, the Court found the respondent guilty of negligence. *Timothy Adkins vs. Department of Highways* (CC-79-470) 355

The presence of a boulder approximately four inches from the edge of the pavement created a definite hazard to traffic on the road, as the respondent had constructive notice of its existence. Failure to move the boulder constituted negligence which was the proximate cause of the damage to the claimant's vehicle, and the Court made an award. *Robert S. & Evelyn Atkinson vs. Department of Highways* (CC-78-6) 18

Where the uncontroverted testimony led to the conclusion that the rocks which had caused damage to a vehicle on the highway had fallen only a short time before the collision occurred, the Court denied the claim as the respondent did not have sufficient notice of the hazard. *Dennis Edward Cantley vs. Department of Highways* (CC-79-20) 72

Claimant was denied recovery for damage to his vehicle which occurred when rocks fell from a hillside directly onto his lane of travel. The claimant failed to establish by a preponderance of the evidence the necessary elements of liability on the part of the respondent. *David A. Carrol vs. Department of Highways* (CC-78-300) 73

Where rocks fell upon a vehicle causing damage thereto, the Court held that the respondent cannot be found liable in such a situation unless the respondent has reason to anticipate the rock slide. *James F. Collins vs. Department of Highways* (CC-79-41) .. 22

Where a rock was located directly on the berm of the road within two inches of the blacktop surface, the Court held that the respondent had constructive notice of the location of the rock, and failure to remove the rock constituted negligence. *Arley Don Dodd vs. Department of Highways* (CC-80-383) 397

Where the claimant was aware of the location of the rock which caused his accident, the Court applied the doctrine of comparative negligence and reduced the amount of the award. *Arley Don Dodd vs. Department of Highways* (CC-80-383) 397

As the respondent had no reason to anticipate a rock fall in an area, which caused damage to claimant's vehicle, the Court denied the claim. *Wendell Dunlap vs. Department of Highways* (CC-79-61) 75

Where the claimants failed to establish by a preponderance of the evidence that the respondent knew or should have known of the dangerous condition of a rock cliff along the roadway, and a large boulder dislodged from the cliff striking claimant's vehicle, the Court denied their claim. *Collie Jeter, Guardian of Kermit Jeter vs. Department of Highways* (CC-77-183) 409

Where the claimant's vehicle sustained damage when rocks fell onto the road in front of his car, the Court disallowed the claim, as the lack of falling rock signs does not make the State liable without convincing evidence of the prior, prolonged existence of

such a hazard. *Dallas Howard Jude vs. Department of Highways* (CC-78-256) 28

Where the facts indicated that the section of road where claimant's vehicle was damaged by falling rocks was not an area which was prone to falling rocks, the Court denied the claim. *William Joseph Manning vs. Department of Highways* (CC-79-589) 275

Where a large boulder fell from the side of the roadway, the Court held that the respondent's failure to take remedial action constituted negligence as the evidence tended to show that the respondent had constructive notice of the hazardous condition. *Margaret K. Richardson vs. Department of Highways* (CC-78-235) 298

FLOODING

Where a flash flood destroyed beer at claimant's warehouse, the Court made an award for the State tax refund as any other action would constitute unjust enrichment. *Cline Distributing Company vs. Nonintoxicating Beer Commission* (CC-80-362) 351

Where negligent maintenance of a drain resulted in flooding of claimant's property and damage thereto, the Court made an award to the claimant. *Fanning Funeral Homes, Inc. vs. Department of Highways* (CC-80-66) 271

Claimant's property and residence sustained damage from a flow of water which resulted when the elevation of the road was raised around the claimant's home. A catch basin, which was improperly maintained by the respondent, caused surface water from other properties to flwo onto claimant's property, and the Court made an award for the damage to the property. *Robert L. Ferguson, Executor of the Estate of Elizabeth L. Ferguson vs. Department of Highways* (CC-78-148) 103

Where there was no evidence that a culvert installed by the respondent increased the flow of water onto or across claimants' property, causing the damage alleged, the Court denied the claim. *Arthur Friend and Pauline Friend vs. Department of Highways* (CC-76-35)..... 125

Where a culvert constructed by the respondent under I-79 became clogged with debris of which the respondent was aware, and this condition of the culvert caused a second flood onto the claimant's property, the Court made an award for the damages sustained by the claimant in the flood. *Cecil Ray Haught vs. Department of Highways* (CC-79-140) 237

Where respondent's failure to maintain a culvert caused the flooding of claimant's basement, the Court made an award for the damages sustained by claimant's property. *Esther Johnson vs. Department of Highways* (CC-79-664) 380

Where the evidence failed to support the allegation that flood waters were the result of construction by the respondent, the Court denied a claim for damage to claimants' properties. *Mary McLaughlin, by Ralph McLaughlin, her son vs. Department of Highways* (CC-79-143), *Robert B. Johnston vs. Department of Highways* (CC-79-114), *James R. Skinner, d/b/a Jim's Grocery vs. Department of HIghways* (CC-79-27) 387

FOSTER CHILDREN

The Court denied a claim for personal property damage committed by two foster children as the record was devoid of any evidence of negligence on the part of the respondent. *Audra Myrle Armstead vs. Department of Welfare* (CC-78-280) 119

Where the claimant housed a foster child in her home and had adequate notice of the child's untrustworthiness, the claimant assumed the risk of any loss which resulted when the claimant gave the child access to her purse. *Claudine Hinkle vs. Department of Welfare* (CC-79-21) 199

When claimant's car was taken for a joy ride by a minor in the custody of the respondent, the Court held that the respondent could not be found negligent when it was following directions from the Ohio County Juvenile Court's disposition order regarding the juvenile. *Marjorie Mitchell vs. Department of Welfare* (CC-79-139) 132

HOSPITALS

Claimant sought payment for hospital supplies delivered to Welch Emergency Hospital, and, as the respondent admitted the validity of the claim and that sufficient funds were available to pay the claim, the Court made an award to the claimant. See also *American Scientific Products vs. Dept. of Health,* 13 Ct.Cl. 357 (1981). *American Hospital Supply vs. Department of Health* (CC-79-575) 151

Claimant sought payment for medical care rendered to an inmate of the Beckley Work Release Center, and, as the respondent admitted the validity and amount of the claim and that sufficient funds were available for payment of the claim, the Court made an award to the claimant. *Appalachian Regional Hospital vs. Department of Corrections* (CC-79-697) 153

Where the respondent admitted the validity of the claim and that there were sufficient funds in its appropriation from which the obligation could have been paid, the Court made an award to the claimant. *Beckley Hospital, Inc. vs. Division of Vocational Rehabilitation* (CC-80-170) 227

The claimant sought payment for hospital services rendered to inmates of respondent's Huttonsville Correctional Center, but, as the *Airkem* principle applied, the Court disallowed the claim. See also *Ohio Valley Medical Center, Inc. v. Dept. of Corrections,* 13 Ct.Cl. 332 (1981) and *Memorial General Hospital v. Dept of Corrections,* 13 Ct.Cl. 373 (1981). *Davis Memorial Hospital vs. Department of Corrections* (CC-79-388) 46

The Court made an award to the claimant for hospital charges of a client of the respondent where the hospital had not been paid. *The Eye & Ear Clinic of Charleston, Inc. vs. Division of Vocational Rehabilitation* (CC-80-3) 209

Where the claimant sought payment for hospital services rendered to an inmate of the respondent, and the respondent admitted the validity of the claim, the Court made an award. See also *Grafton City Hospital v. Dept. of Corrections,* 13 Ct.Cl. 253 (1980) and *Luna v. Dept. of Corrections,* 13 Ct.Cl. 254 (1980).

Fairmont General Hospital vs. Department of Corrections (CC-80-204) 228

The Court made an award for overtime which the claimant was required to work for the respondent's State hospital but for which the respondent had failed to compensate the claimant. *Dr. Loudres Lezada vs. Department of Health* (CC-79-305) 412

A claim for hospital services rendered to inmates of respondent's correctional center was denied based upon the *Airkem* doctrine. See also *Appalachian Mental Health Center vs. Corrections*, 13 Ct.Cl. 350 (1981); *Greenbrier Physicians, Inc. vs. Corrections*, 13 Ct.Cl. 331 (1981); and *William R. Barton, M.D. vs. Corrections*, 13 Ct.Cl. 331 (1981). *Memorial General Hospital Association vs. Department of Corrections* (CC-79-669) 175

The Court held that it was negligence on the part of the respondent's State hospital not to have treated claimant's decedent for diabetes, which illness was indicated to the hospital when the decendent became a patient. As such negligence proximately caused or accelerated the decedent's death, the Court made an award for the wrongful death of the decedent. *John Slone, Administrator of the Estate of Maude Slone, deceased vs. Department of Health* (CC-78-273) 382

An award was made to the claimant for services rendered to an inmate of the Beckley Work Release Center where the bill was not received by the respondent until after the proper fiscal year had expired. *Southern West Virginia Clinic vs. Department of Corrections* (CC-80-95) 165

Where claimant sought payment for installation of fire doors at a State hospital and the respondent admitted the amount of the claim and that sufficient funds were available, the Court made an award. *Trojan Steel Company vs. Department of Health* (CC-80-323) 329

Where the claimant alleged that he was "severely and maliciously beaten" by three aides at respondent's hospital, the Court determined that the evidence indicated that the injuries were received incident to a fight between the claimant and another patient, and the Court denied the claim. *James R. Watson, who sues by his next friend, his brother, Ronald R. Watson vs. Department of Health* (CC-77-169) 139

An award was made for merchandise purchased by a State hospital where the respondent admitted the validity of the claim and that sufficient funds were available in the proper fiscal year in which to pay the claim. See also *Sargent-Welch Scientific Co. vs. Health*, 13 Ct.Cl. 327, (1980). *Weslakin Corporation vs. Department of Highways* (CC-80-315) 304

The *Airkem* doctrine was applied to a claim where outpatient surgery was performed on an inmate of the West Virginia State Penitentiary. *Wheeling Hospital vs. Department of Corrections* (CC-80-94) 178

INDEPENDENT CONTRACTOR

Where there was evidence that a contractor of the respondent had created the condition complained of by the claimant, the

Court denied the claim as the claimant failed to establish by a preponderance of the evidence that the respondent was guilty of any actionable negligence. *Lester Bess vs. Department of Highways* (CC-79-372) 211

Where the evidence indicated that the hazard complained of by the claimant was caused by an independent contractor with no connection to the respondent State agency, the Court disallowed the claim. *Mary K. Fuller vs. Department of Highways* (CC-79-576) 272

Where the record established that an independent contractor was engaged in the construction work, the respondent cannot be held liable for the negligence, if any, of such independent contractor. *James M. Harper vs. Department of Highways* (CC-79-455) 274

A claim for damage to a vehicle sprayed by paint was denied due to the general rule that the respondent is not liable for the negligence of an independent contractor. *Arlie Neil Humphreys vs. Department of Highways* (CC-78-199) 128

Where an independent contractor of the respondent used a crane and headache ball in the destruction of an old bridge, and this work was performed near the property of the claimant, the Court held that this was was intrinsically dangerous; hence, the general rule of non-liability should not be applied, and an award was made to the claimant for damage to the property. See also *Tabit v. Dept. of Highways*, 13 Ct.Cl. 318 (1980). *Cleo Lively Moore vs. Department of Highways* (CC-78-292) 148

Insurance

Where the claimant filed to properly submit a former claim as a subrogation claim, and an award had been made in that action but the claim was never paid, the Court made an award to the insurance carrier for the subrogation claim. *Erie Insurance Exchange, Subrogee of Charles E. Schooley vs. Department of Highways* (CC-78-271) 339

Interest

As the contract entered into by the claimant and the respondent did not provide for the recovery of interest, the Court had no statutory authority to make an award for interest, and, therefore, denied recovery of interest and finance charges. *A. J. Baltes, Inc. vs. Department of Highways* (D-1002) 1

The Court made an award of interest due a contractor on certain balances remaining after completion of a contract based upon the installment paid to the claimant contractor. *J. F. Allen Company vs. Department of Highways* (CC-77-98) 364

Jurisdiction

As the Court's jurisdiction is limited to granting or denying a monetary award, the Court was unable to respond to the claimant's request for assistance in improving the visibility at an intersection. *Beneficial Management Corporation of America vs. Department of Highways* (CC-78-299) 71

Where the claimant failed to receive consideration for a permanent drainage easement which was constructed on his

property, and then filed in the Court of Claims for damages to his property, the Court disallowed the claim as the claimant had an adequate remedy at law in condemnation. *Joseph W. Carlile vs. Department of Highways* (CC-78-287a) 192

A claim for the repair of a driveway was denied as this Court is without jurisdiction to compel any such repair, and there was no evidence of negligence on the part of the respondent in the construction of the drainage ditch complained of by the claimant. *Billy R. Cowan vs. Department of Highways* (CC-79-59) 124

The Court sustained a motion to dismiss an individual respondent named in a complaint, as this Court has held that it has no jurisdiction over individuals. *Margaret A. Kolinski and Raymond L. Kolinski vs. Board of Regents* (CC-77-58) 206

The Court of Claims has no jurisdiction in a claim not filed within the period of limitations applicable under pertinent provisions of the West Virginia Code. *Millicent Kuman vs. Board of Regents* (CC-79-445) 384

If the respondent takes a portion of claimants' property, the claimants have an adequate remedy at law through condemnation proceedings. *Charles H. Page and Dorothy Page vs. Department of Highways* (CC-80-122) 294

As the question of the application of the statute of limitations is a jurisdictional matter, the Court must deny a claim which was not filed within the two-year period of limitations as indicated in Code §55-2-12. *Stonewall Casualty Co., Subrogee of Anthony Tassone vs. Department of Highways* (CC-78-262) 55

Landlord and Tenant

Where the claimant sought payment for rent due on a lease, and the respondent admitted the validity of the claim, stating that it had sufficient funds with which to pay it, the Court made an award to the claimant. *Applachian Homes, Inc. vs. Department of Health* (CC-81-4) 349

Where the claimant sought payment for rent due on a lease with the respondent State agency, and the agency admitted the validity of the claim and that it had sufficient funds, the Court made an award. *Robert H. C. Kay, Trustee, Estate of W. F. Harless vs. Alcohol Beverage Control Commissioner* (CC-80-149) 241

Landslides—See also Falling Rocks

Where the Court determined that the respondent's removal of a portion of the retaining wall on claimant's property, and respondent's failure to shore up the hillside, were the primary causes of a slide which damaged the claimant's property, an award was made for damages. *Rose M. Allen vs. Department of Highways* (CC-78-297) 189

A claim for damage to a vehicle which struck a tree limb protruding over the road from a recent slide ws denied, as the respondent had no notice of the hazard caused by the slide nor a reasonable opportunity to remove it. *Lee W. Clay vs. Department of Highways* (CC-79-164) 123

Where a slide had existed on the highway in a sharp curve for at least a month prior to claimant's accident, the Court held that it was foreseeable that vehicles using the road might have an accident. Respondent's failure to remove the slide constituted negligence which was the proximate cause of the accident, and the Court made an award to the claimant for his injuries. *Daniel C. Farley, Jr. vs. Department of Highways* (CC-78-216) 63

In the course of slide correction work, employees of the respondent damaged a gas line of the claimant, which damage occurred because of the negligence of the respondent, and the Court made an award. *Carl C. Moles vs. Department of Highways* (CC-80-196) 233

Where respondent's failure to correct a slide condition resulted in damage to claimant's well and other property, the Court made an award for said damages. *Virgil E. Moore vs. Department of Highways* (CC-80-280) 385

The Court denied a claim for damage to claimant's vehicle which occurred when he struck a tree that extended across the highway as the result of a slide. The Court determined that the claimant failed to prove that the respondent had not conformed to the standard of reasonable care required. *Douglas Newbell vs. Department of Highways* (CC-80-186) 255

Where a retaining wall owned and maintained by the respondent collapsed and caused damage to claimant's properties, the Court made an award for said damages. *Hughie C. Parks vs. Department of Highways* (CC-77-128) 221

Where the employees of the respondent, in the process of clearing a slide, negligently damaged the property of the claimant, the Court made an award for said damage. *Hughie C. Parks vs. Department of Highways* (CC-80-107) 221

Limitation of Actions

A claim for the loss of drinking water and a well as the result of a negligent act on the part of the respondent was denied where it appeared to the Court that the claimants had failed to file their claim within the two-year period of the statute of limitations. *Victor Frisco and Janet Frisco vs. Department of Natural Resources* (CC-80-121) 287

The Court of Claims has no jurisdiction in a claim not filed within the period of limitations applicable under pertinent provisions of the West Virginia Code. *Millicent Kuman vs. Board of Regents* (CC-79-445) 384

The Court held that, in a written contract for the purchase of stone by the respondent, the contract was breached at the point when the respondent "canceled" the purchase order; therefore, the period of limitations did not bar the claim, and the Court made an award for the stone. *Stone Company, Inc. vs. Department of Highways* (CC-78-95) 167

As the question of the application of the statute of limitations is a jurisdictional matter, the Court must deny a claim which was not filed within the two-year period of limitations as indicated in Code §55-2-12. *Stonewall Casualty Co., Subrogee of Anthony Tassone vs. Department of Highways* (CC-78-262) 55

Motor Vehicles—See also Negligence; Streets and Highways

Where an employee of the respondent violated West Virginia Code §17C-13-1 by stopping on Interstate 64, and, as a result, claimant's vehicle struck said vehicle and sustained damage, the Court made an award to the claimant. *The Board of Education of The County of Kanawha vs. Department of Highways* (CC-79-215) 60

Where employees of the respondent dropped a steel section from a bridge onto the vehicle of the claimant, an award was made for the damages sustained by the vehicle. *Katherine H. Boyd vs. Department of Highways* (CC-81-64) 435

The doctrine of res ipsa loquitur was applied in a situation where a caution sign owned by the respondent's agent, a construction company, blew over and damaged claimant's vehicle. *Homer Bush vs. Department of Highways* (CC-79-72) ... 21

Where the claimant had to rent a vehicle as a replacement car when his vehicle was damaged as the result of the negligence of the respondent, the Court determined that a fair and reasonable amount for the rental of the vehicle would be $15.00 per day, and granted claimant an award based upon that amount. *Homer Bush vs. Department of Highways* (CC-79-72) 21

Where an accident causing damage to claimant's vehicle was caused when an employee of the respondent failed to signal his intention to turn left, the Court made an award for the violation of W.Va. Code Section 17C-7-3(A). *Carmet Company vs. Department of Highways* (CC-76-41) 145

Claimant was granted an award for damage to her vehicle which occurred when she struck a pocket of snow on a highway. The Court determined that this was a hazard created by the respondent. *Frances Jeanette Casey vs. Department of Highways* (CC-79-181) 182

The court made an award for damage to the tire of a vehicle which occurred because of the negligent placement of a traffic counter over the highway. *John F. Clark vs. Department of Highways* (CC-79-338) 85

Where a light pole belonging to the respondent fell across the highway, damaging claimant's vehicle, the Court made an award for the negligent maintenance of said pole. *Carol A. Demersman vs. Department of Highways* (CC-81-1) 352

To operate a motor vehicle in the face of visible hazards of which a driver is aware, or, in the exercise of reasonable care, should be aware, is to assume a known risk which bars recovery. The Court therefore denied a claim where the claimant alleged damage to his windshield when he passed a salt-spreading truck. *Erie Insurance Group, Subrogee of Frank R. Godbey vs. Department of Highways* (CC-79-89) 88

To operate a motor vehicle in the face of visible hazards of which the driver is aware is to assume a known risk, which bars recovery; therefore, the Court denied a claim where the claimant struck a pothole causing damage to his vehicle. *William J. Fox vs. Department of Highways* (CC-79-300) 236

An apparently overloaded dump truck driven by an employee of the respondent at an unreasonable rate of speed damared claimant's vehicle. Such conduct constituted negligence on the part of the respondent which proximately caused the damages suffered by the claimant, and an award was made. *Margaret Gibson vs. Department of Highways* (CC-79-648) 217

A claim for damage to a vehicle sprayed by paint was denied due to the general rule that the respondent is not liable for the negligence of an independent contractor. *Arlie Neil Humphreys vs. Department of Highways* (CC-78-199) 128

Where the claimants failed to establish by a preponderance of the evidence that the respondent knew or should have known of the dangerous condition of a rock cliff along the roadway, and a large boulder dislodged from the cliff striking claimants' vehicle, the Court denied their claim. *Collie Jeter, Guardian of Kermit Jeter vs. Department of Highways* (CC-77-183) 409

An award was made to the claimant for damage to his vehicle which occurred when a truck owned by the respondent negligently spilled limestone onto claimant's car. *Bert Kessler vs. Department of Highways* (CC-81-109) 436

The Court denied a claim for damage to a vehicle when said vehicle struck a broken curb as it was not established who, as a matter of law, was responsible for the repair and maintenance of the broken curb. *Kyle King vs. Department of Highways* (CC-79-39) 29

Where claimant's vehicle was struck by a piece of concrete which fell from a bridge owned and maintained by the respondent, the Court made an award as the respondent failed to properly maintain the bridge. *Carroll Lynch vs. Department of Highways* (CC-79-522) 187

Where the facts indicated that the section of road where claimant's vehicle was damaged by falling rocks was not an area which was prone to falling rocks, the Court denied the claim. *William Joseph Manning vs. Department of Highways* (CC-79-589) 275

It was obvious from the testimony that the respondent did not exercise reasonable care and diligence in the maintenance of the road in question, and this failure of the respondent caused the damages to the claimant's vehicle, for which the Court made an award. *Charles F. McCallister vs. Department of Highways* (CC-79-371) 219

The Court made an award when the respondent did not exercise reasonable care and diligence in the maintenance of the road in question, and this failure caused the damages to the claimant's vehicle. *Charles F. McCallister vs. Department of Highways* (CC-79-371) 219

Where the claimant's vehicle sustained damage when claimant attempted to drive it off a snow-covered exit of the interstate, the Court determined that the doctrine of comparative negligence applied. The respondent had not sufficiently cleared the exit of snow, but the claimant failed to drive at a speed consistent with

the prevailing conditions. *Sara H. McClung vs. Department of Highways* (CC-80-188) 371

The Court made an award to the claimant for damage to his vehicle when it was struck by a loose steel plate on a bridge owned and maintained by the respondent. *Barton Meaige vs. Department of Highways* (CC-79-200) 187

Where claimant's vehicle was splattered with paint which employees of the respondent had spilled on the roadway, the Court held that the negligence of the respondent in spilling the paint was the proximate cause of the damages, and made an award to the claimant. *Robert W. Mick vs. Department of Highways* (CC-80-387) 353

Where the respondent was negligent in failing to place warning signs in the vicinity of a hazard on a highway, the Court made an award to the claimant for damages sustained by a vehicle. *Barbara L. Miller vs. Department of Highways* (CC-79-443) 243

Where the claimant alleged damage to her windshield when a truck threw cinders upon her vehicle, but the claimant failed to establish that the windshield was damaged as the result of some act of negligence on the part of the respondent, the claim was denied. *Charles P. Moore vs. Department of Highways* (CC-79-71) 77

The Court denied a claim for damage to claimant's vehicle which occurred when he struck a tree that extended across the highway as the result of a slide. The Court determined that the claimant failed to prove that the respondent had not conformed to the standard of reasonable care required. *Douglas Newbell vs. Department of Highways* (CC-80-186) 255

Leaving a jagged piece of steel protruding from the sidewalk of a bridge constituted negligence on the part of the respondent which was the proximate cause of the damage sustained by claimant's vehicle. An award was made to the claimant. See also *Vinson v. Dept. of Highways*, 13 Ct.Cl. 40 (1979). *Gary Cline Spurgeon vs. Department of Highways* (CC-79-191) 39

The negligence of the claimant in leaving his ignition key in the switch of his automobile was determined to be the proximate cause of the damage to claimant's vehicle when it was taken for a joy ride by residents of the West Virginia Children's Home, and the Court denied the claim. *Jospeh H. Stalnaker vs. Department of Highways* (CC-79-157) 93

Where the evidence failed to establish that the object which struck and broke claimants' windshield came from a Department of Highways vehicle, the claim was denied. *M. Wood Stout and Lova Stout vs. Department of Highways* (CC-80-166) 256

Where the claimant was not forced onto the berm nor otherwise necessarily had to use the berm, the Court held that the claimant was guilty of negligence which equalled or exceeded that of the respondent when the claimant drove onto the berm and damaged his vehicle. See also *Perdue v. Dept. of Highways*, 13 Ct.Cl. 137 (1980). *Robert J. Sweda vs. Department of Highways* (CC-79-479) 249

The Court made an award for damage to claimant's vehicle which occurred when a member of the Department of Public Safety intentionally struck the rear of the vehicle in apprehending three juveniles who had stolen it. The Court held that the claim was one which, in equity and good conscience, the State should pay. *Mary Louise Szelong vs. Department of Public Safety* (CC-79-111) 96

An award for damage to claimant's windshield was made where a truck owned by the respondent negligently spread cinders on the vehicle. *Charles E. Tedrow vs. Dept. of Highways* (CC-81-28) 438

Where a truck owned by the respondent negligently spread cinders onto claimant's vehicle, breaking the windshield, the Court made an award for the negligent operation of the truck. *Charles E. Tedrow vs. Department of Highways* (CC-81-28)..... 438

Where claimant's vehicle sustained damage as the result of having limestone thrown against it by the dual tires of a truck being operated by respondent's employee, the Court found liability on the part of the respondent as it was negligent in failing to properly maintain mudguards on a truck which was proceeding in and out of a limestone stockpile. *Gary Thompson vs. Department of Highways* (CC-79-179) 266

To operate a motor vehicle in the face of visible hazards such as defects in the road, of which the driver is aware, is to assume a known risk which bars recovery. *Earl A. Whitmore, Jr. and Barbara A. Whitmore vs. Department of Highways* (CC-80-181) . 304

Where the evidence was such that the claimant appeared to be guilty of negligence which proximately caused the accident between the claimant and an eastbound truck owned by the respondent and operated by one of its employees, the Court denied the claim. *Offie D. Williams vs. Department of Highways* (CC-79-46) 140

Where claimant's vehicle struck an expansion joint and was damaged, the Court made an award because of the negligent maintenance of the bridge. See also *Young v. Dept. of Highways*, 13 Ct.Cl. 268 (1980). *David J. Yates vs. Department of Highways* (CC-80-180) 268

Where a snowplow being operated by an employee of the respondent struck and damaged a vehicle, the Court made an award for the damage. *Robert L. Zimmerman and Federal Kemper Insurance Company, as subrogee of Robert L. Zimmerman vs. Department of Highways* (CC-79-421)..... 282

NEGLIGENCE—See also Motor Vehicles; Streets and Highways

Respondent's failure to properly inspect and maintain a lamp cord in claimant's room constituted negligence which proximately caused a fire damaging claimant's personal property. *Kimberly Allen vs. Board of Regents* (CC-79-121)..... 321

Where claimant's truck fell through a culvert on the respondent's right of way, the Court determined that the negligent maintenance of the culvert resulted in the damage to

claimant's vehicle. *Allstate Construction & Roofing Co. vs. Department of Highways* (CC-81-3) 375

When employees of the respondent negligently and carelessly allowed a pipe to fall onto a guy wire of claimant's distribution line pole, causing damage to claimant's property, the Court made an award for said damage. *Appalachian Power Co. vs. Department of Highways* (CC-78-289) 260

The presence of a boulder approximately four inches from the edge of the pavement created a definite hazard to traffic on the road, as the respondent had constructive notice of its existence. Failure to move the boulder constituted negligence which was the proximate cause of the damage to the claimant's vehicle, and the Court made an award. *Robert S. & Evelyn Atkinson vs. Department of Highways* (CC-78-6) 18

When an employee of the respondent negligently operated a piece of equipment and broke claimant's gas line, this negligence was the proximate cause of the damage suffered by the claimant, and the Court made an award. *Harry H. Barrett vs. Department of Highways* (CC-79-53) 20

Where the claimants failed to establish the burden of proof necessary to establish a prima facie case of liability against the respondent, the claim was denied. *Dayton C. Beard and Jeanne Beard vs. Department of Highways* (CC-80-412) 389

Where there was evidence that a contractor of the respondent had created the condition complained of by the claimant, the Court denied the claim as the claimant failed to establish by a preponderance of the evidence that the respondent was guilty of any actionable negligence. *Lester Bess vs. Department of Highways* (CC-79-372) 211

The Court reopened a claim where the evidence plainly demonstrated negligence on the part of the respondent, but the question of contributory negligence on the part of the claimant could not be determined by the evidence, and the Court desired further testimony. *Paul Bogert vs. Department of Highways* (CC-80-27) 269

Where the respondent left a ditch line which had been cut in the pavement uncovered and unmarked, and this caused damage to claimant's vehicle, the Court made an award for the negligence of the respondent. *Harley C. Butler vs. Department of Highways* (CC-79-711) 208

Where the claimant's vehicle was damaged on newly-installed speed bumps on the campus of Potomac State College, and said speed bumps were abnormally high, the Court made an award for the damage. *Charles L. Coffman vs. Board of Regents* (CC-81-11) 355

Where the berm of a road simply collapsed, causing an accident, the Court made an award to the claimant as the respondent was under a duty to maintain the berm in a safe condition. *Eugene W. Conn vs. Department of Highways* (CC-79-493) 194

Where the respondent failed to repair a road defect for a period of three weeks, the Court determined that this constituted

negligence which was the proximate cause of the damage to claimant's automobile, and an award was made to the claimant. *Violet Cook vs. Department of Highways* (CC-79-482) 213

Where the claimants failed to establish by a preponderance of the evidence that the respondent was guilty of primary negligence in failing to exercise reasonable care to keep the road in a safe condition, the Court disallowed the claim. *G. Lee Cox and June F. Cox vs. Department of Highways* (CC-79-401) 215

Where claimant was forced to cross a ditch constructed across a road by respondent's employee, and claimant's vehicle was damaged as a result of the failure of the respondent to warn motorists of the hazard, the Court made an award for the damages. See also *Finney v. Dept. of Highways*, 13 Ct.Cl. 262 (1980). *Richard E. Cozad vs. Department of Highways* (CC-80-306) 261

Where a light pole belonging to the respondent fell across the highway, damaging claimant's vehicle, the Court made an award for the negligent maintenance of said pole. *Carol A. Demersman vs. Department of Highways* (CC-81-1) 352

Where the claimant was forced off a narrow, one-lane road onto a berm which was in a bad state of repair, the Court held that the respondent was negligent in the maintenance of the berm, and made an award to the claimant. *Reba C. Dunlap vs. Department of Highways* (CC-79-414) 285

Where the claimant candidly admitted that she was aware of the existence of a pothole prior to hitting it, the Court denied the claim. *Carl Dunn and Virginia Dunn vs. Department of Highways* (CC-79-42) 86

A claim for damage to a vehicle which struck a pothole was denied as negligence on the part of the respondent was not proven. See also *Roberts vs. Highways*, 13 Ct.Cl. 417 (1981). *Kenneth E. Duskey and Lois V. Duskey vs. Department of Highways*, (CC-80-182) 401

Where employees of the respondent caused damage to claimant's gas line while replacing a concrete culvert in the vicinity of claimant's property, the Court made an award to the claimant. *Russell E. Freeman vs. Department of Highways* (CC-80-122) 237

Where there was no evidence of negligence on the part of the respondent, the Court disallowed a claim for damage to a vehicle which struck a pothole. *Grange Mutual Casualty Co., Subrogee of Jack De Giovanni vs. Department of Highways* (CC-79-202) 273

Where the respondent sprayed a bridge surface with a mixture of linseed oil and mineral spirits and then placed small abrasive "skid stone" upon the surface, but did not erect warning signs or post flagmen to warn of the condition of the bridge surface until it was dry, the Court found the respondent negligent and therefore liable for the damages sustained by the claimant who had an accident on the bridge. *Dean R. Grim vs. Department of Highways* (CC-78-124) 378

The simple existence of a defect in a road does not establish negligence per se. Therefore, a claim for damages to a vehicle

caused by striking a pothole was denied. *Gary Hall vs. Department of Highways* (CC-79-40) 127

Where negligence on the part of the respondent in permitting a dangerous hazard to exist was the proximate cause of the damage to claimant's vehicle, but the claimant was aware of the hazard and in the exercise of due care should have anticipated it, the Court applied the doctrine of comparative negligence in making an award to the claimant. *Lee Roy Hamilton vs. Department of Highways* (CC-80-85) 263

Where employees of the respondent had a roadway blocked, and the claimant rounded a blind curve and collided with those cars which were halted, the Court made an award to the claimant as the respondent created a dangerous condition without any warning to motorists, and such act was irresponsible and established negligence on the part of the respondent. *Barney Dale Johnson vs. Department of Highways* (CC-79-640) 265

An award was made to the claimant for damage to his vehicle which occurred when a truck owned by the respondent negligently spilled limestone onto claimant's car. *Bert Kessler vs. Department of Highways* (CC-81-109) 436

Where claimant's vehicle struck a deteriorated section of highway covering the entire width of the westbound lane of travel, the Court determined that it was negligence on the part of the respondent to fail to erect some type of warning sign for the traveling public. The Court made an award to the claimant for the damage to his vehicle. *Gary L. Knowlton vs. Department of Highways* (CC-79-110) 291

The Court denied a claim for reimbrusement for damages to a vehicle and a towing fee where the claimant alleged that escapees of the West Virginia Industrial School for Boys had stolen the vehicle. The evidence indicated that the vehile was unlocked and the key was in the ignition. The Court held that this negligent act on behalf of the claimants was the proximate cause of any subsequent harm done to the vehicle. *William F. LePera and Dixie Lee LePera vs. Department of Corrections* (CC-78-45) 49

Where claimant's vehicle was struck by a piece of concrete which fell from the bridge owned and maintained by the respondent, the Court made an award as the respondent failed to properly maintain the bridge. *Carroll Lynch vs. Department of Highways* (CC-79-522) 187

The Court denied a claim for damage to claimant's vehicle which occurred when said vehicle struck a pothole on a bridge. There was no evidence in the record to establish notice of the existence of the pothole on the part of the respondent. *Frank M. Marchese vs. Department of Highways* (CC-79-135) 230

Where claimant's vehicle sustained damage by striking a pothole and the claimant testified that she saw the hole after an automobile in front of her missed it, the Court disallowed the claim, as the existence of a defect in the highway does not establish negligence per se. *Estelle M. Martin vs. Department of Highways* (CC-79-64) 32

Without a positive showing of negligence on the part of the respondent there can be no liability, as the existence of a defect in the highway does not establish negligence per se; therefore, the Court disallowed the claim. *Estelle M. Martin vs. Department of Highways* (CC-79-64) 32

Where the claimant proceeded through a marked traffic construction area and her vehicle struck steel plates being used by the respondent, the Court determined that the claimant's negligence in striking the plates was equal to or exceeded the negligence of the respondent, and denied an award. *Peggy Mayhorn vs. Department of Highways* (CC-80-157) 323

As contributory negligence of a driver will not be imputed to the owner of the vehicle who was not present at the time of the accident, the Court made an award to the owner of the vehicle for damages which the vehicle sustained in an accident on a highway where the respondent State agency was found to be negligent. An award was made for the fair market value of the vehicle. *Jonathan E. McDonald, Administrator of the Estates of Norma Jean McDonald, et al. vs. Department of Highways* (CC-77-38a-d) 13

It is an established principle of law that the negligence of the operator of a vehicle cannot be imputed to the passengers therein, where such passengers are neither guilty of negligence nor exerted any control over the driver. The Court therefore made awards to the estates of two children who died as the result of an accident in which a car slid on ice on the highway. *Jonathan E. McDonald, Administrator of the Estates of Norma Jean McDonald, et al. vs. Department of Highways* (CC-77-38a-d)..... 13

Where a clogged culvert caused a water condition on the highway the Court held that it was foreseeable that the continued spread of water onto the road and a drop in temperature would result in the formation of ice, posing a hazard for traffic. Failure to correct the situation constituted negligence on the part of the respondent. *Jonathan E. McDonald, Administrator of the Estates of Norma Jean McDonald, et al. vs. Department of Highways* (CC-77-38a-d) 13

Where the driver of a vehicle slid on a stretch of ice on the highway, the Court held that the driver failed to exercise ordinary care against a visible and hazardous condition. No recovery was granted to the estate of the driver. *Jonathan E. McDonald, Administrator of the Estates of Norma Jean McDonald, et al. vs. Department of Highways* (CC-77-38a-d) 13

Claimant's vehicle sustained damage when it struck a hole in the berm of the road in a construction area where construction signs were posted at each end and the claimant was aware of said construction. Without a positive showing of negligence on the part of the respondent, the claim falls within the purview of the well-settled principle of *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947), and the Court disallowed the claim. *Gary McFann vs. Department of Highways* (CC-78-257) 33

When claimant's vehicle struck an uncovered hole in a bridge resulting in damage to the vehicle, the Court made an award, as the negligence of the respondent in failing to maintain the bridge

in a reasonably safe condition was the proximate cause of the damages. *Carl Eugene McNeely vs. Department of Highways* (CC-80-143) 232

The Court made an award to the claimant for damage to his vehicle when it was struck by a loose steel plate on a bridge owned and maintained by the respondent. *Barton Meaige vs. Department of Highways* (CC-79-200) 187

Where claimant's vehicle was splattered with paint which employees of the respondent had spilled on the roadway, the Court held that the negligence of the respondent in spilling the paint was the proximate cause of the damages, and made an award to the claimant. *Robert W. Mick vs. Department of Highways* (CC-80-387) 353

In the course of slide correction work, employees of the respondent damaged a gas line of the claimant, which damage occurred because of the negligence of the respondent, and the Court made an award. *Carl C. Moles vs. Department of Highways* (CC-80-196) 233

Where claimant alleged damage to the windshield when a truck threw cinders upon the vehicle, but the claimant failed to establish that the windshield was damaged as the result of some act of negligence on the part of the respondent, the claim was denied. *Charles P. Moore vs. Department of Highways* (CC-79-71) 77

The Court made an award for damage to the vehicle of claimant's insured where the respondent had no flagman present to warn of a work site obscured from public view by the crest of a hill, and as a result of this negligence, the claimant's insured's vehicle was damaged. *Nationwide Insurance Company, Subrogee of Franklin L. Dalton vs. Department of Highways* (CC-79-182) . 51

Respondent's failure to have flagmen in an area to warn motorists of a hazardous condition of the highway consituted negligence. *Roy Porterfield and Donna F. Porterfield vs. Department of Highways* (CC-80-98) 297

Where the record did not establish negligence on the part of the respondent, the Court disallowed a claim for damage to a vehicle which struck a hole in the pavement. See also *Van Horn v. Dept. of Highways*, 13 Ct.Cl. 422 (1981). *Charles E. Priestly, Jr. and Penny A. Priestley vs. Department of Highways* (CC-79-34) 36

Where a hazardous condition exists on a roadway of which the respondent is aware, and no warning devices are placed for the benefit of the traveling public, the respondent was found to be negligent. Where such negligence was the proximate cause of the claimant's injuries, an award will be made. *Sterling L. Pullen, Jr. vs. Department of Highways* (CC-79-579) 278

Where clogged culverts and a ditch line caused the volume of water running onto the road to be too great to flow through the natural drainage area, and it flowed onto claimant's property and damaged it, the Court held that the negligence of the respondent in failing to maintain the ditch line was the proximate cause of the damage. *Glen L. Ramey vs. Department of Highways* (CC-79-87) 342

Where claimant's vehicle was damaged when it crossed an uncovered culvert where no warning signs had been placed by the Department of Highways, the negligent maintenance of the road by the respondent was the proximate cause of the damages sustained. *Lee Roy Robertson vs. Department of Highways* (CC-80-302) 381

The Court made an award to the claimant for damage to his vehicle as the record reflected, by a preponderance of the evidence, that the respondent had actual notice of the existence of the hole in the road, and failure to remedy this defect constituted negligence. *Franklin D. Rowe vs. Department of Highways* (CC-78-288) 65

Where the claimant indicated that she was aware of the existence of the pothole, the Court held that her failure to avoid striking the hole constituted negligence which equaled or exceeded any negligence on the part of the respondent. *Eugene J. Sapp vs. Department of Highways* (CC-79-324) 317

Where the claimant's negligence was equal to or greater than that of the respondent as claimant had knowledge of the defect in the highway, the Court denied the claim. *Margaret Spatafore and Joseph Robert Spatafore vs. Department of Highways* (CC-80-185) 399

Where the claimant admitted that he had travelled over the defect in the road several times, the Court held that the claimant was guilty of negligence which equalled or surpassed that of the respondent, and denied the claim. *James Edward Sturm vs. Department of Highways* (CC-79-449) 248

Where the claimant was not forced on the berm nor otherwise necessarily had to use the berm, the Court held that the claimant was guilty of negligence which equalled or exceeded that of the respondent when the claimant drove onto the berm and damaged his vehicle. See also *Perdue v. Dept. of Highways*, 13 Ct.Cl. 137 (1980). *Robert J. Sweda vs. Department of Highways* (CC-79-479) 248

Where a truck owned by the respondent negligently spread cinders onto claimant's vehicle, breaking the windshield, the Court made an award for the negligent operation of the truck. *Charles E. Tedrow vs. Department of Highways* (CC-81-28)..... 438

Where claimant's vehicle sustained damage as the result of having limestone thrown against it by the dual tires of a truck being operated by respondent's employee, the Court found liability on the part of the respondent as it was negligent in failing to properly maintain mudguards on a truck which was proceeding in and out of a limestone stockpile. *Gary Thompson vs. Department of Highways* (CC-79-179) 266

Where the respondent left a portion of a stop sign post exposed, resulting in damage to the claimant's lawnmower, the Court made an award for said damage. *United States Post Office vs. Department of Highways*, (CC-81-78) 438

The failure of respondent's employee to take any action with respect to a rock which he saw in the road but failed to remove constituted negligence which proximately caused the accident in

this claim, and the Court made an award for damages to claimant's vehicle. *West Virginia Telephone Company vs. Department of Highways* (CC-80-161) 426

Where employees of the Department of Highways were conducting obstructive road work but failed to take the necessary steps to warn motorists, this constituted negligence for which an award was made to the claimant. *Charles E. Williams vs. Department of Highways* (D-749) 428

Where the evidence was such that the claimant appeared to be guilty of negligence which proximately caused the accident between the claimant and an eastbound truck owned by the respondent and operated by one of its employees, the Court denied the claim. *Offie D. Williams vs. Department of Highways* (CC-79-46) 140

Where a tree located close enough to the road to present a definite hazard fell upon claimant's vehicle and damaged it, and the record indicated that the respondent had been informed of this hazard in time to take corrective action but failed to do so, the Court held the respondent liable. *Ernest N. Wolford and Patricia K. Wolford vs. Department of Highways* (CC-80-268) ... 348

Claimant's vehicle was damaged when he struck steel plates on the road due to construction. The Court denied the claim as the claimant was aware that the road was under construction, and there was nothing in the record by which actual negligence on the part of the respondent could be established. *Harold Young vs. Department of Highways* (CC-78-274) 41

Where a snowplow being operated by an employee of the respondent struck and damaged a vehicle, the Court made an award for the damage. *Robert L. Zimmerman and Federal Kemper Insurance Company, as subrogee of Robert L. Zimmerman vs. Department of Highways* (CC-79-421)..... 282

NOTICE

Evidence of the falling of a rock without a positive showing that the respondent knew or should have known of the dangerous condition is insufficient to justify an award. *R. C. Adkins vs. Department of Highways* (CC-80-207) 307

Failure of the respondent to maintain a portion of road in a reasonably safe condition, and failure to erect signs to warn motorists of the unsafe condition constituted negligence, and an award was made to the claimant for injuries sustained as the result of an accident on the roadway. *Russell Lee Barkley vs. Department of Highways* (CC-78-187) 83

The Court denied a claim for damage to a vehicle which hit a pothole as the Court must have not only evidence as to the respondent's knowledge of the existence of the hole, but also sufficient time for the respondent to repair the hole. See also *Bush v. Dept. of Highways*, 13 Ct.Cl. 122 (1980). *William T. Blackwell and Karen M. Blackwell vs. Department of Highways* (CC-79-63) 121

A claim for damage to a vehicle which struck a hole in the road was denied as the claimant did not meet the burden of proof. The

claimant must prove that the respondent has actual or constructive notice of the defect and a reasonable amount of time to correct the defect. See also *Swofford vs. Highways*, 13.Ct.Cl. 259 (1980), and *Tate vs. Highways*, 13 Ct.Cl. 259 (1980). *Arna Cash vs. Department of Highways* (CC-80-194) 252

Notice of the existence of a pothole is necessary to establish a failure on the part of the respondent to exercise reasonable care in maintaining a road. The Court will deny a claim where such notice is not established. *Robert D. Cline vs. Department of Highways* (CC-79-548) 212

Where rocks fell upon a vehicle causing damage thereto, the Court held that the respondent cannot be found liable in such a situation unless the respondent has reason to anticipate the rock slide. *James F. Collins vs. Department of Highways* (CC-79-41) .. 22

Where the respondent failed to repair a road defect for a period of three weeks, the Court determined that this constituted negligence which was the proximate cause of the damage to claimant's automobile, and an award was made to the claimant. *Violet Cook vs. Department of Highways* (CC-79-482) 213

The respondent cannot be held liable for damages caused by collisions with potholes unless the claimant proves that the respondent had actual or constructive knowledge of the potholes and a reasonable time to effect repairs. *Eugenia Currey vs. Department of Highways* (CC-79-208) 216

Where a rock was located directly on the berm of the road within two inches of the blacktop surface, the Court held that the respondent had constructive notice of the location of the rock, and failure to remove the rock constituted negligence. *Arley Don Dodd vs. Department of Highways* (CC-80-383) 397

As the respondent had no reason to anticipate a rock fall in an area, which caused damage to claimant's vehicle, the Court denied the claim. *Wendell Dunlap vs. Department of Highways* (CC-79-61) 75

The Court made an award to the claimant for damage to his vehicle which occurred while crossing a wooden floor bridge. One of the floorboards flew up and damaged the vehicle, and the Court found that the respondent should have known of or discovered the loose floorboards of the bridge and made the necessary repairs. *Joe B. Eller vs. Department of Highways* (CC-79-485) 155

Where a slide had existed on the highway in a sharp curve for at least a month prior to claimant's accident, the Court held that it was foreseeable that vehicles using the road might have an accident. Respondent's failure to remove the slide constituted negligence which was the proximate cause of the accident, and the Court made an award to the claimant for his injuries. *Daniel C. Farley, Jr. vs. Department of Highways* (CC-78-216) 63

Where the claimant's vehicle sustained damage when it struck a piece of concrete in the road and the broken pavement was a condition which had existed for a month or more, the Court determined that the respondent was guilty of negligence which

caused the damage. *Irene E. Fragale vs. Department of Highways* (CC-80-301) 340

Claimant was denied an award for damage to his vehicle when it struck a pothole as the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, and there was no proof that the respondent had notice of the defect. See also *Lawrence v. Dept. of Highways,* 13 Ct.Cl. 129 (1980) and *Mayes v. Dept. of Highways,* 13 Ct.Cl. 131 (1980). *Larry P. Frye vs. Department of Highways* (CC-79-124) 126

A claim for damage to a vehicle, which occurred when the claimant drove onto a berm which was not properly maintained, was denied, as it was not established from the evidence that the respondent knew or should have known of the defective condition of the berm. *Nancy C. Graham vs. Department of Highways* (CC-80-316) 406

Claims for damages to motor vehicles were denied as the claimant failed to carry the burden of proof necessary to establish that the respondent had actual or constructive knowledge of the existence of the potholes and a reasonable amount of time to take suitable corrective action. See also *Nichols vs. Highways,* 13 Ct.Cl. 256, (1980), *Snyder vs. Highways,* 13 Ct.Cl. 333, (1981) and *Hull vs. Highways,* 13 Ct.Cl. 408, (1981). *Clarence G. Hager vs. Department of Highways* (CC-80-101) 253

An award was made to the claimant for damage to a vehicle which occurred when the vehicle passed over a disintegrated section of a bridge on a four-lane highway as the Court held that the respondent had notice of the condition of the bridge and should have effected repairs or erected warning devices. *Walter A. Henriksen vs. Department of Highways* (CC-79-165) 157

Before an award can be made for damage to a vehicle which struck a pothole in the road proof, either actual or constructive, that the respondent was aware of a defective condition must be presented. See also *Vilain vs. Highways,* 13 Ct.Cl. 330, (1980). *Mark Allen Hicks vs. Department of Highways* (CC-80-190) 310

Where the claimant housed a foster child in her home and had adequate notice of the child's untrustworthiness, the claimant assumed the risk of any loss which resulted when the claimant gave the child access to her purse. *Claudine Hinkle vs. Department of Welfare* (CC-79-21) 199

Where the claimant's vehicle sustained damage when rocks fell onto the road in front of his car, the Court disallowed the claim, as the lack of falling rock signs does not make the State liable without convincing evidence of the prior, prolonged existence of such a hazard. *Dallas Howard Jude vs. Department of Highways* (CC-78-256) 28

The respondent cannot be held liable for damages caused by collisions with potholes unless the claimant proves that the respondent had actual or constructive notice of the existence of the danger posed by the particular pothole and sufficient time to eliminate the danger. As the claimant brought forth no such evidence, the Court denied his claim for damage to his vehicle. *Henry R. Larmoyeux vs. Department of Highways* (CC-79-55) ... 31

The Court denied a claim for damage to claimant's vehicle which occurred when said vehicle struck a pothole on a bridge. There was no evidence in the record to establish notice of the existence of the pothole on the part of the respondent. *Frank M. Marchese vs. Department of Highways* (CC-79-135) 230

Claimant's vehicle sustained damage when it struck a hole in the berm of the road in a construction area where construction signs were posted at each end and the claimant was aware of said construction. Without a positive showing of negligence on the part of the respondent, the claim falls within the purview of the well-settled principle of *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947), and the Court disallowed the claim. *Gary McFann vs. Department of Highways* (CC-78-257) 33

As it is well-established law that the respondent is not an insurer of those using the highways of the State, and no evidence was presented to establish notice on the part of the respondent as to the hole in the road, the Court denied a claim for damage to a vehicle. *James L. Meadows vs. Department of Highways* (CC-79-126) 76

Where the respondent was negligent in failing to place warning signs in the vicinity of a hazard on a highway, the Court made an award to the claimant for damages sustained by a vehicle. *Barbara L. Miller vs. Department of Highways* (CC-79-443) 243

Where there was no evidence that the respondent knew or should have known of the existence of the pothole which allegedly caused the damage to claimant's vehicle, the Court disallowed the claim. The mere existence of a pothole in a road is not sufficient to impose liability upon the respondent. See also *Ryckman v. Dept. of Highways*, 13 Ct.Cl. 139 (1980) and *Perry v. Dept. of Highways*, 13 Ct.Cl. 324 (1980). *Douglas W. Morris vs, Department of Highways* (CC-79-45) 34

An award was made to the claimant for personal injuries sustained when he fell through a slat on a bridge. The Court determined that the respondent had constructive notice of the condition of the bridge. *Franklin D. Mullins and Sarah Y. Mullins vs. Department of Highways* (CC-78-198) 436

The Court made an award for damage to the vehicle of claimant's insured where the respondent had no flagman present to warn of a work site obscured from public view by the crest of a hill, and as a result of this negligence, the claimant's insured's vehicle was damaged. *Nationwide Insurance Company, Subrogee of Franklin L. Dalton vs. Department of Highways* (CC-79-182) . 51

A claim for damage to the tires of a vehicle which struck a pothole was denied as no testimony was introduced from which the Court could conclude that the respondent knew or should have known of the dangerous condition of that section of the highway. *Barbara A. Ney vs. Department of Highways* (CC-79-138) 133

A claim for damage to vehicle which struck a pothole was denied as the respondent cannot be held liable for such damage unless the claimant proves that the respondent had actual or constructive knowledge of the existence of the pothole and a

reasonable amount of time to repair it or take other suitable action. See also *Whitehouse vs. Highways*, 13 Ct.Cl. 224 (1980) and *Zicafoose vs. Highways*, 13 Ct.Cl. 226 (1980). *Julie Peiffer vs. Department of Highways* (CC-79-525) 222

Where the respondent knew or should have known that the road was narrow and that motorists would be required to leave the hard surface in order to pass approaching vehicles, it was the duty of the respondent to maintain the berm in a safe condition to accommodate vehicles proceeding on the roadway. *Zona Ruth Peters vs. Department of Highways* (CC-78-218) 325

Where claimant's vehicle sustained damage when the planking of a bridge collapsed adjacent to an existing hole which claimant was attempting to straddle, the Court made an award to the claimant for the damage. The claimant established, by a preponderance of the evidence, that the respondent knew or should have known of the existence of the defect. *Joyce Porter vs. Department of Highways* (CC-79-192) 161

Where a large boulder fell from the side of the roadway, the Court held that the respondent's failure to take remedial action constituted negligence as the evidence tended to show that the respondent had constructive notice of the hazardous condition. *Margaret K. Richardson vs. Department of Highways* (CC-78-235) 298

As the claimant failed to establish that the respondent had knowledge (either actual or constructive) of the existence of the pothole, the Court denied the claim. *Irving Robinson vs. Department of Highways* (CC-79-31) 78

The Court made an award to the claimant for damage to his vehicle as the record reflected, by a preponderance of the evidence, that the respondent had actual notice of the existence of the hole in the road, and failure to remedy this defect constituted negligence. *Franklin D. Rowe vs. Department of Highways* (CC-78-288) 65

A claim for water damage was denied where the evidence indicated that the respondent had not been contacted concerning the blocked drain, and there was no constructive notice of the problem as the road had just been taken over for maintenance by the respondent. *Rickie Allen Saunders vs. Department of Highways* (CC-80-205) 328

A claim for damage to claimant's vehicle caused when he struck pieces of broken concrete in the highway was denied based upon lack of notice on the part of the respondent. *David D. Smith vs. Department of Highways* (CC-79-450) 202

Where a hazardous condition was shown to have been in existence for at least two weeks before claimant's accident, and the accident took place on a much-used highway, the Court found that the respondent was negligent in the maintenance of said highway, and made an award to the claimant. *Joe Snodgrass vs. Department of Highways* (CC-79-145) 246

Where the Court determined that the respondent had constructive notice of the existence of a defect in the highway, and that defect was the proximate cause of damage to the

claimant's vehicle, the Court made an award. *Harold Ray Stafford vs. Department of Highways* (CC-78-197) 54

A claim for damages occurring when a vehicle struck a pothole was denied even though hearsay evidence disclosed that the pothole had existed some time prior to the accident as there was no competent evidence to establish that the respondent knew or should have known of the existence of the hazard. *John H. Ward and Nancy L. Ward vs. Department of Highways* (CC-79-65) 81

Even though the respondent may have actual knowledge of the existence of a hole in the road, it must also have had sufficient time to repair the defect before the Court will make an award for damage to a vehicle which struck the hole. *John Williams vs. Department of Highways* (CC-79-158) 97

Where a large hole in a main highway caused damage to the claimant's vehicle, the Court made an award on the basis that a hole of that size did not develop overnight and must have been in existence for some time prior to claimant's accident. *Ernest Williamson vs. Department of Highways* (CC-80-67) 281

Where the claimant established that he was forced off the road onto the berm, and the berm was in a defective condition of which the respondent had actual notice, the Court made an award in favor of the claimant. *Albert Ted Wood vs. Department of Highways* (CC-79-580) 305

Office Equipment and Supplies

The *Airkem* doctrine will be applied in a claim where the respondent admitted the validity of the claim but stated that there were no funds remaining in its appropriation for the fiscal year from which the obligation could have been paid. *Interstate Printers & Publishers, Inc. vs. Department of Corrections* (CC-80-133) 218

Claimant sought payment for three typewriters which it had supplied to West Virginia University, and, as the respondent admitted the validity of the claim and that funds were available, the Court made an award. *Kanawha Office Equipment, Inc. vs. Board of Regents* (CC-79-475a) 179

Claimant sought payment for a typewriter delivered to the respondent, and, as the respondent admitted the validity of the claim and that it had sufficient funds to pay the claim, the Court made an award to the claimant. *Kanawha Office Equipment, Inc. vs. West Virginia Board of Chiropractic Examiners* (CC-79-585). 159

Where several claimants sought compensation for goods and services which were furnished to the respondent, the Court determined that, as there were no funds remaining in respondent's appropriation for the fiscal year in question, the *Airkem* doctrine applied, and all of the claims were denied. *Southern West Virginia Clinic, et al. vs. Department of Corrections* (CC-79-686 et al.)..... 176

Claimant sought payment for a monitor which was purchased by West Virginia University, and, as the respondent admitted the validity of the claim and that funds were available in the proper fiscal year, the Court made an award. See also *Varian Associates* -

Instrument Division vs. Board of Regents, 13 Ct.Cl. 345 (1981). *Spatial Data Systems, Inc. vs. Board of Regents* (CC-80-8)..... 166

The Court made an award for printing services performed for respondent when the respondent admitted the allegations of the claim and that sufficient funds were available in the proper fiscal year. *Three Printers, Inc. vs. Department of Health* (CC-80-81) .. 169

Claimant sought payment for an amount due on two invoices for the rental of equipment, and, as the respondent indicated that it did not have sufficient funds with which to pay the claim, the Court disallowed it under the *Airkem* principle. See also *M. Merrick & Assoc., Inc. vs. Dept. of Corrections*, 13 Ct. Cl. 322 (1980). *Xerox Corporation vs. Department of Corrections* (CC-79-588)... 70

Pedestrians

An award was made to the claimant for personal injuries sustained when he fell through a slat on a bridge. The Court determined that the respondent had constructive notice of the condition of the bridge. *Franklin D. Mullins and Sarah Y. Mullins vs. Department of Highways* (CC-78-198)..... 436

Even though the evidence was that the claimant crossed the bridge daily and knew of its general condition, there was no evidence that the particular slat which broke should have been apparent to a pedestrian exercising ordinary care. *Franklin D. Mullins and Sarah Y. Mullins vs. Department of Highways* (CC-78-198) 436

Where a board in a walkway broke when claimant stepped on it, causing injuries to the claimant, the Court made an award as the negligence of the respondent in failing to properly maintain the walkway was the proximate cause of the injuries to the claimant. *Franklin D. Mullins and Sarah Y. Mullins vs. Department of Highways* (CC-78-198) 436

Where the respondent left a pile of asphalt on a sidewalk without any warning to the public, the Court made an award to a claimant who fell over the pile of asphalt and sustained physical injuries as a result. *Nancy J. Thabet vs. Department of Highways* (CC-79-206) 203

PERSONAL SERVICES

An award was made to the claimant who served as a Mental Hygiene Commissioner because the funds to pay for his services were exhausted, and the Court followed the *Swartling* decision. *F. William Brogan, Jr. vs. Office of the State Auditor* (CC-79-229) 67

Where an agency's rules and regulations contained the language "committing a breach of law" as grounds for suspending an employee, the Court interpreted it to include a conviction for such breach of law, and therefore made an award for back pay to the claimant who was suspended prematurely by the head of the agency. *Leonard A. Cerullo vs. Alcohol Beverage Control Commissioner* (CC-80-390) 392

Where it appeared to the Court that the respondent failed to pay the claimant proper compensation for work performed, the Court

made an award for the wages which she should have received. *Sue H. Ellis vs. Board of Regents* (CC-79-475c) 195

Where the claimant sought payment for overtime worked at respondent's institution, and the respondent admitted the allegations of the claim but indicated that there were not sufficient funds left in the appropriation with which to pay the overtime, the Court held that claims for personal services will not be denied, in accordance with the previous decision of this Court in *Petts, et al. v. Div. of Voc. Rehab.*, 12 Ct.Cl. 222 (1978). Claims for personal services will not be denied under the *Airkem* doctrine, and the Court made an award for the overtime. *Barbara Gruber vs. Department of Health* (CC-79-108) 24

Claimants were granted awards for serving as counsel for indigents in mental hygiene hearings where the claimants' fees were denied by the respondent because the fund to pay the same was exhausted, and the Court determined that the factual situations were identical to that in *Swartling, et al. vs. Office of the State Auditor*, 13 Ct.Cl. 57 (1979). *John S. Hrko, et al. vs. Office of the State Auditor* (CC-79-221 et al.) 104

The Court made an award for overtime which the claimant was required to work for the respondent's State hospital but for which the respondent had failed to compensate the claimant. *Dr. Lourdes Lezada vs. Department of Health* (CC-79-305) 412

Where the claimant worked many hours of overtime without compensation, the Court held that to deny the claim would have the effect of unjustly enriching the State. *Dr. Lourdes Lezada vs. Department of Health* (CC-79-305)..... 412

When claimant failed to receive a semimonthly paycheck as the result of a clerical error, and the respondent admitted the validity and amount of the claim, the Court made an award to the claimant. *Ernest J. Sandy vs. Board of Regents* (CC-80-92) 163

The Court of Claims is not bound by advisory opinions of the attorney general; therefore, the Court did not apply West Virginia Code §6-7-7, which prohibits retroactive pay increases, in a case where the claimant had been granted a promotion but had not been paid for a two-month period due to a delay in paperwork. *Cynthia Donahue vs. Board of Regents* (CC-80-108), *Patsy Spatafore vs. Board of Regents* (CC-80-109) 399

Where a delay in paperwork effecting a promotion for the claimant caused her to lose part of her pay for the promotion, the Court held that making an award did not constitute an illegal retroactive pay increase. *Cynthia Donahue vs. Board of Regents* (CC-80-108), *Patsy Spatafore vs. Board of Regents* (CC-80-109) .. 399

Where the claimant was promoted to a higher-paying position, but the paperwork to effect her promotion was delayed for a two-month period, the Court made an award for the amount of salary which the claimant lost due to the delay, for to deny the award would be inequitable and would constitute unjust enrichment to the State. *Cynthia Donahue vs. Board of Regents* (CC-80-108), *Patsy Spatafore vs. Board of Regents* (CC-80-109) .. 399

The Court made awards to individuals in payment of services under the Mental Hygiene Fund and the Needy Persons Fund. Those funds became inadequate to pay for the services, but the Court held that the claims were distinguishable from the *Airkem* principle and were clearly claims which the State, in equity and good conscience, should discharge and pay. *Richard K. Swartling, et al. vs. Office of the State Auditor* (CC-79-211) 57

PHYSICIANS AND SURGEONS—See also Hospitals

POISONS

Claimant alleged damage to his property when employees of the respondent were engaged in weed control operations, but the Court denied the claim as there was no evidence to establish a causal connection between the use of the weed killer and the alleged damages. *Joseph Raymond Snyder and Sarah Snyder vs. Department of Highways* (CC-76-100) 79

PRISONS AND PRISONERS

Where the undisputed evidence precluded a finding that the respondent was negligent in failing to provide adequate measures to protect the claimant, who alleged physical attack by another inmate while he was confined for pre-sentencing evaluation in Huttonsville Correctional Center, the Court denied the claim. *Billy Conn Adkins vs. Department of Corrections* (CC-77-196) 117

Claimant sought payment for medical care rendered to an inmate of the Beckley Work Release Center, and, as the respondent admitted the validity and amount of the claim and that sufficient funds were available for payment of the claim, the Court made an award to the claimant. *Appalachian Regional Hospital vs. Department of Corrections* (CC-79-697) 153

Where claimant sought payment for hospital services rendered to an inmate of the respondent, and the respondent admitted the validity of the claim, the Court made an award. See also *Grafton City Hospital v. Dept. of Corrections*, 13 Ct.Cl. 253 (1980) and *Luna v. Dept. of Corrections*, 13 Ct.Cl. 254 (1980). *Fairmont General Hospital vs. Department of Corrections* (CC-80-204) 228

Where no evidence was presented to indicate that the supervisors of four escapees of the West Virginia Industrial School for Boys had acted in a negligent manner, the Court denied the claim. *William F. LePera and Dixie Lee LePera vs. Department of Corrections* (CC-78-45) 49

Where the claimant failed to establish the elements constituting false imprisonment, the Court disallowed his claim. *Lewis Dale Metz vs. West Virginia State Board of Probation and Parole and Department of Corrections* (CC-77-155) 292

Where claimant hospital sought payment for services rendered to an inmate of the West Virginia institution and the respondent indicated it did not have sufficient funds with which to pay for the said services, the Court applied the *Airkem* doctrine and disallowed the claim. *Ohio Valley Medical Center, Inc. vs. Department of Corrections* (CC-79-398) 42

An award was made to the claimant for services rendered to an inmate of the Beckley Work Release Center where the bill was not received by the respondent until after the proper fiscal year had expired. *Southern West Virginia Clinic vs. Department of Corrections* (CC-80-95) 165

The Court denied a claim for expenses incurred by the sheriff of Upshur County with respect to a paroled prisoner, as the West Virginia Code provides that the cost of confining a paroled prisoner shall be paid out of the funds appropriated for the penitentiary from which the individual was paroled, and that prisoner was not paroled from a West Virginia penitentiary. *Eugene C. Suder vs. Department of Corrections* (CC-79-1) 258

Claimant sought payment for services rendered to an inmate of the Hancock County Jail who was in custody of the respondent. As the respondent admitted the allegations, and sufficient funds were available, the Court made an award. *Weirton General Hospital vs. Department of Corrections* (CC-79-292) 66

The *Airkem* doctrine was applied to a claim where outpatient surgery was performed on an inmate of the West Virginia State Penitentiary. *Wheeling Hospital vs. Department of Corrections* (CC-80-94) 178

Public Institutions

The Court denied a claim for reimbursement for damages to a vehicle and a towing fee where the claimant alleged that escapees of the West Virginia Industrial School for Boys had stolen the vehicle. The evidence indicated that the vehicle was unlocked and the key was in the ignition. The Court held that this negligent act on behalf of the claimants was the proximate cause of any subsequent harm done to the vehicle. *William F. LePera and Dixie Lee LePera vs. Department of Corrections* (CC-78-45) 49

Where no evidence was presented to indicate that the supervisors of four escapees of the West Virginia Industrial School for Boys had acted in a negligent manner, the Court denied the claim. *William F. LePera and Dixie Lee LePera vs. Department of Corrections* (CC-78-45) 49

The Court held that it was negligence on the part of the respondent's State hospital not to have treated claimant's decedent for diabetes, which illness was indicated to the hospital when the decedent became a patient. As such negligence proximately caused or accelerated the decedent's death, the Court made an award for the wrongful death of the decedent. *John Slone, Administrator of the Estate of Maude Slone, deceased vs. Department of Health* (CC-78-273) 382

The negligence of the claimant in leaving his ignition key in the switch of his automobile was determined to be the proximate cause of the damage to claimant's vehicle when it was taken for a joy ride by residents of the West Virginia Children's Home, and the Court denied the claim. *Joseph H. Stalnaker vs. Department of Highways* (CC-79-157) 93

A claim for the destruction of a barn by juveniles who were residents of the Children's Center was denied as the record was

devoid of any evidence of negligence on the part of the respondent. *James P. Stemple vs. Department of Welfare* (CC-79-331) 94

Public Officers

Where a communications director exceeded his authority in hiring the claimant, the Court denied a claim for loss of wages. *James R. Lavender vs. Department of Highways* (CC-79-141) 241

The Court made an award to the claimant for costs she incurred in instituting a summary proceeding for the appointment of a committee for her incompetent husband where the claimant was engaged in negotiations with the respondent and was informed by a right-of-way agent that the fees would be paid by the respondent. *Virginia Williams vs. Department of Highways* (CC-80-119) 319

Real Estate

Where the Court determined that the respondent's removal of a portion of the retaining wall on claimant's property, and respondent's failure to shore up the hillside, were the primary causes of a slide which damaged the claimant's property, an award was made for damages. *Rose M. Allen vs. Department of Highways* (CC-78-297) 189

Where the claimant failed to receive consideration for a permanent drainage easement which was constructed on his property, and then filed in the Court of Claims for damages to his property, the Court disallowed the claim as the claimant had an adequate remedy at law in condemnation. *Joseph W. Carlile vs. Department of Highways* (CC-78-287a) 192

Where the installation of a drain by the respondent caused damage to the claimants' land, the Court made an award to the claimants for said damage. *Melvin Dingess and Corenia Dingess vs. Department of Highways* (CC-78-207) 146

Where the respondent's employees trespassed onto property of the claimant causing damage thereto, the Court made an award for said damage. *Sam Epling vs. Department of Highways* (CC-80-424) 338

Claimant's property and residence sustained damage from a flow of water which resulted when the elevation of the road was raised around the claimant's home. A catch basin, which was improperly maintained by the respondent, caused surface water from other properties to flow onto claimant's property, and the Court made an award for the damage to the property. *Robert L. Ferguson, Executor of the Estate of Elizabeth L. Ferguson vs. Department of Highways* (CC-78-148) 103

Claimants alleged damage to their properties from deterioration which occurred when claimants were allegedly advised by agents of the respondent to refrain from repairing homes in an area to be condemned for a new roadway. The Court held that the representations of a right-of-way agent employed by the respondent which exceed the scope of the agent's apparent authority do not create a contractual obligation on behalf of the State, and the Court denied the claims. *Jimmie W. Fields & Oma*

Alice Fields and Seba Tipton vs. Department of Highways (D-874g and CC-76-39) 196

The respondent Department of Highways is under a legal duty to use reasonable care to maintain ditch lines in such condition that they will carry off surface water and prevent it from being cast upon the property of others. Where the respondent fails to properly maintain a ditch line, which results in damage to a claimant's property, an award will be made for said damage. *Hobert Friel vs. Department of Highways* (CC-79-81) 404

Where the respondent not only fails to properly maintain a ditch line, but takes affirmative action to destroy the ditch line, causing damage to a claimant's property, the Court will make an award. *Hobert Friel vs. Department of Highways* (CC-79-81) 404

Where claimant's property was damaged as the result of the construction of a drainage system incident to a new highway, which caused a material increase in the volume of surface water flowing onto claimant's land, the Court made an award based upon the diminution of the market value attributed to the increased burden of water. *Elizabeth Smith Grafton vs. Department of Highways* (CC-79-26) 147

Where water flowed its natural course down the slope of a mountain and onto the claimants' property, the Court disallowed a claim where the claimants contended that the installation of a culvert caused the water damage to their property. *Emit Jennings, Jr. and Victoria Jennings vs. Department of Highways* (CC-79-216) 289

Where respondent's failure to maintain a culvert caused the flooding of claimant's basement, the Court made an award for the damages sustained by claimant's property. *Esther Johnson vs. Department of Highways* (CC-79-664) 380

The respondent was held absolutely liable for damages proximately caused by blasting operations, and the Court made an award to the claimant. *Mary McLaughlin, et al. vs. Department of Highways* (CC-79-143) 387

Where the evidence failed to support the allegation that flood waters were the result of construction by the respondent, the Court denied a claim for damage to claimants' properties. *Mary McLaughlin, by Ralph McLaughlin, her son vs. Department of Highways* (CC-79-143), *Robert B. Johnston vs. Department of Highways* (CC-79-114), *James R. Skinner, d/b/a Jim's Grocery vs. Department of Highways* (CC-79-27) 387

Where the evidence in the claim was such that the flooding of claimants' pond was the result of the negligent placement of ditches along the road or the failure to maintain the ditch, the Court made an award for the damage to claimants' property. *Carl Moats and Pauline Moats vs. Department of Highways* (CC-79-52) 243

Where an independent contractor of the respondent used a crane and headache ball in the destruction of an old bridge, and this work was performed near the property of the claimant, the Court held that this was intrinsically dangerous; hence, the

general rule of non-liability should not be applied, and an award was made to the claimant for damage to the property. See also *Tabit vs. Dept. of Highways,* 13 Ct.Cl. 318 (1980). *Cleo Lively Moore vs. Department of Highways* (CC-78-292) 148

Where claimant's property sustained damage as the result of a clogged culvert which changed the flow of surface water onto claimant's property and into her home, the Court made an award for the damage. *Catherine Nestor vs. Department of Highways* (CC-78-296) 150

Property damage alleged to have been caused by the respondent was denied as it was not proved by a preponderance of the evidence that the damage was caused by misconduct on the part of the respondent. *Robert R. Nickel and Bertha E. Nickel vs. Department of Highways* (CC-78-189) 134

Where the claimant failed to offer any evidence of the amount of damage caused by water flowing beneath a bridge and into the basement of claimant's house, the Court held open the claim in order to permit the claimant to pursue the matter further if he so desired. *Donald J. Oliverio vs. Department of Highways* (CC-78-240) 180

If the respondent takes a portion of claimants' property, the claimants have an adequate remedy at law through condemnation proceedings. *Charles H. Page and Dorothy Page vs. Department of Highways* (CC-80-122) 294

Where a retaining wall owned and maintained by the respondent collapsed and caused damage to claimant's properties, the Court made an award for said damages. *Hughie C. Parks vs. Department of Highways* (CC-77-128) 221

The Court denied a claim based upon property damage from pooling water as there was no evidence that the respondent was negligent in the placement or care of the culvert alleged to have caused the damages. *Gail and Ora Pitsenbarger vs. Department of Highways* (CC-77-222) 35

The Court made an award for property damage caused by respondent's failure to correct a drainage system adjacent to the property. *Shel Products, Inc. vs. Department of Highways* (CC-76-92) 201

Claimant alleged damage to his property when employees of the respondent were engaged in weed control operations, but the Court denied the claim as there was no evidence to establish a causal connection between the use of the weed killer and the alleged damages. *Joseph Raymond Snyder and Sarah Snyder vs. Department of Highways* (CC-76-100) 79

Claimants alleged that failure of the respondent to maintain the ditch line along the road adjacent to their property caused a washout of claimants' driveway, and the Court made an award based upon the respondent's failure to properly maintain the drainage ditch. *Frank Terango & Duel Terango vs. Department of Highways* (CC-79-257) 168

Res Judicata

As claimants were granted a recovery in a prior action, at which time they might have had the matter disposed of on its merits, the doctrine of res judicata barred them from recovering additional damages. *James H. Curnutte, Jr. and Deborah L. Curnutte vs. Department of Highways* (CC-80-176) 396

Scope of Employment

Claimants alleged damage to their properties from deterioration which occurred when claimants were allegedly advised by agents of the respondent to refrain from repairing homes in an area to be condemned for a new roadway. The Court held that the representations of a right-of-way agent employed by the respondent which exceed the scope of the agent's apparent authority do not create a contractual obligation on behalf of the State, and the Court denied the claims. *Jimmie W. Fields & Oma Alice Fields and Seba Tipton vs. Department of Highways* (D-874g and CC-76-39) 196

State Agencies

The Court made an award for engineering and consultant services performed for the respondent where the respondent admitted the validity of the claim, and sufficient funds were available for the payment of the claim. *Appalachian Engineers, Inc. vs. Department of Health* (CC-79-502) 82

Where an agency's rules and regulations contained the language "committing a breach of law" as grounds for suspending an employee, the Court interpreted it to include a conviction for such breach of law, and therefore made an award for back pay to the claimant who was suspended prematurely by the head of the agency. *Leonard A. Cerullo vs. Alcohol Beverage Control Commissioner* (CC-80-390) 392

Where the claimant sought payment for a fire service fee owed by the respondent, and the respondent admitted the validity of the claim but stated that it did not have sufficient funds with which to pay it, the Court applied the *Airkem* doctrine and denied the claim. *The City of Charleston vs. Department of Finance and Administration* (CC-80-398) 350

The Court made an award for remodeling work performed by the claimant in anticipation of receiving a retail liquor license because agents of the respondent led the claimant to believe that the license would be granted. *Nita Kay Colliton vs. Alcohol Beverage Control Commissioner* (CC-78-212) 62

Where the West Virginia Code provides for a maximum amount payable to attorneys for representing indigents in criminal actions, the Court will not hold that equitable principles can justify the circumvention of the plain and unambiguous language of the statute. A claim for an amount over and above the statutory limit was therefore denied. See also *Finnerin vs. State Auditor*, 13 Ct.Cl. 431 (1981); *Martin vs. State Auditor*, 13 Ct.Cl. 432 (1981); and *Vannostrand vs. State Auditor*, 13 Ct.Cl. 433 (1981). *George M. Cooper vs. Administrative Office of the Supreme Court of Appeals and Office of the State Auditor* (CC-80-287) 394

Where the claimant and the respondent indicated that the respondent owed a sum of money to the claimant for the tuition of one of claimant's clients, the Court made an award for said tuition. *Davis and Elkins College vs. Division of Vocational Rehabilitation* (CC-80-111) 308

Where the claimant sought payment for services as a financial examiner, and the respondent admitted that the claim was valid and that there were funds available, the Court made an award to the claimant. *Michael J. Davoli vs. Insurance Department* (CC-80-363) 338

An advisory determination was made in a claim where one State agency alleged that it was owed money by another State agency. *Department of Highways vs. Department of Corrections* (CC-79-633) 173

The Court applied the *Airkem* doctrine to a claim wherein one State agency requested payment from another State agency for gasoline sold to it for which the agency was not paid. *Department of Highways vs. Department of Corrections* (CC-79-633) 173

The Court made an award to the claimant for reimbursable expenses incurred while he was an employee of the respondent State agency. *Edward J. Hamilton vs. Department of Banking* (CC-80-394) 353

Claimants were granted awards for serving as counsel for indigents in mental hygiene hearings where the claimants' fees were denied by the respondent because the fund to pay the same was exhausted, and the Court determined that the factual situations were identical to that in *Swartling, et al. vs. Office of the State Auditor*, 13 Ct.Cl. 57 (1979). *John S. Hrko, et al. vs. Office of the State Auditor* (CC-79-221a et al.) 104

The Court granted awards to attorneys who served as counsel for criminal indigents in juvenile, misdemeanor, or felony proceedings where the attorney fees were denied by the respondent because the fund was exhausted. The factual situations in these claims were identical to that of *Swartling, et al. vs. Office of the State Auditor*, 13 Ct.Cl. 57 (1979). *John S. Hrko, et al. vs. Office of the State Auditor* (CC-79-221b et al.) 110

As the administrative office of the Supreme Court of Appeals has no jurisdiction over the maintenance and custodial care of county courthouses, the Court denied a claim where claimant lost his coat in a county courthouse. *Andrew Noshagya vs. Administrative Office of the Supreme Court of Appeals* (CC-80-226) 415

Where the claimant undertook, in good faith, the task of producing a seal for the respondent State agency, but the agency did not have the funds to pay for the seal, the Court was bound by the *Airkem* doctrine to deny the claim. *Harry S. Spectre, d/b/a Commonwealth Castings Company vs. Board of Occupational Therapy* (CC-80-392) 374

The Court made awards to court reporters who performed reporting services in mental hygiene cases pursuant to the West Virginia Code, Chapter 27, Article 5, but who were denied

payment by the respondent because the "mental hygiene fund" was exhausted, as the factual situations were identical to that in *Swartling, et al. vs. Office of the State Auditor*, 13 Ct.Cl. 57 (1979). *Lisa A. Stewart, et al. vs. Office of the State Auditor* (CC-79-294 et al.) 100

The Court made awards to individuals in payment of services under the Mental Hygiene Fund and the Needy Persons Fund. Those funds became inadequate to pay for the services, but the Court held that the claims were distinguishable from the *Airkem* principle and were clearly claims which the State, in equity and good conscience, should discharge and pay. *Richard K. Swartling, et al. vs. Office of the State Auditor* (CC-79-211) 57

Where construction work performed by the claimant was accepted as satisfactory, and the amount owing for the work was reasonable as indicated by the respondent, the Court made an award for the work performed even though the claimant and the respondent had entered into an agreement that was not properly approved, and no purchase order had been issued by the Department of Finance and Administration. *Wente Construction Company, Inc. vs. Board of Regents* (CC-80-171) 346

Where the respondent received the benefit of services performed by the claimant, even though no purchase order was approved by the Department of Finance and Administration, the Court held that denial of the claim would constitute unjust enrichment, and made an award to the claimant. *Wente Construction Company, Inc. vs. Board of Regents* (CC-80-171) ... 346

STATUTES

Where an employee of the respondent violated West Virginia Code §17C-13-1 by stopping on Interstate 64, and , as a result, claimant's vehicle struck said vehicle and sustained damage, the Court made an award to the claimant. *The Board of Education of The County of Kanawha vs. Department of Highways* (CC-79-215) 60

Where an accident causing damage to claimant's vehicle was caused when an employee of the respondent failed to signal his intention to turn left, the Court made an award for the violation of W.Va. Code §17C-7-3(a). *Carmet Company vs. Department of Highways* (CC-76-41) 145

Where the claimant sought an award for legal services incurred in the defense of an action instituted against him under the Civil Rights Act, the Court held that under no legal theory could the Court make an award. *Stanley T. Greene, Jr. vs. Department of Highways* (CC-78-117) 23

As the question of the application of the statute of limitations is a jurisdictional matter, the Court must deny a claim which was not filed within the two-year period of limitations as indicated in Code §55-2-12. *Stonewall Casualty Co., Subrogee of Anthony Tassone vs. Department of Highways* (CC-78-262) 55

STIPULATION AND AGREEMENT

An award was made to the claimant for damage to her vehicle which occurred when the vehicle struck a loose board on a bridge and the parties stipulated the claim. *Deborah J. Hodges vs. Department of Highways* (CC-79-590) 159

The claimant and the respondent filed a stipulation reflecting their agreement to accept the decision of arbitrators to the effect that the respondent is obligated to pay a certain portion of the claim which was arbitrated in accordance with a previous decision of the Court. Therefore, the Court made an award in accordance with the arbitrators' decision. *Zando, Martin & Milstead, Inc. vs. State Building Commission* (D-942) 354

STREETS AND HIGHWAYS—See also Falling Rocks; Landslides; Motor Vehicles; Negligence

Where the evidence indicated that the claimant was not maintaining a careful outlook to the highway ahead of his vehicle, or was not maintaining the vehicle under proper control, the Court found the claimant guilty of negligence to the degree of 25%, and therefore reduced the award by that percentage. *Timothy Adkins vs. Department of Highways* (CC-79-470) 355

The presence of a boulder approximately four inches from the edge of the pavement created a definite hazard to traffic on the road, as the respondent had constructive notice of its existence. Failure to move the boulder constituted negligence which was the proximate cause of the damage to the claimants' vehicle, and the Court made an award. *Robert S. & Evelyn Atkinson vs. Department of Highways* (CC-78-6) 18

The Court made an award to the claimants for personal injuries and property damage which occurred when claimants' vehicle struck a pothole and went into a drainage ditch. The Court determined from the evidence that the respondent was negligent in failing to properly maintain the road and in failing to post signs to warn of the condition of the road. *Jeffrey A. Bailey and Mary Jo Bailey vs. Department of Highways* (CC-79-692) 376

Where claimant's vehicle sustained damage when it struck an extraordinarily large pothole on a main route, the Court followed the precedent of *Lohan v. Dept. of Highways*, 11 Ct.Cl. 39 (1975), and made an award to the claimant. *Ronald L. Bailey vs. Department of Highways* (CC-79-195) 144

Failure of the respondent to maintain a portion of road in a reasonably safe condition, and failure to erect signs to warn motorists of the unsafe condition constituted negligence, and an award was made to the claimant for injuries sustained as the result of an accident on the roadway. *Russell Lee Barkley vs. Department of Highways* (CC-78-187) 83

The Court applied the doctrine of comparative negligence where the respondent failed to properly maintain a road, but the claimant proceeded along the road on his motorcycle when he knew of the condition of the roadway. *Russell Lee Barkley vs. Department of Highways* (CC-78-187) 83

As the Court's jurisdiction is limited to granting or denying a monetary award, the Court was unable to respond to the claimant's request for assistance in improving the visibility at an intersection. *Beneficial Management Corporation of America vs. Department of Highways* (CC-78-299) 71

Where there was no evidence of negligence on the part of the respondent, the Court disallowed a claim for damage to a vehicle which struck a pothole. *Grange Mutual Casualty Co., Subrogee of Jack DeGiovanni vs. Department of Highways* (CC-79-202) 273

Where the negligence of the respondent in leaving a metal protrusion on a State highway caused damage to claimant's vehicle, the Court made an award for said damage. See also *Jones v. Dept. of Highways*, 13 Ct.Cl. 211 (1980). *Thomas P. Gunnoe vs. Department of Highways* (CC-80-84) 210

Claims for damages to motor vehicles were denied as the claimant failed to carry the burden of proof necessary to establish that the respondent had actual or constructive knowledge of the existence of the potholes and a reasonable amount of time to take suitable corrective action. See also *Nichols vs. Highways*, 13 Ct.Cl. 256 (1980), *Snyder vs. Highways*, 13 Ct.Cl. 333 (1981) and *Hull vs. Highways*, 13 Ct.Cl. 408 (1981). *Clarence G. Hager vs. Department of Highways* (CC-80-101) 253

The simple existence of a defect in a road does not establish neglience per se. Therefore, a claim for damages to a vehicle caused by striking a pothole was denied. *Gary Hall vs. Department of Highways* (CC-79-40) 127

Where negligence on the part of the respondent in permitting a dangerous hazard to exist was the proximate cause of the damage to claimant's vehicle, but the claimant was aware of the hazard and in the exercise of due care should have anticipated it, the Court applied the doctrine of comparative neglience in making an award to the claimant. *Lee Roy Hamilton vs. Department of Highways* (CC-80-85) 263

Where damage to claimant's vehicle was caused by a loose metal expansion joint protruding from a bridge on I-64, the Court found the respondent liable and made an award to the claimant. *Gregory A. Harrison vs. Department of Highways* (CC-80-125) .. 229

Before an award can be made for damage to a vehicle which struck a pothole in the road, proof, either actual or constructive, that the respondent was aware of a defective condition must be presented. See also *Vilain vs. Highways*, 13 Ct.Cl. 330 (1980). *Mark Allen Hicks vs. Department of Highways*, (CC-80-190) 310

A claim for damage to a vehicle which struck a large hole in the road was disallowed under the principles outlined in *Parsons v. State Road Comm'n.*, 8 Ct.Cl. 35 (1969). *Bruce E. Hobbs vs. Department of Highways* (CC-79-44) 27

Where employees of the respondent had a roadway blocked, and the claimant rounded a blind curve and collided with those cars which were halted, the Court made an award to the claimant as the respondent created a dangerous condition without any warning to motorists, and such act was irresponsible and established neglience on the part of the respondent. *Barney Dale Johnson vs. Department of Highways* (CC-79-640) 265

Where the evidence was such that the accumulation of water flowing onto claimants' property was largely attributable to the natural flow of water over existing snow and ice on the roadway,

the Court denied a claim for water damage to claimants' property. *Mr. and Mrs. Robert Jones vs. Department of Highways* (CC-79-73) 239

The Court denied a claim for damage to a vehicle when said vehicle struck a broken curb as it was not established who, as a matter of law, was responsible for the repair and maintenance of the broken curb. *Kyle King vs. Department of Highways* (CC-79-39) 29

Where claimant's vehicle struck a deteriorated section of highway covering the entire width of the westbound lane of travel, the Court determined that it was neglience on the part of the respondent to fail to erect some type of warning sign for the traveling public. The Court made an award to the claimant for the damage to his vehicle. *Gary L. Knowlton vs. Department of Highways* (CC-79-110) 291

Where employees of the respondent had constructed a rut across the highway and said rut caused damage to claimant's vehicle, the Court made an award as the respondent was negligent in failing to place warning signs in the vicinity of the hazard. See also *Barnett v. Dept. of Highways*, 13 Ct.Cl. 284 (1980). *Mr. and Mrs. Tamas A. de Kun vs. Department of Highways* (CC-79-444) 234

Where the respondent did not know, nor could it have known, of a hazardous condition caused by a bent sign protruding onto the highway, the Court denied the claim. *Chester W. Lemasters vs. Department of Highways* (CC-79-160) 130

Where claimant's vehicle sustained damage by striking a pothole and the claimant testified that she saw the hole after an automobile in front of her missed it, the Court disallowed the claim, as the existence of a defect in the highway does not establish negligence per se. *Estelle M. Martin vs. Department of Highways* (CC-79-64)..... 32

Without a positive showing of negligence on the part of the respondent there can be no liability, as the existence of a defect in the highway does not establish negligence per se; therefore, the Court disallowed the claim. *Estelle M. Martin vs. Department of Highways* (CC-79-64)..... 32

Where the claimant proceeded through a marked traffic construction area and her vehicle struck steel plates being used by the respondent, the Court determined that the claimant's negligence in striking the plates was equal to or exceeded the negligence of the respondent, and denied an award. *Peggy Mayhorn vs. Department of Highways* (CC-80-157) 323

It was obvious from the testimony that the respondent did not exercise reasonable care and diligence in the maintenance of the road in question, and this failure of the respondent caused the damages to the claimant's vehicle, for which the Court made an award. *Charles F. McCallister vs. Department of Highways* (CC-79-371) 219

Where an accumulation of ice and water on the highway was due to a clogged culvert, the continuous flow of water onto the highway constituted an unusally dangerous condition. *Jonathan*

E. McDonald, Administrator of the Estates of Norma Jean McDonald, et al. vs. Department of Highways (CC-77-38a-d) 13

Claimant's vehicle sustained damage when it struck a hole in the berm of the road in a construction area where construction signs were posted at each end and the claimant was aware of said construction. Without a positive showing of negligence on the part of the respondent, the claim falls within the purview of the well-settled principle of *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947), and the Court disallowed the claim. *Gary McFann vs. Department of Highways* (CC-78-257) 33

As it is well-established law that the respondent is not an insurer of those using the highways of the State, and no evidence was presented to establish notice on the part of the respondent as to the hole in the road, the Court denied a claim for damage to a vehicle. *James L. Meadows vs. Department of Highways* (CC-79-126) 78

Where the respondent was negligent in failing to place warning signs in the vicinity of a hazard on a highway, the Court made an award to the claimant for damages sustained by a vehicle. *Barbara L. Miller vs. Department of Highways* (CC-79-443) 243

Where there was no evidence that the respondent knew or should have known of the existence of the pothole which allegedly caused the damage to claimant's vehicle, the Court disallowed the claim. The mere existence of a pothole in a road is not sufficient to impose liability upon the respondent. See also *Ryckman v. Dept. of Highways*, 13 Ct.Cl. 139 (1980) and *Perry v. Dept. of Highways*, 13 Ct.Cl. 138 (1980). *Douglas W. Morris vs. Department of Highways* (CC-79-45) 34

A claim for damage to the tires of a vehicle which struck a pothole was denied as no testimony was intoduced from which the Court could conclude that the respondent knew or should have known of the dangerous condition of that section of the highway. *Barbara A. Ney vs. Department of Highways* (CC-79-138) 133

A claim for damage to a vehicle which struck a pothole was denied as no evidence of negligence on the part of the respondent was revealed. See also *Dennis vs. Highways*, 13 Ct.Cl. 285 (1980). *Virginia Pauley vs. Department of Highways* (CC-79-153)..... 277

A claim for damage to a vehicle which struck a pothole was denied as the respondent cannot be held liable for such damage unless the claimant proves that the respondent had actual or constructive knowledge of the existence of the pothole and a reasonable amount of time to repair it or take other suitable action. See also *Whitehouse vs. Highways*, 13 Ct.Cl. 224 (1980) and *Zicafoose vs. Highways*, 13 Ct.Cl. 226 (1980). *Julie Peiffer vs. Department of Highways* (CC-79-525) 222

Where the respondent was aware that washouts of the berm adjacent to the highway did occur, yet the respondent failed to adequately maintain this berm, the Court made an award to the claimant for damages sustained when her vehicle dropped off the road as the result of a washed-out berm. *Reba Dixie Perry vs. Department of Highways* (CC-79-509) 324

Where the respondent knew or should have known that the road was narrow and that motorists would be required to leave the hard surface in order to pass approaching vehicles, it was the duty of the respondent to maintain the berm in a safe condition to accommodate vehicles proceeding on the roadway. *Zona Ruth Peters vs. Department of Highways* (CC-78-218) 325

Respondent's failure to have flagmen in an area to warn motorists of a hazardous condition of the highway constituted negligence. *Roy Porterfield and Donna F. Porterfield vs. Department of Highways* (CC-80-98) 297

Where the record did not establish negligence on the part of the respondent, the Court disallowed a claim for damage to a vehicle which struck a hole in the pavement. See also *Van Horn v. Dept. of Highways,* 13 Ct.Cl. 422 (1981). *Charles E. Priestley, Jr. and Penny A. Priestley vs. Department of Highways* (CC-79-34) 36

Where a hazardous condition exists on a roadway of which the respondent is aware, and no warning devices are placed for the benefit of the traveling public, the respondent was found to be negligent. Where such negligence was the proximate cause of the claimant's injuries, an award will be made. *Sterling L. Pullen, Jr. vs. Department of Highways* (CC-79-579) 278

Where claimant's vehicle was damaged when it crossed an uncovered culvert where no warning signs had been placed by the Department of Highways, the negligent maintenance of the road by the respondent was the proximate cause of the damages sustained. *Lee Roy Robertson vs. Department of Highways* (CC-80-302) 381

Where the claimant contended that the respondent had agreed to assist him in the upgrading of his road but did not do its share of upgrading, the Court determined that the record did not establish claimant's contention, and the claim was denied. *Thomas H. Sickle vs. Department of Highways* (CC-80-167)..... 418

Where respondent's employee attempted to take action to prevent accidents after discovering a hole in the road, the Court determined that the record did not establish neglience on the part of the respondent, and disallowed the claim. *James Sisk vs. Department of Highways* (CC-80-69) 280

A claim for damage to claimant's vehicle caused when he struck pieces of broken concrete in the highway was denied based upon lack of notice on the part of the respondent. *David D. Smith vs. Department of Highways* (CC-79-450) 202

Claimant's vehicle sustained damage when he attempted to drive onto a berm and struck two pieces of steel which were cemented into the concrete berm for breakaway "road signs" which had been cut off. The steel pieces constituted a dangerous obstruction for which the Court made an award to the claimant. *Kevin E. Smith vs. Department of Highways* (CC-78-284)..... 38

Where a hazardous condition was shown to have been in existence for at least two weeks before claimant's accident, and the accident took place on a much-used highway, the Court found that the respondent was negligent in the maintenance of

said highway, and made an award to the claimant. *Joe Snodgrass vs. Department of Highways* (CC-79-145) 246

Where the claimant's negligence was equal to or greater than that of the respondent as claimant had knowledge of the defect in the highway, the Court denied the claim. *Margaret Spatafore and Joseph Robert Spatafore vs. Department of Highways* (CC-80-185) 399

Where the Court determined that the respondent had constructive notice of the existence of a defect in the highway, and that defect was the proximate cause of the damage to the claimant's vehicle, the Court made an award. *Harold Ray Stafford vs. Department of Highways* (CC-78-197) 54

Where respondent's failure to post warning signs or flagmen at the scene of an accident where employees of the respondent were in the roadway, and the damage to claimant's vehicle occurred as a result of their presence, the Court made an award to the claimant. *State Farm Mutual Automobile Insurance Company, Subrogee of James A. McDougal and James A. McDougal, individually vs. Department of Highways* (CC-78-250) 344

Where a hazardous condition existing on a road in an area where the respondent was conducting construction operations resulted in claimant's accident, the Court reviewed the testimony and exhibits and determined that the respondent had failed to maintain the construction area in a reasonably safe condition. As the claimant was also guilty of some negligence, the Court applied the doctrine of comparative negligence. *Arden Leon Stull vs. Department of Highways* (CC-80-60) 420

Where the claimant was not forced onto the berm nor otherwise necessarily had to use the berm, the Court held that the claimant was guilty of negligence which equalled or exceeded that of the respondent when the claimant drove onto the berm and damaged his vehicle. See also *Perdue vs. Dept. of Highways*, 13 Ct.Cl. 137 (1980). *Robert J. Sweda vs. Department of Highways* (CC-79-479) 249

Where the evidence indicated that the respondent had erected a sign warning of the condition of the roadway, and had placed stone in the hole the day before the claimant struck the hole, the Court denied the claim as the respondent is responsible only for maintaining a standard of reasonable care and diligence under all circumstances. *Frederick B. Tallamy vs. Department of Highways* (CC-79-149) 250

Where the respondent left a pile of asphalt on a sidewalk without any warning to the public, the Court made an award to a claimant who fell over the pile of asphalt and sustained physical injuries as a result. *Nancy J. Thabet vs. Department of Highways* (CC-79-206) 203

A claim for damage to a vehicle which struck a hole in the road was denied as the law is well settled in West Virginia that the respondent is not an insurer of motorists using its highways. *Ayers Thomas vs. Department of Highways* (CC-80-179) 301

A claim for damages occurring when a vehicle struck a pothole was denied even though hearsay evidence disclosed that the

pothole had existed some time prior to the accident as there was no competent evidence to establish that the respondent knew or should have known of the existence of the hazard. *John H. Ward and Nancy L. Ward vs. Department of Highways* (CC-79-65) 81

The failure of respondent's employee to take any action with respect to a rock which he saw in the road but failed to remove constituted negligence which proximately caused the accident in this claim, and the Court made an award for damages to claimant's vehicle. *West Virginia Telephone Company vs. Department of Highways* (CC-80-161) 426

Where employees of the Department of Highways were conducting obstructive road work but failed to take the necessary steps to warn motorists, this constituted negligence for which an award was made to the claimant. *Charles E. Williams vs. Department of Highways* (D-749) 428

Even though the respondent may have actual knowledge of the existence of a hole in the road, it must also have had sufficient time to repair the defect before the Court will make an award for damage to a vehicle which struck the hole. *John Williams vs. Department of Highways* (CC-79-158) 97

Where a large hole in a main highway caused damage to the claimant's vehicle, the Court made an award on the basis that a hole of that size did not develop overnight and must have been in existence for some time prior to claimant's accident. *Ernest Williamson vs. Department of Highways* (CC-80-67) 281

The respondent is not an insurer of motorists using the highways of this State, but has only the duty of exercising reasonable care to maintain the highways in a safe condition. Where the claimant fails to demonstrate by a preponderance of the evidence that the respondent knew or should have known of the existence of a pothole, the claim must be denied. *Robert Christopher Wise vs. Department of Highways* (CC-77-223) 98

Where the claimant established that he was forced off the road onto the berm, and the berm was in a defective condition of which the respondent had actual notice, the Court made an award in favor of the claimant. *Albert Ted Wood vs. Department of Highways* (CC-79-580) 305

Taxation

Where a flash flood destroyed beer at claimant's warehouse, the Court made an award for the State tax refund as any other action would constitute unjust enrichment. *Cline Distributing Company vs. Nonintoxicating Beer Commission* (CC-80-362) 351

The Court made an award for the cost of draft beer excise tax stamps where the stamps were not used because the claimant ceased to be in the brewery business. *Falls City Industries, Inc., formerly Falls City Brewing Co. vs. Nonintoxicating Beer Commission* (CC-80-62) 186

Trees and Timber

A claim for damage to a vehicle which struck a tree limb protruding over the road from a recent slide was denied, as the

respondent had no notice of the hazard caused by the slide nor a resonable opportunity to remove it. *Lee W. Clay vs. Department of Highways* (CC-79-164) 123

Where the respondent stockpiled material and installed improper drainage along a roadway, which resulted in damage to claimant's trees, the Court made an award to the claimant. *Randy B. Fry vs. Department of Highways* (CC-80-332) 309

The Court denied a claim for damage to claimant's vehicle which occurred when he struck a tree that extended across the highway as the result of a slide. The Court determined that the claimant failed to prove that the respondent had not conformed to the standard of reasonable care required. *Douglas Newbell vs. Department of Highways* (CC-80-186) 255

Where a tree located close enough to the road to present a definite hazard fell upon claimant's vehicle and damaged it, and the record indicated that the respondent had been informed of this hazard in time to take corrective action but failed to do so, the Court held the respondent liable. *Ernest N. Wolford and Patricia K. Wolford vs. Department of Highways* (CC-80-268) ... 348

Trespass

Where the respondent's employees trespassed onto property of the claimant causing damage thereto, the Court made an award for said damage. *Sam Epling vs. Department of Highways* (CC-80-424) 338

Wages

Claimant was granted an award for loss of work resulting from negligent blasting operations performed by the respondent. *Mitchell F. Adkins vs. Department of Highways* (CC-81-68) 434

Where respondent's blasting activities caused damage to a telephone cable, which prevented claimant from being notified of work and he lost income as a result, the Court made an award for the claimant's loss. *Mitchell F. Adkins vs. Department of Highways* (CC-81-68) 434

Where a communications director exceeded his authority in hiring the claimant, the Court denied a claim for loss of wages. *James R. Lavender vs. Department of Highways* (CC-79-141) 241

WATERS AND WATERCOURSES—See also Drains and Sewer; Flooding

Claimant's property and residence sustained damage from a flow of water which resulted when the elevation of the road was raised around the claimant's home. A catch basin, which was improperly maintained by the respondent, caused surface water from other properties to flow onto claimant's property, and the Court made an award for the damage to the property. *Robert L. Ferguson, Executor of the Estate of Elizabeth L. Ferguson vs. Department of Highways* (CC-78-148) 103

Where there was no evidence that a culvert installed by the respondent increased the flow of water onto or across claimants' property, causing the damage alleged, the Court denied the

claim. *Arthur Friend and Pauline Friend vs. Department of Highways* (CC-76-35) 125

Where the respondent's failure to take any action to eliminate water or warn motorists of its presence constituted a failure to keep an exit ramp in a reasonably safe condition, the Court made an award to the claimant for the damage sustained by a vehicle as the result of this negligence. *Martin V. Gaston, Sr. vs. Department of Highways* (CC-79-37) 90

Where the evidence indicated that an accumulation of water on the claimant's land was attributable to the natural flow of water from higher land levels, the Court disallowed the claim. *Clara Mae Hall vs. Department of Highways* (CC-78-217) 25

Where water flowed its natural course down the slope of a mountain and onto the claimants' property, the Court disallowed a claim where the claimants contended that the installation of a culvert caused the water damage to their property. *Emit Jennings, Jr. and Victoria Jennings vs. Department of Highways* (CC-79-216) 289

Where the evidence was such that the accumulation of water flowing onto claimants' property was largely attributable to the natural flow of water over existing snow and ice on the roadway, the Court denied a claim for water damage to claimants' property. *Mr. and Mrs. Robert Jones vs. Department of Highways* (CC-79-73) 239

Where there was no evidence of any misconduct on the part of the respondent, the Court held that there was no liability for surface water damage to claimants' house. *William R. Miller and Carolyn Miller vs. Department of Highways* (CC-79-518) 414

Where claimant's property sustained damage as the result of a clogged culvert which changed the flow of surface water onto claimant's property and into her home, the Court made an award for the damage. *Catherine Nester vs. Department of Highways* (CC-78-296) 150

Where the claimant failed to offer any evidence of the amount of damage caused by water flowing beneath a bridge and into the basement of claimant's house, the Court held open the claim in order to permit the claimant to pursue the matter further if he so desired. *Donald J. Oliverio vs. Department of Highways* (CC-78-240) 180

Where clogged culverts and a ditch line caused the volume of water running onto the road to be too great to flow through the natural drainage area, and it flowed onto claimant's property and damaged it, the Court held that the negligence of the respondent in failing to maintain the ditch line was the proximate cause of the damage. *Glen L. Ramey vs. Department of Highways* (CC-79-87) 342

Where there was no evidence that the respondent's actions or failure to act created any unusal flow of water onto claimant's land, the Court denied the claim for damages to the property. See also *Ramey v. Dept. of Highways,* 13 Ct.Cl. 342 (1980). *Glen L. Ramey and Faye Ramey vs. Department of Highways* (CC-79-87) 52

WELLS

A claim for the loss of drinking water and a well as the result of a negligent act on the part of the respondent was denied where it appeared to the Court that the claimants had failed to file their claim within the two-year period of the statute of limitations. *Victor Frisco and Janet Frisco vs. Department of Natural Resources* (CC-80-121) 287

Failure of the claimant to establish that the respondent or any of its agents conducted quarrying operations which caused the claimant's well to fail resulted in a denial of the claim. *Robert Stephen Lowe vs. Department of Highways* (CC-78-254) 91

Where respondent's failure to correct a slide condition resulted in damage to claimant's well and other property, the Court made an award for said damages. *Virgil E. Moore vs. Department of Highways* (CC-80-280) 385

W. VA. UNIVERSITY—See Board of Regents