STATE OF WEST VIRGINIA

Report

of the

Court of Claims

For the Period from July 1, 1993

to June 30, 1995

By

CHERYLE M. HALL

Clerk

Volume XX

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

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Letter of Transmittal

To His Excellency
The Honorable Gaston Caperton
Governor of West Virginia

Sir:

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

Respectfully Submitted,

Cheryle M. Hall,
Clerk

Terms of Court

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

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In the Court of Claims in the
State of West Virginia

OPINION ISSUED JULY 12, 1993

JOHN WAYNE BOOTH
VS.
DIVISION OF HIGHWAYS
(CC-92-76)

Jane Moran, Attorney at Law, for claimant.
Glen A. Murphy, Attorney at Law, for respondent.

BAKER, JUDGE

Claimant, John Wayne Booth, seeks an award for pain and suffering from the Division of Highways for personal injury sustained when he fell through a gap in the Water Street Bridge on February 16, 1990, in the town of Logan, Logan County.

From the evidence adduced at the hearing on March 26, 1993, it appears that the claimant was walking across the sidewalk of the Water Street Bridge which is W. Va. Route 10. The bridge is over the Guyandotte River. The sidewalk was in a deteriorated condition and, at the site of claimant's accident, there was a gap between the sidewalk and the guardrail on the creek side of the bridge. While walking across the bridge on the sidewalk, the claimant's left knee gave out and he fell through the hold. As a result of the injury to his left knee, he underwent surgery. The claimant's medical expenses were covered by a collateral source; however, he is seeking an award for pain and suffering.

The claimant testified that he had noticed several holes in the sidewalk of the bridge on previous occasions when he was a passenger in a vehicle crossing the travel portion of the bridge, but he had not reported these holes to the respondent. He had not walked across the bridge on the sidewalk until the evening of the accident herein. He had been to the grocery store and he was walking to his home which was in Logan. He normally did not use the Water Street Bridge but he was waling on the sidewalk of that bridge to go home. The claimant stated that he had suffered minor injuries to his knee which caused his leg to give out on occasion. As he was walking across the bridge, his left knee gave out on him causing him to fall and his leg slipped into a hole between the guardrail and the edge of the sidewalk. A gentlemen assisted the claimant to stand up and he then hobbled home. His leg began to swell but he was unable to go to the doctor until February 20, 1990. Surgery was required on his left knee as a result of the injury received in this fall.

Although the claimant testified that he had consumed no alcohol on the day of the accident, a witness for the claimant, William Douglas Morgan, stated that he smelled alcohol when he was assisting the claimant after his fall. The claimant also testified that he could not see the holes on the sidewalk while he was walking because it was dark and the bridge had no lights; however, Mr. Morgan stated that he was walking approximately 100 feet behind the claimant and that he saw him fall down upon the sidewalk and he was able to see the claimant because the lights on the bridge had come on.

Mr. Curley Belcher, a witness for the respondent, stated that he had received no complaints of the deterioration of the sidewalk on the bridge, but he had noticed different holes in the travel portion of the bridge and he had tried to repair them. He explained that it was his duty to make emergency repairs to the bridge, but the Bridge Department was responsible for the actual maintenance of the bridge and the sidewalk. He testified that the hole on the sidewalk was created by a gap between the bottom of the guardrail and the edge of the eroded sidewalk which was eight to ten inches wide and that a person's leg could fit into the hole at an angle.

After reviewing the record, this Court finds that the respondent knew, or should have known, that the sidewalk on the Water Street Bridge was in a state of disrepair, and that the respondent was negligent in failing properly to maintain the sidewalk on the bridge. The Court also finds that the claimant was negligent based upon evidence that the claimant may have been under the influence of alcohol at the time of this accident; that the claimant was familiar with the deteriorated condition of the sidewalk; and, that the claimant refused the same operation prior to the accident which may have prevented the injury to his leg which occurred in this incident. Based upon the theory of comparative negligence, this Court finds that the negligence of the claimant was equal to or greater than that of the respondent.

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

Claim disallowed

Judge Webb did not participate in the hearing or decision of this claim.

OPINION ISSUED JULY 12, 1993

JAMES R. DAWSON
VS.
DIVISION OF HIGHWAYS
(CC-92-406)

Claimant present in person.

Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant, James R. Dawson, seeks an award of $4,204.88 from the Division of Highways for property damage sustained when a deer jumped out in front of his vehicle on November 19, 1992, on U.S. Route 50 near the city of Salem.

From the evidence adduced at the hearing on April 21, 1993, it appears that the claimant was traveling north to Clarksburg when a deer jumped over the guardrail and ran into his vehicle. The claimant drove to Clarksburg after the incident. The claimant stated that he had observed deer on this road in prior travels and he is of the opinion that respondent should construct a fence to keep the deer off of the road.

It is the respondent's position that the accident was an act of nature and that there is no practical manner in which the respondent would be able to prevent deer from crossing the roads in this State. The respondent provides deer crossing signs to advise travelers of this potential occurrence.

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). This Court agrees with the respondent. There is no practical manner in which the travel of deer can be prevented by respondent. Persons traveling on State roads assume the risk of hitting a running deer. As the claimant has failed to prove negligence on the part of the respondent by a preponderance of the evidence; the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED JULY 12, 1993

MARY HODGES
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-92-326)

Claimant present in person.
Larry M. Bonham, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Mary Hodges, seeks an award from the Department of Health and Human Resources for property loss sustained when she was admitted as a patient at Huntington State Hospital on May 15, 1992, in Huntington, West Virginia, Cabell County.

From the evidence adduced at the hearing on March 25, 1993, it appears that the claimant was admitted as a patient at Huntington State Hospital in May 15, 1992, and was discharged on May 15, 1992. At the time of her admission, her possessions were inventoried and placed into a yellow envelope. She was given her purse, her clothes, and her hairbrush to keep on her person. At the time of discharge, the staff at the hospital returned her sunglasses and a bottle of perfume to her, but stated that they could not locate the remainder of her belongings, which consisted of the following:

1 mens' Citizen watch (valued at $150.00)
1 Barbie watch (valued at $50.00)
1 gold wedding band (valued at $50.00)
1 Harley Davidson ring (valued at $25.00)
1 silver necklace (valued at $25.00)
$3.16 in coins
$88.00 in currency

Although there was a signed "Waiver of Responsibility" admitted into evidence which purports to relieve the hospital for any liability for lost or damaged articles of clothing of the patient, the claimant stated that she never signed this waiver. The claimant's signature was not on the form.

The Court finds, after reviewing the record, that the claimant has established that her belongings were taken from her by personnel at the hospital and that these belongings were not returned to her upon her discharge from the hospital. The claimant was entitled to receive the personal property taken from her by the hospital personnel. It is the opinion of the Court that the claimant may recover the fair and reasonable value of her personal property which the Court has determined to be the amount of $400.00.

Therefore, the Court is of the opinion to and does grant an award to the claimant in the sum of $400.00.

Award of $400.00.

Judge Webb did not participate in the hearing or decision of this claim.

OPINION ISSUED JULY 12, 1993

WILLIAM J. LUCAS AND RALPH J. LUCAS
VS.
DIVISION OF HIGHWAYS
(CC-91-348)

William B. Richardson, Attorney at Law, for claimants.
Glen A. Murphy, Attorney at Law, for respondent.

BAKER, JUDGE:

Claimants, William J. Lucas and Ralph J. Lucas, seeks an award from the Division of Highways for property damage and personal injury sustained in an automobile accident which took place on June 26, 1991, on Route 68, formally known as Route 2, near Parkersburg, Wood County.

From the evidence adduced at the hearing on March 24, 1993, it appears that Ralph Lucas is the father of William Lucas and the owner of a 1974 Chevrolet half-ton pick-up truck. On the day of the accident, William J. Lucas and a friend were driving the truck northerly on Route 68 during daylight hours at a speed of approximately 45 miles per hour when his right front tire blew out and he was forced to drive off the paved portion of the road onto a grassy area where the truck proceeded to run over an I-beam that was installed by the respondent. The I-beam was exposed, but it was covered over the overgrown grass and was not visible to William before his vehicle struck it. The exposed beam did extensive damage to the truck causing it to be declared a total loss. William J. Lucas received physical injuries in the accident.

Respondent contends that it had no notice that this particular I-beam was exposed and that the beam was off of the berm area. Mr. William J. Lucas drove beyond the berm area and then his vehicle struck the I-beam. The situation has been remedied since this accident.

According to claimant Ralph J. Lucas the truck was worth $1,500.00 prior to the accident and he received salvage value of $300.00, resulting in total damages of $1,200.00. He testified that he measured the distance of the I-beam from the paved portion of the road to be approximately five feet.

William J. Lucas testified that he was operating his father's truck during daylight hours on June 26, 1991. He was with a friend and they were on their way to the James Country Store to purchase gas for a riding a lawnmower. As he was driving north on Route 68, the right front tire of the truck went flat. He then drove "onto the berm into a grassy area and struck an I-beam." The

beam caught the undercarriage of the truck causing him to be thrown onto the steering wheel and inflicting physical injuries to him. As a result of the accident, William J. Lucas suffered injury to his neck, upper back, middle back, and right shoulder, which required the services of a chiropractor, Dr. Donald L. Shepherd. He testified that he now finds it painful to engage in the activities of splitting wood and physical sports. He alleges damages for his physical injuries in the amount of $15,000.00 due to his pain and suffering and for special damages. There is an outstanding medical bill owed to the chiropractor in the amount of $974.00.

Dr. Shepherd, the treating chiropractor for William J. Lucas, testified that it is his opinion that William's condition will continue in the future.

Paul Reese, superintendent of road maintenance in Wood County, testified for the respondent that respondent had not received any complaints of exposed I-beams at the side of the accident. The I-beams are placed in the ground with sheets of steel between the beams to keep the soil from eroding away where there are slip problems. However, he did state that occasionally mowers operated by employees of the respondent will hit beams similar to the one in question and that the respondent either places fill dirt around it or installs a warning paddle to alleviate the situation. The situation, i.e., an exposed beam, usually cannot be corrected at the time it is discovered by the employee. He observed the piling or I-beam struck by claimant's truck and he was of the opinion that it was projected sufficiently above the ground to catch the under parts of a vehicle with a flat tire and that it probably prevented the vehicle from going over the hill.

This Court finds that although the piling was approximately five feet five inches from the edge of the pavement, the respondent was negligent in permitting a hazardous condition to exist in an area close enough to the side of the road that in an emergency situation the berm area is rendered unsafe. However, the Court also finds that the respondent is not responsible for the defective condition of the tire on claimant Ralph Lucas' truck; therefore, the Court reduces its award to him for the value of the truck based upon the theory of comparative negligence and finds the respondent 60% negligent and the claimant, Ralph Lucas 40% negligent. An award of $720.00 will be granted to Ralph Lucas for the value of his truck. The Court has determined that a fair and reasonable award in the amount of $4,000.00 be granted to William J. Lucas for his pain and suffering and special damages.

Award of $720.00 to Ralph J. Lucas.
Award of $4,000.00 to William J. Lucas.

Judge Webb did not participate in the hearing or decision of this claim.

OPINION ISSUED JULY 12, 1993

MARC TRAIN SERVICE

VS.
RAILROAD MAINTENANCE AUTHORITY
(CC-93-130)

William N. Fitzpatrick, Assistant Attorney General, for claimant.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $10,000.00 for an agreement entered into with respondent for the operation of the MARC Train Service in West Virginia. The third quarter of the second year of the agreement was not paid by the respondent State agency. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $10,000.00.

Award of $10,000.00.

Judge Webb did not participate in the hearing or decision of this claim.

OPINION ISSUED JULY 12, 1993

MOLLY A MCCALLISTER
VS.
DIVISION OF HIGHWAYS
(CC-92-310)

Claimant present in person.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimants, Molly A. McCallister and Ronnie F. Burgess, seek an award from the Division of Highways for property damage sustained when their vehicle struck pieces of broken asphalt on Interstate 64 on September 24, 1992 at 7:30 a.m. in Kanawha County in the city of

Charleston.

From the evidence adduced at the hearing on March 25, 1993, it appears that Ms. McCallister was driving a 1987 Chevrolet Celebrity Eurosport on Interstate 64 and Mr. Burgess was a passenger, when a broken piece of asphalt, approximately six inches long and three inches wide, flew up and struck the left side of the hood of the vehicle, bounced up, and, thereupon, struck and cracked the windshield. The estimated cost of repairs is $1,501.73. Both claimants stated that they did not see the debris in the road until the vehicle had already struck it. Mancie Legg, Maintenance Supervisor for the respondent, testified that the debris on the interstate was liquid asphalt which had been used to seal an expansion joint. Apparently, the liquid asphalt had deteriorated and had come out of the expansion joint. He stated that there had been no complaints concerning this expansion joint prior to claimant's incident.

This Court finds, after reviewing the record, that the respondent had constructive, if not actual notice, of the deteriorated condition of the expansion joint on Interstate 64, a heavily traveled highway through the city. This deteriorated condition is not one that occurs instantaneously. Therefore, the Court is of the opinion that the respondent is guilty of negligence for failing properly to maintain this portion of the interstate.

On the date of the hearing, the Court requested that Ms. McCallister furnish a copy of the insurance policy which covers her vehicle in order for the Court to determine the amount of the deductible if any, available to her under the policy. Ms. McCallister provided documentation from her insurance company which establishes that she currently has a $500.00 deductible clause; however, correspondence from the insurance carrier states that there was no coverage in effect on the date of the incident herein. Therefore, the Court makes an award to her for the damages to her vehicle in the amount of $1,501.73.

Award of $1,501.73 to Molly A. McCallister.

Judge Webb did not participate in the hearing or decision of this claim.

OPINION ISSUED JULY 12, 1993

MPL CORPORATION
VS.
BOARD OF COAL MINE SAFETY AND TECHNICAL REVIEW COMMITTEE
(CC-93-80)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,519.25 plus interest for database computer programming and computer software. The invoice for the computer service software was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid. The respondent denies interest claimed by the claimant. The Court is of the opinion to deny the interest based upon West Virginia Code §14-2-12.

In view of the foregoing, the Court makes an award in the amount of $1,519.25.

Award of $1,519.25.

Judge Webb did not participate in the hearing or decision of this claim.

OPINION ISSUED JULY 12, 1993

ROSE AND QUESENBERRY FUNERAL HOME INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-93-93)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $400.00 for funeral services provided a client of the respondent State agency.

Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED JULY 12, 1993

DORIS TRENT, ADMINISTRATRIX OF THE ESTATE OF
MINA FERGUSON, DECEASED
VS.
DIVISION OF HIGHWAYS
(CC-91-340)

Thomas M. Hayes, Attorney at Law, for claimant.
Glen A. Murphy, Attorney at Law, for respondent.

BAKER, JUDGE:

Claimant, Doris Trent, Administratrix of the Estate of Mina Ferguson, seeks an award from the Division of Highways for the unlawful death of her mother, Mina Ferguson, who was killed in a motor vehicle accident on November 9, 1989, near Hampden, Mingo County, West Virginia. Claimant alleges that the respondent was negligent in failing to maintain an adequate system of surface water drainage, causing the surface water to accumulate on the roadway, which condition caused Joseph Cantrell to drive his vehicle left of center and to collide with the vehicle driven by the decedent, Mina Ferguson, ultimately resulting in her death. It was stipulated by counsel that the issues of liability and damages be bifurcated and that the liability issue be resolved prior to consideration of damages.

From the evidence adduced at the hearing on January 22, 1993, and from the evidence contained in eight evidentiary depositions, it appears that Mrs. Ferguson was traveling south around a curve on Route 52 toward the town of Gilbert when another vehicle, driven by Joseph Cantrell, was traveling south around a curve on Route 52 toward the town of Gilbert when another vehicle, driven by Joseph Cantrell, was traveling north around the same curve. Mr. Cantrell steered his vehicle left of center to avoid driving in mud and water that had accumulated on the road and then collided with the vehicle operated by Mrs. Ferguson.

Witnesses for the claimant testified that on the day of the accident there was an accumulation of water and mud in the road. There was testimony that this accumulation occurred every time that there was a heavy rain. Witnesses for the claimant also stated that this condition has existed for about twenty to thirty years. However, none of the witnesses for the claimant ever

reported the condition of the road to the respondent.

There were four vehicles involved in this accident. When Joseph Cantrell, who testified that he had driven this section of Route 52 prior to the date of this accident and had observed mud and water on the road on previous occasions, drove his northbound truck into the mud on the road, he stated that this condition caused his truck to veer to the left of center whereupon it was struck by the southbound Ferguson vehicle causing both vehicles to spin the road. Sherry Cresong, the driver of the vehicle also proceeding northbound behind the Cantrell truck, slowed down her vehicle to drive through the mud and water on the road, but the Ferguson vehicle slid into her vehicle. Another vehicle proceeding south behind the Ferguson vehicle and driven by Marietta Robinette then struck the Cantrell truck as it was sliding in the road. Sherry Cresong testified that she observed the Cantrell truck proceed left of center as it went into the curve. She saw the mud and water in the road, slowed down her vehicle, and drove through the water and mud with no apparent problems. Joseph Cantrell was cited for failing to keep his truck right of center.

The investigating officer of this accident, Roby Pope, Jr., a Corporal with the West Virginia State Police, filed a traffic accident report wherein he marked the block "Failure to Maintain Control" for the driver of the pick up truck, Mr. Cantrell, because he was driving left of center when the collision with the Ferguson vehicle occurred. He noted that there was dried mud on the road, but there was no water in the road when he was at the scene of the accident. In fact, he stated in his deposition that there was no standing water on roadway or the berm.

Norman Stepp, assistant county supervisor for the respondent, testified that he had personally observed the water problems on this road, but that there had never been any complaints made to the respondent about the condition of the road. He also stated that crews for the respondent had performed work on the road prior to the accident, and, because there were no complaints, he was unaware that there was a problem. He stated that after the accident the respondent discovered an old tile drain in the curve that had been covered over with mud and sand. Although the drain appeared to have been constructed in the early 1920's or 1930's, the respondent was unaware of this drain prior to the Ferguson accident.

This Court finds, after reviewing all of the evidence, that the respondent was not negligent in its maintenance of Route 52 at the scene of the accident herein. Photographs taken of the accident scene by the investigating officer portray muddy conditions on the berm or a parking area adjacent to the road. However, there does not appear to be standing water on the road or the berm. There is an appearance of mud on the road, but the mud does not appear to the Court to create a hazardous condition. The Court is of the opinion that the proximate cause of the accident herein was the act of negligence on the part of Mr. Cantrell when his truck went to the left of the center and into the path of the vehicle driven by Mr. Ferguson.

Although the Court is not unmindful of the tragedy which has befallen the family of Mrs. Ferguson, the Court has determined that the respondent was not negligent in its maintenance

of Route 52. For the reasons stated above, the Court must deny this claim.

Claim disallowed.

Judge Webb did not participate in the hearing or decision of this claim.

OPINION ISSUED JULY 12, 1993

CAROL J. WHITE
VS.
DEPARTMENT OF EDUCATION
(CC-93-82)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks reimbursement of $293.00 for a course taken to renew her teaching certificate for fiscal year 1991-92. The invoice for the course was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $293.00.

Award of $293.00.

OPINION ISSUED AUGUST 26, 1993

ADAMS TRUCKING AND SUPPLY, INC.
VS.
DIVISION OF HIGHWAYS
(CC-93-81)

Claimant present in person.

Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Adams Trucking and Supply, Inc., seeks an award of $1,043.16 from the Division of Highways for property damage sustained on February 8, 1993, when one of the claimant's trucks was crossing a bridge on Bowen Creek Road, County Road 49, in Cabell County, and the bridge collapsed. The damages to the truck, the value of the load of limestone, and the towing bill total $1,043.16, for which claimant requests an award from this Court.

From the evidence adduced at the hearing on May 5, 1993, it appears that the claimant's driver, Dale Morrison, who was not available to testify, was making a delivery of limestone to a customer on Bowen Creek Road when he attempted to drive over a bridge just off the main road. The claimant was not at the scene of the accident when it occurred.

Although it is alleged in the complaint that the driver walked under the bridge to check the beams and felt the bridge would be safe to cross, there is no evidence in the record to support such allegations.

After reviewing the evidence in this claim, the Court has determined that there is essential testimony from the driver of claimant's truck which is not a part of the record in this claim. The Court has been placed in the position of speculating as to what the driver did prior to driving the truck onto the bridge or structure in question and why he relied upon the condition of the bridge. The Court will not speculate in rendering an opinion in a claim. For this reason, the Court is not in the position to make an award.

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

Claim disallowed.

OPINION ISSUED AUGUST 26, 1993

JOHN RANDOLPH CHEETHAM AND JOHN T. CHEETHAM
VS.
DIVISION OF HIGHWAYS
(CC-93-11)

Claimant present in person.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimants, John Randolph Cheetham and John T. Cheetham, seek an award from the Division of Highways for property damage sustained when their vehicle struck a metal expansion joint on April 2, 1992, on Interstate 64 near Huntington, Cabell County.

From the evidence adduced at the hearing on May 5, 1993, it appears that John Randolph Cheetham was driving a 1982 Honda Accord which was titled in his name and his father's name, John T. Cheetham. He was proceeding east on I-64 behind a tractor trailer when he saw a metal beam standing straight up in the highway approximately three to four feet tall. He stated that he only had about two seconds to react when his vehicle struck the beam and it came up through the floor of the vehicle about six inches behind his foot and ripped the car like a can opener all the way back to the rear tires. The vehicle was a total loss.

Mr. John R. Cheetham was uncertain of the exact time of the accident. He stated that it could have occurred any time between 12:30 to 1:00 p.m. The time of the accident is important in this claim because it is one of several claims that has been heard by this Court concerning the same expansion joint. The claimants have the burden of establishing that the respondent had notice of the hazardous condition. The accident report stated that the accident occurred at approximately 2:00 p.m.; however, Mr. Cheetham feels that it was closer to 1:00 p.m. There is evidence in the Claim of *Wanda Nunley Radcliffe vs. Div. of Highways,* CC-92-134, that Ms. Nunley reported the defective expansion joint to the respondent before 1:00 p.m. Also, the respondent in the present claim stipulated that it had notice of the hazardous condition due to the uncertainty of the time for claimant John R. Cheetham's accident.

This Court finds that the respondent had notice of the defective expansion joint. As this Court heard and decided another claim involving the same hazardous condition and granted an award where it was found that the respondent had notice of the defective condition and failed to warn the traveling public of the hazard, the Court is of the opinion that the claimants herein should be granted an award. See *Kerry P. Dillard and Susan R. Dillard vs. Division of Highways,* CC-92-239.

Therefore, the Court makes an award to the claimants for the towing bill of $37.50, the estimate charge of $19.08, the value of the vehicle of $1,900.00, and the value of the vehicle of $1,900.00, and the value of the lost vacation day of $63.00, for a total award of $2,019.58.

Award of $2,019.58.

OPINION ISSUED AUGUST 26, 1993

JUDITH L. FIELDS
VS.
DIVISION OF HIGHWAYS

(CC-93-79)

Claimant present in person.
Glen A. Murphy, Attorney at Law, for respondent.
PER CURIAM:

Claimant, Judith L. Fields, seeks an award of $69.91 from the Division of Highways for property damage sustained when her vehicle, a 1989 Chevrolet Cavalier, struck an expansion joint on Interstate 64 at the Greenbrier exit on December 5, 1992, at approximately 12:20 p.m. in Charleston, Kanawha County.

From the evidence adduced at the hearing on May 5, 1993, it appears that the claimant was traveling in the middle lane of the interstate when she came upon a defective expansion joint which was turned up in the road. Her vehicle struck the expansion joint after the vehicle immediately in front of her also went over it. The claimant later noticed that there were several other vehicles parked along the road which had also hit the expansion joint. As a result of the incident, the claimant had to replaced one of her tires at a cost of $69.91.

The respondent received notice of the hazardous condition at 1:05 p.m. and immediately arrived upon the scene to correct the condition. The respondent was not aware of the defective expansion joint prior to the incident, and respondent had no reason to believe that the expansion joint would come loose from the pavement to create a hazard.

This Court finds, after reviewing the record, that the respondent had no actual or constructive notice of the defective expansive joint, and that after receiving such notice, acted in a timely manner to correct the situation. The claimant has failed to prove negligence on the part of the respondent by a preponderance of the evidence. Accordingly, this claim shall be and is denied.

Claim disallowed.

OPINION ISSUED AUGUST 26, 1993

ROBERT LOWERY
VS.
DEPARTMENT OF TAX AND REVENUE
(CC-93-183)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $1,044.80 for travel expenses as an employee of the respondent State agency.

Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED AUGUST 26, 1993

SANDRA MILLER AND CHARLES MILLER
VS.
DIVISION OF HIGHWAYS
(CC-91-185)

Hobert H. Henderson, Attorney at Law, for claimant.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Sandra Miller and Charles Miller, wife and husband, hereinafter the "claimants," seek an award from the West Virginia Department of Transportation, Division of Highways, hereinafter the "respondent," for negligently having damaged their three-acre parcel of real estate in Lincoln County, West Virginia, and the contents of their residence therein, over a period from 1981 to 1990. Their damages resulted, they allege, from the negligence of the respondent in the installation and placement of a culvert under the Six-Mile Creek Road, to carry the flow of Six-Mile Creek, in such manner that, in periods of high water, water backed up behind the entrance or upper opening of said culvert, overflowed the banks of said creek, removed topsoil placed on flat areas adjacent to the creek, deposited sand and stone on such areas, eroded stream banks, and entered the nearby residence of the claimants.

The Millers acquired said real estate in an unimproved state in the 1970's, and began

construction of their home-to-be in the late 1970's, and occupied it in 1980. About that time or a little later, respondent removed a 20-year-old bridge near the site of the home, which carried Six-Mile Creek Road over the Creek, to claimants' home and beyond, and replaced the bridge with a six-foot culvert, over which the road thereafter passed and through which the waters of the creek passed. There is evidence in the record that while the bridge was in place the area was never flooded to the extent that the creek was out of the bank, and no evidence to the contrary.

Six-Mile Creek traverses the Miller property for the entire length of the property, leaving relatively flat areas on either side, part of which lent itself to truck gardening, for which it was used in the early years after claimants' acquisition of the property.

In 1981, 1982, 1985, 1987, 1989, and 1990, the creek overflowed its banks, and its waters spread over the flat areas, and in some years entered and stood in the lower level of the Miler residence, with resultant damage to tangible personal property.

The testimony and other evidence at the hearing was extensive and helpful. The Court has considered all of the evidence and makes additional findings of fact and the following conclusions of law.

Findings of Fact

1. This claim was filed on January 3, 1991.

2. Damages to claimant's real property proximately resulted from respondent's negligence, primarily from the installation of a culvert of insufficient capacity to carry all of the water of Six-Mile Creek at various times during seven of the ten years between 1981 and 1990; and also because of respondent's negligent failure to remove sediment from that culvert and to stabilize the banks of the creek above and below the culvert.

3. Claimants suffered extensive damages to their residence, its contents and building materials stored in and around the house, in the floods, and from erosion of stream banks and cultivated areas.

4. According to the undisputed testimony of a knowledgeable witness for the claimants, the cost of restoring the flat areas of claimants' land, including their yard, and of stabilizing the banks of the creek to prevent or minimize future damage, is $51,490.00. Damage to the land occurred in seven of the ten years in question, but it is impossible, upon the state of the record herein, to assign a separate figure for such damage for each of those seven years, 1989 and 1990, and was proximately caused by respondent's negligence, and that claimants are entitled to recover damages for those two years.

5. The sum of $1,000.00 is the reasonable value of the land actually lost to the

stream bed, by erosion of the banks, over the ten year period, and two-sevenths of that sum of $285.41.

6. Two-sevenths of the amount required to restore claimants land to its original condition and to stabilize the banks of Six-Mile Creek where it passes through claimants' property, is $14,711.43, and that sum will be included in the award for damages to claimants' real estate proximately caused by the negligence of the respondent.

Conclusions of Law

1. The West Virginia statute of limitations applicable to this claim began to run from the time when a cause of action arose. West Virginia Code §55-2-12, §55-2-19, and §14-2-21. With respect to this type of claim, the original wrongdoing is not of itself actionable without injury or special damage, and an action is not for the wrongful act, but solely for the consequences. 51 Am. Jr. 2d 703-705, Limitations of Actions §135. See also *Handley v. Town of Shinston*, 169 W.VA. 617, 289 S.E. 2d 201 (1982), and *Bell v. Div. of Highways*, W. Va. Court of Claims No. CC-89-159 (1991). The period of limitations in this case began to run two years before the filing of the claim in this case, on January 4, 1989. This Court may make an award to claimants only to the extent that they suffered losses as a proximate result of respondent's negligence between January 4, 1989, and the date of filing of the claim herein.

Between January 4, 1989, and January 3, 1991, both dates included, the real property of the claimants was damaged to the extent of $14,996.84.

2. No award is made for damages sustained as a result of respondent's negligence during the years 1981, 1982, 1985, 1987, and 1988, recovery for the same being barred by the statute of limitations. In accordance with the findings of fact and conclusions of law as stated above, the Court makes an award to the claimants in the amount of $14,996.84.

Award of $14,996.84.

Judge Webb did not participate in the hearing or decision of this claim.

OPINION ISSUED AUGUST 26, 1993

TWANDA NEWKIRK
VS.
DIVISION OF HIGHWAYS
(CC-92-244)

Claimant present in person.

Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Twanda Newkirk, seeks an award from the Division of Highways for property damage sustained at 6:45 a.m. on July 6, 1992, when her vehicle struck a branch from a tree which was hanging over the travel portion of Route 60 in Shrewsbury, Fayette County.

A hearing was held on November 20, 1993. From the evidence adduced the hearing, it appears that the claimant was driving her vehicle west on Route 60 and as she proceeded around a blind curve in the road, she came upon a tree limb which was hanging over the road. She swerved to the left, attempting to avoid hitting the limb, but because of oncoming traffic, she was unable to do so. The limb struck the vehicle's front passenger window shattered it. The cost of replacing the window was $340.00. During the hearing, it was determined that the tree which the claimant testified about and the tree which the respondent's witness testified about, were two different trees. The Court was unable to determine whether or not the tree from which the limb was hanging and which was struck by claimant's vehicle was on the State's right of way.

At a second hearing held on May 26, 1993, the parties produced testimony concerning the location of the tree from which the limb was hanging and measurements from the center line of Route 60 to the trunk of the tree. This Court has determined that the tree in question was not on the respondent's right of way, as it was approximately thirty-five feet from the center line. This Court calculated this distance based upon measurements provided by witnesses at the second hearing. This Court is not unmindful of the fact that respondent may have a duty to remove a dangerous limb from a tree not upon its right of way, but in this claim there is also a lack of evidence as to whether the tree was dead or alive. It appears to this Court that respondent had no notice that this particular limb posed a potential hazard to the traveling public; therefore, negligence on the part of the respondent has not been substantiated by the evidence.

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

Claim disallowed.

OPINION ISSUED AUGUST 26, 1993

O. J. TRUCKING COMPANY, INC.
VS.
DIVISION OF HIGHWAYS
(CC-93-22)

David A. Barnette, Attorney at Law, for claimant.
Glen A. Murphy, Attorney at Law, for respondent.

STEPTOE, JUDGE:

O. J. Trucking Company, Inc., hereinafter referred to as O. J. Trucking, brought this action to recover monies expended to replace a trailer and repair a tractor damaged in an incident which occurred on October 27, 1992, on Erbacon Road also known as Secondary Route 6 in Webster County. O. J. Trucking alleges that respondent failed properly to maintain the berm adjacent to the road immediately prior to a one-lane bridge on Erbacon Road. As a result of the failure to maintain the berm in a stable condition, O. J. Trucking incurred a loss in the amount of $20,147.92.

The evidence adduced at the hearing on May 28, 1993, established that James J. Hughart, an employee of O. J. Trucking, was operating a tractor-trailer hauling coal from the Tammie Lynn coal mines on Tioga Road in Nicholas County, northward to the Juliana Tipple in Webster County. The route to the tipple required travel on the Erbacon Road in Webster County. There was a one-lane bridge on the road which was too narrow for two trucks to pass over at the same time. Mr. Hughart observed a southbound lumber truck approaching the bridge and slowed his own vehicle, and then he saw an automobile behind the truck also proceeding over the bridge whereupon he drove his rig onto the berm to avoid a collision. The tractor-trailer then tipped over into the creek when the berm gave way beneath the weight of the rig with resultant damages to claimant's tractor and trailer.

Respondent contends that the proximate cause of the accident was the weight of the rig which was over the legal weight limit of 65,000 pounds for Erbacon Road. This act constitutes negligence as it is a violation of West Virginia law. Likewise, respondent contends that the weight tolerance for the berm adjacent to Erbacon Road is 65,000 pounds.

The evidence established the following facts and conclusions of law:

1. Erbacon Road is a road maintenance by the Division of Highways and is heavily traveled by coal and lumber trucks.

2. The bridge in question is a one-lane bridge and two trucks could not pass each other on the bridge at the same time.

3. The pavement of Erbacon Road at the approach to bridge narrows from 18 feet to 15 feet.

4. Both truck drivers attempted to inform each other as to which truck was approaching the bridge so that one truck could safely stop to allow the other truck the right of way over the bridge.

5. The southbound lumber truck reached the bridge first and crossed the bridge safely; however, an automobile following that truck also crossed the bridge forcing Mr. Hughart to stop his coal truck at the approach to the bridge where the pavement narrowed. He drove the coal truck onto the berm which gave way under the right rear tire of the trailer whereupon the rear end of the trailer slid into the creek causing the tractor to slide over the berm also. The coal spilled into the creek and all weigh slips for this date were lost.

6. Documentation submitted by the parties established that the coal trucks operated by O. J. Trucking were more often overweight than in compliance with the statutory 65,000 pound weight limit for Erbacon Road.

7. Although the weight of the coal truck being operated by Mr. Hughart at the time of the accident herein is not known and cannot be established by either party, the testimony of both Mr. Hughart and the general manager who is also one of the owners of O. J. Trucking, Orvid Johnson, substantiates the fact that many of its coal trucks were operated and driven over the roads of this State at weights over the statutory limit of 65,000 pounds, and Mr. Johnson was aware of this circumstance.

Conclusions of Law

1. West Virginia Code §17C-17-9 provides that a gross weight of 65,000 pounds is the legal weight limit upon roads such as the Erbacon Road in Webster County.

2. The general manager of O. J. Trucking was aware of the weight limit statute, and the company was in breach of the law when it permitted its trucks to haul coal with a gross weight over 65,000 pounds.

3. Breach of the law is negligence per se. See *Salerno Brothers, Inc. vs. Div. of Highways*, Claim No. CC-89-305, issued April 2, 1992.

4. When O. J. Trucking chose to permit coal trucks to be driven over Erbacon Road at gross weights over 65,000 pounds, with full knowledge that these same trucks would necessarily need to use the berm of the roads, it also assumed the risk that problems could occur.

5. On the date of the accident, the Division of Highways had no notice that there were any potential defects in the berm area at the approach to the one-lane bridge or that the berm would collapse.

6. O. J. Trucking has failed to establish negligence on the part of the Division of Highways by a preponderance of the evidence.

7. As the Court has determined that the Division of Highways was not negligent

in its maintenance of the berm on the Erbacon Road, this claim must be denied.

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

Claim disallowed.

Judge Webb did not participate in the hearing or the decision of this claim.

OPINION ISSUED AUGUST 26, 1993

KENNETH H. SMITH
VS.
DIVISION OF HIGHWAYS
(CC-93-58)

Claimant present in person.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Kenneth H. Smith, seeks an award of $600.00 from the Division of Highways for property damage sustained when his vehicle struck rocks from a rock slide which occurred on February 11, 1993, at approximately 7:30 p.m. on West Virginia Route 60 in Cedar Grove, Kanawha County.

From the evidence adduced at the hearing on May 5, 1993, it appears that the claimant was traveling west on Route 60 driving his 1983 Cutlass Supreme at 40 miles per hour, when he came upon a rockslide that was covering the westbound lane of traffic. It was a very dark, rainy night. The claimant was unable to drive into the left-hand lane of traffic due to oncoming vehicles and he did not have time to stop his vehicle. Consequently, he drove over the rocks, causing damage to his vehicle. Three of the tires blew out, three rims were bent, three wire wheel hubcaps were destroyed, and tie rods had to be replaced. He had driven on this road frequently and he was aware that rock slides occurred. He stated this particular rock slide looked as if it had occurred within the past five minutes prior to the time that he came upon the rocks. He saw a warning sign posted on the road after the accident, but stated that he did not know if the warning sign had been there before the accident.

James Dingess, county supervisor for the respondent, testified that there were signs in the area prior to the day of the accident warning of the rockslide area. He stated that after the accident was reported to him that they went out and cleaned up the area.

This Court finds, after reviewing the record, that the respondent did not have actual or constructive notice of the fallen rocks and that upon receiving such notice, respondent acted in a timely manner to correct the hazardous condition. The respondent has attempted to provide warning to the traveling public of the potential hazard of fallen rocks by placing warning signs in both directions on the highway. As the claimant has failed to establish negligence on the part of the respondent by a preponderance of the evidence, this claim must be denied.

Claim disallowed.

OPINION ISSUED AUGUST 26, 1993

THOMAS TREADWAY
VS,
DIVISION OF HIGHWAYS
(CC-92-237)

Claimant present in person.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Thomas Treadway, seeks an award of $135.00 from the Division of Highways for property damage sustained while driving his vehicle on July 12, 1992, on West Virginia Route 16 in Cotton Hill, Fayette County.

From the evidence adduced at the hearing on May 5, 1993, it appears that the claimant was driving his 1985 Caprice at approximately 50 miles per hour around 12:00 noon with his wife as a passenger on Route 16, when he noticed a hole in the road approximately four to five feet long and four to five inches deep. He was approximately ten to twelve feet away from the hole when he noticed it and he slowed down to go over it. He had been aware that there was construction on the road before he drove on it that day. However, he thought that the holes had all been filled with gravel. As a result of his vehicle hitting the hole, he had to replace two tires on his vehicle.

The respondent admits that it did install a culvert pipe on June 26, 1992, and that the hole was filled with a gravel substance until settlement occurs. The settled area is then paved with asphalt. Apparently, the area was not paved with asphalt at the time that claimant's vehicle went into the settled area.

This Court finds, after reviewing the record, that the respondent was aware of the hazardous condition and failed to properly maintain the area. The claimant also was aware of the

construction in the area. He was not operating his vehicle with the caution required for the potentially hazardous condition then and there existing at this area. Therefore, based upon the principle of comparative negligence, this Court finds the respondent 60% negligent and the claimant 40% negligent, thereby reducing the award of total damages of $135.00 to the sum of $81.00.

The Court is of the opinion to and does make an award to the claimant in the amount of $81.00.

Award of $81.00.

OPINION ISSUED AUGUST 26, 1993

MATTHEW A. TULLIUS
VS.
DIVISION OF HIGHWAYS
(CC-93-6)

Claimant present in person.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Matthew A. Tullius, seeks an award of $736.90 from the Division of Highways for property damage sustained while driving his vehicle on October 30, 1992 at 11:30 p.m. on West Virginia Route 2 in Waverly, Wood County.

From the evidence adduced at the hearing on May 5, 1993, it appears that the claimant was driving his 1992 Eagle Talon north on Route 2 at approximately 55 miles per hour with his brother-in-law as a passenger when he noticed an oncoming vehicle approaching left of the center line. The claimant attempted to avoid a head-on collision by driving his vehicle onto the berm on the right-hand side of the road. This area is a part of the entrance to a gravel parking lot for the High Chapparal (a local bar). The entrance to the parking lot abuts Route 2 on the State's right-of-way. When his vehicle went onto this area, it went into an eight to twelve inch deep hole where the gravel had been washed away. Claimant's vehicle sustained damage and the cost to repair the vehicle is in the amount of $736.90. The claimant did not turn this damage into his insurance company. The amount of the claimant's deductible is $500.00.

Paul Reese, county supervisor for the respondent, testified that he is familiar with the scene of the accident and that the respondent had received complaints of the defective condition of the area on prior occasions. However, he also stated that he is of the opinion that it is the property owner's responsibility to keep the driveway properly maintained. he had previously notified the

owner of the High Chapparal that the driveway was in need of repair. he is of the opinion that this defective area is not the responsibility of the respondent. However, respondent failed to carry out the enforcement of W. Va. Code §17-16-9, which requires owners of land fronting any State road to keep the area properly maintained.

The Court finds, after reviewing the record, that the respondent had actual notice of the defective condition on the berm and that the respondent failed to maintain the berm area or to enforce the appropriate statutes as to the maintenance of driveways which abut State roads. In an emergency situation, the driver of a vehicle relies upon the berm area of a road to be in good repair. In this claim, the claimant has established negligence on the part of the respondent by a preponderance of the evidence.

Therefore, the Court is of the opinion to make an award to the claimant for the damage to his vehicle limited to the amount of his deductible on his insurance policy of $500.00.

Award of $500.00.

OPINION ISSUED AUGUST 26, 1993

EARL K. VIA
VS.
DIVISION OF HIGHWAYS
(CC-93-8)

Claimant present in person.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Earl K. Via, seeks an award of $1,369.89 from the Division of Highways for property damage sustained in a single vehicle accident which took place on December 18, 1992, at 8:45 p.m., on West Virginia Route 10, south of the town of Itmann in Wyoming County. Federal Kemper Insurance Company also seeks an award of $1,169.89 from the Division of Highways for subrogation of the amount which it paid to the claimant.

From the evidence adduced at the hearing on April 21, 1993, it appears that the claimant was driving a 1987 Mercury on Route 10 when his vehicle struck some rocks which were scattered in the road. The rocks apparently had come from a pile of rocks placed on the side of the road by the respondent. The claimant travels this road frequently; however, he had not seen these rocks in the road prior to the accident. The amount of damage to the claimant's vehicle was

$1,369.89; however, his insurance company paid $1,169.89., leaving the claimant to pay his $200.00 deductible.

For the respondent, James David Cox, assistant supervisor, testified that the pile of rocks was the respondent's stockpile and that it was nine and one-half feet from the pavement off the side of the road. He stated that the respondent first discovered that the rocks were scattered in the road when it received an emergency telephone call informing respondent of an accident at 9:00 p.m. Mr. Cox then went to the scene of the accident and cleared the road. However, the emergency telephone call was regarding another accident involving two females. It was not the accident involving the claimant. The respondent was not aware of the defective condition of the stockpile until after claimant's accident. Furthermore, the respondent was not aware of the accident involving the claimant until the following day.

This Court finds, after reviewing the record, that the respondent had no actual or constructive notice of the defective condition of the stockpile prior to the accident, and that upon receiving notice of the same, that the respondent acted in a timely manner in correcting the defective condition. Therefore, the claimant has failed to establish negligence on the part of the respondent by a preponderance of the evidence and this claim must be denied.

Claim disallowed.

OPINION ISSUED AUGUST 26, 1993

SALENA M. WILLIAMS
VS.
DEPARTMENT OF EDUCATION
(CC-93-98)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $165.00 for reimbursement for a class taken to renew her teaching certificate. The invoice for the class was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $165.00.

Award of $165.00.

OPINION ISSUED DECEMBER 17, 1993

JULIA ADKINS
VS.
DIVISION OF HIGHWAYS
(CC-90-177)

Michael A. Esposito, Attorney at Law, for claimant.
Glen A. Murphy, Attorney at Law, for respondent.

STEPTOE, JUDGE:

Julia Adkins, hereinafter known as the claimant, seeks an award for personal injuries and property damage she sustained about 0845 on the 7th day of June, 1988, while operating her motor vehicle on West Virginia Secondary Route 14, hereinafter Route 14, at or near the community of Dehue in Logan County, West Virginia.

Claimant alleges that the Division of Highways, hereinafter known as the respondent, was negligent in failing properly to repair the highway at and in the vicinity of the accident, and in failing to keep the highway in a safe condition four the traveling public, and that the negligence of the respondent proximately caused the injuries sustained by the claimant and her property damage.

By order of this Court on the 28th day of May, 1993, hearing of this claim was bifurcated, and the issue of liability was set for hearing on the 29th day of June, 1993, to be followed by a hearing as to damages if liability was established.

At the hearing as to liability on June 29, 1993, the claimant testified that she was alone in her car, a 1985 Ford Escort, driving in a westerly direction on Route 14, from her residence at Yolyn to the city of Logan, a distance of some twelve miles. According to her testimony, she was following by a car length or less a car then being operated by "Ronnie' (evidently Ronnie Summers, of Yolyn, whose name appears on the list of witnesses), and she estimated her speed immediately prior to the accident to have been 25 to 30 miles per hour. She testified to the existence of a large number of potholes in the surface of the road, and to the extensive use of the road made by heavy coal trucks. She apparently hit a pothole or some other defect or object in the road, with some force and attempted to keep her vehicle in her own lane, but it went out of control, crossing the lane

reserved for the use of oncoming traffic and smashing into the metal guardrail on the other side of the road. The impact of her car against the guardrail evidently three her violently against unknown interior parts of her car and she was rendered unconscious, from which state she gradually emerged while being removed from her car by emergency medical personnel who had been called and who took her to a hospital.

About a week after the accident, claimant took, or caused to be taken, five photographs of the scene of the accident, which were admitted into the evidence. The pictures show Route 14 at the scene of the accident as running between a high rock wall on the northerly side of the road, and a coal preparation plant on the southerly side. The paved portion of the road appears to be some twenty feet in width, on either side of which are unpaved shoulders of widths varying from three feet to six feet. The original asphalt pavement appears to have numerous line cracks, which are not dangerous, but where the accident took place another layer of asphalt had been superimposed upon the original surface, for some undisclosed reason; there also appear to be a number of potholes, none of which appear to be large or dep; the pothole tentatively identified by claimant as the one her car struck seems to be one of the smaller ones.

Claimant testified that at the time of the accident the weather was clear and the road was dry. No other car was involved.

No other person testified for the claimant. There was no police report of the accident, which probably was not investigated by the police.

The respondent produced only one witness, Everett Bowder, who did not see the accident, but who is and was at and before the accident employed by the respondent as foreman of the Man substation of the respondent in Logan County, with supervisory responsibility for the performance of maintenance in the area if Logan County where the accident took place. he confirmed claimant's statement that Route 14 is heavily used by coal-hauling trucks, which he blamed for the surface irregularities of Route 14 and other roads in coal-producing areas of the State, especially in the winter months. During cold weather it is their practice, following directives, to patch potholes with a cold mix of asphalt, which often pops right out of the hole, especially under heavy traffic, but apparently there is nothing else they can do until the advent of warm weather, when hot asphalt is available and is much more effective. This witness produced work records kept in the ordinary course of his work and required of him, for work performed by his men on Route 14 between January 14, 1988, and June 7, 1988, showing that patching was done on January 14, 1988, and that on March 22 and 23, 1988, Route 14 was patched form one end to the other. Additionally, his crew worked sixteen days, or parts thereof, on Route 14, during said period, doing maintenance of various kinds, including the aforesaid patching. The witness testified that he had received no complaints from the public during said period concerning the condition of Route 14.

Findings of Fact

1) Route 14 is Logan County, West Virginia, is a secondary road about ten miles

long, serving for the most part coal-hauling trucks and the residents of nearby rural communities.

2) Said road bears an asphalt surface which is adequately maintained during most of the year but which, during the cold months, due to freezing and thawing and to heavy use of coal-hauling trucks, develops potholes and other irregularities, which maintenance forces are unable to repair immediately and permanently. Respondent received no complaints as to the condition of the road from and after January 14, 1988, to the date of claimant's accident.

3) Claimant, before the accident, was quite familiar with the road and its surface condition, having used the road for years as her road of choice for the purpose of doing her marketing and shopping and for transacting business in the city of Logan.

4) In the operation of her motor vehicle immediately before the accident, claimant's vehicle was so close to the vehicle ahead that she probably could not have avoided the accident if she had seen it.

5) Claimant's cause of action is predicted upon alleged negligence of the respondent in the maintenance of Route 14 at and near the scene of her accident. During the five-month period preceding her accident, respondent performed routine maintenance on the road, including the patching of potholes, but winter weather heavy traffic, and intrinsic inadequacy of the only known patching material combined to make it inevitable that winter efforts to control surface irregularities would not be wholly effective.

6) It has been demonstrated, and proved, that at the time of the accident, there were potholes in the surface of the road in the vicinity of the accident, and the surface was rough. Claimant has not proven the existence of any pothole which, by reason of its size or depth, could have been expected to cause an accident and which was known to or should have been known by the respondent.

Conclusion of Law

Respondent was not guilty of negligence in producing the accident in which claimant received personal injuries and sustained property damage.

Claim disallowed.

OPINION ISSUED DECEMBER 17, 1993

STEVEN W. ADKINS

VS.
DIVISION OF CORRECTIONS
(CC-92-248)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks recovery for the replacement of a ring that was lost while claimant was an inmate at the West Virginia State Penitentiary at Moundsville, West Virginia, a facility of the respondent.

The respondent admits the validity and amount of the claim and further states that the ring belonging to the claimant was misplaced by a correctional officer. Respondent does not have a fiscal method for compensating the claimant.

The Court, having reviewed the Petition and Amended Answer in this claim, has determined that claimant suffered a loss as a result of the negligence of the part of the respondent. The Court is of the opinion that $150.00 is the fair and reasonable value of the personal property of the claimant.

In view of the foregoing, the Court makes an award to the claimant in the amount of $150.00.

Award of $150.00.

OPINION ISSUED DECEMBER 17, 1993

KAREN PHILIPPI ARNETT
VS.
DIVISION OF HIGHWAYS
(CC-93-154)

Claimant appeared in person.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Karen P. Arnett, a resident of Charleston, West Virginia, brought this action to recover damages to her vehicle which occurred on March 29, 1993, when claimant was traveling west bound on Interstate 64 in the middle lane near the Montrose Exit in South Charleston. Claimant's insurance paid for the damages excluding claimant's $200.00 deductible, which represents the amount of this claim.

The evidence adduced at the hearing established that claimant was operating her 1992 Honda Accord on I-64 at approximately 8:30 p.m. It was dark and raining. She noticed a police car with flashing lights and other vehicles parked at the side of the road. She was operating her vehicle at approximately 45 miles per hour when she heard a "big bang." When she got home, she noticed the front portion of her vehicle had sustained damages. She placed a telephone call to the South Charleston Police and was informed that there was a hole in the west bound middle lane on I-64. She then realized that her vehicle had struck this hole.

Mancie Legg, respondent's maintenance supervisor for I-64 in Charleston, testified that he was called out by Charleston Control on March 29, 1993, at 8:50 p.m., and he took cold mix material to fill the hole. Respondent's employees had patched the hole earlier that day with cold mix, a winter grade asphalt. This material does not effect a permanent repair. Respondent made permanent repairs to the hole in the interstate on March 30, 1993, when the rain had ceased. Cold patch was used, but respondent was able to cut out the hole and blow it out with an air compressor for a permanent patch. Mr. Legg explained to the Court that placing cold mix in wet weather is not a permanent repair. He also stated that warning signs are not placed on the interstate.

This Court is of the opinion that respondent's employees were not negligent in the maintenance of I-64 with respect to this particular hole. The hole was patched with temporary material, cold patch, which is the only material available to respondent during the winter months. This Court recognizes that it would be impractical to require respondent to place warning signs when respondent had repaired the area a few hours prior to claimant's accident. Although this Court sympathizes with the claimant, this Court is also understands the burden placed upon the respondent in its maintenance of the State's highways. This Court will not impose an impossible task upon respondent. There will be situations occurring for which respondent cannot be held responsible as it has acted to alleviate hazards on the highways to the best of its ability.

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

Claim disallowed.

OPINION ISSUED DECEMBER 17, 1993

PATRICK MICHAEL BILLIPS AND PATRICIA BILLIPS

VS.
DIVISION OF HIGHWAYS
(CC-92-350)

Claimant Patrick Michael Billips appeared in person.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Patrick Michael Billips and Patricia Billips, residents of Delbarton, Mingo County, brought this action in the amount of $500.00, the deductible of their automobile insurance, as their automobile was totaled in an accident on W. S. Route 52, near Nolan, West Virginia.

The evidence adduced at the hearing established that claimant was driving his 1982 Toyota Celica on January 21, 1992, at approximately 3:15 p.m., proceeding south on U. S. Route 52, when his automobile went over gravel on the highway. Claimant lost control and the automobile swerved into an oncoming vehicle. Claimants' automobile was totaled in this accident.

William Thompson, driver of the oncoming vehicle, testified that he was proceeding south on U. S. Route 52. He stated that he observed claimant lose control of his vehicle and saw the vehicle coming toward him. He further stated that he had not seen any gravel on the surface of the road prior to coming upon claimant or at the scene of the accident.

Charles E. Curry, a truck driver for the respondent in Mingo County, testified that respondent's employees were performing work on the berm of the road by placing gravel in the berm. He had driven through this section of U. S. Route 52 at approximately 3:00 p.m. when the employees had completed their project for this day. He did not recall any foreign matter in the curve at that time.

After reviewing the evidence in this claim, this Court has determined that claimant has failed to establish negligence on the part of the respondent. The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For respondent to be held liable for damages caused by a defect of this sort, it must have had either actual or constructive notice of the condition on the road and a reasonable amount of time to take suitable corrective action. As the claimant has not met this burden of proof, the claimant has not established negligence on the part of the respondent.

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

Claim disallowed.

OPINION ISSUED DECEMBER 17, 1993

CABELL COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-93-394)

William T. Watson, Attorney at Law, for claimant.
Grethen A. Murphy, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, County Commission of Cabell County, is responsible for the incarceration of prisoners who have committed crimes in Cabell County. Some of the prisoners have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action to recover the costs of housing for prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in the *County Comm'n or Mineral County v. Div. of Corrections*, an unpublished opinion of the Court of Claims issued November 21, 1990, that the respondent is liable to the claimant for the cost of housing these inmates. Pursuant to the holding in the *Mineral County* Opinion, the respondent reviewed this claim to determine the number of inmate days for which respondent may be liable. Respondent then filed an Answer admitting the validity of the claim and that the amount of $168,150.00 is fair and reasonable.

In view of the foregoing, the Court makes an award to claimant in the amount of $168,150.00.

Award of $165,000.00.

OPINION ISSUED DECEMBER 17, 1993

THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY OF WEST VIRGINIA
VS.
DEPARTMENT OF ADMINISTRATION

(CC-93-310)

Joseph J. Starsick, Jr., Attorney at Law, for claimant.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $656.88 for telephone services provided respondent. The invoice for the service was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $656.88.

Award of $656.88.

OPINION ISSUED DECEMBER 17, 1993

GAYLE DINGESS
VS.
DIVISION OF HIGHWAYS
(CC-93-118)

Claimant appeared in person.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Gayle Dingess, a resident of Lake, Boone County, West Virginia, brought this action to recover damages to her vehicle which occurred on February 15, 1993, when her vehicle struck a hole in County Route 7. Claimant's 1993 Ford Probe sustained damages in the amount of $982.00; however, claimant's insurance paid for the damages with the exception of claimant's deductible in the amount of $100.00, the amount of this claim.

The evidence adduced at the hearing established that claimant was driving her vehicle from Logan to Madison on County Route 7 at approximately 8:30 p.m. She was driving at approximately 35 miles per hour when her vehicle struck a large hole in the surface of the road. She described the hole as being 20 inches wide, 28 inches long, and 17 inches deep. She was unable to

see the hole prior to coming upon it, even though there were no vehicles in front of her; however, there was oncoming traffic. Claimant was unfamiliar with this road, as she did not travel it frequently. She was returning from a football game held at Logan Junior High School.

The Logan County Maintenance Supervisor for respondent, Hobart Adkins, testified that he was unaware of the existence of this particular hole in the road. He indicated that he was not personally aware of any complaints reported to the Logan County headquarters regarding this section of County Route 7. He also stated that the substation garage in Chapmanville may have received complaints about this particular hole, but any complaints were not relayed to him.

After reviewing the evidence in this claim, this Court is of the opinion that a hole of these dimensions, particularly seventeen (17) inches deep, could not have developed over a short period of time. Respondent should have been aware of the existence of the defect in the road. The Court is of the opinion that respondent had constructive notice of the defect and failed to repair or warn traveling public. The negligence on the part of the respondent was the proximate cause of the damages which occurred to claimant's vehicle.

In accordance with the findings stated herein above, this Court makes an award to the claimant in the amount of $100.00.

Award of $100.00.

OPINION ISSUED DECEMBER 17, 1993

ROSA BELLE GAINER
VS.
DIVISION OF HIGHWAYS
(CC-93-110)

Claimant appeared in person.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Rosa Gainer, a resident of Glenville, West Virginia, brought this action for damages to her 1992 Buick Skylark. On April 4, 1993, at approximately 12:20 p.m., claimant was proceeding east on W. VA. Route 5 in Gilmer County. She was operating her vehicle at approximately 45-50 miles per hour when her vehicle struck a hole in the road causing damages to both tires on the passenger side. The cost to replace this tires, a wheel cover, a wheel, and realigning the front end is in the amount of $540.80. The claimant has an insurance policy with a $250.00

deductible for collision, but the policy excludes road damage to tires.

The evidence adduced at a hearing established that the claimant, although familiar with W. VA. Route 5, did not see the hole in the road prior to the time that her vehicle struck the hole. The hole was located in the travel portion of the road on the right side of the eastbound lane.

Max Marshall, Supervisor for respondent in Gilmer County, testified that he had noticed this same hole on April 2, 1993, the Friday prior to the date of claimant's accident. He described the hole as ten to twelve inches in diameter, and that it was the only hole in the area. He did not place any warning signs or effect repairs, as it was late in the day. He had the hole repaired on the following Monday, April 5, 1993.

After having reviewed the evidence in this claim, this Court is of the opinion that respondent had actual notice of the defect in the road, and failed to provide any warning to the traveling public. It was foreseeable that a hole of this size could cause damage to a vehicle being operated by a traveler on the road. The negligence on the part of the respondent was the proximate cause of the incident herein, and as result, claimant's vehicle sustained damages.

Therefore, this Court is of the opinion to and does make an award to the claimant in the amount of $250.00, the amount of the deductible on her collision insurance, plus $177.90 for the cost of replacing her tires, a total of $427.90.

Award of $427.90.

OPINION ISSUED DECEMBER 17, 1993

GENERAL DELIVERY, INC.
VS.
DIVISION OF HIGHWAYS
(CC-92-251)

Harry R. Cronin, Jr., Attorney at Law, for claimant.
Glen A. Murphy, Attorney at Law, for respondent.

BAKER, JUDGE:

General Delivery, Inc., hereinafter referred to as claimant, brought this action for damages to its tractor-trailer which occurred in an accident on September 3, 1990. Claimant alleges that respondent improperly maintained a runaway truck ramp on Interstate 68, in Monongalia County, on Cooper's Mountain, in the area of Cheat Lake. Claimant's tractor-trailer sustained severe

damages when it failed to stop on the ramp and proceeded over a hill adjacent to the ramp. The cost to repair both the tractor and the trailer is in the amount of $23,007.88.

Respondent contends that the truck escape ramp was properly maintained and that it worked properly in stopping the truck from going out of control.

At the hearing of this claim on June 28, 1993, it was established that the driver of claimant's tractor-trailer was Charles W. Cook, an employee of the claimant. On the date of the accident, he was operating the tractor-trailer proceeding westbound on I-68, when the tractor-trailer lost its brakes and he turned onto the truck escape ramp, lost control of the tractor-trailer, whereupon, it went through the guardrail on the ramp and went over the hill. The cargo on the tractor-trailer was a load of Pepsi Cola lids for cans. The accident occurred at approximately 6:00 p.m.

Charles Cook testified that he was operating the tractor-trailer at approximately 45 miles per hour when he experienced the loss of the brakes. He turned the vehicle onto the escape ramp, turned to the right, the left drive axle went down into the gravel first, and when the right side of the tractor-trailer went into the gravel, he lost control. He had driven this section of I-68 on many occasions, and he had seen this particular truck escape ramp many time, though he had never used it prior to the date of this accident.

Respondent established through the testimony of an enforcement officer for the West Virginia Public Service Commission, Sharon Randall, who investigated this accident, that the right front trailer brake failed, as indicated by the fact that the diaphragm had ruptured, causing an abrupt loss of air resulting in the brake failure. She explained that a ruptured diaphragm does not normally occur in an accident, but generally occurs before the accident, resulting in brake failure, and if some of the wheels are not braking, it can draw the tractor-trailer sideways.

Charles R. Lewis, II, a planning and research engineer for the Traffic Engineering Section of the Division of Highways, explained that "a truck escape ramp is kind of a last resort safety device. It's placed at or near the bottom of a down grade where either a mechanical failure or a driver handling error or both may lead to the loss of some or all of the braking capability on a large vehicle, tractor-trailer, and the intent of the truck escape ramp is to give the driver an escape route so that he can get off the road and that the vehicle can be slowed to a stop safely, pretty much out of harm's way with minimum damage." He described the material on this particular ramp as pea gravel. Once a truck hits the gravel bed, there is little or no steering capability on the part of the driver.

The evidence in this claim established that the truck escape ramp on I-68 at the site of this accident has two lanes. On the date of the accident, one of the lanes contained deep gravel similar to pea gravel, whereas the outside lane, i.e., the lane closest to the hillside, was a paved lane. Tractor-trailer rigs with brake failure are to proceed onto the ramp on the gravel side allowing the deep gravel to stop the tractor-trailer rig. The paved lane is for the use of tow trucks, which need

room to tow the tractor-trailer rigs from the ramp. The photographic evidence in this claim and testimony of the driver, Charles Cook, appear to establish that the tractor-trailer went onto this truck escape ramp with the left tires on the gravel and the right tires on the paved lane of the ramp. The tractor-trailer rig then veered sharply to the left, going through the guardrail and over the hill toward the westbound lanes of I-68. The truck escape ramp was not effective in stopping this rig because all of the tires of the rig did not go into the deep gravel on the ramp at the same time. The driver evidently drove the tractor-trailer too close to the right side of the ramp onto the paved portion of the ramp. The lanes appeared to be fairly well delineated for driers to observe the difference in the lanes.

After having reviewed the testimony and evidence in this claim, the Court is of the opinion that there wan no improper maintenance of the truck escape ramp used by claimant's driver. Claimant has failed to establish any negligence on the part of the respondent. The truck escape ramp was maintained in the manner for which its use was intended. The two lanes are necessary and it is unfortunate that the driver of claimant's tractor-trailer drove the rig with the left wheels int the pea gravel and the right wheels on the paved portion rather than with both sets of wheels in the pea gravel lane. Therefore, this Court is unable to make an award to the claimant for the damages to its tractor-trailer.

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

Claim disallowed.

OPINION ISSUED DECEMBER 17, 1993

RUSSELL HAMMACK
VS.
DIVISION OF HIGHWAYS
(CC-93-176a)

JAN ADRIAN CREASY
VS.
DIVISION OF HIGHWAYS
(CC-93-176b)

FRANK MCGUIRE
VS.
DIVISION OF HIGHWAYS
(CC-93-176c)
ROGER BALSER

VS.
DIVISION OF HIGHWAYS
(CC-93-176d)

VIRGIL N. MARTIN, JR.
VS.
DIVISION OF HIGHWAYS
(CC-93-176e)

TIMOTHY HUDNALL
VS.
DIVISION OF HIGHWAYS
(CC-93-176f)

Claimant Russell Hammack appeared on behalf of all the claimants.
George J. Joseph, Attorney at Law, for respondent.

PER CURIAM:

Claimants, employees of the respondent State agency, brought these actions for reimbursement of the value of certain items of personal property which were destroyed when a truck, belonging to the respondent and used by claimants in the performance of their duties, was stolen and destroyed.

Claimants are employed by respondent at the Cheylan headquarters in Cabin Creek, Kanawha County. On May 25, 1993, claimants, having completed work for the day, locked the doors of the truck and put the keys in the office, which was the normal routine. During the weekend, juveniles stole the truck and set it on fire. All of claimants' personal belongings used in the performance of their duties for respondent were burned in the fire. Respondent is unable to reimburse the claimants' for their personal belongings, as respondent does not have a fiscal method for this purpose.

Respondent does not contest the facts of these claims or the requested awards put forth in the claims. Bernard Ferrell, area maintenance supervisor for respondent, testified that claimants followed the routine procedures for returning the truck. The trucks are kept in a fenced area which is secured with a combination lock on the gates. He recalled the incident and acknowledged that the truck was stolen and burned. The claimants have no recourse for receiving reimbursement for their personal property except through the Court of Claims.

Although the Court recognizes that respondent did not act in an improper manner, this Court is also aware that claimant employees are required to have certain personal property in the truck which they use in the performance of their duties for respondent. The personal effects kept by the employees included such items as insulated jackets, coveralls, and rain suits. This Court is of the opinion that claimants are entitled to be reimbursed for their personal property losses as a moral obligation of the State. The amounts claimed appear to this Court to be fair and reasonable for the items listed in the claims.

In view of the foregoing, this Court is of the opinion to and does grant awards to the claimants as indicated below.

Award of $63.55 to Russell Hammack.

Award of $20.09 to Jan Adrian Creasey.

Award of $202.69 to Frank McGuire.

Award of $81.51 to Roger Balser.

Award of $50.83 to Virgil N. Martin, Jr.

Award of $89.99 to Timothy Hudnall.

OPINION ISSUED DECEMBER 17, 1993

IBM CORPORATION
VS.
DEPARTMENT OF TAX AND REVENUE
(CC-93-403)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,012.00 for computer equipment provided respondent. The invoice for the equipment was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and the amount of the claim and states that

there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,012.00.

Award of $1,012.00.

OPINION ISSUED DECEMBER 17, 1993

DANNY JORDAN
VS.
DIVISION OF HIGHWAYS
(CC-93-92)

Claimant present in person.
George J. Joseph, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Danny Jordan, seeks an award of $4,448.18 from the Division of Highways for property damage and work loss sustained by an automobile accident which took place on December 21, 1992, at approximately 7:00 a.m. on the 5100 block of State Route 2, near Huntington, Cabell County. The claimant alleges that the respondent was negligent in failing to apply salt to the surface of the road during rush hour traffic.

From the evidence at the hearing on September 15, 1993, it appears that the claimant was driving his vehicle, a 1982 Cadillac, approximately 50 miles per hour north on Route 2 on his way to work at Point Pleasant when he noticed a disabled vehicle in his lane of traffic. It was dark outside and there were no street lights. The disabled vehicle had no headlights or tail lights turned on. The claimant applied his brakes, but his vehicle slid on a patch of ice that was caused by a stream of water running over the surface of the road. His vehicle then collided with the parked and disabled vehicle and proceeded to bounce off and hit a second vehicle. The front end of the claimant's vehicle was damaged and he had it towed to a storage facility. The claimant is seeking compensation in the amount of $4,448.18 for damage to his vehicle, the cost of storing his vehicle, and work loss of one day.

According to the testimony of Kari Queen, loss control specialist employed by the West Virginia American Water Company, there was a water main break in the 5100 block of Route

2 on the morning of the accident which caused the patches of ice. She stated that it is the responsibility of the West Virginia American Water Company to maintain the water line. The water company was notified of the break at 6:20 a.m., but the supervisor was unable to investigate the situation before the accident occurred. She also testified that to her knowledge, the respondent was not notified of the main break.

This Court finds, after reviewing the record, that the respondent had no actual or constructive notice of the defective condition of the road surface, and that the maintenance of the broken water line was not the responsibility of the respondent. Therefore, the claimant has failed to establish negligence on the part of the respondent by a preponderance of the evidence. Accordingly, this claim must be denied.

Claim disallowed.

OPINION ISSUED DECEMBER 17, 1993

MILBURN COLLIERY COMPANY
VS.
DEPARTMENT OF COMMERCE, LABOR AND ENVIRONMENTAL RESOURCES
(CC-93-137)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover $84.51 which represents the interest lost on funds deposited for posting a bond with the respondent state agency.

Claimant Milburn Colliery Company, hereinafter referred to as Milburn, posted a bond with the respondent for reclamation work to be performed. When the work was completed in 1989, Milburn requested a refund from the respondent. The bond funds had been placed with the West Virginia Consolidated Investment Fund. The money was released to the Department of Energy which is now known as the Division of Environmental Protection, an agency administered by the respondent. Milburn did not receive these funds from the respondent until January 11, 1993. The interest which would have been earned on these funds by the Consolidated Investment Fund during that time frame from April 1, 1990, to January 11, 1993, would have been the amount claimed, $84.51.

Respondent does not contest the fact that Milburn did not receive its refund in a timely manner and that the amount of $84.51 is the correct amount of interest which would have

been earned. Respondent's only defense to this claim is that neither the Office of the State Auditor nor the Division of Environmental Protection admits responsibility for the failure of Milburn to receive its refund of the bond in a timely manner.

In view of the foregoing, the Court is of the opinion that Milburn is entitled to recover the interest on the bond in the amount $84.51 as the respondent failed to make a timely refund of the bond. Therefore, the Court makes an award to the claimant in that amount.

Award of $84.51.

OPINION ISSUED DECEMBER 17, 1993

DONALD K. NAVARRO
VS.
DIVISION OF HIGHWAYS
(CC-93-27)

Claimant represents self.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action requesting recovery for damages to his 1984 Chrysler Fifth Avenue which occurred on January 4, 1993, on W.Va. Route 61/24 in the Armstrong Creek area of Fayette County. The total of the damages to claimant's automobile is $679.21; however the amount of the claim is $250.00, which represents the amount of claimant's deductible provided in his insurance coverage.

Claimant, a resident of the Armstrong Creek area, is very familiar with W.Va. Route 61/24. The residents of this area had complained about the condition of this particular road and had met with representatives of the respondent in February 1992, to discuss the deteriorated condition of W.Va. Route 61/24. The road was paved in November 1992, but the pavement deteriorated as coal trucks traveled this road on a daily basis. The "load side" of the road appeared to sustain the most damages. Claimant's accident occurred on a bridge when his vehicle struck a hole in the bridge deck. Claimant was unable to see the hole as it was filled with water at that time. Claimant submitted a video tape of W.Va. Route 61/24 in order for this Court to observe the poor condition of the pavement. The video tape was taken on January 23, 1993, but does not include the location of claimant's accident on the bridge.

Respondent did not offer any testimony, but its position is that respondent was

working on the road and that the road was torn up.

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). For the respondent to be held liable for damage caused by a defect of this sort, it must have had either actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. Davis v. Dept. of Highways, 11 Ct. Cl. 150 (1977). Claimant herein has established that respondent was well aware of the deteriorated condition of W.Va. Route 61/24. Claimant also was aware of the hazardous conditions existing on this road in January 1993; however, it appears to this Court that claimant was not negligent when he drove over the bridge and was unable to see the hazard which existed there. This Court is disposed to make an award to the claimant for the damages to his automobile, as respondent allowed this particular road to remain in an obvious deteriorated condition over a long period of time.

Accordingly, this Court makes an award to the claimant in the amount of $250.00.

Award of $250.00.

OPINION ISSUED DECEMBER 17, 1993

SHERRI NOE
VS.
DIVISION OF HIGHWAYS
(CC-92-81)

Claimant present in person.
Glen A. Murphy, Attorney at Law, for respondent.

BAKER, JUDGE:

Claimant brought this action for property damages to a vehicle and physical injuries which she received in an accident on February 2, 1990, when she was operating her 1989 Bronco II, on County Route 9/1, in Logan County. This claim was bifurcated and this Court heard the claim on August 6, 1993, with respect to the issue of liability only.

Claimant alleges that respondent improperly maintained County Route 9/1, as it permitted mud and water to accumulate on the surface of the road from a bank adjacent to the road. This accumulation of mud, debris, and water was the cause of her accident, according to claimant.

Claimant testified that it was approximately 8:00 a.m. on the date of the accident when she proceeded on County Route 9/1 on her way to Holden Grade School. She was on her way

back through the same area near the Whitman Grade School, when she felt her vehicle either hydroplaning or sliding on mud. When the vehicle slid to dry pavement, it rolled over, causing the damages to the vehicle and physical injuries to her. Claimant further testified that an adjacent property owner allowed mud and water from his property to clog a ditch line adjacent to County Route 9/1, causing mud and water to flow onto the surface of the road creating a hazardous condition which , in her opinion, was the proximate cause of her accident.

Sergeant David L. Townsend, a Deputy Sheriff with the Logan County Sheriff's Department, investigated this accident. He observed the scene of the accident and the fact that there was ice on the road. It was his opinion that mud, debris, and rocks were thrown on the road by the impact of claimant's vehicle with the bank adjacent to the road. He estimated the speed of the vehicle at 40 miles per hour, and noted that the Whitman Grade School is posted as a school zone with a speed limit of 15 miles per hour.

The testimony of James Roberts, Maintenance Assistant from respondent's Huntington Office, established that there were problems with mud slides from property adjacent to County Route 9/1 however; the are of the slide was approximately 400 feet form the Whitman Grade School, well beyond the scene of claimant's accident. The evidence was that claimant's vehicle came to rest approximately 250 feet from the entrance to the Whitman Grade School.

It appears to this Court that the claimant has failed to establish negligence on the part of the respondent in its maintenance of County Route 91. The claimant had observed mud on the surface of this road on prior occasions, although this Court is of the opinion that these conditions were not the proximate cause of her accident. Claimant was operating her vehicle at a high rate of speed without regard for the conditions then and there existing.

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

Claim disallowed.

OPINION ISSUED DECEMBER 17, 1993

ROSCOE PRATER AND CASSANDRA PRATER
VS.
DIVISION OF HIGHWAYS
(CC-90-409)

H. Randall Starnes, Attorney at Law, for claimants.
Glen A. Murphy, Attorney at Law, for respondent.

WEBB, JUDGE:

Claimants, Roscoe Prater and Cassandra Prater, seek an award from the Division of Highways for personal injury and property loss sustained in a motor vehicle accident which took place at 3:00 p.m. on March 24, 1990 on Route 49 near Williamson in Mingo County.

From the evidence adduced at the hearing on April 20, 1993, it appears that Cassandra Prater was driving her vehicle, a 1986 Pontiac 6000, south on Route 49, coming from the town of Williamson. Her two daughters, ages 13 and 11, were passengers in the vehicle. They were traveling to their home in Stopover, Kentucky. Route 49 was in a state of disrepair, making it impossible for Mrs. Prater to drive her vehicle through the area without going into some of the holes in the road. While driving, Mrs. Prater was trying to avoid hitting the holes; however, due to oncoming traffic, her vehicle went into one of the holes and proceeded to go over an embankment landing on its top. The vehicle fell over the embankment approximately 25 to 30 feet, causing injuries to her and both of her two daughters. Mrs. Prater had not traveled on Route 49 for over a year prior to this incident and she was not familiar with the defective condition of the road.

Cassandra Prater testified that she suffered a lacerated eyelid; a fractured forehead; bruises on her brain; and a dead nerve from her left arm, up her neck and into her head. Her daughter, Andrea, suffered a broken clavicle bone and her other daughter Tabitha, suffered a broken arm. Mrs. Prater further stated that she suffers form permanent injury to her left arm, and it is painful for her to pick up objects with her fingers. She also suffers from migraine headaches. The medical evidence offers no corroboration for Mrs. Prater's claim of a fractured forehead.

As a result of the accident, the claimants have unpaid medical bills in the sum of $5,047.12. The medical bills for the children were paid through an insurance policy. Mr. Prater was required to transport his wife to therapy sessions, for which he sustained a loss of income of $192.00 for two shifts of work which he missed. The claimants also incurred travel expenses of $710.00 for medical treatment. Their vehicle was valued at $5,600.00, and was considered a total loss.

The respondent admits that the road was in a state of disrepair, but blames the deteriorated condition on the fact that the road is used by coal companies and that the coal trucks are responsible for the deterioration of the road. There is evidence that the coal companies help finance the maintenance of the road.

The evidentiary deposition of Shirley Markle Cline was offered by the respondent, and was admitted into evidence by the respondent. Ms. Cline was driving the northbound vehicle which was approaching the Prater vehicle at the time of the accident. Ms. Cline testified that she saw Mrs. Prater trying to drive around the holes very slowly and she stopped in her lane of traffic so that Mrs. Prater could drive around the holes, but the Prater vehicle appeared to accelerate and then went over the hill. However, Mrs. Prater testified that she veered to the left to avoid the holes in the road and she did not see Ms. Cline's vehicle stop. She was under the impression that the vehicle was still coming toward her when she moved back into her lane of traffic to avoid an

accident, and as she did, her vehicle bounced out of a hole and proceeded over the hill. Both Ms. Cline and Mrs. Prater stated that the chain of events occurred very quickly.

After reviewing the record in this claim, this Court has determined that the claimants have established negligence on the part of the respondent by a preponderance of the evidence. The respondent was aware of the defective condition of the road and failed to keep the road properly maintained. As a result of this negligence, the claimant, Cassandra Prater, lost control of her vehicle when it struck a large hole in the pavement and the vehicle over the embankment adjacent to Route 49. The proximate cause of the accident was the defective condition of Route 49.

This Court is of the opinion to make an award in the amount of $11,549.12 to claimants for their property loss, medical expenses, travel expenses, and work loss. This Court is also of the opinion that Mrs. Prater suffered a permanent injury as a result of the accident, for which she has had and will continue to have pain and suffering in the future. This Court makes an additional award in the amount of $16,750.00 to Mrs. Prater.

Award of $11,549.12 to Roscoe and Cassandra Prater.

Award of $16,750.00 to Cassandra Prater.

OPINION ISSUED DECEMBER 17, 1993

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
VS.
DIVISION OF CORRECTIONS
(CC-93-329)

Chad Cardinal, Assistant Attorney General, for claimant.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, Regional Jail and Correctional Facility Authority, provides and maintains the Eastern Regional Jail and Central Regional Jail as facilities for the incarceration of prisoners who have committed crimes in various counties. Some of the prisoners held in these regional jails have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action in the amount of $579.335.69 to recover the costs of housing for

prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the claimant, these prisoners have had to remain in the regional jails for periods of time beyond the dates of the commitment orders.

Claimant asserts that respondent is liable for inmate costs of $353,602.74 for the Eastern Regional Jail and $225,732.95 for the Central Regional Jail.

Respondent filed an Answer admitting the validity of the claim and that the amount of $579,335.69 is fair and reasonable. However, Respondent further state that it did not have sufficient funds in its appropriation for the fiscal year with which to reimburse the claimant.

This Court has determined in prior claims by claimant for the cost of housing inmates that respondent is liable to claimant for these costs, and the Court has made the appropriate awards. The Court previously determined in the *County Comm'n. of Mineral County v. Div. of Corrections*, an unpublished opinion of the Court of Claims issued November 21, 1990, that the respondent is liable to the claimant for the cost of housing these inmates.

In view of the foregoing, the Court makes an award to claimant in the amount of $579,335.69.

Award of $579,335.69.

OPINION ISSUED DECEMBER 17, 1993

JAMES ALLEN SAMS, SR., AND SHAYNE RENE SAMS,
HIS WIFE, INDIVIDUALLY AND AS GUARDIANS OF
JAMES ALLEN SAMS, JR., AND ANDREA GAYLE SAMS, INFANTS
VS.
WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS
(CC-92-84)

Christopher S. Smith, Attorney at Law, for claimants.
Glen A. Murphy, Attorney at Law, for respondent.

STEPTOE, JUDGE:

In this cause of action, filed herein on 20 February 1992, claimants seek awards from the respondent for damages resulting from personal injuries sustained by James Allen Sams, Jr., hereinafter referred to as Jamie, and Andrea Gale Sams, on 12 September 1990, when they fell from a bridge spanning Camp Run, on West Virginia Secondary Route 4/5, in Clay County, West

Virginia. Claimants allege that their injuries and damages were proximately caused by the negligence of the respondent in failing to maintain the bridge and to keep it in repair. The respondent filed an answer denying negligence.

Hearing was held on the 4th day of August, 1993.

It appears to the Court, from the pleadings, testimony, evidentiary depositions, stipulations, and exhibits, that on 12 September 1990, Jamie, then 13 years of age, and Andrea, his sister, then 9 years of age, were on a walk at about 1930 hours, with their parents and two younger sisters, and came to the bridge across Camp Run, near their home. Andrea put her hands on the guardrail while she was looking downward into the bed of the creek, and Jamie came up and put his hands on the guardrail near the place where Andrea was standing, and the guardrail gave way the place where Andrea was standing, and the guardrail gave way or collapsed. The children fell forward and tumbled into the rocky creek bed, Jamie falling some 15 feet and Andrea some 20 feet, and both were injured and eventually removed to Charleston General Hospital, where they received emergency room treatment and from which they were discharged some six hours later.

It further appears from the evidence that, as part of its ongoing inspection program of highway bridges, the respondent caused an inspection to be made of said bridge, from which Jamie and Andrea fell, on 24 November 1984, and on 7 November 1986; the reports of said inspections were made part of the record herein.

The earlier report indicated, in general language, that the guardrails were in need of repair.

The report of 7 November 1986 contains the following language:

"Summary and Recommendations"

"The structure remains in fair condition. The most serious deficiencies observed, along with our recommendations, are as follows:

1. The comments in the 1984 report regarding the need to clean and paint the stringers and diaphragms, and the missing mortar joints still apply.

2. The guardrail posts are weakly attached, with some loose, and one having fallen into the creek. Repairs should be made.

Please note that the approach roadway shoulder at Abutment who have built up with gravel as recommended in 1984."

Respondent offered no evidence to show that the guardrails had received maintenance

or repair during the period from 7 November 1986 until the date of the accident of 12 September 1990, and presented no witnesses.

The Court makes the following findings of fact:

1. On 12 September 1990, the guardrails on the bridge over Camp Run, on West Virginia Secondary Route 4/5 in Clay County, had continuously been in dangerous state of disrepair and neglect since 7 November 1986.

2. The respondent had been on notice of the dangerous condition of the bridge, especially to pedestrians, but made no effort to correct that condition, although it made repairs to other parts of the bridge during the two-year period preceding the 1986 report.

3. The negligence of the respondent in failing to perform repairs and maintenance on the guardrails as recommended by respondent's own engineers was the sole proximate cause of the injuries sustained by Jamie and Andrea on 12 September 1990.

4. As a proximate result of his fall, Jamie suffered a sprained back, a concussion, and a severe laceration of his left leg, which, due to an infection, healed slowly and is not yet completely recovered to its condition before the accident, and will be permanently scarred.

5. Andrea sustained a concussion, severe injuries to her wrists, injuries to her chest and forehead, severe injuries to her nose and upper left lip, and still has headaches, all as a result of the accident. There are small scars on the left side of her nose and a larger scar on her left lip, which are asymptomatic but permanent.

6. Claimant James Allen Sams, Sr., was an employee-beneficiary of a medical and hospital insurance policy, of which Jamie and Andrea were additional beneficiaries. James Allen Sams, Sr., and Shayne Rene Sams have paid or are personally obligated to pay those medical and hospital expenses incurred for the care and treatment of Jamie and Andrea which were not within the policy coverage or exceeded the amounts payable by the insurer.

7. Claimants James Allen Sams, Sr., and Shayne Rene Sams have personally paid or are obligated to pay medical and hospital charges beyond those charges paid by the insurer, for the care and treatment of Jamie as follows:

Charleston Area Medical Center	$540.95
Associated Radiologists	130.60

Dr. John H. Schmidt	42.00
Clay County Ambulance Authority	37.00
Prescriptions	23.36
Medical Supplies	40.00
TOTAL	$822.91

8. Claimants James Allen Sams, Jr., and Shayne Rene Sams have personally paid or are personally obligated to pay medical and hospital charges, beyond charges paid by the insurer, for the care and treatment of Andrea Gale Sams, as follows:

Charleston Area Medical Center	$347.80
J. E. Fernandez, M. D.	27.00
Constantino Y. Amores, M. D.	105.80
James D. Caudill, M. D.	10.00
Ronny H. G. Go, M.D.	9.60
Clay County Ambulance Authority	32.00
TOTAL	$606.90

9. James Allen Sams, Jr., is in need or reconstructive surgery on his left leg, injured in the accident of 12 September 1990; the reasonable cost thereof at this time is $5,500.00, including hospital expenses, and it is estimated that the insurer will pay $4,400.00, leaving a balance of $1,100.00 to be paid by the Guardians.

10. Andrea Gale Sams is in need of reconstructive or plastic surgery for the amelioration of facial scars inflicted in the accident on 12 September 1990; the reasonable estimated cost thereof at this time is $2,500.00, including hospital expenses, and it is estimated that the insurer will pay $2,000.00, leaving a balance to be paid by the Guardians of $500.00.

11. James Allen Sams, Jr., and Andrea Gale Sams each sustained pain and suffering in the period after the accident and before the hearing, and in the course of their respective surgeries in the future, will sustain additional pain and suffering, the reasonable estimated value of which, for past and future pain and suffering, in each case, is $4,000.00.

It is the opinion and judgement of the Court that, as a result of negligence of the respondent which proximately caused the injuries sustained by the claimants, respondent has a moral obligation to pay to James Allen Sams, Sr., and Shayne Rene Sams, his wife, jointly, the sum of $1,429.81 as reimbursement of sums advanced by them to pay medical and hospital expenses of Jamie and Andrea, and unpaid obligations incurred by them for such expenses; that the respondent

has a moral obligation to pay to James Allen Sam, Sr., and Shayne Rene Sams, Guardians of Jamie , the sum of $1,100.00 for future medical and hospital expenses; that the respondent has a moral obligation to pay James Allen Sams, Sr., and Shayne Rene Sams, Guardians of Andrea, the sum of $500.00 for future medical and hospital expenses; that the respondent has a moral obligation to pay to James Allen Sams, Sr., and Shayne Gale Sams as Guardians of Jamie, the sum of $4,000.00 for past and future pain and suffering; and that the respondent has a moral obligation to pay to James Allen Sams, Sr., and Shayne Gale Sams, Guardians of Andrea, the sum of $4,000.00 for past and future pain and suffering.

Award of $3,029.81 to James Allen Sams, and Shayne Rene Sams.

Award of $4,000.00 to guardians of James Allen Sams, Jr.

Award of $4,000.00 to guardians of Andrea Gayle Sams.

OPINION ISSUED DECEMBER 17, 1993

ST. MARY'S HOSPITAL
VS.
DEPARTMENT OF HEALTH & HUMAN RESOURCES
(CC-92-356)

William T. Watson, Attorney at Law, for claimant.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, St. Mary's Hospital, brought this action to recover medical expenses for services rendered to a patient who was involuntarily admitted to the hospital pursuant to an Order of the Cabell County Circuit Court. Respondent, Department of Health & Human Resources, paid a portion of the medical expenses; however, St. Mary's has an outstanding balance in the amount of $79,020.92 which has been denied by respondent based upon its interpretation of applicable Medicaid regulations.

The evidence adduced through a stipulation of facts and briefs filed by the parties establishes the following:

1. The patient was first admitted to St. Mary's on September 13, 1989, with Medicaid coverage as the patient was unemployed with no other medical coverage.

2. On November 17, 1989, the patient "eloped" (left against medical advice)

from the hospital.

3. Respondent's employees immediately sought and received an Emergency Order from the Cabell County Circuit Court to have the patient re-admitted to St. Mary's for further medical treatment which it deemed in the best interest of the patient.

4. The Emergency Order was entered on November 17, 1989, and the patient was re-admitted to St. Mary's hospital.

5. After a hearing on November 20, 1989, the Cabell County Circuit Court entered a second Order which provided that the patient remain at the hospital until further Order of the Court.

6. A third Order was entered by the Cabell County Circuit Court on March 7, 1990, to allow therapeutic passes for the patient.

7. the patient was medically discharged on May 1, 1990.

8. Respondent reimbursed St. Mary's the amount of $40,116.75 for twenty-five days hospitalization and thirty days counted as administrative days including allowances in accordance with Medicaid regulations.

St. Mary's contends that the Emergency Order entered by the Cabell County Circuit Court constitutes a second admission of the patient and it should be permitted to receive further Medicaid reimbursement based upon that admission.

Respondent argues that it has paid St. Mary's based upon applicable Medicaid regulations and it is unable to pay any additional dollars for the medical services rendered to patient. Respondent does not suggest another source for reimbursement for the cost of the hospitalization of this patient, but only states that it is not the State agency responsible.

The Court, on its own initiative, inquired of the Office of the Supreme Court Administrator as to the availability of funds to reimburse St. Mary's, but was advised that the Supreme Court is not responsible for these hospital expenses even though the patient was re-admitted pursuant to an Emergency Order of a circuit court.

Thus, this Court faces a unique issue to be resolved. St. Mary's rendered medical services to a patient pursuant to an Emergency Order in good faith and anticipating reimbursement for its services. The Court recognizes that the monetary resources of the respondent are limited, but is it equitable for the State of West Virginia to expect that free medical services be rendered to a patient in a hospital when the patient is admitted pursuant to an Emergency Order sought by employees of one State agency and entered by one of its circuit courts? This Court cannot believe

that the State expects free medical services which would result in cost shifting of medical expenses to its other citizens and, further, this Court will not permit such a dilemma for a hospital providing patient care in good faith. Care should be taken by both the court system and the respondent State agency when patients are admitted to private pay hospitals by court order. There should be some responsibility for follow-up reports between the courts and the respondent for the medical progress of the patient and the expenses being incurred by the medial provided on behalf of the patient. A private pay hospital should not be placed in as tenuous a position as the claimant herein for receiving reimbursement for medical services it renders in good faith to a patient. In light of the Court's decision, the position of St. Mary's that there was a second admission of the patient need not be considered by the Court.

Therefore, the Court finds that respondent Department of Health and Human Resources is liable for the medical expenses incurred on behalf of the patient who was re-admitted to St. Mary's pursuant to the Emergency Order sought by its employees and entered by the Cabell County Circuit Court. The Court has excluded from the amount claimed the actual medical expenses in the sum of $4,409.65 which were incurred during the period from the including November 7, 1989, through November 16, 1989, as the Emergency Order was not entered by the Cabell County Circuit Court until November 17, 1989. For all practical purposes, this is the only equitable result which may be considered by this Court which has the statutory duty to determine moral obligations of the State of West Virginia.

In accordance with t he findings of fact as stated herein above, the Court is of the opinion to and does make an award to St. Mary's Hospital in the amount of $74,611.27.

Award of $74,611.27.

OPINION ISSUED DECEMBER 17, 1993

JARED TAYLOR
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM
OF WEST VIRGINIA
(CC-93-57)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $59.63 for an article of clothing that was damaged on a piece of metal in a facility of the respondent.

Respondent, in its Answer, admits the validity of the claim, but respondent does not have funds in its budget with which to compensate claimant for his loss.

Based upon the foregoing, the Court makes an award to the claimant in the amount of $59.63.

Award of $59.63.

OPINION ISSUED JANUARY 21, 1994

JUDY BAILEY
VS.
DIVISION OF HIGHWAYS
(CC-92-324)

PAULINE LUCION
VS.
DIVISION OF HIGHWAYS
(CC-92-335)

Lacy A. Wright, Attorney at Law, for claimants.
Glen A. Murphy, Attorney at Law, for respondent.

STEPTOE, JUDGE:

Judge Bailey and Pauline Lucion, who are sisters living in separate, side-by-side dwellings in McDowell County, filed separate claims against the respondent for real and personal property damages which they separately incurred as a result of two rock and earth slides which descended upon their respective homes on 21 July 1992 and 27 July 1992, from a nearby embankment above their homes, which supported West Virginia Secondary Route 7, in McDowell County, at the town of Hensley.

Respondent denied negligence on its part. The cases were consolidated for hearing, which took place on 5 August 1993.

It appears from the evidence that the residence of each claimant had been constructed many years before the slides of July 1992; that the rear of each home was within a few feet of the

foot of a steep highway embankment which rose as much as thirty feet from the level on which the residences rested; that the slides took place after a period of heavy rains; and that the embankment material which came to rest against the houses was largely mud and rock, the level of which eventually rose to about five feet against the Lucion house. Extensive damage was done to each house, in the case of the Bailey property caused by a tree which had been displaced and fell against her house.

It further appears from the evidence that prior to 21 July 1992 complaints had been lodged with respondent about the surface water coming over the road and down the embankment and under the claimants' homes.

If further appears from the evidence that the instability of the embankment immediately before the slide which caused the damage to claimant's homes was due to respondent's failure to prevent large quantities of surface water originating from the upper side of Route 7, from crossing the road and entering upon and permeating the embankment immediately above claimants' homes; that there was a ditch on the upper side of the road, but it was frequently obstructed and infrequently cleared by the respondent, so much so that one of the claimants herself took it upon herself, from time to time, to try to clear it. It may well be, moreover, that respondent's action in driving new guardrails into the embankment, several months before the slide, contributed to the instability of the embankment.

In any event, respondent was on notice of instability of the embankment and failed to take effective measures to deal with the problem, and its failure to do so was negligence which proximately caused the damage to the claimants' homes.

Damages proximately caused by such negligence were:

1.) to Judy Bailey:

Electrical work, materials and labor	$3,700.00
Floor covering for dining room	500.00
19-inch Samsun TV set	166.00
Nintendo set	129.00
AM-FM cassette	60.00
Clock radio	29.95
Clean-up expense	200.00
inconvenience and loss of use of home	1,000.00
TOTAL	$5,784.95

2.) to Pauline Lucion:

Furnace re-work, repair of cracks in foundation, replacement of concrete sidewalk, vinyl siding,

roof over-hang and guttering and spouting	$2,100.00
Labor employed by claimant	680.00
Clean-up materials	50.00
Gravel and lime	111.29
Replacement of Rainbow Cleaner	639.40
Paint	42.35
Damage to water softener	100.00
Damage to lawn mower	50.00
Damage to antique furniture	500.00
Damage to bicycle	60.00
Loss of Christmas ornaments	100.00
Loss of old clothing	100.00
Loss of books	100.00
Loss of building materials purchased in 1991	210.00
Loss of school supplies	100.00
Inconvenience and loss of use of home	1,000.00
TOTAL	$5,943.04.

Award to Judy Bailey in the amount of $5,784.95.

Award to Pauline Lucion in the amount of $5,943.04.

OPINION ISSUED JANUARY 21, 1994

BOONE COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-94-21)

Claimant represents self.
Gretchen A. Murphy, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, County Commission of Boone County, provides and maintains a facility for the incarceration of prisoners who have committed crimes in Boone County. Some of the prisoners held in the county facility have been sentenced to facilities owned and maintained by the

respondent, Division of Corrections. Claimant brought this action to recover the costs of housing for prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the county prison facility for periods of time beyond the date of the commitment order.

The Court previously determined in the *County Comm'n of Mineral County v. Division of Corrections*, an unpublished opinion of the Court of Claims issued November 21, 1990, that the respondent is liable to the claimant for the cost of housing these inmates.

Pursuant to the holding in the *Mineral County* Opinion, the respondent reviewed this claim to determine the number of inmate days for which respondent may be liable. Respondent then filed an Answer admitting the validity of the claim and that the amount of $74,025.00 is fair and reasonable.

In view of the foregoing, the Court makes an award to claimant in the amount of $74,025.00.

Award of $74,025.00.

OPINION ISSUED JANUARY 21, 1994

DAVID LEE BREWER AND PATRICIA I. BREWER
VS.
DIVISION OF HIGHWAYS
(CC-91-355)

Larry Losch, Attorney at Law, for claimants.
Glen A. Murphy, Attorney at Law, for respondent.

BAKER, JUDGE:

Claimants, David Lee Brewer and Patricia I. Brewer, his wife, are the owners of property in Nicholas County. Claimants were involved in a property dispute with the respondent, Division of Highways, when the respondent asserted that the road adjacent to claimant's property was a road within the State Road System. Claimants' allege that employees of the respondent came onto their property, removed their spilt-rail fence, damaged a culvert belonging to the claimants, created a nuisance by permitting the public to use the road, and caused defective conditions upon their driveway resulting in damages to their daughter's automobile. Claimants allege damages as a result of the actions of the respondent.

The evidence adduced at the hearing of this claim on July 22, 1993, established that

claimants purchased unimproved property on the Left-Hand Fork of Line Creek in Lockwood, Nicholas County in 1979. Claimants were of the opinion that the road adjacent to the property was a private road. They moved a mobile home onto the property in 1985 50 1986 and made this location their permanent residence. Claimants gave a right-of-way on the private road to Bethlehem Steel in an agreement in 1981. According to this agreement, Bethlehem Steel graded the private road at least once a year. This road was used by Bethlehem Steel to maintain a ventilator shaft to a coal mine. During 1989, claimants became involved in a dispute as to whether the road was a private road or a road within the jurisdiction of the respondent, Division of Highways. On October 27, 1989, employees of the respondent brought equipment to widen the road. During this activity, the employees of the respondent removed claimants' split-rail fence which had been purchased and erected approximately six months prior to this date. Respondent's employees confiscated the fence and stored it at their headquarters in Nicholas County.

During the period of 1989 through 1990, there were several proceedings in various courts of the State. The Circuit Court of Nicholas County entered the original Order which declared that the Left-Hand Fork of Line Creek was a State road under the domain of the respondent. After an appeal to the West Virginia Supreme Court, the Circuit Court of Kanawha County conducted a trial before the Court and an advisory jury whereupon the Court entered an Order declaring that the dirt road which crosses claimants' property is, in fact, a private road. This Order was entered September 13, 1990.

After the Order had been entered, the claimants requested that the respondent return their split-rail fence and re-erect the fence in the same location from which it had been removed. Employees of the respondent returned the fence to claimants' property in October 1990, but the fence was not re-erected until May 1991.

The testimony established that respondent's employees erected the fence using a grade-all. The employees were unable to use a mechanical method of tamping down the soil and the posts. The accepted method to install a split-rail fence as testified to by Kelly Arnett, an expert witness on behalf of the respondent, contemplates the use of a one-man auger drill to dig the post hole, a post is set in the hole, the ground around the post is mechanically tamped down to secure the post, and the fence is placed one section at a time. Ms. Arnett viewed the fence as placed by respondent's employees and noted that 13 rails and one post needed to be replaced. She also stated that setting fencing that had not been treated prior to being set in place and then taking down the fence and putting it back up would be destructive and it would be necessary to "start from scratch."

The evidence also established that a culvert for Line Creek on claimants' property was damaged by respondent's equipment during a backfill operation when the road was graded. Through a video placed in evidence, claimants established that respondent's equipment did not pass over the culvert. There was damage to one end of the culvert. Although this culvert was not an actual pipe and may have been a converted water heater, it served the purpose for which it was intended. The

damage to the culvert has reduced its capacity to maintain the flow of water from the Creek.

Claimants contend that during the dispute involving the private status of the road there was increased traffic flow on the road including logging trucks. This traffic allegedly caused claimant David Brewer to suffer an aggravation to his health. This contention is speculative in nature and the Court declines to speculate as to any allegation of damages.

Claimants also contend that their daughter's vehicle sustained damages due to soft shoulder area at the end of the their driveway. Claimants seek $3,000.00 for repairs made to the automobile. The Court is of the opinion that this element of damages is speculative and declines to make any award for damages to the automobile.

The Court has determined that claimants are entitled to recover an award for a new split-rail fence and the labor for erecting the fence. The original fence had not been treated as claimants intended to treat the fence after it had been in place for a year. Thus, the Court finds that the amount of $2,600.00 is fair and reasonable and will adequately compensate the claimants for their fence. The cost to replace the damaged culvert is $1,200.00 which amount the Court will include as a part of the damages. Claimants incurred the expense of $650.00 to stabilize the road after it was determined to be a private road and the Court finds that this amount should be included as part of the award.

Accordingly, the Court is of the opinion to and does make an award to claimants in the amount of $4,450.00.

Award of $4,450.00.

OPINION ISSUED JANUARY 21, 1994

GARY E. EARP
VS.
DIVISION OF HIGHWAYS
(CC-93-71)

Claimant present in person.
George J. Joseph and Nancy Kwan McCoy, Attorneys at Law, for respondent.

PER CURIAM:

Claimant, Gary E. Earp, seeks an award of $494.23 from respondent, Division of Highways, for property damage sustained when his vehicle struck a rock from a rockslide which occurred on December 11, 1992, at approximately 9:00 p.m. on U.S. Route 250 near the town of

Fairmont, Marion County.

From the evidence adduced at the hearing on October 18, 1993, it appears that the claimant was operating his vehicle, a 1986 Chrysler LeBaron, south on U.S. Route 250 on a dark, rainy night when he noticed a rock which had fallen from a nearby hillside lying in the road. He stated that he was unable to avoid hitting the rock and that upon collision, his vehicle was damaged in the amount of $494.23. He stated that there is one sign that reads "Falling Rock" in the area. He travels this road approximately twice a week and considers himself familiar with the road.

Dwayne Miller, county maintenance assistant supervisor for the respondent, testified that he is familiar with the area of the incident and that the respondent has difficulties with rockslides approximately three or four times a year in that particular area. He stated that on the night of the incident, his maintenance crews were already on the road removing rocks from another rockslide in the area. He stated that the respondent did not receive notice of the rockslide involving the claimant until after the incident, and then the crews immediately went to the area and cleaned up the trucks.

The claimant alleges that although the respondent had no notice of the rockslide involved in this claim prior to the incident, that it did have notice of many other prior rockslides in the are and has failed to take proper precautions to avoid accidents. The claimant suggests that the respondent install a net or snow fence in an attempt to catch the rocks before they gather in the roadway or to install lighting so that the traveling public can see the rocks in the road at night before accidents occur. Mr. Miller admitted that he has no knowledge of the respondent undertaking any studies to ascertain if it could do anything to curtail the rockslides or catch the rocks in the area.

This Court finds, after reviewing the evidence, that the claimant has proven negligence on the part of the respondent by a preponderance of the evidence. The respondent had actual notice of the dangerous condition of the rockslides and the fact that this is a curvy road in which the traveling public has no chance to view obstacles in the roadway until rounding a curve. The respondent should have undertaken an attempt to reduce the amount of rockslides in the area by cutting back the hillside or constructing a fence or net to catch the rocks. The respondent cannot be protected from a claim of negligence by simply erecting a "Falling Rocks" sign in areas that have that have repeated incidents resulting in damages and injuries. This Court has made awards in similar cases where the respondent had notice of problems of a particular hillside for many years and failed to take appropriate remedial measures to prevent rockslides. *Katherine Jean Dunn vs. Division of Highways*, CC-92-26 (1992). Accordingly, an award is hereby granted in the amount of $494.23.

Award of $494.23.

OPINION ISSUED JANUARY 21, 1994

LINDA KAY EDDY
VS.
DIVISION OF HIGHWAYS
(CC-93-179)

Claimant present in person.
Nancy K. McCoy, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Linda Kay Eddy, seeks an award of $221.72 from respondent, Division of Highways, for property damage sustained while her husband, Richard Eddy, was driving her vehicle on March 13, 1993, on West Virginia Route 25 near Minister's Run in Marion County.

From the evidence adduced at the hearing on October 19, 1993, it appears that at approximately 11:30 p.m., Richard Eddy was driving the claimant's vehicle, a 1984 Oldsmobile Cutlass Sierra, at an estimated speed of 30 miles per hour south on West Virginia Route 25 approximately a quarter of a mile north of Minister's Run, when the vehicle struck a hole in the surface of the road. It had been raining and the hole in the surface of the road. It had been raining and the hole was filled with water and Mr. Eddy did not notice the hole until the vehicle struck it. As a result, damage was done to two tires, two rims, and one hubcap, for an estimated damage of $221.72. The hole was approximately four feet wide and eight to ten inches deep. It had been approximately six months since he had traveled that particular road and there were no warning signs or signals in the area to warn the traveling public of the hazardous condition.

Aaron Gibson, a witness for the respondent, was unfamiliar with the site of the incident and his testimony was not useful to the outcome of this claim. The respondent then called another witness, James Costello, supervisor of Marion County, who testified that he had no personal notice of the defective condition of the road, but that if a complaint comes into the office, it could go to another individual.

This Court finds, after reviewing the evidence, that the claimant has proven a prima facie case of negligence and that the respondent provided no defense to the claim of negligence. This Court also finds that the respondent will not be protected from a claim of negligence merely calling a representative of the respondent to the witness stand and attempting to prove lack of notice of the defective condition by showing that the witness had no personal knowledge of the condition, with full knowledge that the witness did not search for records concerning the incident prior to his or her appearance in this Court. Accordingly, an award of $221.72 is hereby granted.

Award of $221.72.

OPINION ISSUED JANUARY 21, 1994

GIBBONS & KAWASH
VS.
DIVISION OF NATURAL RESOURCES
(CC-93-470)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $18,025.00 for accounting services provided respondent. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $18,025.00.

Award of $18,025.00.

OPINION ISSUED JANUARY 21, 1994

JOHN P. GRIMMETT, II
VS.
DIVISION OF HIGHWAYS
(CC-93-1)

Claimant present in person.
George Joseph and Nancy Kwan McCoy, Attorneys at Law, for respondent.

PER CURIAM:

Claimant, John P. Grimmett, II, seeks an award of $558.85 from respondent, Division of Highways, for property damage sustained while driving his vehicle on December 16, 1992, on U.

S. 250 in Fairmont, Marion County.

From the evidence adduced at the hearing on October 18, 1993, it appears that between 10:00 and 10:30 p.m., the claimant was driving his vehicle, a 1990 Honda Accord EX, south on U. S. 250, leaving Fairmont, at a normal rate of speed when his vehicle struck a hole in the surface of the road approximately 10 to 12 inches deep. It was dark and rainy and the claimant did not see the hole in the surface of the road until his vehicle struck it. As a result of the incident, both of the passenger side tires were flattened and the rims were bent. The claimant incurred unreimbursed damages of $558.85; however, the claimant does carry automobile insurance with a deductible of $500.00. The amount claimed based upon the deductible is $500.00. He stated that he travels this road approximately once or twice a month and that there are no signs warning of defects in the surface of the road.

James Costello, Marion County supervisor for the respondent, testified that he could have possibly had notice of the particular hole in the surface of the road, but that in the winter time it may not have been corrected in a timely manner because it would be considered a lower priority. However, he admitted that this road is one of the more heavily traveled roads in Marion County.

This Court finds, after reviewing the evidence, that the claimant has proven negligence on the part of the respondent by a preponderance of the evidence. The claimant established that this road is heavily traveled, that the hole was within a mile of the respondent's headquarters, and that the respondent had actual or constructive notice of the defective condition. Respondent failed to establish that it had no actual or constructive notice of the defective condition.

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

Award of $500.00.

OPINION ISSUED JANUARY 21, 1994

HAMPSHIRE DISTRIBUTOR, INC.
VS.
DIVISION OF HIGHWAYS
(CC-93-171)

Claimant present in person.
Robert F. Bible, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Hampshire Distributor, Inc., seeks an award of $95.40 from the respondent, Division of Highways, for property damage sustained while trying to avoid an automobile accident on May 24, 1993, on Patterson Creek Road in Mineral County.

From the evidence adduced at the hearing on September 24, 1993, it appears that Clarence Hesse, a driver for the claimant, was driving the claimant's truck from Petersburg to Romney on Patterson Creek Road when he approached a narrow section of the road that has a 20 to 30 foot drop off on the right side. There was a reflector sign at the drop off point. As the driver approached the narrow section of the road, an oncoming pickup truck was traveling over the center line and was in the driver's lane of traffic. The driver had two choices: either hit the pickup truck head-on or pull over as far as he could to the right side of the road and hit the reflector sign. He chose to hit the sign and in the process he damaged the mirror on the side of the truck and broke the glass out of the window.

The driver had traveled this road prior to this incident; however, he had never had cause to pull over in an emergency situation. The driver stated that he did not have time to stop his vehicle before the impact because at the time that he saw the oncoming truck he was already in a narrow section of the road.

In prior decisions, this Court has held that a lower standard of care and maintenance is required for the berm or shoulder of a public road than for the regularly traveled portion of the road, this being the so-called New York rule. An exception to the rule, recognized both in New York and West Virginia, is that the higher standard of care and maintenance required for the traveled portion of the road will be applied for the shoulder when an emergency requires it. See *Retzel v. State,* 94 Misc.2d 562, 405 N.Y.S.2d (1978). In the present case, the driver of the oncoming truck was driving over the center line and in the claimant's driver's lane of traffic, placing the claimant's driver in a state of emergency. The respondent had actual notice of the defective condition of the road and did not construct a berm area for emergency conditions.

This Court finds by a preponderance of the evidence that the respondent was guilty of negligence. Accordingly, this Court makes an award of $95.40 to claimant for the damages to its truck.

Award of $95.40.

OPINION ISSUED JANUARY 21, 1994

STEVEN D. HAWLEY
VS.
DIVISION OF CORRECTIONS

(CC-93-385)

Claimant represents self.
Gretchen A. Murphy, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks recovery for personal items which were sent to him when he was at Pruntytown Correctional Center, a facility of the respondent. The items of property were in the care of the administration at Pruntytown when a package had been mailed to him from his mother. The records at Pruntytown indicate that the package was placed in storage, but it was missing when claimant received his other personal belongings. Claimant alleged a loss of $290.00.

Respondent, in its Answer, admits the claimant was sent a package and that the package was missing. Respondent and claimant agreed that $200.00 is a fair and reasonable settlement of the claim.

In view of the foregoing, the Court makes an award to the claimant in the amount of $200.00.

Award of $200.00.

OPINION ISSUED JANUARY 21, 1994

HELICOPTER FLITE SERVICES, INC.
VS.
DIVISION OF PUBLIC SAFETY
(CC-93-458)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $2,850.69 for maintenance performed on an aircraft belonging to the

respondent. The invoice for the maintenance was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $2,850.69.

Award of $2,850.69.

OPINION ISSUED JANUARY 21, 1994

KANAWHA COUNTY COMMISSION
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-93-427)

Betty L. Caplan, Attorney at Law, for claimant.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, Kanawha County Commission, seeks $18,896.00 for rent for office space and parking places provided to law masters who are employees of the respondent State agency. Certain of the invoices submitted to the respondent were in an amount less than that stated in the rental agreement between the parties. The rental agreement provided that the rent for the office space would be $932.00 per month including utilities and $30.00 per month per parking space. The invoices remitted by the Kanawha County Commission on a quarterly basis calculated the rent based upon the amount of $832.00 per month and charged that amount accordingly. The respondent paid the amount as stated on the invoices. Neither party was aware of the errors on the invoices until a new agreement was entered into by the parties.

Respondent admits that the amount of $9,468.00 is owed to the claimant, Kanawha County Commission, for the period October through December 1992 and January through June 1993

for rent not paid to the claimant County; however, respondent denies the remaining rent owed upon the invoices which were submitted in erroneous amounts.

The Court, having considered the evidence in this claim, is of the opinion that the parties had an agreement for the terms of rent, that a mutual mistake was made to the detriment of the claim County, and that it is unconscionable for the respondent to hide behind the mistake of the claimant County.

Accordingly, the Court has determined that there is a moral obligation on the part of the respondent State agency to pay the difference in the amount of the rent owed and the amount actually paid which is $9,428.00. Thus, the Court makes an award to the claimant county in the total amount of $18,896.00.

Award of $18,896.00.

OPINION ISSUED JANUARY 21, 1994

MANPOWER TEMPORARY SERVICES
VS.
DIVISION OF ENVIRONMENTAL PROTECTION
(CC-93-129)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $3,844.65 for temporary employees provided respondent. The invoices for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $3,844.65.

Award of $3,844.65.

OPINION ISSUED JANUARY 21, 1994

MARION COUNTY COMMISSION
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-93-414)

George R. Higginbotham, Attorney at Law, for claimant.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $2,154.33 for office rental for law masters. The invoices for the rent were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity of the claim and accepts $718.11 as full and complete satisfaction of this claim, as the amount of $1,436.22 was paid through normal channels. Respondent further states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $718.11.

Award of $718.11.

OPINION ISSUED JANUARY 21, 1994

MEDICAL CLAIMS REVIEW SERVICES, INC.
VS.
BUREAU OF EMPLOYMENT PROGRAMS
(CC-93-84)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $7,773.38 for medical review services provided respondent. The invoices for the services were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity of the claim and that the amount of $6,422.65 is the correct amount owed by respondent. Respondent further states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid. Claimant has agreed to accept $6422.65 as full and complete satisfaction of the claim.

In view of the foregoing, the Court makes an award in the amount of $6,422.65.

Award of $6,422.65.

OPINION ISSUED JANUARY 21, 1994

RICHARD L. PORTER
VS.
DIVISION OF CORRECTIONS

(CC-92-164)

Claimant represents self.
John E. Shank, Deputy Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,163.08 for damage to his home and property by an escapee from the State Penitentiary in Moundsville, West Virginia, a facility of the respondent.

The evidence adduced at the hearing of this claim on September 15, 1992, established that there was an escape from the State Penitentiary in Moundsville, and one of the escapees broke into claimant's home on February 24, 1992, causing damages to the property in the amount of $1,163.08. The respondent admitted the factual allegations of the claim, and that the amount claimed

is fair and reasonable.

Accordingly, the Court makes an award to the claimant in the amount of $1,163.08.

Award of $1,163.08.

OPINION ISSUED JANUARY 21, 1994

EDWARD E. PRESLEY
VS.
DIVISION OF HIGHWAYS
(CC-93-210)

Claimant present in person.
Nancy K. McCoy, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Edward E. Presley, seeks an award of $871.32 from respondent, Division of Highways, for property damage sustained while driving his vehicle on July 4, 1993, on U.S. 250 in Fairmont, Marion County.

From the evidence adduced at the hearing on October 19, 1993, it appears that between 1:00 and 2:00 p.m., the claimant was driving with his parents as passengers in his vehicle, a 1991 Mercedes Benz 300D, south on U.S. 250, leaving Fairmont, at an estimated speed of 40 miles per hour when an oncoming vehicle began to crowd him out of his lane of traffic. As he drove his vehicle to the right side of the road, the two passenger side tires struck a hole in the surface of the road. Both of the tires were flattened and the rimes were bent. The claimant stated that he does travel this road quite often, but that he had not noticed this hole in the surface of the road before. The hole was located near the berm of the road and the claimant stated that he would not have been required to drive near the berm area had an emergency situation not existed.

James Costello, Marion County supervisor for the respondent, testified that the respondent did have notice of the defective condition of the road and that it had been patched on April 29, 1993.

This Court finds, after reviewing the evidence, that the claimant has proven negligence on the part of the respondent by a preponderance of the evidence. This Court takes notice of the fact that a prior claim, *John P. Grimmett, II vs. Division of Highways*, CC-93-1 (1993), was based in an incident occurring at the exact location as the claim herein. It appears that the

respondent had actual notice of the defective condition at least as of December 16, 1992, and failed to patch the area until April 29, 1993, four months later. The incident herein occurred on July 4, 1993, a mere two months later. Therefore, the respondent failed to alleviate a known hazard in the surface of the road.

Accordingly, this Court is of the opinion to and does make an award to the claimant in the amount of $871.32.

Award of $871.32.

OPINION ISSUED JANUARY 21, 1994

RALEIGH COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-94-9)

Carl W. Roop, Attorney at Law, for claimant.
Gretchen A. Murphy, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, County Commission of Raleigh County, provides and maintains a facility for the incarceration of prisoners who have committed crimes in Raleigh County. Some of the prisoners held in the county facility have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action to recover the costs of housing for prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the county prison facility for periods of time beyond the date of the commitment order.

The Court previously determined in the *County Comm'n. of Mineral County v. Division of Corrections*, an unpublished opinion of the Court of Claims issued November 21, 1990, that the respondent is liable for the cost of housing these inmates.

Pursuant to the holding in the Mineral County Opinion, the respondent reviewed this claim to determine the number of inmate days for which respondent may be liable. Respondent then filed an Answer admitting the validity of the claim and that the amount of $32,161.78 is fair and reasonable.

In view of the foregoing, the Court makes an award to claimant in the amount of $32,161.78.

Award of $32,161.78.

OPINION ISSUED JANUARY 21, 1994

MORAG JANET SCHANZ
VS.
DIVISION OF HIGHWAYS
(CC-93-230)

Claimant appeared in her own behalf.
Nancy K. McCoy, Attorney at Law, for respondent.

PER CURIAM:

Claimant resides at 137 Valley Drive in the Cross Lanes area of Kanawha County. She has lived at this location for approximately fourteen years. During the months of May through July 1993, claimant experienced water problems which caused damages to her home. She alleges that the water problems resulted from the failure of the respondent to maintain drainage structures for the water flowing from Interstate 64 which is on a hillside adjacent to and above the street where claimant resides. The carpeting in claimant's family room needs to be replaced at a cost of $1,029.54 and paneling must be replaced at a cost of $88.44 for a total amount of damages $1,117.94.

The evidence adduced at the hearing of this claim established that water flowed from the hillside of I-64 on five occasions during the months of May, June, and July 1993. Claimant had never experienced water problems prior to this time. She contacted respondent on several occasions to complain about the water problem. Respondent performed work on the hillside adjacent to I-64 in early August 1993. Claimant has not experienced any further problems since this work was performed.

Laura Conley-Rinehart, an engineer with respondent's maintenance division, testified that respondent re-established the surface ditch line by installing a gravel leach bed so that water and subsurface drainage from the interstate would migrate into the leach bed. Respondent also installed twenty-four inch corrugated plastic pipe to gather any water coming from the interstate cross pipe. It was her opinion that the water problems experienced by the claimant were not the fault of the respondent. She had directed this additional work adjacent to the interstate to be assured that water from the interstate was not affecting the residents of Valley Drive.

The Court, having reviewed the evidence in this claim, is of the opinion that claimant has established a basis for recovery. She observed the water flowing from the hillside adjacent to I-64 at the time that the water problems occurred. She has not experienced any further water problems since respondent has performed maintenance to its drainage system along I-64. The only conclusion that the Court may reach is that respondent failed properly to maintain its drainage structure and this failure resulted in excess water being cast upon claimant's property.

In accordance with the findings of facts as stated herein above, the Court makes an award to the claimant in the amount of $1,117.94.

Award of $1,117.94.

OPINION ISSUED JANUARY 21, 1994

LOUISE JOHNSON GRIFFIN SIMMONS
VS.
DIVISION OF HIGHWAYS
(CC-93-64)

Claimant present in person.
Nancy K. McCoy, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Louise Johnson Griffin Simmons, seeks an award from respondent, Division of Highways, for property damage sustained to her 1988 Lincoln Town Car, when she was driving northbound on U. S. Route 52, in Mercer County, on February 22, 1993, and her automobile slid on an area of the pavement covered in ice. Her automobile slid into a rock cliff sustaining damages for which she claims the amount of her deductible, $250.00.

The evidence adduced at the hearing on October 29, 1993, established that claimant was returning to her home in Bluefield, W.Va., at approximately 7:30 p.m. As she drove up Coaldale Mountain on U.S. Route 52, reaching the top of the Mountain, her vehicle which slid into the rock cliff on the right side of the highway. The road surface coming up the mountain was dry.

There was a sign at the bottom of the mountain "Watch For Ice", but this sign is located in weeds on the berm of the road. The claimant had driven on this section of U. S. Route 52 approximately two or three times a month during previous years. She had noticed that this section on Coaldale Mountain was wet at this location, but she had not encountered ice previously. Claimant's vehicle sustained damages in the amount of $5,613.05; however, claimant's insurance covered all but $250.00 which is the amount of her insurance deductible.

Claimant's husband, Thomas E. Simmons, testified that he observed the ice on Coaldale Mountain when he came to the scene that evening. He stated that the water has been running for years on this section of highway and he had experienced problems with ice previously.

The respondent established in its evidence that there are underground springs beneath the pavement on U.S. Route 52, at the top of Coaldale Mountain. There is a ditch behind the curb on the sides of the highway to keep surface water from coming onto the pavement. There is also an under drain for the wet weather springs in an attempt to catch the subsurface water and to keep it from coming to the surface of the highway. The under drains have not remedied the problem with water seeping through to the surface of the pavement and causing wet pavement or icy conditions depending upon the weather. There are signs at the foot of the mountain and the sign for northbound traffic states "Watch For Ice on Road" with a sign above that sign depicting a vehicle sliding. This sign is approximately a half mile from the scene of claimant's accident. There is nothing respondent can do other than completely rebuilding the road to remedy the problem with the wet weather spring.

After reviewing the record in this claim, the Court has determined that respondent was aware of a potentially hazardous condition existing on U.S. Route 52 at the top of Coaldale Mountain. The claimant was not negligent in the manner in which she operated her vehicle on the night of this accident. The signs at the bottom of the mountain suffice to warn drivers a hazard which a reasonable prudent person would anticipate if there was rain or snow. However, on this evening the roads were dry and claimant had no reason to anticipate ice on the top of the mountain on one

particular section of U.S. Route 52. Therefore, the Court has determined that claimant may recover damages in the amount of her deductible, $250.00.

Award of $250.00.

OPINION ISSUED JANUARY 21, 1994

BONNIE J. STARKEY

VS.
DIVISION OF HIGHWAYS
(CC-92-381)

Frank T. Litton, Jr., Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

BAKER, JUDGE:

Claimant, Bonnie J. Starkey, the co-owner and operator of a 1986 Dodge Omni, was attempting to return from East Bank, in Kanawha County, at approximately 10:30 p.m. on November 29,1 990. She was traveling on Center Street, Secondary State Route 61/8, in or near the unincorporated community of Hansford.

A stop sign was located on Center Street at its intersection with Twelfth Street, and claimant stopped her vehicle, discussed with her passenger the best way to reach the main road, observed the headlights of a vehicle moving toward her from the opposite direction and elected to drive straight ahead, accelerating normally. Claimant had never before traveled Route 61/8 and was not familiar with the area.

To her dismay, claimant learned that this was not a four-way intersection but a "T", and her vehicle went over the brink of a steep embankment, down the embankment, and ground to a halt on a paved area below, suffering mortal wounds along the way.

Claimant was hurled forward, her head breaking the windshield of her vehicle. She walked to the residence of Gary W. DiVita, on the lower part of Center Street, within view of the accident site, and summoned assistance.

There was no barrier alongside Twelfth Street to prevent vehicles from going over the embankment, there was no warning sign or delineator either before or past the intersection to warn of the hazard, the embankment was not visible to those approaching the stop sign, and the headlights on the vehicle approaching on the lower segment of Center Street created the illusion that Center Street continued through the intersection and that claimant might safely traverse it.

Claimant suffered painful injuries to her head and neck, and her vehicle was a total loss. After crediting recoveries from collateral sources, claimant lost the $100.00 deductible on her physical damage insurance, and has $42.45 in unpaid medical bills. Because the balanced owed a bank on her vehicle far exceeded the amount paid by her insurance carrier on its loss, claimant had difficulty in obtaining replacement transportation.

Mr. DiVita, who for 22 years has lived about 150 feet from the place claimant's vehicle came to rest, testified that at one time he and a neighbor put wooden posts at the top of the embankment, as a warning, but they had been removed by vandals, and at a later date the respondent

erected three 2" posts with reflectors, but he believed that those had also been broken off by vandals. Mr. DiVita has seen three or four cars come over the hill, but they didn't make it [safely] and has also observed four-wheel drive vehicles on the slope. He confirmed that when one is at the stop sign he can't see the hill.

James Dingess is a supervisor employed by respondent and has served in the Chelyan area, which includes the accident site, for 14 years. He recalled no complaints about the location in question but he considers the intersection, in the absence of proper signage, to constitute a hazard.

Barry Warhoftig, a registered professional engineer employed by respondent in its Traffic Engineering Division, visited the accident site in late December or early January, immediately following the accident in question. From his inspection or from photographs taken att his direction, he discovered the remnants of three posts which had been knocked down by a vehicle traveling in the same direction as claimant, and he identified the posts as once having mounted delineators, a type or reflector used as a warning device. A search of records available to him disclosed no prior accidents or complaints relating to the location in question, but because the location had the potential of being a hazardous one, a double-headed arrow on a yellow warning sign, shown in the photographs introduced as Respondent's Exhibits 3 and 4, was placed at the intersection within two months following claimant's accident.

From the evidence the Court finds that, in the absence of a warning sign or barricade, a hazardous condition existed at the three-way intersection, constituting a trap for the unwary; that respondent was aware, or in the exercise of reasonable diligence should have been aware, of the hazardous condition and the absence of any warning sign or device; and that the respondent was negligent in this regard, proximately causing the injuries to the claimant and the losses which she suffered as a result thereof.

Claimant is entitled to recover the sum of $100.00 for the deductible feature on her automobile insurance, the sum of $42.45 for reimbursed medical expenses incurred as a result of the accident, and the sum of $2,000.00 for pain and suffering from her accident injuries and the inconvenience occasioned by the loss of her vehicle.

Award of $2,142.45.

OPINION ISSUED JANUARY 21, 1994

RICHARD L. THOMPSON

VS.
DIVISION OF HIGHWAYS
(CC-93-181)

Claimant appeared in his own behalf.
Nancy K. McCoy, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to his vehicle when it struck a hole in County Route 27 in Marion County. Claimant was driving his vehicle and his wife and young daughters were passengers. They were proceeding from the Middletown Mall to their home in Worthington when they decided to go to a Dairy Mart. Claimant then proceeded on Everson Road, which is also known as County Route 27, when the incident occurred. Claimant alleges damages to his vehicle in the amount of $311.18.

The evidence adduced at the hearing on October 19, 1993, established that claimant was operating his 1988 Toyota Cressida on May 29, 1993, on County Route 27 when he drove around a curve and came upon a vehicle approaching in the opposite lane. Claimant drove his vehicle to the right side of his lane of travel to avoid the approaching vehicle. The right rear tire of his vehicle then went into a hole on the paved portion of the road which extended into the berm. The hole was approximately five to seven inches deep. The car sustained damages which required claimant to purchase a new wheel and to have the vehicle realigned.

Dwayne Miller, maintenance assistance with the respondent in Marion County, testified that the first notification or complaint that respondent had concerning this particular hole on County Route 27, was received from the claimant after the incident herein. Respondent had a small paving machine performing work on County Route 27 but not in the area of claimant's accident.

The Court, having considered the evidence in this claim, is of the opinion that claimant may recover for the damages to his vehicle. There were no warning signs to alert claimant to this defect in County Route 27. A hole in the pavement which is five to seven inches deep would not have developed overnight. Therefore, the Court is of the opinion that respondent had constructive notice of the hole. Claimant was required to drive to the right side of the road by the oncoming vehicle. This constitutes an emergency situation, and the Court has held in prior decisions that the edge of the road and the berm should be maintained in a proper manner for use by the traveling public under circumstances such as these.

In view of the foregoing, the Court makes an award to the claimant in the amount of $311.18.

Award of $311.18.

OPINION ISSUED JANUARY 21, 1994

MARY L. TYBURSKI
VS.
BUREAU OF EMPLOYMENT PROGRAMS
(CC-93-36)

Claimant present in person.
Larry M. Bonham, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Mary L. Tyburski, seeks an award from respondent, Bureau of Employment Programs, for property loss sustained by a theft which occurred at her place of employment with the Workers' Compensation Fund, an agency of the respondent, on February 1, 1993, in Wheeling, Ohio County.

From the evidence adduced at the hearing on October 6, 1993, it appears that the claimant had arrived at work at approximately 8:30 a.m. She placed her leather coat on a coat rack located 25 feet from the rear entrance of the office. It rear entrance looked at all times. At approximately 11:45 a.m. the claimant discovered that her coat had been stolen. She immediately went to the rear entrance and found the door to be unlocked. She stated that no unauthorized person passed by the front desk in order to get to the coat rack and that no other State employee or maintenance personnel had used a key to enter through the door from the outside.

The value of the coat was $645.00. Personal property that was located inside the coat at the time of the theft included: Isotoner gloves valued at $40.00; prescription glasses valued at $80.00; and $75.00 in cash. The claimant's insurance covered the loss with the exception of the amount of $250.00 for her deductible. Therefore, the claimant is limited to an award for the amount of her deductible.

John Hepburn, fraud investigator for Workers' Compensation, testified for the claimant that it was office policy to keep the rear door locked at all times and that the coat rack had been placed by the rear door only a few days before this incident.

This Court finds, after reviewing the evidence, that the respondent was guilty of negligence by a preponderance of the evidence for failing to follow established security procedures.

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

Award of $250.00.

OPINION ISSUED JANUARY 21, 1994

UPSHUR COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-93-380)

Claimant represents self.
Gretchen A. Murphy, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, County Commission of Upshur County, provides and maintains a facility for the incarceration of prisoners who have committed crimes in Upshur County. Some of the prisoners held in the county facility have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action to recover the costs of housing for prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the county prison facility for periods of time beyond the date of the commitment order.

The Court previously determined in the *County Comm'n of Mineral County v. Div. of Corrections*, an unpublished opinion of the Court of Claims issued November 21, 1990, that the respondent is liable to the claimant for the cost of housing these inmates.

Pursuant to the holding in the *Mineral County* Opinion, the respondent reviewed this claim to determine the number of inmate days for which respondent may be liable. Respondent then filed an Answer admitting the validity of the claim and that the amount of $25,953.95 is a fair and reasonable settlement of the claim.

In view of the foregoing, the Court makes an award to claimant in the amount of $25,953.95.

Award of $25,953.95.

OPINION ISSUED JANUARY 21, 1994

WVU EXTENSION CONTINUING EDUCATION &
PROFESSIONAL DEVELOPMENT
VS.
DIVISION OF ENVIRONMENTAL PROTECTION
(CC-93-251)

Kelli D. Talbott, Senior Assistant Attorney General, for claimant.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $4,022.00 for an asbestos building inspector course taken. The invoice for the course was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $4,022.00.

Award of $4,022.00.

OPINION ISSUED JANUARY 21, 1994

R. DEAN CODDINGTON, M. D.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-94-20)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,170.00 for medical treatment provided a client of the respondent State agency. The invoices for the services were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and the amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,170.00.

Award of $1,170.00.

OPINION ISSUED JANUARY 21, 1994

SAINT ALBANS PSYCHIATRIC HOSPITAL, INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-93-128)

Robert M. Nunley, and Larry M. Bonham, Assistant Attorneys General, for respondent.
John M. Hedges, and Duane C. Rosenlieb, Jr., Attorneys at Law, for claimant.

PER CURIAM:

Claimant, Saint Albans Psychiatric Hospital, Inc., is a Virginia corporation and operates a private, non-profit psychiatric hospital in Pulaski County, Virginia. In July 1989, on a petition filed by respondent, a 14-year-old juvenile was placed in the temporary custody of respondent under a voluntary placement agreement pursuant to Chapter 49, Article 2, Section 16 [$49-2-16] of the *West Virginia Code*, by the Circuit Court of Raleigh County. Subsequent Court orders continued the temporary custody of respondent, and on October 27, 1989, the juvenile was admitted to claimant's facility. He was discharged on November 27, 1989, still in the temporary custody of respondent.

Claimant seeks $13,372.97 for its services in this connection.

All of the material allegations in the complaint having been admitted by respondent, the Court is of the opinion that claimant is entitled to the relief which it seeks.

Award of $13,372.97.

OPINION ISSUED JANUARY 21, 1994

TERRILL W. WOOD
VS.
BOARD OF BARBERS AND COSMETOLOGISTS
(CC-93-463)

Claimant represents self.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, an employee of the respondent, seeks $106.50 for travel expenses. The travel expense voucher was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $106.50.

Award of $106.50.

OPINION ISSUED JANUARY 27, 1994

FAHLGREN, INC.
VS.
LOTTERY COMMISSION
(CC-93-473)

Larry A. Winter, Attorney at Law, for claimant.
Larry M. Bonham, Assistant Attorney General, for respondent.

PER CURIAM:

Fahlgren, Inc., formerly known as Fahlgren Martin, Inc., brought this action to recover monies alleged to be due and owing under a contract entered into with the Lottery Commission, respondent herein, in 1991 to provide advertising services. The claim was brought in the amount of $200,875.66.

The evidence in this claim established that the Lottery Commission sought a supplier of advertising services in 1991. A bid procedure was not used, but the Lottery Commission requested examples of the promotion of a fictitious program and evaluated examples of the promotion of a fictitious program and evaluated the proposals from various interested parties based upon the presentions of the programs. The contract was awarded to Fahlgren Martin, Inc., began as of July 1, 1991, and was to expire on June 30, 1992, when the Lottery Commission requested that the contract be extended for six months. A change order extended the contracted to December 31, 1992. In December 1991, the Lottery Commission voted to award the new contract to Fahlgren Martin, Inc. However, it was necessary for the Lottery Commission to extend the 1991 contract through the months of January and February 1993 while the purchasing process for the new contract was completed. Change Order No. 6 was prepared by the Lottery Commission to extend the contract with Fahlgren Martin, Inc., through January and February 1993. This change order was signed and approved by all of the pertinent parties including the Attorney General; however, the Change Order did not provide an increase in the cap for advertising and marketing. Therefore, the Lottery Commission prepared and executed Change Order No. 7 to increase the spending cap of the contract by $200,000.00 in order to compensate Fahlgren Martin, Inc., for services rendered in accordance with Change Order No. 6. Change Orders Nos. 6 and 7 were duly approved by the Division of Purchasing of the Department of Administration.

There is no dispute that the Lottery Commission desires to render payment to Fahlgren, Inc., as the expenditures for media advertising were made and services were satisfactorily performed and were in compliance with the terms of the contract. However, the Attorney General has refused to approve Change Order No. 7 and the $200,000.00 provided in Change Order No. 7 may not be paid to Fahlgren, Inc. The Attorney General acknowledges the facts of the claim, but contends that Fahlgren, Inc., was aware that Change Order No. 7 did not go through the proper purchasing process; that any reliance upon the change order was unreasonable; and that Fahlgren should bear the burden of providing services when it did not have a contract.

The Court has reviewed the evidence in this claim and the Opinion issued on November 23, 1993, by the W.Va. Supreme Courts of Appeals in *State of West Virginia Ex Rel Fahlgren Martin, Inc. v. Darrel V. McGraw, Jr., Attorney General of the State of West Virginia,* wherein that Court upheld the new 1993 contract and directed that the Attorney General must sign the contract if nothing is wrong with the form. The Court is of the opinion that Change Order No.

6 constitutes a contract and Change Order No. 7 should have been signed by the Attorney General. A leads to no conclusion other than that Change Order No. 7 complements Change Order No. 6 by supplying a $200,000.00 increase in the spending cap in the 1991 contract, which increase was inadvertently omitted from Change Order No. 6. The bulk of the claim represents expenditures made by Fahlgren, Inc., to purchase media advertising for the use and benefit of the Lottery Commission. Therefore, the Court has determined that Fahlgren, Inc., performed services under the terms of a contract for which it should be compensated by the Lottery Commission. The Court is of the further opinion that even if the contract were not valid, Fahlgren, Inc., is entitled to a recovery based upon the theory of quantum meruit as it performed services and made expenditures for respondent in reliance upon representations made to it by the proper authorities in the Lottery Commission and the Division of Purchasing.

In accordance with the findings of fact and conclusions of law as stated herein above, the Court grants an award to Fahlgren, Inc., of $200,000.00, the amount of funds that would have been available through Change Order No. 7.

Award of $200,000.00.

OPINION ISSUED FEBRUARY 18, 1994

PUTNAM COUNTY COMMISSION
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-94-22)

Mr. Roger Williams, Assistant Prosecuting Attorney, for claimant.
Donna Quesenberry, Senior Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, Putnam County Commission, brought this action in the amount of $14,850.00 to recover rent for office space provided to the law master in accordance with a rental and lease agreement entered into by the Putnam County Commission and the Administrative Director of the West Virginia Supreme Court of Appeals on November 25, 1986. The State agency responsible for paying the rent was the Department of Health and Human Resources as it had control of the funds.

The evidence established that the lease for space for the law master's offices began

on December 1, 1986, and extended to June 30, 1992. The Putnam County Commission, for reasons unknown, did not invoice the respondent for rent on a monthly basis. This oversight was not discovered until 1993 during negotiations for a new lease. Putnam County Commission received back rent from the respondent for the period of July 1, 1992, through March 30, 1993. However, respondent was unable to make payment of rent for the period December 2, 1986, through June 30, 1992. Respondent contends that the mistake on the part of Putnam County Commission to submit invoices for the rent in a timely manner thus relieves it of responsibility for the rent.

The Court, having reviewed the facts and circumstances of this claim, has determined that the respondent received the benefit of having the use of the office space provided to the law master in Putnam County, and further, that there is both a legal and moral obligation on the part of the respondent to abide by the terms of the lease agreement.

Accordingly, the Court is of the opinion to and does make an award to the Putnam County Commission in the amount of $14,850.00.

Award of $14,850.00.

OPINION ISSUED MARCH 31, 1994

BILLIE MARLENE CROAFF
VS.
DIVISION OF HIGHWAYS
(CC-93-158)

Alonzo Croaff, brother of the claimant, appeared in person.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

This action was originally filed by Alonzo Croaff to recover damage to his sister's automobile, a 1991 Oldsmobile Cutlass. The Court, on its own motion, amended the style of the claim to reflect the owner of the vehicle, Billy Marlene Croaff. The damages to the vehicle were in the amount of $115.91.

The evidence adduced at the hearing of the claim on February 17, 1994, established that Alonzo Croaff, brother of the claimant, was operating her automobile on December 17, 1992, near Switzer, West Virginia. Mr. Croaff and his family were traveling from Logan to Ragland, proceeding southerly on West Virginia Route 44. He was traveling at approximately 40-45 miles

per hour. It was a very dark evening. As Mr. Croaff drove the automobile across the bridge on Route 44, the left front tire struck a large, deep hole in the bridge deck, which caused the tire to go flat immediately. Mr. Croaff drove the vehicle to an area where he was able to drive off the road and change the tire. He noticed that the wheel cover was missing and he went back to the bridge to find it. While at the scene of the accident, he assistant other people in flagging traffic around the hole on the bridge until personnel of the Division of Highways came upon the scene.

Hobert Adkins, the Logan County Maintenance Supervisor for respondent, testified that a section of this bridge had dropped out and he had a steel plate, four feet by eight feet and three-fourths inches thick placed over this section of the bridge. He had reported the bridge failure to the bridge division of the respondent more than a week prior to Mr. Croaff's accident. The bridge deck is somewhat tilted and the steel plate which had been covering the failed section of the bridge had evidently slid to the other lane and no longer protected the traveling public from the deteriorated section of the bridge. The steel plate was not secured to the bridge deck. Mr. Adkins was familiar with the deterioration condition of the bridge, and he recalled having received notice of the vehicles having problems with the exposed section of the bridge on this particular evening in December 1992.

The Court, having considered the evidence in this claim, is of the opinion that respondent had notice of the condition of the bridge deck and sufficient time to which to repair the bridge surface to protect the traveling public. The dropped out section on the bridge was located in the center of the bridge and it created a hole approximately two to three feet wide and eight to ten inches deep which the Court deems to be a hazardous condition. The facts in this claim support the premise that the failure of the respondent to promptly repair a section of the bridge which had dropped out was the proximate cause of the damage to the claimant's automobile.

In accordance with the findings of fact as stated herein above, the Court is of the opinion to and does make an award for the damages to claimant's automobile.

Award of $115.91.

OPINION ISSUED MARCH 31, 1994

MICHAEL FERNATT AND BRENDA FERNATT
VS.
DIVISION OF HIGHWAYS
(CC-92-374)

Brenda Fernatt appeared in person.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action to recover damages to their vehicle which occurred on August 22, 1992. Claimant Brenda Fernatt was driving the claimants' 1987 Subaru proceeding south on I-77 in Charleston, West Virginia. Claimants' automobile struck an object in the road and sustained damages to the muffler and connector pipe in the amount of $90.86.

The evidence adduced at the hearing of this claim on February 17, 1994, established that claimant Brenda Fernatt and her family had been on a vacation and they were returning to their home in South Charleston, Kanawha County. She was driving on I-77 when she drove into the curve at the intersection of I-79, and she noticed an object in her lane of travel. she was unable to proceed into the right lane due to traffic, and she was unable to stop because of the traffic behind her. She drove over the object which appeared to be a large truck tire that was split. She was driving at approximately 65 miles per hour. When she drove her automobile over the tire in the highway, it caused damages to the automobile.

Respondent's maintenance supervisor for the interstate in the Charleston area, Mancie Legg, testified that he maintains a daily diary and his diary does not reflect any telephone call to him from Charleston control about an object on the interstate on the date of claimant's accident, which was on a Saturday. He was not aware of the hazard nor was he aware that it evidently was removed from the interstate by persons other than personnel of the respondent.

The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by an object on the highway, it must have had either actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. As the respondent was not informed as to the object on the highway, the Court is of the opinion that claimants have not established negligence on the part of the respondent which was the proximate cause of the incident which caused the damages to their automobile.

Accordingly, this claim must be denied.

Claim disallowed.

OPINION ISSUED MAY 12, 1994

LOLA HICKS
VS.
BOARD OF DIRECTORS OF THE STATE COLLEGE SYSTEM
(CC-94-26)

M. Corbin Vierling, Attorney at Law, for claimant.
Donna S. Quesenberry, Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $151.57 for damaged and missing items taken from her dorm room at Concord College, a facility of the respondent. The respondent admits the validity and amount of the claim; however, respondent does not have a fiscal method to pay the claim.

In view of the foregoing, the Court makes an award in the amount of $151.57.

Award of $151.57.

OPINION ISSUED MAY 23, 1994

DIVISION OF PERSONNEL
VS.
DIVISION OF CORRECTIONS
(CC-94-144)

Claimant represents self.
Donna S. Quesenberry, Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $32,210.94 for administrative fees due for full-time equivalent positions in fiscal year 1993 that were not paid in accordance with West Virginia Code Chapter 29, Article 5, Section 23. The Correctional Unit account expired a combined total of $48,920.85; however, approximately $30.000.00 of that amount was credited to the account on July 30 and 31, 1993. The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $32,210.94.
Award of $32,210.94.

OPINION ISSUED JULY 13, 1994

DALE E. FIELDS
VS.
DIVISION OF HIGHWAYS
(CC-93-140)

Thomas H. Sayre, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

BAKER, JUDGE:

Claimant, Dale E. Fields, sustained personal injuries when he fell from a walking bridge in Kanawha County on February 23, 1993. He brought this action to recover work loss as he was unable to work for several months after receiving injuries in the fall. He alleges that the respondent failed properly to maintain the walking bridge and this failure to maintain the bridge was the proximate cause of this accident.

Respondent contends that it had not notice of any defects on the bridge and that claimant's fall was the result of his own negligence.

The evidence adduced in the hearing of this claim on April 22, 1994, established that claimant and a female friend were walking across the bridge over the Elk River at Falling Rock, W.Va., on February 23, 1993. It was a very cold and snowy day. There was snow falling as they walked and it was accumulating on the walkway surface of the bridge. Earlier on that day claimant had been drinking alcoholic beverages with a friend. He then joined his female friend and they went to diner and were returning to claimant's home. Claimant had parked his vehicle on the west side of the bridge at Bridge Elementary School. He and his friend were walking easternly on the bridge in the snow. As claimant neared the east side of the bridge, he slipped in the snow and fell headfirst through a section of the bridge where chain link fencing was missing from the bottom portion of the bridge. Claimant described the scene for the Court and his fall as follows:

> We had parked there because we live on the other side and we got out of the car and proceeded across the bridge. The bridge was covered with snow. As we were walking across the bridge, as you go across the bridge you're going across the river, the wind is blowing real hard, and as we were walking across the bridge I had my hands in my pockets. You know, my pants are tight. I'm not skinny and my

pants are tight.

> As we were walking across the bridge, they were in front of me, and as we were walking across the bridge we were slipping and sliding and then when we got over to where the fence is gone, I did slip and I fell, and I couldn't get my hands out on my pockets fast enough. When I fell, I hit my head on, you'll see the railing, it's made of angle iron. And when I slipped and fell, I hit my head on the railing and went through the railing.
>
> As far as I know just, I went right on through the, because it, it didn't knock me out, but it addled me to where I, I don't know, I just went through the railing. I do remember hitting the tree and then the next thing you know, I'm laying on the ground looking up, on my back, flat on my back, and snow is coming down on top of me from where I hit the tree. And I'm trying to catch my breath and my girlfriend is running back and forth across the bridge screaming, and the next thing I know she just disappears and, you know, like I'm there by myself and, you know, it took me a few minutes to get myself together after I could catch my breath. You know, I was hurting pretty bad, especially my left leg, and I got up and limped up the hill.

Claimant testified that the portion of the bridge missing chain link fence had been in this condition for two or three months prior to his fall; however, he had not reported it to the respondent's headquarters. He stated that he had mentioned it to two individuals who were sitting in a pick-up truck which he identified as a truck marked as one belonging to the respondent, Division of Highways, and which was parked at the bridge site some time prior to his accident. He was unable to provide any information as to the identity of these two men.

Claimant sustained physical injuries to his left knee and his left hip as a result of his fall from the bridge. He was able to return to work in August of 1993, but he experiences pain and he feels that it is necessary for him to return to asbestos abatement employment after he receives proper training for this work because he will not be required to lift as much weight as is required in either the logging business or moving furniture which he has been doing. He had injured his left knee prior to this accident, but he is of the opinion that he has reinjured it and it continues to cause him discomfort when he works.

Testimony on the part of witnesses for the respondent provided a description of the walking bridge. It is a swinging bridge with a railing approximately four feet two inches high with chain link fencing from the bottom to the top rail. The rails have a space approximately one foot eleven inches between them. There was chain link fence missing at the east of the bridge on the

bottom portion of the bridge railing.

Respondent's witness, Calvert Mitchell, Assistant Supervisor for the Elkview area of Kanawha County, testified that he had no complaints about the condition of this walking bridge until after claimant's accident. Testimony from Robert S. Campbell, District Bridge Engineer for District 1, indicated that bridges are inspected at least every two years as required by federal standards. This bridge had been inspected on April 9, 1991. The bridge department had not received any complaints or notice of the missing chain link fence until March 1993 and repairs were effected immediately.

The Court, having reviewed all of the evidence in this claim, has determined that respondent did not have notice that the bridge railing was in a defective condition. Claimant, however, was aware of the defective condition and he was walking across the bridge when it was in a very slick condition with the wind blowing and the bridge moving up and down. He placed himself in a perilous position when he walked across the bridge with his hands in this pockets. It is the opinion of the Court that claimant's own actions were the proximate cause of this fall from the bridge.

Accordingly, this claim must be denied.

Claim disallowed.

OPINION ISSUED JULY 13, 1994

EMOGENE HARRIS, AS MOTHER AND GUARDIAN OF
MARK A. HARRIS, II
VS.
DIVISION OF HIGHWAYS
(CC-93-157)

Stephen P. Swisher, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Emogene Harris, brought this action as guardian of her son, Mark A. Harris, II, who received injuries when he was involved in a bicycle accident on W.Va. Route 25, also known as Fairlawn Avenue, in Institute, Kanawha County, on July 14, 1992. Claimant does not allege any monetary damages, but rather she desires that the respondent place a signal light at the intersection for a private drive that it almost opposite Barron Drive which dissects the West Virginia State College campus. The evidence adduced at the hearing on March 30, 1994, established the

following facts:

1. Claimant's son, Mark A. Harris, II, was riding a two-wheel bicycle from his grandmother's house. He rode his bike to the bottom of the private driveway where it intersects with Fairlawn Avenue.

2. Barron Drive intersects with W.Va. Route 25 to the east and on the other side of W.Va. Route 25 there is a private driveway. There is a three-way stop light fixture for traffic proceeding from Barron drive and for traffic proceeding east and west on W.Va. Route 25.

3. The private drive has a pole with a push button for the stop light. Mark A. Harris, II, was approaching the pole either ridding his bicycle or walking it when an automobile proceeding west on West Virginia Route 25 struck him and knocked him approximately ten feet.

4. He sustained head injuries as a result of the accident.

5. Mr. Mark A. Harris, father of Mark A. Harris, II, testified that he desires that respondent replace the three-way stop light with a four-way stop light in order that people driving or walking from his mother's private drive onto W.Va. Route 25 would have been the benefit of the lights when proceeding onto W.Va. Route 35.

6. Mr. Harris indicated that his son was accustomed to riding his bicycle from his grandmother's home as he had ridden from her house to his own house on many prior occasions.

7. The respondent, Division of Highways, produced testimony from Roger Russell, a traffic engineer and special assistant in traffic operations, that a traffic signal would not be placed on a private driveway and this particular driveway is offset from the intersection. It is not actually a part of the intersection for W.Va. Route 25 and Barron Drive.

The Court has reviewed the facts in this claim and has determined that respondent is not negligent in its placement of the traffic signal of the intersection in question. Although the Court regrets that Mark A. Harris, II, was injured in a bicycle accident at the intersection of the private drive with W.Va. Route 25, the Court is of the opinion that respondent has provided the appropriate traffic signal for the intersection of W.Va. 25 with Barron Drive. This Court has no statutory authority to order or to request affirmative acts on the part of any State agency.

In accordance with the findings of facts as indicated hereinabove, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED JULY 13, 1994

LLOYD A. SMITH
VS.
STATE OF WEST VIRGINIA
(CC-93-29)

Stephen P. Swisher, Attorney at Law, for claimant.

Robert M. Nunley, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, Lloyd A. Smith, brought this action in accordance with the provisions in W.Va. Code §14-2-13a to recover damages which he incurred as the result of an unjust arrest. The Court received and filed the Agreed Stipulation of Fact and heard arguments of counsel at a hearing conducted on December 3, 1993. The Agreed Stipulation of Fact established the following:

1. The Claimant, Lloyd A. Smith, was arrested on July 3, 1990, on a felony charge pursuant to Chapter 61, Article 2B, Section 4 of the West Virginia Code, as amended for second degree sexual assault.

2. The victim of the assault was unable to positively identify the claimant as her assailant.

3. The claimant passed a polygraph test supporting his defense, that he did not know the victim, and was not guilty of the offense claimed. DNA tests administered to the claimant and the victim established that the claimant was excluded as the perpetrator of the alleged crime.

4. As a result of the arrest, the claimant was incarcerated in the Kanawha County Jail for a few hours.

5. The charges against the claimant were dismissed on May 15, 1992, two years after his arrest.

6. As a result of the unjust arrest, the claimant incurred attorney fees in the amount of $8,000.00.

7. Claimant suffered a $500.00 penalty for withdrawing money from his savings and higher income taxes, $128.00 for two days wages lost by his wife, $1,787.52 in lost wages and $30.00 in expenses.

8. No other person has been arrested or prosecuted and convicted for the same

criminal offense which was brought against this claimant.

Claimant's action was brought in accordance with the provision of West Virginia Code §14--2-13a. This section of the Code provides for statutory relief in unjust arrest claims. The provisions of the Unjust Arrest statute are very specific as to the findings made by this Court. The Court notes that this section of the Code provides as follows:

> §14-2-13a(c) In order to present the claim for unjust arrest or imprisonment, claimant must establish by documentary evidence that he has been arrested and imprisoned, or both arrested and imprisoned and charged by warrant, information or indictment for one or more felonies against the state **and that subsequently another person was arrested and prosecuted and convicted for the same criminal offense or offenses** and all charges against the claimant were dismissed. (Emphasis supplied.)

As stipulated by the parties, it is agreed that no other person has been arrested or prosecuted or convicted for the criminal offense for which the claimant herein was arrested. As the remedy is purely statutory in nature, the Court must apply the statute very strictly. The claimant has not been able to satisfy all of the provisions in W.Va. Code §14--2-13a; therefore, the Court is unable to grant an award.

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

Claim disallowed.

OPINION ISSUED AUGUST 3, 1994

ROBERT AND JANE ANDERSON
VS.
DIVISION OF HIGHWAYS
(CC-91-67)

Claimant appeared in their own behalf.
Glen A. Murphy, Attorney at Law, for respondent.

PER CURIAM:

Claimants, Robert and Jane Anderson, are the owners of a triangular shaped lot in

Cross Lanes, Kanawha County, which fronts West Virginia Secondary Route 62. They brought this action alleging that a paving and drainage project known as the Cross Lanes Connector Project has caused flooding on their property. The Cross Lanes Connector Project was performed by Danis Industries Corporation in accordance with a contract awarded in April 1990 by respondent. Claimants maintain a one-story building on the property in which their business, Huskey's Dairy Bar, is located. To the rear of this building claimants reside in a mobile home. There is also a tool shed located on the property and claimants have a truck trailer parked on the lot.

Claimants allege that flooding on their property has caused damages of approximately $1,354.72. The damages include the amount of $250.00 for a survey and replacement of property markers for $250.00. Claimants were required to replace their tool shed and construct a block wall. Building materials were in the amount of $854.72 for a total claim of $1,354.72 in damages.

The evidence adduced at the hearing on July 21, 1993, established that claimants have been in business at this location for seventeen years. The first flooding which occurred on the property was in August 1990 during the construction of the Cross Lanes Connector Project. The claimants contend that water during heavy rains overflows from the drainage structures onto their property as a result of the failure of respondent to remove debris which collects on a grate over the top of a box culvert. Photographs were placed in evidence depicting the construction activities and the area surrounding claimants' property.

Findings of Fact

1. The Cross Lanes Connector Project was a paving and drainage project for W.Va. Routes 622 and 62. Subsurface draining was placed in order to provide drainage in the area and to prevent surface water from standing on the road.

2. The natural drainage for this area is behind claimants' property where the water flowed in a ditch along Lake Shore Drive to the Rocky Fork Creek prior to the Cross Lanes Connector Project.

3. The original construction plans for the Cross Lanes Connector Project required the placement of a 24-inch concrete pipe, but a utility line was discovered and respondent altered the plans by requiring the placement of dual 18-inch pipes. These two pipes adjoin a 24-inch pipe with a drop inlet and grate over the pipes.

4. Water in the area of claimants' property now flows southerly into drain pipes beneath W.Va. Secondary Route 62, and to the rear of claimants' property in drainage pipes which are beneath Lake Shore Drive, and, eventually, the water flows northeasterly into Rocky Fork Creek, which flows in a south to north direction.

5. After the construction was completed, claimants contracted respondent by letter and in person to advise respondent that water was flowing onto their property. Respondent's employees visited the scene and determined that the water problems were not the result of the construction.

6. A construction easement was obtained by respondent adjacent to claimants' property to provide access for its contractor to place the drainage structures. However, claimants gave the contractor permission to move their truck trailer during construction and requested the contractor to move it back to its original position after the construction project. This was eventually done by the contractor. Respondent was not involved with these negotiations.

7. The Cross Lanes Connector Project was constructed in accordance with the plans and specifications provided by the respondent to its contractor.

8. The evidence and photographs in this claim substantiate respondent's contention that there is flooding in this area due to low lying properties; more particularly, Sun Valley Drive to the north of W.Va. Secondary Route 62, has been an area with flooding problems for many years.

This Court urged the claimants on several occasions during preliminary appearances before the Court to obtain the assistance of counsel; however, claimants decided that they would proceed without benefit of counsel to assist them in the presentation of their claim. Although claimants may have a meritorious claim, they have failed to establish that respondent was negligent in the placement or maintenance of the drainage system abutting their property. Claimants' attempts to marshal and present evidence were wholly ineffective. This Court cannot assume the burden of proving claimants' claim and the Court will not speculate in order to find liability or to determine damages on behalf of the claimants. Thus, the Court finds that the claimant have failed to establish any negligence on the part of the respondent.

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

Claim disallowed.

OPINION ISSUED AUGUST 3, 1994

HUGHIE BRYANT
VS.
DIVISION OF HIGHWAYS
(CC-94-128)

Claimant appeared in his own behalf.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Hughie Bryant, a resident of Chapmanville, West Virginia, brought this claim to recover damages sustained by his 1993 Pontiac Sunbird. Claimant's vehicle sustained damage to a tire and claimant incurred expenses in the amount of $59.30 for a new tire.

The evidence adduced at the hearing of this claim on April 21, 1994, established that claimant was operating his automobile near Godby Heights, on W.Va. Route 10 in Logan County, on February 28, 1994. He was proceeding to his home in Millcreek. As claimant approached an oncoming truck, the truck threw rocks lying in the road. There had been a rock slide and the rocks were still present on the road. When the oncoming truck went over the rocks, some of the rocks were thrown into claimant's lane of travel, and he was unable to avoid driving over the rocks. The rocks caused the damage to the left front tire of claimant's automobile.

The evidence established that the respondent had no notice of the rock slide. There is a high wall adjacent to W.Va. Route 10, which is not benched. When weather conditions create freezing and thawing, it causes the rocks to fall directly upon the roadway. Curley Belcher, County Assistant Supervisor for Logan County, stated that he was familiar with this area and respondent attempts to keep the road clear of rock falls as soon as respondent receives notice.

Mr. Bryant was quite candid with the Court when he explained that he filed his claim based upon information broadcast over the radio that citizens should file claims for damages to their vehicles occasioned by defects on the highway. Mr. Bryant admitted that the respondent's employees maintain the roads in his area, "but theses things happen."

The information broadcast on the radio did not inform citizens such as Mr. Bryant, that it is necessary to establish negligence on the part of the respondent in order to make a recovery for damages to their vehicles. In a claim such as this one, the claimant must establish that the respondent had sufficient time to clear the rocks from the area. The claimant herein was unable to establish such proof; therefore, the Court may not grant an award in this claim. The Court informed Mr. Bryant at the hearing that his claim would be denied.

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

Claim disallowed.

OPINION ISSUED AUGUST 3, 1994

JOYCE ANN FORTNER
VS.
DIVISION OF HIGHWAYS
(CC-93-67)

Robert E. Vital, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

STEPTOE, JUDGE:

Joyce Ann Fortner brings this action for personal injuries sustained, for medical expenses incurred, and for loss of income sustained as a result of a two-car collision which occurred on August 8, 1990, at the intersection of West Pea Ridge Road and Irwin Road, in an unincorporated residential area of Cabell County, West Virginia.

Claimant alleges that the proximate cause of the accident was the failure of respondent to maintain properly a stop sign previously erected at the intersection.

Respondent contends that it was not aware that said stop sign was not in place at the time of the accident, and that its failure to replace the sign is not actionable; and that the accident was caused solely by the joint negligence of the claimant and of the operator of the second vehicle, Margaret A. Daniels.

It appears to the Court, as the trier of fact, from the evidence adduced from a hearing conducted on April 20, 1994, that the accident occurred at about 6:45 p.m., that the weather was clear and the road surfaces were dry; that the intersection was designated and marked by a stop sign at each of four approaches, but that the stop sign controlling traffic from the east was not in place, or visible to a motorist approaching from the east, but had in fact been lying on the ground below the surface and not far from the point at which for two weeks or so it had been erected; that the speed limit on West Pea Ridge Road was 35 miles per hour; that there were no eyewitnesses to the accident except Mrs. Fortner and Mrs. Daniels; and that each of the two intersection public roads was a two-lane road.

It further appears from the evidence that Mrs. Fortner had approached the intersection, which was familiar to her, from the west on West Pea Ridge Road, intending to stop at the intersection as required, and to make a left turn into and upon Irwin Road and then to proceed in a northerly direction on Irwin Road. In fact she did come to a full stop, at the intersection at a point from which she could see traffic approaching from the north, from the south, and from the east; she testified that she looked and determined that there was no approaching traffic, and then entered the intersection, making a turn to her left or northward, and the right side of her vehicle was struck by the Daniels vehicle, apparently within the intersection.

It further appears from the evidence that Mrs. Daniels, who, unaccountably, did not testify, had approached the intersection, on West Pea Ridge Road, from the east, and that she made no effort to stop at the intersection, for whatever reason, if any, and struck the Fortner vehicle.

The unimpeached testimony of one of the respondent's witnesses, was that, from the

place at which Mrs. Fortner brought her vehicle to a stop, before entering the intersection, she had a clear view of West Pea Ridge Road, to the east, from which direction the Daniels car was proceeding, for a distance of 425 feet. If Mrs. Daniels had been traveling at the speed limit of 35 miles per hour, it would have taken her over eight seconds to reach the intersection, and had she been traveling at a lower speed, it would have taken even longer to reach the intersection. In short, Mrs. Fortner had eight seconds in which to see a clearly observable object, and did not see it, in spite of having looked for it.

At the hearing, the claimant acknowledged that she had received $12,000.00 from Mrs. Daniels' insurer.

Such are the Courts findings of the significant and salient facts.

The first conclusion of law reached by the Court is that the respondent was not negligent with respect to its failure to have a stop sign in place to control movement of westbound traffic on West Pea Ridge Road. True, the respondent having erected the sign, had a duty to maintain it, but that duty does not entail maintenance of 24-hour watch over it, and the rule has been, and is that the duty to repair or replace commences with actual notice of the fact of failure of the sign, of which fact respondent's constructive notice, of which, in this case, there is no proof. If there be no duty, there can be no negligence in failing to perform a duty.

Our second conclusion of law is that claimant herself was negligent in producing the accident by her failure to comply with the West Virginia statute regulating a left turn at an intersection, Code §17--9-2, which provides that:

> The driver of a vehicle within an intersection intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or **so close thereto as to constitute an immediate hazard,** but said driver, having so yielded **and having given a signal when and as required by this chapter,** may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right-of-way to the vehicles (sic) making the left turn." (Emphasis supplied.)

It is obvious to the Court that 1) claimant could have seen the approaching Daniels vehicle for eight seconds but waited until the last second or two to enter the intersection, when the Daniels vehicle was an immediate hazard. There is no evidence, furthermore, of her having made a left turn signal as required by statute, to give notice to approaching driver on the same road.

In view of our conclusion that respondent was not negligent, and that the claimant was negligent, we deem it unnecessary to discuss the evidence as to damages.

Claim disallowed.

OPINION ISSUED AUGUST 3, 1994

MARK A. JETT AND KARA K. JETT
VS.
DEPARTMENT OF HIGHWAYS
(CC-94-110)

Claimants represent selves.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action to recover $387.71 for damages to their 1989 Chevrolet Beretta in an incident which occurred on February 20, 1994.

The evidence adduced at the hearing of their claim on April 21, 1994, established that claimant, Mark A. Jett, was driving their automobile with his wife and daughter as passengers. He was driving toward the Wallback exit of Interstate 79 on W.Va. Route 36 which is a two lane asphalt road. As claimant was proceeding easterly at approximately 40-45 miles per hour, he was driving up a little grade when his vehicle struck a hole at the edge of the pavement. He described the hole as being approximately thirteen inches in diameter and three to four inches in depth. The vehicle sustained damage to the right front tire and rim, and needed to be realigned. He had not traveled this road previously and he was unaware of the hole in the asphalt.

The county supervisor for respondent in Roane County, Clarence Boggs, testified that W.Va. Route 36 is a high priority road in Roane County. During the month of February 1994, respondent's employees were involved in snow and ice removal activities. Holes in the road were patched with cold patch, a temporary patching material. Respondent's records reveal that holes on W.Va. Route 36 were patched on February 18 and 19, 1994.

The Court is well aware that the winter months of January and February 1994 were months with severe weather conditions which impacted the conditions of all of the roads and highways throughout the State. The snow and rain created snow and ice conditions upon all of the roads and highways. Respondent, by necessity, concentrated its maintenance efforts upon snow and ice removal activities which had to take priority over all other maintenance activities.

As the claimants have failed to establish that respondent knew or should have known of the hole in the pavement on W.Va. Route 36 on the date of their accident, the Court is of the opinion that respondent was not negligent in its maintenance of W.Va. Route 36 on the date of

claimants' accident.

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

Claim disallowed.

OPINION ISSUED AUGUST 3, 1994

FLOYD WILLIAMS
VS.
DIVISION OF ENVIRONMENTAL PROTECTION
(CC-93-422)

Claimant represents self.
Donna S. Quesenberry, Senior Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, Floyd Williams, brought this action to recover damages resulting from crude oil seeping into his water supply from an abandoned oil and gas well. Claimant and counsel for the respondent, Donna S. Quesenberry, Senior Assistant Attorney General, entered into Joint Stipulations of Fact, which was filed with the Court. The Joint Stipulations of Fact stated the following:

1. An abandoned oil and gas well (API #47-079-464) is located approximately 150 feet from claimant's water well on Trace Creek Road, Hurricane, West Virginia.

2. The plugging and filling of this oil and gas well (API #37-079-464) was commenced on October 10, 1950, and was completed November 11, 1950.

3. Claimant first noticed crude oil and/or natural gas in his water supply on or about May 24, 1993.

4. Claimant filed a complaint with the West Virginia Division of Environmental Protection, Section of Oil and Gas, on or about June 3, 1993.

5. On or about June 22, 1993, Inspector Glen Robinson investigated claimant's complaint.

6. As a result of Inspector Glen Robinson's investigation, it was determined that at least one source of the crude oil and/or natural gas in claimant's water supply is from API #47-079-

464.

7. According to records maintained by the West Virginia Division of Environmental Protection, Section of Oil and Gas, API #47-079-464 was owned by C.D. Raines of Hurricane, West Virginia (now deceased).

8. Other than filing a complaint with the West Virginia Division of Environmental Protection, Section of Oil and Gas, claimant has taken no steps as an interested party to replug API #47-079-464.

9. The Division of Environmental Protection has taken steps pursuant to the West Virginia Abandoned Well Act to plug or replug the abandoned oil and gas well, API #47-079-464.

The Court, having reviewed the Joint Stipulations of Fact, and, also, having reviewed W.Va. Code §22-5-1- et. seq., which is the West Virginia Abandoned Well Act, has determined that claimant has not established a basis for a claim against the respondent. The statutes under the West Virginia Abandoned Well Act provide a method for respondent to plug old oil and gas wells. The statutes do not attach liability to the State of West Virginia for the contamination of water wells from crude oil and/or natural gas seeping from abandoned wells. The State has been given responsibility for plugging wells, but this responsibility does not extend to liability upon the State for other problems caused by these abandoned wells.

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

Claim disallowed.

OPINION ISSUED AUGUST 16, 1994

ERNEST M. PANDELOS D/B/A ESQUIRE SUPPER CLUB, INC.
VS.
DIVISION OF HIGHWAYS
(CC-91-287)

Rodney T. Berry, Attorney at Law, for claimant.
Glen A. Murphy, Attorney at Law, for respondent.

BAKER, JUDGE:

Claimant, Earnest M. Pandelos, owner and operator of the Esquire Supper Club, Inc.,

seeks an award from the Division of Highways for property damage sustained by flood water alleged to have flowed from West Virginia Route 88 near Bethlehem in Ohio County, West Virginia.

From the evidence adduced at the hearing on November 18, 1992, it appears that for several years the claimant has suffered damage to his real property from water washing down and alongside Route 88 during heavy rainstorms. The water has flooded the parking lot and, on occasion, the restaurant. According to claimant, most of the damage occurred when the property flooded during storms on June 21, 1989, and June 17, 1991, although there may be some question about the latter date, a storm depositing five and one-half inches of rain in less than an hour having hit the area on June 14, 1990.

The claimant seeks damages from June 21, 1989, to the present, in the amount of $11,123.00. However, the statute of limitations for property damage is two years; therefore, the Court will consider the damages from the flooding occurring on and after September 30, 1989, two years prior to the date this claim was filed.

The claimant has owned and operated Ernie's Esquire Supper Club since 1956. The restaurant is located on the south side of route 88, which descends from west to east at approximately a 6.25% grade. As it passes claimant's property Route 88 is superelevated from south to north, away from claimant's property, but claimant has paved respondent's property between the paved portion of Route 88 proper and the entrance to his supper club. Respondent has five drop inlets, catch basins or culverts in a drainage ditch above the elevation of claimant's property, on the south side of Route 88, and claimant has installed three such drop inlets on his property which tie into respondent's drainage system. Claimant's parking area and supper club are some eighteen feet below the level of Route 88 as it joins the entrance to claimant's property.

Water from the highway started flowing onto claimant's property in 1989 when sticks and rubbish blocked the culverts on Route 88. However, the flow of water from his drainage structure carries debris onto claimant's property and a large drop inlet adjacent to claimant's property also becomes clogged and the water flows over the drop inlet onto the asphalt parking areas on the property. Claimant alleges that this water caused deterioration of the asphalt on the parking lots for the restaurant which claimant had to repave at a total cost of $14,265.00, of which $8,231.00 is the portion attributable to the water damaged areas. Claimant also alleges that the drains on the parking lots became clogged with debris from water flowing from the State road causing flooding in the kitchen of the restaurant. There were three instances of flooding of his nature which also added to the damages in this claim

Charles Garvick, an expert in the field of engineering, testified that he viewed the site and talked with the claimant. He determined that the water was coming from the highway and not from the small creek behind the property. He also stated that even if the claimant's drains are tied into the respondent's culvert, the fact that claimant's drains are lower than the respondent's drains would not cause them to back up. He testified that it is his opinion that the water problems are caused by the respondent's lack of maintenance of the culvert. He stated that the claimant's

restaurant is located at the bottom of a basin and that it would be important in reaching a determination of how much water collects in the area to perform a drainage analysis on the area; however, he did not perform such an analysis.

Respondent contends that the excess water on claimant's property flows from the hillside which surrounds the property and not just from Route 88. The drainage structures on the State road are cleaned on an annual basis which is the normal, routine schedule for respondent in Ohio County. IN 1990, respondent installed new head walls in the area. Gordon Peake, maintenance engineer for the respondent, testified that he had investigated the area several times after telephone calls were received from the claimant complaining of the drainage problems. He stated that he requested his bridge department to conduct a drainage analysis, found that in excess of 52 acres drain into claimant's restaurant and parking areas and that, considering the slope of Route 88, if there was a lot of rain, the water would come down like a river and the drains would probably not be sufficient to prevent water accumulation on the property of the supper club. Further, at an earlier date he recommended to the claimant that he install a grate across the front of the driveway to the restaurant parking lot in order to provide for drainage before the water flows onto the parking lot.

The evidence in this claim substantiates the allegations that claimant's property may have excessive water flowing into the entrance and onto the parking lots. The property is at the bottom of a drainage area of 52.66 acres with Route 88 and hillsides surrounding the property. Respondent maintains Route 88 to the best of its ability. Claimant has an obligation to attempt to reduce the flow of water by constructing additional drainage structures at the entrance to his parking lots and this may alleviate the problem of excessive water which deteriorates the parking lots. The Court is not convinced that water alone caused the asphalt to deteriorate. The asphalt appears to have deteriorated due to its age as well as the water problems. The Court also finds that there are many contributing factors to the condition of excessive water flowing onto claimant's property besides the water coming down off Route 88, some of which water may come down the hillside and ditch or road leading to the rear of claimant's upper parking lot. Thus, the Court is of the opinion that the claimant has failed to establish negligence on the part of the respondent by a preponderance of the evidence and that such negligence proximately contributed to the damages suffered by claimant.

In accordance with the findings of the Court as stated herein above, this claim must be denied.

Claim disallowed.

Former Judge Hanlon participated in the hearing but not in the decision of this claim.

OPINION ISSUED SEPTEMBER 24, 1994

VIRGIL J. ADKINS
VS.
DIVISION OF HIGHWAYS
(CC-94-187)

Claimant represents self.
Cynthia Majestro, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to his 1993 Chrysler Lebaron, which occurred on February 23, 1994. The damages to the vehicle were in the amount of $244.88.

The evidence adduced at the hearing of this claim established that claimant was proceeding south on W.Va. Route 10, in the proximity of the Mouth of Blind Stone Hollow, when he drove to the right edge of the paved portion of the road to avoid oncoming traffic and his vehicle went into a hole at the edge of the road. It was approximately 7:30 p.m., and it was raining. He was driving at approximately 40 miles per hour in an area where the speed limit is 55 miles per hour. There was a curve to the right and the hole in the edge of the pavement was in the curve. Claimant travels W.Va. Route 10 approximately once a month. The hole was filled with water from the rain and he was unable to see it prior to his vehicle striking the hole, but the right front and right rear tires immediately went flat. Claimant had to replace two tires and have his vehicle realigned.

Respondent's Assistant Supervisor for Logan County, Curley Belcher, testified that there is frequent coal truck traffic on W.Va. Route 10. He was aware of the condition of the shoulder in this particular curve, as he had received complaints. He was unaware if the complaints were made prior to claimant's accident. The area was repaired thirty days after the date of claimant's accident.

The Court, having reviewed the evidence in this claim, has determined that the claimant saw the lights of oncoming traffic when he steered his vehicle to the far right side of Route 10 where there was a defect in the road. Further, the respondent had knowledge that the edge of the road and the shoulder area in this curve were not always maintained in proper condition as coal trucks using the road caused the edge of the road to erode. The Court finds that respondent was negligent in the maintenance of W.Va. Route 10 and this negligence was the proximate cause of the claimant's accident.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $244.88.

Award of $244.88.

OPINION ISSUED SEPTEMBER 26, 1994

MARTHA BELCHER
VS.
DIVISION OF HIGHWAYS
(CC-94-178)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to her 1984 Cadillac Seville, which occurred on November 29, 1993, in West Logan, Logan County. Claimant's vehicle sustained damages in the amount of $708.00.

The evidence adduced tat the hearing of this claim established that claimant was driving her automobile on W.Va. Route 10 in West Logan, when the right rear tire struck an area in the highway which appeared to have been cut by respondent's employees to prepare the hole for paving, which was not controverted by the respondent. She was driving at approximately 25-30 miles per hour at the time of the incident. She was familiar with the road and was aware that there were holes, but the holes had not been cut out for patching. There were no warning signs or signals of any kind at the location of the hole. Claimant's vehicle sustained damages to a tire, rim, and hubcap, and had to be realigned. Although claimant alleges $708.00 as the amount of the damages, the damages substantiated by the exhibits total $378.00. Claimant stated that she only maintains liability insurance upon her vehicle.

The Court, having reviewed the evidence in this claim, has determined that the respondent failed adequately to warn the traveling public that a hole had been cut in the pavement to prepare the surface for repairs. This failure to warn the public constitutes negligence which was the proximate cause of the damages to the claimant's automobile.

In accordance with the findings of facts as stated above, the Court makes an award to the claimant in the amount of $378.00.

Award of $378.00.

OPINION ISSUED SEPTEMBER 26, 1994

ROD R. BRADLEY AND SHIRLEY BRADLEY
VS.
DIVISION OF HIGHWAYS
(CC-94-63)

Claimants represent selves.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action to recover damages to their 1987 Volkswagen Goff, which occurred when claimant, Rod R. Bradley, was driving the automobile on the Lee Street Bridge, in Charleston, Kanawha County on February 8, 1994. Claimants sustained damages in the amount of $720.79.

The evidence adduced at the hearing of this claim on May 12, 1994, revealed that claimant Rod R. Bradley was operating claimants' automobile at 8:30 p.m. on February 8, 1994. He had driven from the Lee Street Exit proceeding through a stop light and was driving on the Lee Street Bridge when his automobile went through 10 to 12 holes in the pavement in the right lane. His automobile started "shaking and shivering real bad..." The bridge pavement was dry and he did not observe the holes prior to driving over them. Claimants' automobile sustained damage to the right front upper strut and to the wheel. Although claimant had driven over this bridge previously, he had not noticed these particular holes.

Respondent contends that snow and ice removal operations were the priority operations for the maintenance crews during this time period; however, the Lee Street Bridge has priority for patching any holes. The holes on the Lee Street Bridge were patched in mid-February after claimant's accident. Respondent's witness, Calvert Mitchell, testified that he was not aware of the holes on the Lee Street Bridge.

The Court, having reviewed the evidence in this claim, has determined that respondent's failure to maintain the Lee Street Bridge was the proximate cause of the damages to claimant's automobile. Respondent knew or should have known of the severity of the holes on this bridge as the bridge handles major traffic in Charleston and is a priority for respondent to maintain.

In accordance with the findings of fact as stated herein above, the Court grants an award to the claimants in the amount of the estimate of repair for $720.79.

Award of $720.79.

OPINION ISSUED SEPTEMBER 26, 1994

BENNY T. FLESHMAN AND BEULAH FLESHMAN
VS.
DIVISION OF HIGHWAYS
(CC-94-152)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants are the owners of a 1989 Ford Escort, which sustained damages on February 25, 1994, when claimant Benny Fleshman was driving from Glen Jean to Whipple, Fayette County, on W. Va. Route 21/20. His automobile sustained damages in the amount of $2,894.16.

The evidence adduced at the hearing of this claim established that claimant Mr. Fleshman was driving on W.Va. Route 21.20 at approximately 9:00 p.m., in rain and ice conditions. His automobile went into a hole in the road and then skidded on ice into a bank causing damage to his automobile. He was not familiar with this road and he was unable to see the hole as it was filled with water. He described the hole as being one and one half feet in diameter and approximately ten inches deep. It was located close to the yellow line in the center of the road. He observed many other holes along W.Va. Route 21/20. He maintains insurance on his automobile and has a $250.00 deductible provision, which represents the amount of this claim.

The assistant county supervisor for Fayette County, John Zimmerman, testified that W.Va. Route 21/20 is local service road in Fayette County. Respondent's crews were spending 90% of their time on snow removal and ice control in February 1994. He was aware that there were holes on W.Va. Route 21/20, but described these holes as being "skin patches" or holes that are one inch to one and one half inches in depth. He traversed Route 21/20 on the day following claimant's accident, but was unable to find any hole of the size and depth of the hole described by the claimant on this road. Cold patch material is used during winter months to patch any holes, but this is a temporary patching material.

The Court is well aware that the winter months of January and February 1994 were months with severe weather conditions which impacted the condition of all of the roads and highways throughout the State. The snow and rain created snow and ice conditions upon all of the roads and highways. Respondent, by necessity, concentrated its maintenance efforts upon snow and ice removal activities which had to take priority over all other maintenance activities.

The Court has determined that the claimant has failed to establish negligence on the part of the respondent, and, for these reasons, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 26, 1994

BOBBY FOWLER
VS.
DIVISION OF HIGHWAYS
(CC-94-10)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to his 1993 Toyota pick-up truck which occurred on January 2, 1994, when claimant was driving across the Chelyan Bridge in Kanawha County. The pick-up truck sustained damage to its right rear tire. The cost to replace the tire was $106.20.

The evidence adduced at the hearing of this claim on May 12, 1994, established that at approximately 6:30 to 7:00 p.m., claimant was operating his pick-up truck, traveling 10 to 15 miles per hour while proceeding across the Chelyan Bridge from U.S. Route 60 to State Route 61. There was a steel plate covering a hole on the bridge, and, apparently, the right rear tire of claimant's pick-up truck dropper into the hole as the steel plate had moved and no longer completely covered the hole. Claimant travels across the bridge occasionally, and he was aware that at various times steel plates were used to cover holes.

James Dingess, a supervisor for the respondent, testified that the Chelyan Bridge is a very old bridge and holes frequently occur in the flooring. Respondent covers the holes with steel plates which are four feet by eight feet and one-half inch thick. Mr. Dingess stated that there were many complaints about the condition of the bridge; that the bridge department had been requested to make permanent repairs to the holes; and that the respondent had trouble keeping the steel plates over the holes.

The Court, having reviewed the evidence in this claim, has determined that claimant may recover for the damages to his pick-up truck. Respondent was aware of the deteriorated condition of the bridge and failed to protect the traveling public from the defects. The steel plates used to cover the holes in the pavement of the bridge do not remain in place and the holes then become a hazard to the traveling public.

Accordingly, the Court is of the opinion to and does grant an award to the claimant in the amount of $106.20.

Award of $106.20.

OPINION ISSUED SEPTEMBER 26, 1994

VICKY AND SCOTT HAMILTON
VS.
DIVISION OF HIGHWAYS
(CC-94-37)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action to recover damages to their 1981 Ford Fairmont automobile which occurred when the automobile struck a tree limb on U.S. Route 60 on January 8, 1994. The windshield was damaged and had to be replaced at a cost of $184.08.

The evidence adduced at the hearing of this claim on May 12, 1994, established that claimant, Scott Hamilton, was operating claimants' automobile on U.S. Route 60 at Shrewsbury, Kanawha County, near the Chelyan Bridge. It was approximately 3:30 or 4:00 p.m. and it was raining. As claimant was driving across the bridge, he steered to the right to avoid a truck which was approximately one foot into claimant's lane of travel on the approach to the bridge. He was driving at approximately 45 miles per hour and he did not see a tree limb hanging out into the road until it caught his windshield. Claimants' automobile was on the paved portion of the road when the accident occurred.

Respondent established through James Dingess, Supervisor for the Chelyan area the respondent, that there had been a slip at the edge of the road which caused the tree limb to hand from a tree and extend over U.S. Route 60 at the scene of claimant's accident. Respondent's crew attempted to keep the slip area clear, but there were many problems with the roads during this time period and this slip was continuous in nature.

The Court is of the opinion that respondent maintained this slip area as well as could have been anticipated considering all of the snow and ice removal operations which were necessitated by adverse weather conditions during the 1993-94 winter. Respondent had many responsibilities at this time and maintained the slip area to the best of its ability. As respondent was not negligent in its maintenance of the slip area, it is not liable to claimants for the damage to their automobile.

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

Claim disallowed.

OPINION ISSUED SEPTEMBER 26, 1994

BETH HENSLEY
VS.
DIVISION OF HIGHWAYS
(CC-94-146)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants, the owners of a 1991 Pontiac Grand Am, brought this action to recover damages to their automobile which occurred on February 12, 1994, when claimant, Beth Hensley, was driving from Chapmanville to Delbarton.

The evidence adduced at the hearing of this claim established that Mrs. Hensley was driving through Holden, Logan County, on W.Va. Route 119, a two-lane road. Her automobile went into a "humongous pothole", which she was unable to miss because a coal truck was approaching in the opposite lane. After claimant's incident, she noticed certain individuals placing a steel plate over the hole. The speed limit in this are is 40 miles per hour, and she estimated that she was driving at approximately 37 miles per hour. She attempted to miss the hole by driving to the right, but the left front and left rear tires went into the hole. She described the hole as being approximately one and one-half dep. She had to replace both tires at a cost of $114.48.

Evidence provided by the respondent indicated that a drain had collapsed beneath the road, and the steel plate had been placed over the hole as a temporary measure by a contractor performing construction work for the respondent on Corridor G, adjacent to the scene of the accident.

The Court is of the opinion that the respondent had no notice that the road surface would collapse. The temporary measure taken to protect the public was taken without respondent's knowledge. As there was no notice to the respondent as to the defect in the road, although large and dangerous, the Court is of the opinion to and must deny this claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 26, 1997

GLORIA M. HUGHES
VS.
DIVISION OF HIGHWAYS
(CC-94-36)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to her 1989 Mercury Topaz which occurred when her vehicle struck rocks on an exit ramp of Interstate 64 as she was proceeding to W.Va. Route 35. Claimant's vehicle sustained damages in the amount of $728.15, but her insurance deductible is $500.00, which represents the amount of her claim.

The evidence adduced at the hearing of this claim of May 12, 1994, established that claimant was driving to her home in Red House at approximately 10:00 p.m. to 10:30 p.m. on January 12, 1994. As she drove off the exit ramp at Exit 44, she noticed "all kinds of rocks on the side of the road and there was some in the middle of the road, and then I had no choice to hit the rock or go to the left and hit the side rails...There was rocks all around." A policeman was following claimant on the ramp and he removed the rocks from the ramp after claimant's accident. Claimant testified that she drives in this area on occasion and that she noticed rock signs placed by respondent after her accident. This exit ramp has a large rock cliff adjacent to it.

Respondent established that it did not have notice of the rocks in the road on the date of claimant's accident. Warren Parkins, a supervisor from the Scary, West Virginia, office of respondent, testified that there are falling rock signs are on this particular ramp, but he did not know if the signs were in place prior to claimant's accident. He had not received any complaints of rocks on this particular ramp of I-64 prior to claimant's accident.

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). For the respondent to be held liable for damage caused by rocks on the interstate ramp, it must have had either actual or constructive notice of the rocks on the ramp and a reasonable amount of time to take corrective action. Davis v. Dept. of Highways, 11 Ct.Cl. 150 (1977). As the claimant did not meet this burden of proof, the claim must be denied.

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

Claim disallowed.

OPINION ISSUED SEPTEMBER 26, 1994

MICHELE K. RIVERA, M.D.
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM OF WEST VIRGINIA
(CC-88-168)

Christopher S. Butch, Attorney at Law, for claimant.
William F. Douglass, Jr., Senior Assistant Attorney General, for respondent.

STEPTOE, JUDGE:

This is an action filed by Michele K. Rivera against the Board of Trustees of the University System of West Virginia, and hereinafter known as "the Board," to recover for the breach of an alleged employment contract for the period from July 1, 1987, until June 30, 1988.

The claimant, hereinafter known as "Dr. Rivera," is a licensed physician initially employed by the Board in 1981, under a probationary contract, as an Assistant Professor in the Department of Pathology in the medical school of Marshall University, at Huntington, West Virginia, for the period from July 1, 1981 until June 20, 1982. She performed her assigned duties for that period and received her stipulated compensation.

Dr. Rivera received substantially similar probationary contracts for the five succeeding academic years; her compensation for the sixth year was $41,544.00.

It is the position of Dr. Rivera that she was entitled by law to a one year terminal contract for the period July 1, 1987 until June 30, 1988, for a compensation of not less than $41,544.00, notwithstanding that she had received from the University no contract in writing.

The Board filed a general denial, but at the hearing offered evidence to support two defenses, to-wit:

a) no written contract--no pay; and
b) Dr. Rivera had resigned her position, in February 1986, effective June 30, 1987.

The first defense is not substantiated by the Board's own rules, its "Revised Policy Bulletin No. 36," dated December 14, 1984, and hereinafter referred to as "the Rules of the Board," restating the Board's policy with respect to academic freedom, faculty appointments, and appeal procedures, and providing in its resolution clause, in pertinent part, that "All academic appointments made after the effective date hereof shall be made in conformity with this policy statement."

Section 8 of the Rules of the Board reads as follows:

8. Probationary Status:

a. When a full-time faculty member is appointed on other than a temporary or tenured basis in any of the institutions of higher education under the jurisdiction of the Board of Regents, the appointment shall be probationary.

b. During the probationary period, the terms and conditions of every reappointment shall be stated in writing, with a copy of the agreement furnished the individual concerned within 15 days following receipt of the Board of Regents' budgetary allocations and guidelines.

c. The maximum period of probation shall not exceed seven years. Before completing the sixth year of a probationary appointment, any nontenure faculty member shall be given written notice of tenure, or offered a one-year written terminal contract of employment. During the probationary period, faculty members may be granted tenured appointment before the sixth year of service, such appointment to be based upon criteria established by the institution and copies provided to the Board of Regents.

d. During the probationary period, contracts shall be issued on a year-to-year basis, and appointments may be terminated at the end of the contract year. During said probationary period, notice of nonreappointment may be issued for any reason that is not arbitrary, capricious, or without factual basis. Any documented information relating to the decision for nonretention or dismissal shall be provided promptly to the faculty member upon request.

e. After the decision regarding retention has been made by a President, he or she shall notify the probationer of the decision as soon as practicable. In cases of nonretention of faculty who began service at the start of the fall term, formal notification shall be given.

(1) No later than March 1 of the first academic year of service;

(2) No later than December 15 of the second academic year of service;

(3) At least one year before the expiration of an appointment after two or more years of service in the institution.
(The remainder of subsection e. and subsections f. and g. are not pertinent.)

Subsection c. of Section 8, it will be observed, provides that a probationary faculty

member may not serve in such status more than seven years, and that as to any non-tenured faculty member, he or she must be offered a one-year written terminal contract of employment. It is also provided in Subsection e. (3) that a probationary faculty member with tow or more years of service in the institution must be notified of nonretention at least one year before the expiration of an appointment.

From the evidence it has been shown that Dr. Rivera received an appointment, or contract of employment for the academic year commencing July 1, 1986, until June 30, 1987, performed her duties and received her stipulated compensation. The Board failed or refused to give her, on or before June 30, 1986, a notice of nonretention for the academic year commencing on July 1, 1987, to notify her of tenure, or to giver her a one-year written terminal contract of employment as provided and mandated by the Rules of the Board and to which she was entitled. The Court holds that a termination contract should have been offered, and that such a mandated contract, even though not issued, may be the basis of a contract of employment on which a cause of action may be issued.

There remains the Board's contention that Dr. Rivera had, in February of 1986, voluntarily submitted her resignation as an Associate Professor, effective June 30, 1987, when she signed her annual Faculty Evaluation Report dated February 1986. Said Evaluation Report appears in the hearing record as Claimant's Exhibit No. 8 to the pretrial deposition of Dr. Stebbins B. Chandor, which deposition was admitted to the evidence adduced at the hearing before this Court as Court's Exhibit No. 1. The Evaluation Report was signed by Dr. Rivera and by Dr. Chandor, then the Chairman of the Pathology Department of the School of Medicine of Marshall University. Dr. Chandler was the immediate superior of Dr. Rivera and had the duty to report on her performance as an Assistant Professor of Pathology. His opinion of her performance was, apparently for the first time, professionally critical. Dr. Rivera defended her own performance, at some length and in some detail; and both of them signed the report. The last sentence of the report, evidently written by Dr. Chandor, reads as follows:

"This next years contract (1986-87) is considered a terminal appointment.."

Dr. Rivera contends not only that the word "resign" or the word "resignation" did not appear in the document, but that she did not intend to resign, and signed the Report only because it was expected that she should sign her annual Evaluation Report, each year. She further contends that, as Dr. Chandor admitted in his deposition, that the Evaluation Report was not a contract. It was shown by documentary evidence that Dr. Chandor had authority only to make recommendations in the Report, and had absolutely no authority to terminate or extend a contract, which authority was vested in the President of the University.

It clearly appears from the evidence, moreover, that notwithstanding Dr. Chandor's recommendation, Dr. Rivera was given a probationary contract for her sixth year of service, and not a terminal contract, and rendered service for the entire academic year of 1986-1987.

The University, on May 15, 1987, caused a letter to be written to Dr. Rivera, signed

by Harry E. Neel, Jr., its Executive Vice President, in behalf of Dale F. Nitzschke, the President, giving her notice that she would not be reappointed after the 1987-88 academic year. By a subsequent letter, dated June 29, 1987, and over the same signature, the University said that on May 15th it had not been fully informed, and that would not be employment for Dr. Rivera in 1987-88, because she had agreed to end her employment on June 30, 1987. In any event, if the letter of June, 1987, it came exactly 364 days too late to have any significance or effect under the Rules of the Board.

Furthermore, the Rules of Board, Section 6, require that a faculty member desiring to resign give a notice in writing. Dr. Rivera gave no such notice, was not requested to give such notice, and expected to be employed for another year.

The Rules of the Board are too plain to require construction, and the evidence of the Board on the question of resignation falls far short of a preponderance of the evidence, and is not persuasive.

The Court finds that the Board failed to comply with its guidelines for reemployment of probationary faculty members, in this case to the prejudice of Dr. Rivera, and that she was entitled to a one-year written terminal contract of employment for her academic year 1987-1988, at a salary of $41,544.00, which contract she was ready, willing and able to perform, for her part.

The Court also finds, on the basis of all of the evidence, that the Board failed to prove that Dr. Rivera resigned her position as an Assistant Professor.

Accordingly, the Court makes an award to Michele K. Rivera of $41,554.00.

Award of $41,554.00.

OPINION ISSUED SEPTEMBER 26, 1994

GLEN RUTLEDGE II AND KATHY RUTLEDGE
VS.
DIVISION OF HIGHWAYS
(CC-94-47)

Claimants represent selves.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action to recover damages to their vehicle, a 1991 Mazda 626, which occurred on January 27, 1994, near Delbarton in Mingo County. Claimant's vehicle sustained damages to a tire which was replaced at a cost of $69.15.

The evidence adduced at the hearing of this claim on May 12, 1994, revealed that claimant, Kathy Rutledge, was operating claimants' vehicle on W.Va. Route 65 in Mingo County when she was approaching the Elk Creek Bridge. She was proceeding into a curve when two coal trucks were approaching in the opposite lane. She drove to the right of her lane for the coal trucks to pass her. Her vehicle went into a very deep hole at the edge of the pavement which had a sharp edge causing damage to the tire. Claimant was traveling at approximately 20 to 25 miler per hour and she did not observe the hole. Although claimant travels this road frequently, she had not noticed the hole prior to this incident.

The Court, having reviewed the evidence in this claim which includes a photograph of the hole in the travel portion of the road, has determined that it was necessary for claimant, Kathy Rutledge, to use this portion of the road to avoid oncoming traffic. The Court is of the opinion that respondent had constructive if not actual notice of the hole on W.Va. Route 65 and failed to maintain the road in proper condition for the traveling public. The negligence of the respondent was the proximate cause of claimant's accident.

In accordance with the findings of fact as stated herein above, the Court grants an award to the claimants in the amount of $69.15.

Award of $69.15.

OPINION ISSUED SEPTEMBER 26, 1994

BRENDA J. STEPP
VS.
DIVISION OF HIGHWAYS
(CC-93-114)

Frank Stepp, claimant's husband, appeared in her behalf.
Nancy K. McCoy, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to rental property located in Bluefield, Mercer County, which damages occurred in March 1993, due to flooding on her property. Water flowed from W.Va. Route 598 onto the property. Claimant alleges damages in the amount of $3,567.66.

This claim was heard in part on October 29, 1993, and the claim was continued for the taking of a deposition from the claimant, Brenda J. Steep. The Court has been informed that counsel for the respondent attempted to depose the claimant on more than one occasion, but the deposition has not yet been taken. The claim was scheduled for further hearing on May 12, 1994, and neither claimant nor her husband appeared. The Court considers the claim submitted for determination upon the record as developed at the hearing.

The evidence adduced at the hearing established that claimant rents the property that is the subject of this claim; that the back of the property abuts W.Va. Route 598; that certain drains on W.Va. Route 598 became blocked during a heavy rain storm; and, that water flowed from the road onto claimant's property toward the back of the house. The water washed gravel and debris into the back yard, and water also flowed into the family room causing damage to the carpet. Personnel from respondent's local office came to assist Mr. Stepp in cleaning out the drains. Flooding of this nature had occurred in May 1992, but neither claimant nor her husband had reported this incident to the respondent. In addition to the damages to the property, Mr. Stepp requests that respondent be directed by the Court to clean the gravel off claimant's property. This Court may not order such relief. Therefore, the Court will consider the monetary damages only.

Respondent established through William Bennett, Assistant District Engineer, that the drainage system on W.Va. Route 598 is normally sufficient for the water which drains off the surface of the road. However, there was an unusual storm on March 22, 1993, which resulted in an excess amount of water which then flowed onto claimant's property. Also, there had been heavy snow storms in the area and the snow had been plowed against the guardrail and into the ditches along W.Va. Route 598. Snow also remained on the hillside above the road. All of these conditions caused the excessive flow of water on W.Va. Route 598.

The Court has determined that the flooding which occurred to claimant's property was the result of the melting snow and excessive rainfall. The water flowed from W.Va. Route 598 to the natural low spot which was in the area of claimant's property. Respondent established that it has an adequate drainage system to protect property owners from water which flows along W.Va. Route 598 under normal rainfall conditions.

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

Claim disallowed.

OPINION ISSUED SEPTEMBER 26, 1994

CHARLOTTE A. SHAMBLIN
VS.
DIVISION OF HIGHWAYS
(CC-94-166)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to her 1990 Chevrolet Camaro which occurred on January 15, 1994, on January 22, 1994. Claimant was not definite about the date. Claimant's vehicle sustained damages in the amount of $197.05.

The evidence adduced at the hearing of this claim established that claimant was driving her automobile northbound on I-77 near the Tuppers Creek Exit. She was driving approximately 60 miles per hour when her automobile went into a large hole on the Tuppers Creek bridge. It was approximately 12:00 p.m. to 1:00 p.m., when the incident occurred. There were no warning signs indicating a bump or other defect on the bridge. Claimant noticed problems with steering her automobile, and took her automobile to a repair place approximately a week and a half after the incident. She had to replace two tires and have her vehicle realigned. She also experienced transmission leaks which were repaired. She had traveled across the bridge approximately a week prior to this accident, but the bridge was covered with snow and claimant was unable to see any problem with the bridge surface.

Respondent's maintenance crew supervisor for this section of the interstate, David Fisher, testified that respondent's crews were involved in snow removal and ice control operations during January 1994. This particular bridge had problems with holes for the length of the bridge, and respondent began permanent repairs to the bridge within three to four days after claimant's accident. Temporary patching material known as cold mix was used on the bridge prior to the construction. No signs were placed to warn the traveling public of the defective condition of the bridge deck.

Although the Court is aware of the severe winter weather conditions during January 1994, and that respondent had to use its crews for snow removal and ice control, it appears to the Court that respondent was aware of the severe condition of the bridge deck on the Tuppers Creek bridge. Respondent had no obligation to the traveling public on an interstate to place warning sings so that drivers, having been warned, had an opportunity to reduce the speed of their vehicles. The Court is of the opinion that respondent's failure to place such signs constitutes negligence, which was the proximate cause of the damages to claimant's vehicle.

For these reasons, the Court is of the opinion to and does make an award to the claimant in the amount of $197.05.

Award of $197.085.

OPINION ISSUED SEPTEMBER 26, 1997

TRI-STATE SALVAGE, INC.
VS.
DIVISION OF HIGHWAYS
(CC-92-260)

John F. Parkulo, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

WEBB, JUDGE:

Claimant, Tri-State Salvage, Inc., hereinafter referred to as Tri-State, brought this action for damages to its 18-wheel trailer which occurred on July 22, 1991, on the northbound Medina entrance ramp of I-77. The damages to the tractor trailer were in the amount of $12,094.03.

Respondent contends that Tri-State's driver drove the tractor trailer onto the shoulder area of the Medina entrance ramp in an area not intended for vehicles to park or drive upon and that the actions of the driver in stopping on the entrance ramp in an area not intended for this use and which was not designated for the weight of trucks, was the proximate cause of the accident.

The evidence adduced at the hearing of this claim on March 31, 1994, established that the driver of the tractor-trailer, Calvin R. Cox, was traveling on I-77 on July 22, 1991, with a cargo of scrap cars to be crushed. He had begun this particular trip in Beckley, West Virginia, to drive to Benwood, West Virginia, when he decided to check his load. He drove off the Medina exit ramp and then proceeded onto the Medina entrance ramp where he drove the tractor trailer to the right side of the ramp approximately a foot off the paved surface of the ramp. After the tractor trailer came to a complete stop, he felt the road give way under the right rear tandems of the trailer and the tractor trailer turned over onto its right side. Mr. Cox was an experienced tractor trailer driver with 30 years experience. He testified that there were no warning signs or indications that the area was soft or unstable and he did not see any delineator posts along the entrance ramp where he stopped to park. He had driven tractor trailers on I-77 on many occasions prior to the date of this accident. The accident occurred at approximately 1:30 a.m.

The Medina entrance ramp on I-77 consists of a paved area approximately 14 feet wide and a paved berm of three feet on each side of the ramp for a total paved area of 20 feet. Adjacent to the pavement is a two foot wide area of gravel with delineator posts placed at 50 foot

intervals. The berm is slopped to the gravel area to keep water off the paved surface of the ramp. Although the delineator posts are frequently knocked down, James Keyser, respondent maintenance crew supervisor for this area of the interstate, stated that the posts are replaced after two or three have been knocked down. He was aware that trucks frequently pull off of the sides of the ramp; however, there are signs stating "Emergency Stopping Only" on the interstate to conform with Federal requirements. There are no such signs on the ramps.

As explained by David Clevenger, an engineer for respondent formerly in the design division, the purpose of the delineator posts along the edge of the berm is to indicate where the stabilizer shoulder ends. The area beyond the posts is not stable. The ramps were designed for a weight of 80,000 pounds which is the legal weight limit for vehicles. The p.i. or point of intersection where the slope of the shoulder area and the point of the ditch adjacent to the berm intersect is marked by the delineator posts. The p.i. marks the stabilized shoulder and from that point is the ditch which is sloped. Thus, the area beyond the delineator posts is not a stable area.

The issue before the Court involves questions of whether the driver of the tractor trailer should have parked on the Medina entrance ramp and whether the respondent had an obligation to provide sufficient berm for tractor trailers at the legal weight limit to be parked adjacent to the ramp. The area beyond the berm on entrance and exit ramps on I-77 were not designed for parking purposes. Although there are no sings to indicate specifically that tractor trailers may not use entrance and exit ramps for the purpose of emergency use only. Although there is controversy over the placement of delineator posts on the Medina entrance ramp on the date of this incident, the Court has determined that whether the posts were there or not , the driver of the tractor trailer was certainly aware of the shoulder area available on which to park the tractor trailer. When the rig was parked approximately 18 inches from the white line on the paved portion of the ramp, the tractor trailer was in an area which was sufficiently stable to hold the weight of the rig. The Court is of the opinion that the tractor trailer was parked in an area which was not designated, designed, or intended for such purpose. W.Va. Code §17C-13-3(a)(16) provides as follows: "No person shall stop, stand, or park a vehicle, except when necessary to avoid conflict with other traffic or in compliance with law or the directions of a police officer or traffic-controlled device, in any of the following places: (16) Upon any controlled-access highway..." This law is applicable to the claim herein as the ramps on interstates are a part of controlled-access highways. The Court is also of the opinion that the respondent maintained the shoulder area adjacent to the Medina entrance ramp as designed.

Having reviewed the evidence put forth in this claim and the law applicable thereto, the Court has determined that respondent was not negligent in its maintenance of the Medina entrance ramp, and, further, that respondent is not liable for the damages which occurred on Tri-State's tractor trailer.

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

Claim disallowed.

OPINION ISSUED SEPTEMBER 26, 1994

VICKI L. WATERS
VS.
DIVISION OF HIGHWAYS
(CC-94-66)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover damages to her 1990 Chevrolet Cavalier, which occurred on January 7, 1994, on MacCorkle Avenue in Saint Albans, Kanawha County. Claimant alleges damages in the amount of $187.55.

The testimony adduced at the hearing of this claim established that claimant was driving her automobile on U.S. Route 60 at approximately 7:15 a.m., when she was on her way to work. It was dark and raining. She was driving in the right lane of the four lane highway at approximately 35 miles per hour in heavy traffic, proceeding east, when her automobile's right front and left front tires went into two deep holes in the pavement which broke the belts in the radial tires. Claimant had to replace both of these tires and the automobile had to be realigned.

Respondent's supervisor, Paul Lyttle, testified cold patch, a temporary patching material, was used on U.S. Route 60 on the date of the claimant's accident. Respondent's crews were involved in snow removal and ice control operations during January 1994. Respondent was aware of the holes on U.S. Route 60, and patching was performed. Mr. Lyttle personally travels U.S. Route 60 every day and was aware of the holes on that day.

The Court is aware that U.S. Route 60 is a heavily traveled main highway in Kanawha County. Respondent had constructive if not actual notice that U.S. Route 60 had defects which were hazardous to the many travelers on the highway. Although permanent repairs could not be made, respondent should have placed warning signs for the traveling public. The Court is of the opinion that respondent was negligent in failing to maintain this area of U.S. Route 60, and this failure was the proximate cause of damages to claimant's automobile.

For these reasons, the Court is of the opinion to and does grant an award of $187.55 to the claimant.

Award of $187.55.

OPINION ISSUED SEPTEMBER 26, 1994

LINDA WILLIAMS
VS.
DIVISION OF HIGHWAYS
(CC-94-153)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damages to her 1990 Chevrolet Camaro which occurred on February 1, 1994, in Oak Hill, Fayette County. Damages to her vehicle totaled $921.00, and claimant testified that she has a $500.00 deductible on her insurance. The statement provided after the hearing by the claimant from Nationwide Insurance indicates that claimant had a $250.00 deductible, which represents the amount of this claim.

The evidence adduced at the hearing of this claim established that claimant was driving her automobile from Central Avenue onto Virginia Street at approximately 6:00 to 6:30 p.m., when the vehicle went into a very large hole. She was driving at approximately 10-15 miles per hour. There were no warning signs and the hole was filled with water. She stated that the whole car sank in the hole causing damage to the front end of her vehicle. She was not familiar with the hole in the road and she had not driven on Virginia Street for a week or so prior to her accident. She had three passengers in her automobile at the time and no one was injured.

The Assistant County Supervisor for Fayette County, John Zimmerman, testified that Virginia Street in Oak Hill is County Route 61/28. He stated that there were several holes int the stretch of road at the scene of claimant's accident. This particular hole was caused by severe water problems in the area. Respondent had used cold patch during the winter months to fill the hole.

The Court is well aware that the winter months of January and February 1994 were months with severe weather conditions which impacted the condition of all of the roads and highways throughout the State. The snow and rain created snow and ice conditions upon all of the roads and highways. Respondent, by necessity, concentrated its maintenance efforts upon snow and ice removal activities which had to take priority over all other maintenance activities. However, respondent's crews were able to place cold patch in holes when the weather permitted. The Court is of the opinion that respondent was negligent in its maintenance of Route 61/28 as it was aware of the severity of the holes in the Virginia Street and failed to place warning signs for the safety of the traveling public.

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

Award of $250.00.

OPINION ISSUED OCTOBER 24, 1994

AMBER D. DIMMICK
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM
OF WEST VIRGINIA
(CC-94-520)

Claimant represents self.
William T. Douglass, Jr., Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $75.00 for carpet that was destroyed in her dormitory room when a pipe burst and the room was flooded. Claimant is a student at West Virginia University, a facility of the respondent. Respondent admits the validity and amount of the claim; respondent does not have a fiscal method to reimburse claimant for her damages.

In view of the foregoing, the Court makes an award in the amount of $75.00.

Award of $75.00.

OPINION ISSUED OCTOBER 24, 1994

FRANK J. HAAS
VS.
BUREAU OF EMPLOYMENT PROGRAMS
(CC-94-458)

Claimant represents self.

William T. Douglass, Jr., Assistant Attorney General.

PER CURIAM:

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

Claimant seeks $145.41 for travel expenses which he incurred as an Administrative Law Judge for the Worker's Compensation Division, an agency of the respondent. Claimant's travel voucher was not processed for payment in the proper fiscal year; therefore, claimant has not been paid. In its Answer, Respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the travel expenses could have been paid.

In view of the foregoing, the Court makes an award in the amount of $145.41.

Award of $145.41.

OPINION ISSUED OCTOBER 24, 1994

LINDA RIGGAN
VS.
DIVISION OF HIGHWAYS
(CC-94-136a)

ROBERT L. AND PATRICIA SAMMS
VS.
DIVISION OF HIGHWAYS
(CC-94-136b)

Claimant appeared in their own behalf.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action to recover damages which occurred when claimant Linda Riggan was operating a 1993 Chevrolet Van owned by claimant Robert L. Samms. Claimant Riggan asserts wage loss and gymnastic fees, and claimant Samms asserts a loss of $17.97 for a damaged antenna and van payments.

The evidence adduced at the hearing of this claim established that claimant Riggan had her three children as passengers in the van on the evening of February 13, 1994. It was approximately 8:15 p.m., and it was dark and cold. She was operating her van at 30 to 35 miles per hour in a southerly direction on Goff Mountain Road. The van went into a large hole in the road and then slid on ice, crossing the roadway and striking a right-of-way fence. Goff Mountain Road is a two-lane road which is fairly straight at the scene of claimant's accident. Claimant did not see the hole which was across her lane of travel and was estimated to be twelve to eighteen inches in depth. Claimant Riggan and two of her children received physical injuries; however, the medical expenses and the damages to the van were covered by insurance. Claimant lost $55.00 in wages and expended $75.00 for a ride to work as she had no other transportation while the van was being repaired. She also alleges that her daughter was unable to attend gymnastics classes due to physical injuries an claimant incurred $80.00 for fees for the classes. Claimant Robert L. Samms incurred the expense of $17.97 for a cellular telephone antenna, which was damaged in the accident. He also claimed the payments made for the van while it was being repaired.

Respondent contends that it did not have notice of this hole on Goff Mountain Road. Joseph Weekley, a foreman for respondent testified that he drove into the hole himself, but he was unable to see it. He was traveling on Goff Mountain Road during daylight hours on the day after claimant Riggan's accident. He stated that he had not been notified that there was a hazard on this road prior to claimant's accident. The hole was repaired with approximately six tons of blacktop. He was of the opinion that surface water alongside of the road had probably gotten into the hole and traffic tracked the water on the surface of the road, creating the icy condition which claimant Riggan encountered on the night of her accident.

The Court, having reviewed all of the evidence in this claim, has determined that respondent had constructive notice of this very large hole on Goff Mountain Road. Respondent asserted that this is a priority road, and, as such, respondent should have been aware of the dangerous condition, and at least taken the precaution of placing a warning sign for traveling public.

The only damages that the Court considers as being compensable are claimant Riggan's lost wages of $55.00, and her costs for a ride to work of $75.00, for a total of $130.00. Claimant Robert L. Samms had a loss of $17.97 for the telephone antenna.

Accordingly, the Court makes awards to claimants in the amounts as stated herein below.

Award to Linda Riggan of $130.00.

Award to Robert L. Samms of $17.97.

OPINION ISSUED NOVEMBER 29, 1994

LISA DAWN STICKLEY, INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND OF ANDREA NICOLE VANGILDER
VS.
DIVISION OF HIGHWAYS
(CC-93-227)

George P. Stanton, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

In this proceeding Lisa Dawn Stickley, in her own right and as next friend of her infant daughter, Andrea Nicole Vanglider, seeks an award for personal injuries and personal property damage, and for an award to her daughter for loss of her mother's services, society and companionship, as the result of a one-car automobile accident on 28 October 1992, when her northbound car went out of control and crashed into a tree, and she was seriously injured and her car was damaged beyond repair.

Trial on 3 August 1994 was on the issue of negligence only. Claimant maintains that the respondent was negligent in maintaining the surface of the road, and that respondent's negligence was the proximate cause of the accident. Respondent denies that it was negligent.

The question for the Court, therefore, is to determine whether the respondent was negligent, and, if it were, whether its negligence was the proximate cause of the accident and of claimant's damages.

Claimant labors under the difficulty of proving her own case, because as a result of the impact of the car with the tree, she was rendered unconscious for about three weeks and still has no memory of the events which transpired in the period from two days before the accident until after her discharge from the hospital. She contends, however, that her right front wheel struck an elevated section of pavement at or near the right berm of the lane reserved for northbound traffic, and that her car was thrown out of control; by witnesses she proved the existence of an irregularity in the pavement near the point at which two other witnesses testified her out-of-control skid commenced.

Deputy Sheriff Randy Durrett, of Taylor County, who arrived on the scene shortly after the accident and who made a written report of his investigation, testified to the existence of

parallel skid marks leading from the berm of the northbound traffic lane, across the northbound traffic lane and southbound traffic lane to the berm of the southbound traffic lane, and on to a tree beside which claimant's vehicle was found, demolished, and that the length of the skid marks on the pavement was 103 feet, 3 inches. The origin of the skid marks was found by him to be just north of an area which he designated as "rough patch in road," an area 27 feet, 9 inches in length. He also testified that after hitting the bump, claimant's right rear tire may have left the pavement to the right berm, and surmised that the car was thereby caused to yaw and cross the southbound lane and run into the tree. He did not testify to the vertical variance of the "patch" from surrounding road surface.

Ronald Stickley, a witness for claimant, testified that the vertical variance of the patch was no less than an inch. Eugene Chipps, another witness for the claimant, testified that the variance was "one inch or more over the original surface." Respondent's witness, Ben Savilla, an employee of respondent, testified that the height of the variance was approximately one inch, at its highest point, and tapered, or was faired, to virtually zero at its lowest point. Respondent's exhibits #1,#2, and #5, photographs taken well after the date of the accident but admitted as evidence subject to the reservation that the Court would take into consideration the time difference, were confirmed by Deputy Durrett to be representative portrayals of the patch at the time of the accident; they tend to confirm the testimony of Messrs. Stickley, Chipps, and Savilla, and of Clarence Glaspell, that the patch was tapered and did not extend higher, at its maximum, more than an inch or so above the regular course of the pavement.

Glaspell, the only person who could and did testify as an eyewitness to the accident, characterized the patched area as blacktop which had been rolled smooth. He testified that claimant's vehicle when first observed by him was on the double line (center) of the two lane road, heading northward, then turned toward the berm of the easterly side, touched the first and smaller patched area; then swerved to the left, westwardly, across the double line, and then swerved again to the right, eastwardly, bumping the larger patch with the right rear tire, and approaching but not reaching the berm at the northerly end of the second and larger patch, then turned sharply to the left again westwardly, and into a skid which took the vehicle, then out of control, across the center line again, and finally into the tree. The witness, while on the stand, made a drawing (not to scale) of the movement of the vehicle, which was marked as Court's Exhibit #1, which counsel for both parties, and the Court used extensively in questioning the witness. The witness testified positively that the front (wheels) never came near the second patched area.

The Court recognizes that there are some inconsistencies between the testimony of the investigating officer, Deputy Durrett, and that of Clarence Glaspell, the eyewitness to the accident, but believes that each was telling the truth as he found it or saw it.

The Court believes and finds, by a preponderance of the evidence that:

1. Claimant Lisa Dawn Stickley, was careless in and non-attentive to the operation of her motor vehicle, which, when first seen by the eyewitness,

Glaspell, was in the center of the road; to correct her position, she swerved to the right and came to a point near the right berm, then swerved to the left, crossing the center of the road, and then swerved to the right to a point near the berm again; then, in attempting to avoid going off the road, made a sharp turn to the left and in doing so overcompensated, with the result that her front wheels locked in a full left position, and claimant lost all control of her vehicle; the forward momentum of the vehicle was so great that the vehicle commenced a diagonal northward skid of 107 feet, 3 inches on the pavement and came to rest against a tree beyond the berm on the opposite side of the road.

2. Immediately before claimant lost control, her right rear wheel ran over a portion of the road which had been repaired on August 3, 1992, by filling a pothole with hot mix and rolling the mix; part of the repaired area was about one inch higher than the surface of the rest of the road, but it was tapered to the residue of the surface so that there were no sharp edges.

3. There is no record of prior accidents at the scene of this accident, and no evidence of complaints with respect to the patched area which were made prior to the time of this accident.

4. The respondent was not negligent in its maintenance of the road at the scene of the accident.

5. The patched area of the road where the accident took place was not the proximate cause of the accident.

The Court concludes that respondent was not guilty of negligence with respect to the accident of October 28, 1992, on which claimants base their claim.

Accordingly, the claim is denied.

Claim disallowed.

OPINION ISSUED DECEMBER 14, 1994

DICKSTEIN, SHAPIRO, &MORIN, L.L.P.
VS.
OFFICE OF THE TREASURER
(CC-94-626)

Claimant represents self.
Jamie J. Chenoweth, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $1,432.72 for legal services provided to the respondent. The invoice for the legal services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,432.72.

Award of $1,432.72.

OPINION ISSUED DECEMBER 14, 1994

RAYMOND F. ELTRINGHAM
VS.
DIVISION OF HIGHWAYS
(CC-94-393)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The above styled case was submitted to the Court based upon a stipulation of facts prepared and signed by the claimant, Raymond F. Eltringham, Sr., and respondent, Division of Highways. Both parties agreed to the stipulation freely and voluntarily in open court on December 1, 1994. The stipulation accepted the following statements as facts:

1. Claimant is the sole owner of property located at 1602 Allegheny Street in

Follansbee, West Virginia, and has lived there continuously since 1964.

2. Respondent is the owner of a galvanized culvert pipe located six feet from the foundation of claimant's residence. As the owner, respondent has control and maintenance responsibilities for the galvanized culvert pipe.

3. Due to deterioration of the galvanized culvert pipe, water flows from the pipe to the foundation of claimant's residence.

4. As a result of water flowing from the galvanized culvert pipe, claimant has experienced property damages.

5. Claimant has experienced the following property damages; damage to an embankment at the end of the galvanized culvert pipe where it empties into a creek, damage to the block construction and sub-basement of his home, a crack in the right corner of his home extending from the footer to the main floor level, deteriorating corner of his home extending from the footer to the main floor level, deteriorating corner blocks along the footer, water in the sub-cellar, a cracked porch rail, sinking porch supports, destruction of a retaining wall, and destruction of 60 feet of lawn.

6. The cost of repair the damages stated above is $4,487.28 as evidenced by Exhibit A attached to the stipulation.

The Court, having reviewed the stipulation, has determined that the respondent was negligent in its maintenance of the culvert adjacent to claimant's residence. This negligence was the proximate cause of the damages recited in the stipulation. Based upon the aforementioned stipulated facts and damages, the Court awards claimant $2,487.28.

Award of $2,487.28.

Exhibit A
Material List for Cost To Cure

Robert Scott Lumber Company	$243.34
Morelli Bros. Block & Brick Co., Inc.	$251.22
Weirton Ice & Coal Supply Co.	$337.72
General Rental Center	$775.00

Labor Estimated Costs & Hours

Back-Hoe Operator @ $15.00 per hr. for 24 hrs.	$360.00
Hand excavation of two laborers @ $6.50 per hr. for 40 hrs.	$520.00
Total Cost	$2,487.28

OPINION ISSUED JANUARY 27, 1995

BELL ATLANTIC-WEST VIRGINIA, INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-94-735)

Joseph J. Starsick, Jr., Attorney at Law, for claimant.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $117,620.02 for telephone services provided to respondent. The invoices for the telephone services were not processed for payment in the proper fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoices could have been paid.

In view of the foregoing, the Court makes an award in the amount of $117,620.02.

Award of $117,620.02.

OPINION ISSUED JANUARY 27, 1995

DAVID J. BELLAMY, JR.
VS.
DIVISION OF HIGHWAYS
(CC-94-227)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant, David J. Bellamy, Jr., seeks an award of $193.60 from respondent, Division of Highways, for property damage sustained while driving his vehicle west on Route 60 in Kanawha County.

The evidence presented at the hearing on August 4, 1994, established that at approximately 6:30 p.m., the claimant was driving his vehicle, a 1990 Plymouth Laser RS, west across the Chelyan Bridge on Route 60. As the claimant drove across the bridge at a speed of 10 to 15 miles per hour, his vehicle struck a hole in the surface of the bridge deck which was approximately one foot long by one foot wide and five to six inches deep. Although he saw the hole one car length before his vehicle struck it, he was unable to avoid the hole because of oncoming traffic. He stated that there were no signs warning of any defects in the road at the time of the accident, and he tries to avoid this bridge due to its poor condition. The claimant entered into evidence estimates for repairing the damages to his vehicle which totaled $693.60. After the hearing, the claimant provided the Court with a statement indicating he has insurance with a $500.00 deductible provision.

Mr. James Dingess, a supervisor for the respondent, testified he was responsible for road maintenance in the vicinity of the Chelyan Bridge. He stated that the Chelyan Bridge was in bad condition in March of 1994, but it was also in the process of being patched at this time. he explained that they were receiving a lot of complaints about the Chelyan Bridge because the harsh winter had caused severe deterioration of the bridge.

The Court has considered other claims which occurred on the Chelyan Bridge and has determined that respondent had notice of the deteriorated condition of the bridge. Therefore, the Court is of the opinion that respondent was negligent in its maintenance of this heavily traveled structure on the date of claimant's accident.

Accordingly, the Court makes an award to the claimant in the amount of $500.00 for the damages to his vehicle.

Award of $500.00.

OPINION ISSUED JANUARY 27, 1997

COMMUNITY COUNCIL OF KANAWHA VALLEY, INC.
VS.
GOVERNOR'S CABINET ON CHILDREN AND FAMILIES
(CC-94-840)

Frederick D. Booth, for claimant.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $4,024.00 for the costs of coordinating and providing a Statewide training session for respondent. The invoices for the training session were not processed for payment in the proper fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoices could have been paid.

In view of the foregoing, the Court makes an award in the amount of $4,024.00.

Award of $4,024.00.

OPINION ISSUED JANUARY 27, 1995

CORRECTIONAL MEDICAL SERVICES, INC.
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-94-847)

Michael G. Pfeiffer for claimant.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $25,753.63 for medical services rendered to inmates in the South Central Regional Jail Authority, a facility of respondent.

Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in the appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED JANUARY 27, 1995

JENNIFER F. DORSEY
VS.
DIVISION OF HIGHWAYS
(CC-94-234)

David A. Barnette, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Jennifer F. Dorsey, seeks an award of $404.00 from respondent. Division of Highways, for property damages sustained while driving her vehicle on March 18, 1994, on Route 1 in Boone County.

The evidence presented at the hearing on August 4, 1994, established that the claimant was driving her vehicle, a 1992 Mitsubishi Eclipse, on Route 1 in the Ashford area of Boone County. She was traveling between 35 to 40 miles per hour when her car struck a hole in the road surface. Claimant described the hole as being two feet in diameter and seven to nine inches deep. The hole was located in the middle of the road and had water in it. Although claimant had traveled on Route 1 about one week prior to her accident, she had not observed any holes in the road. She did not see the hole prior to her accident because it was filled with water. There were no warning signs or pylons to warn claimant of the defect in the road. After the accident, the claimant contacted the respondent to obtain a claim form and notify it of the hole. As a result of the accident, the claimant alleges $404.00 in damages to her car. Receipts were offered into evidence which totaled $290.39 to corroborate the damage claim. This amount includes $15.90 to repair the tire rim, $52.00 to realign the front end of the car, and $221.50 for two new tires. Claimant testified she purchased two new tires because she was unable to find a tire identical to the damaged tire. The remaining $113.61 of the claim is the replacement cost of the damaged tire rim. No receipts or written estimates were offered to the Court regarding this amount. After the hearing, claimant provided the Court with documents establishing she had full coverage insurance with a deductible of $500.00 at the time of the accident.

Herbert C. Boggs, maintenance assistant for the respondent, testified his responsibilities include road maintenance along Route 1 in Boone County. This is a priority road for maintenance purposes. During the days prior to March 18, 1994, road crews were engaged in snow removal and routine maintenance work. Mr. Boggs explained that snow removal takes priority over hole patching operations. He stated that he was aware of two holes on Route 1 prior to

claimant's accident but these had been patched. No recent complaints had been received by the respondent regarding a hole in the road surface in the vicinity of the accident prior to March 18, 1994. Mr. Boggs added that when complaints are received about holes in the road, they are typically corrected within a day.

The State is neither an insurer or guarantor of the safety of persons 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 defect in the road, it must have had either actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Department of Highways*, 16 Ct. Cl. 103 (1986). In the instant claim respondent had knowledge that there were two holes which needed maintenance because temporary patching material does not remain in holes. Respondent did not take the precaution to place warning signs or a pylon at the scene for the traveling public. The claimant had no opportunity to avoid the hole as it was filled with water. Therefore, the Court has determined that respondent was negligent in its maintenance of Route 1 on the date of claimant's accident.

Accordingly, the Court is of the opinion to make an award to the claimant for the replacement of one tire, the realignment, and the repair of the rim for a total amount of $179.64.

Award of $179.64.

OPINION ISSUED JANUARY 27, 1995

ROBERT WILLIAM FAWCETT AND PATRICIA LEE FAWCETT
VS.
DIVISION OF HIGHWAYS
(CC-94-267)

Claimants represent themselves.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants, Robert William Fawcett and Patricia Lee Fawcett, seek an award from respondent, Division of Highways, for damage to their vehicle which occurred on March 9, 1994. The evidence presented at the hearing established that Ms. Fawcett was driving a 1992 Geo Metro on Johnson Avenue in Bridgeport, West Virginia, at approximately 7:45 p.m. It was raining and Ms.

Fawcett estimated her speed at less than 25 miles per hour. As she proceeded around a curve, the vehicle struck a large hole in the road. The hole was described as three feet wide, two feet deep, and between 18 to 20 inches deep. Ms. Fawcett travels this road three times per week, but was unaware of this hole prior to the accident. No signs were posted int he general vicinity to warn the possible road defects. As a result of the accident, claimants have paid $30.25 for towing expenses, and $359.29 for repairs to their car. In addition, claimants seeks $191.50 to replace two damaged hubcaps. Claimants have insurance on their car with a $500.00 deductible.

Charles Herman Isner, Ms. Fawcett's brother, arrived at the scene of the accident shortly after it occurred. Mr. Isner examined the hole and estimated it to be 12 inches deep. He also observed several other cars strike the hole while helping his sister.

Michael Anthony Scott, Harrison County Maintenance Superintendent for respondent, testified his responsibilities include road maintenance in the vicinity of the accident. He described Johnson Avenue as a county road with a priority two rating. Mr. Scott was aware of road surface problems on Johnson Avenue, and explained they were crews patched Johnson Avenue on March 7, 1994, with a cold mix material. The cold mix material is temporary in nature, but is the only material available to the respondent during the winter months.

It has long been established that the State is not and cannot insure the safety of motorists on its highways. However, the respondent has the duty to use reasonable care to maintain streets in a safe condition. In the instant case, respondent was aware of the reoccurring problems on Johnson Avenue, and failed to install signs warning of road defects. The Court is of the opinion that the size of this particular hole is indicative of its existence for an extended period of time, and the need for immediate action by the respondent. Therefore, the Court is of the opinion respondent was negligent in its maintenance of Johnson Avenue on the day of the accident. In accordance with the principle of collateral sources, the Court makes an award to claimants in the amount of $500.00 which is their insurance deductible.

Award of $500.00.

OPINION ISSUED JANUARY 27, 1995

JUDITH P. GIBBS
VS.
DIVISION OF HIGHWAYS
(CC-94-360)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

On May 26, 1994, at approximately 8:30 a.m., claimant, Judith P. Gibbs, was driving her vehicle, a 1994 Honda Accord, on Howells Mill Road, also known as Cabell County Route 1. She was traveling between 30 and 35 miles per hour under clear and dry weather conditions. On this occasion an oncoming vehicle was attempting to avoid a hole in its lane, and in doing so, encroached upon claimant's driving lane. Claimant was forced to drive off the road to avoid a collision with the oncoming vehicle. As a result, claimant's vehicle struck a "crumbled" area along the edge of the road which damaged both side tires of her vehicle. Claimant seeks an award of $450.00 for the damages to her vehicle. Claimant has insurance with a $250.00 deductible.

Tom Thornburg, Cabell County Supervisor for the respondent, testified his responsibilities include road maintenance in the vicinity of the accident. He described County Route 1 as a secondary priority road with a blacktop surface and two traffic lanes. The deterioration of County Route 1 was attributable to the harsh weather conditions early in 1994, and heavy logging truck traffic. Furthermore, some of the logging trucks had been stopped for carrying excessive loads. Mr. Thornburg was also aware that County Route 1 had experienced edge failure in various places. For these reasons, a hot mix asphalt material was used to patch County Route 1 on June 8, 1994.

Although the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, it does owe a duty of reasonable care and diligence in the maintenance of roads within the State. *Parsons v. State Road Commission*, 8 Ct. Cl. 35 (1969). In order for respondent to be held liable for damages caused by a defect in the road, it must have had either actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Department of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent was aware of factors which placed it on notice of the road defect. Primarily, there were numerous heavy trucks traveling on County Route 1. Moreover, some of these trucks were known to be overloaded. Respondent was also aware the harsh weather early in 1994 had contributed to the deterioration of the road. The Court is not unmindful of the fact that this harsh weather also created numerous problems on the other roads in Cabell County, which needed to be corrected. However, the Court has determined that some type of remedial action should have been performed in this area prior to May 26, 1994. Therefore, the Court has determined the respondent was negligent in its maintenance of County Route 1 on the day of claimant's accident and an award should be made in this case. In accordance with the principle of collateral sources followed by this Court, an award is made in the amount of claimant's deductible, $250.00.

JANUARY 27, 1995

TIMOTHY B. HUMPHREY
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-94-825)

Claimant represents self.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks reimbursement of $79.00 for broken eye glasses. The eye glasses were broken in the line of duty while restraining an inmate at the South Central Regional Jail, a facility of respondent. The fiscal year ended before the request for reimbursement could be paid, therefore claimant has not been paid. In its Answer, respondent admits the validity and amount of t he claim, and states that there were sufficient funds expired in the appropriate fiscal year with which claimant could have been paid.

In view of the foregoing, the Court makes an award in the amount of $79.00.

Award of $79.00.

OPINION ISSUED JANUARY 27, 1997

JOHN LAFFERTY
VS.
DIVISION OF HIGHWAYS
(CC-94-256)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

Claimant, John Lafferty, seeks an award of $677.00 from respondent, Division of Highways, for property damage sustained while his wife was driving his vehicle on March 7, 1994, on Virginia Street in Oak Hill, West Virginia.

The evidence presented at the hearing on August 4, 1994, established that between

4:00 and 5:00 p.m., Mrs. Shelia Lafferty was driving her husband's 1985 Camaro on Virginia Street, also known as Route 61/18. Mrs. Lafferty testified it was a dry and sunny day, and she was following behind her husband approximately two car lengths when she noticed a hole in the road. She described the hole as being one and a half to two feet wide and six to eight inches deep. The hole was located on the right side of the road. As she approached the hole, she attempted to drive her vehicle to straddle the hole, but her vehicle went into the hole. After the Camaro struck the hole, she continued driving, however, she did notice the vehicle was making a noise. This was the first time Mrs. Lafferty had ever traveled this road. Once Mr. and Mrs. Lafferty reached their destination, the car was examined. It was determined from this examination that there was a broken gear in the rear end of the car. At the haring the claimant entered into evidence a receipt for the cost ob buying a rear disc brake for $477.00. He stated that the whole unit had to be purchased to replace the gear. He also explained that he felt obligated to pay his friend, Mr. Tommy Arrington approximately $60.00, but offered no corroborative evidence of this debt or payments made on the original debt. After the hearing the claimant submitted an insurance indicating the car was only covered by liability insurance.

Mr. John Zimmerman, a supervisor for the respondent, testified that he is responsible for road maintenance in the area of the incident. He stated he was aware of a recurring hole in the road in this area. He also explained that crews had patched Virginia Street on March 1, 1994, with a cold mix temporary patch, and they went back on March 11, 1994, to repatch areas which had broken loose.

The Court is well aware that the winter months of January and February 1994 were months with severe weather conditions which impacted the condition of all of the roads and highways throughout the State. The snow and rain created snow and ice conditions upon all of the roads and highways. Respondent, by necessity, concentrated its maintenance efforts upon snow and ice removal activities which had to take priority over all other maintenance activities. However, the facts in this claim establish that respondent had actual notice of the defect in the road, the severity of the defect, and the propensity for the temporary patching material to come out of the hole in a short period in time. Respondent did not take the precaution of placing a cone in the hole or place some other type of warning device for the traveling public. The hole was located in the travel portion of the road and in a curve. It was filled with water and respondent was aware that this area had a drainage problem so the hole was unusually filled with water. Claimant's wife had no knowledge of the hole in the road and she could not avoid it due to oncoming traffic. Therefore, the Court has determined that respondent was negligent in its maintenance of this area of Route 61/28.

In accordance with the findings of the Court as stated herein above, the Court makes an award to claimant in the amount of $677.00 for the damages to his vehicle.

Award of $677.00.

OPINION ISSUED JANUARY 27, 1995

PUBLIC EMPLOYEES INSURANCE AGENCY
VS.
DIVISION OF CORRECTIONS
(CC-94-810)

Donald L. Darling, Senior Deputy Attorney General, for claimant.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $11,906.68 for insurance premiums due for employees of the Anthony Correctional Center, a facility of the respondent state agency. The premiums were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the premiums could have been paid.

In view of the foregoing, the Court makes an award in the amount of $11,906.68.

Award of $11,906.68.

OPINION ISSUED JANUARY 27, 1995

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
VS.
DIVISION OF CORRECTIONS
(CC-94-827)

Jack Roop, Executive Director, for claimant.
Carol Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, Regional Jail and Correctional Facility, provides and maintains the Eastern

Regional Jail and the Central Regional Jail as facilities for the incarceration of prisoners who have committed crimes in various counties. Some of the prisoners held in these regional jails have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action in the amount of $851, 731.02, to recover the costs of housing prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the claimant, these prisoners have had to remain in the regional jails for periods of time beyond the dates of the commitment orders.

Respondent and claimant then filed a settlement document stating that the parties have agreed that the sum of $841,731.02 is a fair and reasonable amount to satisfy this claim.

This Court has determined in prior claims by claimant for the cost of housing inmates that respondent is liable to claimant for these costs, and that Court has made the appropriate awards. This issue was resolved by the Court previously in the claim of *County Comm'n. of Mineral County v. Div. of Corrections,* an unpublished opinion of the Court of Claims issued November 21, 1990, wherein the Court held that the respondent is liable for the cost of housing inmates.

In view of the foregoing, the Court makes an award to claimant in the amount of $841,731.02.

Award of $841,731.02.

OPINION ISSUED JANUARY 27, 1995

LEAH K. TORBETT
VS.
DIVISION OF HIGHWAYS
(CC-94-296)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Leah K. Torbett, seeks an award from respondent, Division of Highways for property damage sustained while driving her vehicle on April 3, 1994, in Ohio County.

The evidence presented at the hearing on September 29, 1994, established that the claimant was driving her vehicle, a 1988 Ford Taurus Wagon, south on Route 41, also known as the Dallas Pike Road, at approximately 9:15 a.m. The Dallas Pike Road is a two lane road with a priority two classification. While traveling at approximately 35 m.p.h., under normal conditions, the claimant's vehicle struck a large hole in the surface of the road. The hole was located to the right of the center line, and described as being the size of the bathtub. Due to oncoming traffic and a narrow roadway, the claimant was unable to avoid the hole. The claimant travels through this area twice a week and was aware of the poor condition of the road. Prior to the accident, she made no attempt to contact the respondent and complain about the road's condition. There were no signs in the area warning of road defects. As a result of the accident, the rear end of claimant's car was severely damaged. Receipts in the amount of $783.43, for repairs to the suspension, and $122.86, for two tires, were offered as proof of claimant's damages. After the hearing, claimant informed the Court that she had insurance coverage for the accident with a $250.00 deductible.

Thomas Simms, Ohio County supervisor for respondent, testified that his responsibilities include scheduling road maintenance work for the Dallas Pike area. Mr. Simms explained that heavy snowfalls during January, February, and March, 1994 required road crews to focus primarily on snow removal and ice control. As a result, snow and ice removal took priority over patching holes in the road. However, Mr. Simms produced documents indicating some temporary patching work as done in the area prior to the accident as weather conditions permitted. Mr. Simms was aware that his office had received telephone calls regarding the poor condition of the Dallas Pike Road.

For the respondent to be held liable for damage caused by a defect in the road it must have had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Department of Highways,* 16 Ct. Cl. 103 (1986). In the instant claim, the respondent was aware of complaints about the Dallas Pike Road and had patched it on several occasions.

After reviewing the record in this claim, the Court finds that the respondent had notice of the defective condition of Dallas Pike Road. Moreover, the size of the hole indicates the seriousness of the hazard it presented, and the need for immediate action on the part of the respondent. Therefore, the Court is of the opinion that the respondent was negligent in its maintenance of the Dallas Pike Road at the time and location of the accident. In accordance with the principle of collateral sources, the Court makes an award of $250.00.

Award of $250.00.

OPINION ISSUED JANUARY 27, 1995

ADOLFO M. TORRES
VS.

DIVISION OF HIGHWAYS
(CC-94-335)

Stephen L. Thompson, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Adolfo M. Torres, seeks an award of $766.22 from respondent, Division of Highways, for damages to his vehicle as a result of driving across an expansion joint.

On April 5, 1994, claimant was driving his vehicle, a 1993 Mitsubishi Eclipse, west on Interstate 64 at approximately 6:30 p.m. As claimant crossed the Fort Hill Bridge, his vehicle struck an expansion joint and estimated his speed to be between 50 and 55 miles per hour. After the incident, he continued driving home without any noticeable mechanical problems. However, the following morning he noticed the vehicle would vibrate while traveling at low speeds. The vehicle was examined by an auto mechanic and found to have three bent rims. An estimate of $766.22 for replacing the three wheels and aligning the front end of the vehicle was entered into evidence. Claimant testified he has insurance coverage for this incident and has received $560.26 from his insurance carrier. Claimant's out-of-pocked expenses were $205.94 which is the amount of his claim.

A former maintenance supervisor for respondent, Macie Legg, was familiar with the Fort Hill Bridge and the expansion joint struck by claimant. At the time of the accident temporary patching measurers were used to fill the expansion joint until a contractor could be hired to permanently fix the expansion joint. Mr. Legg noted that the expansion joint was located in an elevated curve which made it difficult to maintain.

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 it fails to exercise reasonable care and diligence in the road maintenance under all circumstances. Jones v. Dept. of Highways, 16 Ct.Cl. 36 (1985). The evidence reveals respondent was aware of the defective expansion joint. However, no evidence was offered to show respondent posted signs warning of the defect. In addition, the road defect was located on a major highway which is a heavily traveled interstate. Although respondent made attempts to remedy the problem, the Court finds the temporary patching of the expansion joint without any other warning devices inadequate for this road defect, Therefore, the Court finds respondent negligent in its maintenance of the Fort Hill Bridge at the time of claimant's accident.

In accordance with the principal regarding collateral sources, the Court makes an award of $205.96.

Award of $205.96.

OPINION ISSUED FEBRUARY 7, 1997

MR. AND MRS. JULIUS L. GALLOWAY, SR.
VS.
DIVISION OF HIGHWAYS
(CC-94-103)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Virginia Galloway, seeks an award of $454.00 from respondent, Division of Highways, for property damage arising from two separate incidents in which her car struck a break in the road and a hole.

From the evidence presented at the hearing on June 8, 1994, the claimant stated that she was uncertain of the date of the first incident, but had it occurred in January or February of 1994. At the time of the first incident, the claimant was driving her vehicle, a 1986 Chrysler New Yorker, east on U.S. Route 60 in the general vicinity of Montgomery, Kanawha County, at approximately 7:00 p.m. The claimant stated she was driving between 35 and 40 miles per hour when her automobile struck a break in the road. The break in the road was across the entire right lane, however, she was unable to see it until she was right up on it. The claimant travels this road weekly, and she speculated the break was a recent development. She also stated that there was nothing she could do to avoid the break, and upon impact the tire treads were broken in both front tires and the rack and pinion steering unit was damaged.

The claimant also testified that the second incident occurred at approximately 5:00 p.m. on February 27, 1994, while she was traveling east on Interstate 64, in the aforementioned vehicle. She stated that just before crossing the St. Albans Bridge she was traveling between 45 to 50 m.p.h. and her automobile struck a hole which broke both rear shocks. At the time of the incident, there was a sign warning traffic to slow down to 45 miles per hour. However, the claimant testified she was unable to see or avoid the hole before her automobile struck it. She also indicated that she had not traveled this road for about a year.

The claimant stated she did not inform the respondent of either of these incidents. The only insurance carried on the claimant's car was liability insurance. The claimant produced receipts for two tires, two shocks, and the installation of the rack and pinion steering unit. No receipts were offered for the price of the rack and pinion steering unit or the installation of the

shocks.

The Court having reviewed the evidence in this claim and the fact that respondent presented no witnesses, has determined that respondent was negligent its maintenance of U.S. Route 60 at this is a heavily traveled highway. The defect described by the claimant could not have occurred overnight. Therefore, the Court is the opinion that respondent had constructive, if not actual, notice of the defect. As to the incident which occurred on Interstate 64, the Court has determined that claimant was negligent in failing to take heed after having observed a warning sign placed by the respondent. Thus, the claim is denied.

The claimant established damages in the amount of $216.99 for the first incident for which the Court makes an award.

Award of $216.99.

OPINION ISSUED FEBRUARY 7, 1995

DWIGHT DAVID HALL
VS.
DIVISION OF HIGHWAYS
(CC-94-350)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Dwight David Hall, seeks an award of $448.23 from respondent, Division of Highways, for property damage sustained while driving his vehicle on April 2, 1995, in Wood County.

The evidence presented at the hearing on October 11, 1994, established that the claimant was driving her vehicle, a 1992 Isuzu Stylus, at approximately 25 miles per hour on Eight Avenue at 7:40 p.m., when his vehicle struck a hole in the surface of the road. The hole was located on the right side of the claimant's lane and estimated to be eight to ten inches deep. No signs were present warning of a defect in the road and the claimant did not see the hole prior to the accident. The claimant contacted the respondent and informed personnel of the hole on the first working day after the accident. As a result of the accident, the claimant alleges damage to his car's alignment, wheel, and tire. Although the Court was not provided with receipts for repairs to the car, an estimate totaling $448.23 was introduced into evidence to corroborate the alleged damages. However, the

actual repairs were made by someone other than the person who prepared the estimate. The claimant stated that the estimate was close to the actual cost of repairs. At the time of trial the claimant had repaired his vehicle except for the bent wheel. He attempted to fix the bent wheel instead of replacing it, but it still vibrated when the car was driven. The claimant has full coverage insurance with a $250.00 deductible. At the time of the hearing, the claimant had received payment from his insurance carrier for his damages in excess of his deductible.

Tim Swearing, a crew leader for the respondent in Wood County, testified his responsibilities include road maintenance in the area of the accident. According to his work logs, Mr. Swearingen was able to determine that he patched the hole struck by the claimant's vehicle on March 17, 1994. Instead of using the normal cold mix patch material he used a mixture of tar and number eight gravel. It was Mr. Swearingen's opinion that the tar and gravel patch remains in holes longer than the normal cold mix patch. Although complaints about Eighth Avenue were received prior to March 18, 1994, Mr. Swearingen was aware of any complaints made after March 18, 1994, and prior to the accident.

Although the State does not and cannot insure the safety of motorists on its roads, it does have a duty to exercise reasonable care and diligence in the maintenance of roads under all the circumstances. The evidence in this case reveals respondent knew of the hole and had repaired it with a temporary material. The hybrid patching material was different from that which is normally used by the respondent. The Court is of the opinion that respondent failed to exercise reasonable diligence in monitoring and maintaining the road.

In view of the foregoing, the Court makes an award in the amount of $250.00.

Award of $250.00.

OPINION ISSUED FEBRUARY 7, 1995

LARRY L. HILL
VS.
DIVISION OF HIGHWAYS
(CC-94-204)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Larry R. Hill, seeks an award of $1,849.62 from respondent. Division of Highways, for property damage sustained while driving his vehicle on March 12, 1994 or Route

25/5, between Cross Lanes and Dunbar, at approximately 15 miles per hour. As he approached an oncoming automobile, he slowed his automobile to five miles per hour and drove onto the berm of the road. Although the road was dry, the berm immediately gave way, causing claimant's automobile to slide over the embankment adjacent to the roadway. He stated that there were no warning signs along the road and there was nothing he could do to avoid the accident. The claimant reported the problem to the respondent two days after the incident. The claimant testified he travels Route 25/5 everyday, and that he is aware that it is not wide enough for two vehicles to pass without proceeding onto the berm. The claimant entered into evidence a receipt for $125.00 for towing expenses and an estimate $1,724.62 for repairing his car. The claimant does not carry insurance which will cover this accident.

The respondent did not present any evidence in this claim and the Court must determine the negligence of the respondent, if any, based upon the record before the Court. Claimant did not establish any notice to respondent as to the unstable condition of the berm. In fact, claimant did not realize the instability of the berm until he drove onto it. However, respondent was aware that this is a one-lane road and that vehicles traversing the road would necessarily have to traverse the berm in order to pass each other on this road. Thus, respondent had an obligation to maintain the berm properly to protect the traveling public using the road and the berm. The Court has determined that respondent was negligent in failing to warn the traveling of the unstable berm and/or to maintain the berm in stable condition.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $1,724.62 for the damages to his automobile.

Award of $1,724.62.

OPINION ISSUED APRIL 4, 1995

CHRISTOPHER CONLEY
VS.
DIVISION OF HIGHWAYS
(CC-94-401)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

On January 24, 1994, at 4:30 a.m., the claimant was driving his 1984 four wheel drive

Toyota truck north on Route 10 near the outskirts of Chapmanville, Logan County. While claimant was proceeding between 30 and 40 miles per hour, his vehicle struck a block of ice located in the center of the claimant's lane. The block of ice was approximately one and a half feet high and two feet wide. The claimant was unable to avoid the obstacle due to an oncoming truck and a steep hillside on each side of the vehicle. As a result of the accident, the vehicle sustained extensive damage to the steering unit and transmission. The claimant also suffered injuries to his neck and back. The claimant seeks a total award of $1,914.66 for repairs to his vehicle and medical expenses.

Route 10 is a two lane top priority road. The Logan County Assistant Supervisor, Curley Belcher, testified that his responsibilities include road maintenance along Route 10 near Chapmanville. He was unaware of any problems with obstacles on Route 10 either before or after the claimant's accident.

The record in this claim indicates that the block of ice was very similar in nature to rocks which fall upon roads throughout the State. Therefore, the Court will apply the same legal standard for the block of ice as it would for a rock upon the road. In past decisions the Court has adhered to the principle that the State neither insures or guarantees the safety of motorists on its highways, but is responsible for exercising reasonable care under all the circumstances in which it maintains the roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). Moreover, the Court has consistently held that the unexplained appearance of a rock upon the highway without a positive showing that the respondent knew or should have known of a defect is insufficient to justify an award. See *Hammond v. Dept. of Highways,* 11 Ct.Cl. 234 (1974); *Adkins v. Dept. of Highways,* 13 Ct.Cl. 307 (1980); *Coburn v. Dept. of Highways,* 16 Ct.Cl. 68 (1986).

A review of the evidence in this claim establishes that the respondent had no knowledge of the ice block, or that it should have known of the ice block had fallen onto the road. Therefore, the claimant has not proven the respondent was negligent. For these reasons, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED APRIL 4, 1995

WAYSIDE UNITED METHODIST CHURCH
AND REVEREND GARY R. PHILLIPS
VS.
DIVISION OF HIGHWAYS
(CC-94-574)

Gary R. Phillips, Pastor of Wayside Untied Methodist Church, for claimants.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

This claim was filed by the Wayside United Methodist Church and the Rev. Gary R. Phillips. The claimants request an award of $3,336.51 for flood related damages to personal property and a gravel parking lot. The claimant Wayside United Methodist Church is the owner of a church and parsonage located adjacent to Isner Creek Road near Elkins in Randolph County. Claimant Garry R. Phillips resided with his family in the parsonage. The claimants allege they suffered damages due to the respondent's negligent design and maintenance of a culvert under Isner Creek Road. They contend the culvert was too small to direct the appropriate flow of water into a drainage channel. In addition, the claimants contend this problem was compounded by debris which had not been removed from the culvert. The respondent asserts that it had no notice of any complaints concerning the culvert, and the flood occurred due to a combination of heavy rains and melting snow.

During the early morning hours of February 9, 1994, Dorothy Phillips, the wife of Rev. Phillips, was in the Church parsonage. Upon investigation a noise in the basement, she discovered twenty three and a half inches of water on the basement floor. Mrs. Phillips searched for the source of the water and determined it was coming from a culvert located on Isner Creek Road. She testified that the water was not flowing through the culvert. Instead, the water was flowing across the road and into the parsonage. Mrs. Phillips called the respondent several times during the course of the flood to inform the respondent of the problem.

Later that morning, Kimberly Rice and Jerrod Phillips arrived at the parsonage and helped Mrs. Phillips remove items from the basement. They also attempted to divert the water away from the parsonage and pump water out of the basement. Both Ms. Rice and Mr. Phillips testified that the culvert was not functioning properly. They explained that water was backing up at the culvert inlet and flowing across Isner Creek Road.

Lewis Gardner, an assistant supervisor for the respondent in Randolph County, is responsible for general maintenance of roads and culverts, including at issue in this clam. Mr. Gardner testified that a rainstorm began in the Elkins area on February 8, 1994, at 1:00 p.m. The rain continued to fall until 12:00 noon on February 9, 1994. As a result of the storm, the Elkins area received approximately three and a half inches of rain. The rain caused numerous flooding problems throughout the region. In response to these problems, Mr. Gardner assigned road crews to perform culvert cleaning operations beginning the evening of February 8, 1994. The numerous flooded areas and limited number of maintenance personnel required respondent to concentrate road work efforts on the highest priority roads before working on lower priority roads. Therefore, road crews were unable to answer Mrs. Phillips' complaint until three hours after receiving her first call.

On the day after the flood, Ray Bishoff, the chairman of the trustees of the Church, visited the Church property and inspected the damage. He took several photographs of the flooded area including the drainage culvert, the normal drainage channel, Isner Creek Road, the Church

parsonage, and washed out areas of the parking lot. The photographs and witness testimony indicate that water accumulated behind the uphill side of the Isner Creek Road embankment during the flood. When the water reached the top of the embankment, it flowed across the road, down the opposite embankment, across the driveway and parking lot, and into the parsonage basement. The photographs also indicate the elevation of Isner Creek Road is higher in elevation than the foundation of the parsonage.

As a result of the flood, portions of the parking lot were washed out. The parking lost has since been regraded, and 100 tons of stone had been placed on the parking lot. The total cost of repairing the parking lot was $750.00. Personal property located in the basement of the parsonage was also damaged by the flood waters. An itemized list of the damaged articles including their replacement value was entered into evidence. The total damage to personal property was estimated at $2,586.51.

Although Rev. Phillips as not at the parsonage when the flood occurred, he was aware of the weather conditions on and before February 9, 1994. He testified that the Elkins area had experienced a long hard winter, and had received a considerable amount of snow. Rev. Phillips added that when the flood occurred the temperature was relatively warm, the soil was saturated, and a considerable amount of rain had fallen. Neither Rev. Phillips or Mr. Bishoff were aware of any prior flood damage at the parsonage prior to February 9, 1994.

The standard for determining whether the respondent is liable for flood related damages was articulated by the Court in *Haught v. Dept. of Highways,* 13 Ct.Cl. 237 (1980).

> 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.

When applying this standard in the prior decisions, the Court has considered various factors to determine whether the flood damage was foreseeable. These factors include: Whether an unusually heavy rainfall occurred prior to the flood, *Hudson v. Dept. of Highways,* 15 Ct. Cl. 183 (1983); whether a water line break contributed to the flood waters, *Burger v. Dept. of Highways,* 16 Ct.Cl. 41 (1986); and whether the respondent was informed of a drainage problem prior to the flooding, and refused to timely correct the problem, *Johnson v. Dept. of Highways,* 13 Ct.Cl. 380 (1981).

After a careful review of the record in this claim, the evidence does not establish that respondent was negligent. The testimony of witnesses for both parties indicates that there was a heavy rainstorm in the Elkins area shortly before the flood. Other factors such as saturated soil conditions and melting snow also contributed to the volume of surface water runoff during the flood.

In addition, there was no indication of any prior flooding problems on the Church property which would have placed the respondent on notice of a problem. The damage suffered by the claimants is unfortunate, but under the circumstances of this claim the Court finds that the respondent was not negligent in the design or maintenance of the culvert.

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

Claim disallowed.

OPINION ISSUED MAY 3, 1995

BOBBY JARRELL
VS.
DIVISION OF HIGHWAYS
(CC-94-611)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Bobby Jarrell, seeks an award of $693.53 for damage to his 1983 Ford Ranger. The damage occurred on August 24, 1994, at approximately 12:00 noon in Kimberly, Fayette County. According to Jarrell, he was maneuvering his vehicle into a friend's driveway along County Route 61/24 when the door panel scraped against a metal post. The post was located approximately four feet from the road, one foot from the driveway, and extended two feet above the ground. Mr. Jarrell was not aware of the post prior to the accident. A repair estimate totaling $693.53 was entered into evidence to corroborate the amount claimed.

Shirl Burrow, the driveway owner, testified the metal post was left by a paving crew when County Route 61/24 was resurfaced. The post was used for supporting a road work sign. Although the sign was removed after the road was resurfaced, the post remained in a place for a year. Nonetheless, Ms. Burrow did not contact the respondent about the post until after Mr. Jarrell's accident.

Delbert Gilliam, a maintenance crew chief for the respondent in Fayette County, described County Route 61/24 as a secondary two lane road which receives a heavy amount of traffic. Mr. Gilliam did not know who put the metal post in the ground or why it was there. However, he was certain the respondent had not received any complaints about the post prior to the accident.

The respondent cannot be held liable for damages caused by a road defect unless the claimant proves that the respondent had actual or constructive notice of the defect and a reasonable time to eliminate the danger. In the instant case, the testimony of Ms. Burrow reveals that road crews used the metal post during road construction activities. This use indicates to the Court that the respondent was aware of the post and should have removed it after construction work was completed. Accordingly, the failure to remove the metal post constituted negligence on behalf of the respondent.

On the issue of damages, the estimated cost to repair the vehicle is $693.53. However, Mr. Jarrell testified that the vehicle is covered by insurance with a $500.00 deductible provision. Therefore, the Court makes an award of $500.00 to Mr. Jarrell.

Award of $500.00.

OPINION ISSUED MAY 3, 1995

LOWELL THOMAS KENNEDY
VS.
DIVISION OF HIGHWAYS
(CC-94-367)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

On February 15, 1994, at approximately 8:30 a.m., Bertha Kennedy was driving a 1990 Lincoln Mark VII owned by her husband, Lowell Thomas Kennedy, on Route 83, three-quarters of a mile east of Bradshaw, West Virginia. Ms. Kennedy was traveling 15 miles per hour around a curve when the vehicle crossed an ice-covered section of road, and slid into an embankment. As a result of the accident, the vehicle sustained damages in the amount of $1,369.00. The damages are covered by Mr. Kennedy's automobile insurance; however, the insurance policy has a $1,000.00 deductible. Ms. Kennedy is very familiar with this section of road, and testified road conditions were fair along Route 83 except in this one isolated area. Mr. Kennedy alleges there is a drainage problem at the scene of the accident which caused the icy condition.

On the morning of February 15, 1994, the McDowell County supervisor for the respondent observed the ice-covered area on his way to work. When he arrived at his office, at 7:30 a.m., he dispatched a cinder truck to treat the area. By the time the truck arrived, Ms. Kennedy had already wreaked.

The Court has consistently followed the holding in *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947), which established the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. Moreover, the State can neither be expected or required to keep its highways absolutely free of ice at all times, and the presence of an isolated patch of ice on a road during the winter is generally insufficient to charge the State with negligence. Cole v. Dept. of Highways, 14 Ct. Cl. 350 (1983).

In the instant case, the record reveals a cinder truck was enroute to the scene of the accident shortly after the respondent received notice of the condition. It is unfortunate the accident occurred, but the respondent was clearly taking appropriate action to remove the ice patch within a reasonable time of receiving notice of the problem. The record also lacks any evidence which supports a finding that a drainage problem existed which caused the ice to form on the road. It is not the role of this Court to draw conclusions regarding issues of causations in the absence of any supporting evidence. After a careful review of the evidence, the Court finds the claimant has not established the respondent was negligent in maintaining this road. Accordingly, the claim must be denied.

Clam disallowed.

OPINION ISSUED MAY 3, 1995

JOHN E. MOORE
VS.
DIVISION OF HIGHWAYS
(CC-94-394)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

On May 8, 1994, at approximately 2:00 a.m., John E. Moore was driving his vehicle, a 1989 Bronco II on Route 48 in Marion County. While proceeding between 30 and 35 miles per hour, Mr. Moore observed several rocks sliding off the hillside along the road. The rocks came to rest on the road directly ahead on Mr. Moore's vehicle and the vehicle struck at least one of the rocks. As a result of striking the rocks, the vehicle flipped over onto its top and was damaged beyond repair. Fortunately, Mr. Moore escaped the accident without bodily injury. Mr. Moore seeks an award of $7,075.00 for the loss of the vehicle. This amount is based upon the bluebook value of a 1989 Bronco II at the time of the accident, less his salvage recovery.

Prior to the accident, Mr. Moore had observed rocks on the road, and was aware of a rock slide problem along this section of road. In addition, Cathy Sue Moore, the claimant's wife, called respondent prior to the accident to complain about the falling rock problem. However, she was unable to remember when she called or with whom she spoke about the problem.

Route 48 is a two lane second priority road. The lanes are nine feet wide and the shoulder area is between 10 and 15 feet wide. Harold Swidler, a transportation crew chief for respondent, was aware of an ongoing rock slide problem at the scene of the accident. However, due to the natural typography of the land there are no feasible solutions to the rock slide problem other than careful monitoring of the slide are to determine when rocks must be removed from the road. Normally the slide area is most active in the spring. The respondent dispatches an employee who monitors the area once each evening during the spring months.

This Court has consistently followed the principle 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, 46 S.E.2d 81 (1947). For the claimant to prove his claim against the respondent, the evidence must show the respondent had either actual or constructive notice of the problem and has failed to take appropriate corrective action with a reasonable time. Typically, the respondent is not responsible for sudden and unexpected rock falls along its road. See *Hammond v. Dept. of Highways,* 11 Ct.Cl. 234 (1974); *Collins v. Dept. of Highways,* 13 Ct.Cl. 22 (1979).

In the instant claim, the claimant contends that some type of remedial action should have been taken to reduce or prevent the risk of rocks falling onto the road. However, the record reveals the respondent has established a system for monitoring the road's condition. Further, respondent does not have the ability to correct this rock slide problem. The evidence also establishes that the claimant was aware of the nature of this road and the possibility of rocks in the road. Although this condition is unfortunate, it is not an uncommon situation for low priority roads cuts through the mountainous terrain of West Virginia. Considering the many areas in this State where rock slides can occur and the millions of dollars necessary to correct these areas, this Court is not prepared to find the respondent negligent for failing to prevent the risk of a rock slide in the instant claim. Based upon the aforementioned reasons, the Court has determined that the respondent was not negligent in maintaining Route 48 at the time of the accident.

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

Claim disallowed.

OPINION ISSUED MAY 3, 1995

JAMES CORBIN PERINE
VS.

DIVISION OF HIGHWAYS
(CC-94-124)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, James Corbin Perine, seeks an award of $211.95 from the respondent, Division of Highways, for damage to the control arm of his vehicle, a 1987 Cutlass Cierra S.

On February 3, 1994, at approximately 7:30 a.m., Mr. Perine was traveling on Chestnut Street in Clarksburg, Harrison County. As he proceeded through he intersection of Chestnut Street and West Pike Street, his vehicle made a loud cracking sound as its left front tire dropped into a large hole in the road. Mr. Perine continued driving the vehicle for approximately ten miles without any noticeable problems.

On February 4, 1994, Waltraud Paula Perine, the claimant's wife, was driving the aforementioned vehicle on Route 50. Mrs. Perine drove the vehicle approximately ten miles prior to making a "quick" stop. After the brakes were applied, the vehicle became very difficult to steer, and Mrs. Perine knew something was wrong. She immediately drove the vehicle into the parking lot of a Midas repair shop. She discovered the left front tire was pinned against the body of the car. A mechanic at Midas determined the left front control arm on the vehicle was broken. As a result of the incident, Mr. Perine paid $211.95 to repair the vehicle. After the hearing, Mr. Perine provided the Court with an insurance document indicating he had full coverage automobile insurance with a $250.00 deductible provision.

Michael Anthony Scott, Harrison County Maintenance Supervisor for the respondent, was aware of several holes in the pavement at the intersection of Chestnut State and West Pike Street. Road crews repaired this area with cold mix patching material on January 28, 1994. Prior to this time road crews were primarily engaged in snow removal and ice control.

Ben Savilla, a claim investigator for the respondent, examined the broken control arm. Mr. Savilla testified he was familiar with this type of control arm and how it operated. After examining the fracture in the control arm, Mr. Savilla expressed his opinion that the control arm had broken all at once rather than over a period of time.

The Court has consistently found that the existence of a road defect does not in and of itself establish negligence on behalf of the respondent. The claimant must establish that the alleged road defect was the proximate cause of his damage. The Court will not make an award based upon speculation. *Charles v. Dept. of Highways,* 16 Ct. Cl. 123 (1986).

The claimant stated that he was aware of the defective condition of the road at the intersection of Chestnut Street and West Pike Street. His negligence in failing to drive in a reasonably careful manner was equal to or greater than any negligence on the part of the respondent.

The record in this case also reveals a unique situation involving a substantial amount of time between the road defect alleged to have caused the damages and the evidence of damages. Evidence presented by the respondent refuted the argument that this particular road defect causing the damages to claimant's vehicle. After a careful review of all the evidence in this case, the Court has determined that it would be speculative to find that claimant's vehicle was damaged when it struck the hole in the intersection, but the damage did not manifest itself until the vehicle was driven approximately twenty additional miles.

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

Claim disallowed.

OPINION ISSUED MAY 3, 1995

WALLACE B. WHITING
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM OF WEST VIRGINIA
(CC-94-377)

Claimant represents self.
John Dalporto, Assistant Attorney General, for respondent.

PER CURIAM:

The claimant, Professor Wallace B. Whiting, is a Chemical Engineering Professor at West Virginia University. Professor Whiting seeks an award of $1,960.52 from the respondent, Board of Trustees of the University System of West Virginia, for books which were stolen from his office in the Engineering Sciences Building, for books which were stolen from his office in the Engineering Sciences Building, on the campus of West Virginia University. The books were owned by Prof. Whiting and were used in connection with his work as an instructor. Prof. Whiting discovered the books were missing on April 20, 1993, at approximately 9:23 a.m. He did not know whether his office door was locked when the theft occurred. After he discovered the books were missing, Prof. Whiting contacted the West Virginia University Police. Officer McGee responded to the scene of the crime and prepared a crime report. The officer indicated in the crime report that the office was unlocked at the time of the theft. The officer also provided a list of the stolen books

to several college book stores in the tri-state area. The list of stolen books, their replacement cost, and the police crime report were submitted into evidence. Prof. Whiting alleges the respondent should be liable for the theft because his office is located directly opposite a stairwell and he is required to post his teaching schedule outside his office. These factors allow people to quickly come and go from his office and determine when he is present.

The respondent is not an insurer of a personal property kept in the private offices of its faculty members. Nor can the relationship between Prof. Whiting and the respondent be construed to establish a bailment between the parties. In order for the respondent to be held liable for this property loss, it must be shown that some negligent act on behalf of the respondent was the proximate cause of the loss.

In the instant case, there is nothing in the record which indicates the respondent has acted in a negligent manner. Prof. Whiting possessed the means with which to keep his door locked. By failing to do so he voluntarily exposed himself to the possibility of theft. The Court realizes the considerable difficulty the claimant may incur if certain personal books are not kept in his office, but this is a regrettable exposure for which Prof. Whiting may wish to consider obtaining insurance coverage. There being no actionable negligence established on the part of the respondent, this claim must be denied.

Claim disallowed.

OPINION ISSUED JUNE 5, 1995

RITA C. BROCK
VS.
DIVISION OF MOTOR VEHICLES
(CC-94-775)

Claimant represents self.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

The claimant, Rita C. Brock, seeks an award of $42.40 for damages to an article of her clothing. The damage occurred while Ms. Brock was working for the Division of Motor Vehicles in South Charleston. According to Ms. Brock, she was scooting her chair away from a metal desk when her skirt became snagged on the underside of a desk drawer and began to unravel. Ms. Brock was unaware of a possible problem with the metal desk and did not believe anyone else working in the office knew of the problem.

A review of the record in this case indicates the respondent was unaware of any potential for injury to Ms. Brock from the desk. Although Ms. Brock's accident is unfortunate, the respondent does not and cannot insure the clothing or personal property of its employees. Moreover, an examination of Ms. Brock's skirt revealed that it was only slightly damaged and did not appear to be destroyed or unwearable. Therefore, it is the decision of the Court to deny this claim.

Claim disallowed.

OPINION ISSUED JUNE 5, 1995

JACKIE HUNDLEY AND MARCIA HUNDLEY
VS.
DIVISION OF HIGHWAYS
(CC-95-08)

Claimants represent selves.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Jackie and Marcia Hundley, seek an award of $1,121.45 for damage to their vehicle, a 1992 Z-34 Chevrolet Lumina. The damage is a result of an accident which occurred on November 11, 1994, at approximately 4:30 p.m. On this occasion Mrs. Hundley was traveling 25 miles per hour on Route 119 in Logan County near the community of Cora. Due to construction work, traffic was stopped in the lane opposite to Mrs. Hundley's lane. As Mrs. Hundley proceeded around a curve a vehicle in the opposite lane was encroaching into her lane. She avoided the vehicle by driving along the far right edge of her lane. However, the edge of the pavement was broken and the claimant's vehicle struck the defect very hard. As a result of the accident, both wheels and tires on the right side of the vehicle were damaged. Shortly after the accident, Mrs. Hundley contacted the respondent through its office at Williamson and discovered the respondent was already aware of the pavement defect. At the time of the accident, the claimants had full coverage insurance on their vehicle with a deductible of $250.00.

The Logan County maintenance supervisor for the respondent, Hobert Adkins, described Route 119 as a top priority road. Although Mr. Adkins did not have personal knowledge of the defect at the time of Mrs. Hundley's accident, the Logan County office of the respondent was on notice of the defect. The normal procedure, when a complaint is received at the Logan County office, is for the clerk to inform either Mr. Adkins or a member of his staff in order for the complaint to be investigated. However, in the instant case the clerk did not inform Mr. Adkins or his staff of the road defect encountered by Mrs. Hundley.

This Court has consistently followed the principle that in order for the State to be held liable for damages caused by a defect in the road, it must have had either actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dept. of Highways,* 16 Ct.Cl. 103 (1986). The record in this case indicates the respondent was notified about the pavement failure struck by the claimants' vehicle but failed to take adequate measurers to correct the problem. Therefore, it is the decision of this Court that the respondent was negligent in maintaining Route 119 at the time the claimants' vehicle was damaged, and an award is made to the claimants int the amount of $250.00. This award represents the claimants' out-of-pocket expense of their deductible.

Award of $250.00.

OPINION ISSUED JUNE 5, 1995

RICKY LEWIS
VS.
STATE OF WEST VIRGINIA
(CC-93-220)

Claimant represents self.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, Ricky L. Lewis, seeks an award from respondent, State of West Virginia, under WV Code §14-2-13a. Claimant contends his constitutional rights have been violated, and as a result, he was unjustly arrested and incarcerated. Claimant also contends that the basis for these violations is racial prejudice.

According to the pleadings and exhibits, claimant went to the Clarksburg City Police Station in Harrison County, at 2:00 p.m., on September 28, 1990, where he requested assistance from an officer to apprehend and arrest an individual named Augustine Haymond for violation of a peace warrant. Patrolman J.W. McGahan, III, of the Clarksburg City Police, accompanied claimant to the Strand Pool Hall where Mr. Haymond was a patron. Patrolman McGahan informed claimant that he would not enter the private establishment to make an arrest. Claimant entered the establishment, without Patrolman McGahan, an announced that he was going to make a citizens arrest. Claimant proceeded to initiate an attack upon Mr. Haymond and dragged him to the front door of the establishment. Patrolman McGahan thereupon arrested the claimant and took him before Harrison County Magistrate Kenneth Gorby, where he was formally charged with the misdemeanor of battery.

On January 9, 1991, a two count felony indictment was returned by the Harrison County Grand Jury against the claimant. The two count indictment consisted of a felony and a misdemeanor charge for violation of WV Code §61-2-9 Malicious or unlawful assault; assault, battery; penalties.

On March 5, 1992, claimant entered into a plea agreement with the State of West Virginia wherein he agreed to plead guilty to the misdemeanor charge of battery, and in exchange the State agreed to make a motion to dismiss the felony charge. The Circuit Court of Harrison County entered an order accepting the plea agreement on March 6, 1992. The Order stated claimant was to serve 30 days in the Harrison County Correctional Center beginning March 13, 1992.

When deciding whether to grant or deny a motion to discuss a claim under WV Code §14-2-13a, the Court is required to review the claim to determine claimant's likelihood of success in accordance with the provisions in WV Code §14-2-13a (e) which states as follows:

> (e) The claim shall state facts in sufficient detail to permit the court to find that claimant is likely to succeed at trial in proving that (1) in the case of an unjust arrest or imprisonment with a warrant, information or indictment which was subsequently dismissed that another person was arrested or prosecuted and convicted for the same offense or offenses, and (2) in the case of an unjust conviction and imprisonment that the did not commit any of the acts charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state, and (3) he did not by his own conduct cause or bring about his conviction. The claim shall be verified. If the Court finds after reading the claim that claimant is not likely to succeed at trial, it shall dismiss the claim, either on its own motion or on the motion of the state.

In this instant claim, the State has filed a Motion to Dismiss upon which this claim is now before the Court.

The Court, having reviewed the Motion to Dismiss and the above-cited statutory provision, is of the opinion that the claimant is unlikely to succeed at trial based upon the facts and circumstances of claimant's arrest and guilty plea. The Court has determined that the claimant cannot meet any of the requirements of subsection (e). It may be possible for the claimant to bring an action in some other State or federal court, but at this time the Court of Claims is not a forum available to the claimant to pursue a claim based upon an unjust arrest and imprisonment. Therefore, the Court must grant the Motion to Dismiss filled on behalf of the State of West Virginia and deny this claim.

Claim disallowed.

OPINION ISSUED JUNE 5, 1995

JAMES WITHROW
VS.
DIVISION OF HIGHWAYS
(CC-95-07)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, James Withrow, seeks an award of $2,879.78 for damage to his vehicle, a 1984 Lincoln. On the evening of November 30, 1994, the claimant's son, James Withrow, Jr., was driving the 1984 Lincoln on Route 61 near the mouth of Armstrong Creek. Road conditions were clear and dry. Suddenly, rocks and other debris began falling onto the road and the vehicle. A vehicle traveling in front of Mr. Withrow, Jr. immediately stopped, and Mr. Withrow, Jr. was unable to avoid a collision with the stopped vehicle. Mr. Withrow, Jr. is familiar with this area, but has never informed the respondent about a possible rock slide problem at this location.

Debra Gilliam, a Fayette County crew chief for the respondent, is responsible for general road maintenance in the vicinity of the accident. Mr. Gilliam was unaware of a rock slide problem in this area, and was aware of only one other rock slide at this location during the five years prior to November 30, 1994. However, he noted that falling rock signs were located approximately half a mile from the slide area. Mr. Gilliam did not know of any other feasible action which could have prevented the danger of rock slides in this area.

The respondent is not and cannot guarantee the safety of motorists traveling on its highways *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947. The mountainous terrain of West Virginia requires the respondent to build and maintain a large number of roads through areas with a potential for rock slides. However, the amount of money and labor necessary to entirely eliminate the danger associated with rock slides far exceeds the budgetary limits of the respondent. Therefore, this Court has consistently held that unexplained falling rocks, without a positive showing that the respondent knew or should have known of a dangerous condition and should have anticipated injury to person or property, is insufficient to justify an award. *Hammond v. Dept. of Highways*, 11 Ct.Cl. 234 (1977).

A careful review of the facts as established by the record indicates to the Court that the respondent was not negligent in its maintenance of Route 61 on November 30, 1994. The record reveals that no rock slides have occurred at this location during the five years prior to the accident. In addition, road conditions were dry and no evidence was introduced to establish the respondent had

notice of an imminent rock slide. The respondent also posted falling rock signs in the area to warn motorists of the possibility for falling rocks. Therefore, for the reasons mentioned above, this claim is denied.

Claim disallowed.

REFERENCES

- BERMS
- BRIDGES
- CONTRACTS
- DAMAGES
- DRAINS and SEWERS
- FALLING ROCKS--See also Landslides
- INTEREST
- LANDSLIDES
- LEASES
- LIMITATION OF ACTIONS
- MOTOR VEHICLES, Division of
- NEGLIGENCE--See also Motor Vehicles, Streets and Highways
- NOTICE
- OFFICE EQUIPMENT and SUPPLIES
- PRISONS AND PRISONERS
- PUBLIC EMPLOYEES
- STATE AGENCIES
- STREETS and HIGHWAYS--See also Falling Rocks; Landslides; Negligence
- TREES and TIMBER
- TRESPASS
- VENDORS
- WILD ANIMALS
- W. VA. UNIVERSITY

BERM

HILL VS. DIVISION OF HIGHWAYS (CC-94-204)

The claimant drove onto the berm on Route 25/5 in order to make room for oncoming traffic and the berm gave way. The Court said respondent knew that this was a one-lane road, that vehicles would have to travel on the berm to pass each other, and that therefore respondent had a duty to maintain the berm in safe manner. Award of $1,724.62. . . . . p. 148

LUCAS VS. DIVISION OF HIGHWAYS (CC-91-348)

Claimant was injured and his father's pick-up truck was damaged when, as a result of a blown tire, claimant drove off the berm onto a grassy area and encountered an exposed I-beam installed by respondent. The Court said the berm area had been rendered unsafe for an emergency situation. Award of $4,720. . . . . .

p. 5

O.J. TRUCKING COMPANY, INC. VS. DIVISION OF HIGHWAYS (CC-93-22)

Claimant brought an action for damages to its coal truck, when a berm gave way just before a bridge and the truck tipped into a creek. The Court found that claimant routinely overloaded its trucks and disallowed the claim. WV Code §17C-17-9.$1,724.62. . . . . p. 19

RUTLEDGE VS. DIVISION OF HIGHWAYS (CC-94-47)

Where claimant was forced onto the berm area to avoid oncoming coal truck, the Court found that respondent had notice of the pothole and failed to maintain the road in proper condition for the traveling public.$1,724.62. . . . . p. 117

THOMPSON VS. DIVISION OF HIGHWAYS (CC-93-181)

Where claimant struck a pothole approximately five to seven inches deep, which extended into the berm, the Court said a hole of this size in the pavement would not have developed overnight. Respondent had constructive notice of the hole. Respondent struck the hole after moving to the right to avoid oncoming traffic, constituting an emergency. Accordingly, respondent had a duty to maintain the area safe for use under such circumstances. Award of $311.18.$1,724.62. . p. 77

TULLIUS VS. DIVISION OF HIGHWAYS (CC-93-6)

Claimant's vehicle was damaged when he was forced onto the berm to avoid an oncoming vehicle which had crossed the center line. Claimant encountered a washed-out area on the berm, which was owned by a bar. The Court said the respondent has a duty to enforce WV Code §17-6-9, requiring property owners fronting state roads to properly maintain the area.
Award of $500.00.$1,724.62. . . . . p. 24

BRIDGES

ADAMS TRUCKING AND SUPPLY, INC. VS. DIVISION OF HIGHWAYS (CC-93-81)

Respondent's bridge collapsed when claimant's driver crossed it with a load of limestone. Where the evidence was speculative as to whether claimant's driver inspected the bridge prior to crossing it, the Court found that essential testimony was missing. Claim disallowed. . . p. 12

BELLAMY, DAVID J. VS. DIV. OF HIGHWAYS (CC-94-227)

Claimant's vehicle struck a hole on the Cheylan Bridge. The evidence was that the respondent was aware of the ongoing deteriorating condition of the bridge and was in the process of making repairs to same. The Court said the bridge is heavily traveled and the respondent had notice of its poor condition. Award of $500.. . . . . p. 133

BOOTH VS. DIVISION OF HIGHWAYS (CC-92-76)

Claimant-pedestrian sought an award for pain and suffering after falling through a gap between the sidewalk and guardrail on respondent's bridge. The Court found that the respondent had notice of the defect, that claimant was aware of the hazard and was also intoxicated. Claim disallowed.. . . . . p. 1

BRADLEY VS. DIVISION OF HIGHWAYS (CC-94-63)

The Court awarded $720.79 in damages to his suspension when his vehicle encountered holes in the Lee Street Bridge in Charleston. The Court made an award for the claimant, saying respondent knew or should have known of the severity of these holes.. . . . . p. 107

CROAFF VS. DIVISION OF HIGHWAYS (CC-93-158)

The Court awarded $115.91 in wheel and tire damage after claimant's car encountered a hole in a bridge maintained by respondent. Respondent had placed a steel plate over the hole previously, which was not secured and had become displaced.. . . . . p. 86

FIELDS VS. DIVISION OF HIGHWAYS (CC-93-140)

Where claimant slipped on snow and fell from a walking bridge, and where claimant knew of the gaps in the bridge fencing while respondent had no such notice, the claim will be disallowed.. . . . . p. 89

FOWLER VS. DIVISION OF HIGHWAYS (CC-94-10)

Where claimant's vehicle was damaged when a steel plate covering a hole in the bridge had moved, and where the respondent had received numerous complaints about the deteriorating condition of the bridge, the Court awarded $106.20 for damage to claimant's tire.. . . . p. 109

NAVARRO VS. DIVISION OF HIGHWAYS (CC-93-27)

Claimant's vehicle was damaged when it struck a hole in a bridge. The Court found that respondent had known that the road in this area was deteriorated. Award of $250.. . . . . p. 43

SAMS, ET AL. VS. DIVISION OF HIGHWAYS (CC-92-84)

Claimants, guardians of two infants, brought a claim for personal injuries sustained when the two children fell from a bridge when a guardrail gave way. The Court found that respondent had inspected the bridge previously and had prepared a report documenting the need for repairs. Award of $11,029.81.. . . . . p. 48

SHAMBLIN, CHARLOTTE A. VS. DIV. OF HIGHWAYS (CC-94-166)

Claimant's vehicle was damaged after encountering a hole on the Tuppers Creek bridge. Although the respondent must by necessity concentrate maintenance efforts on snow and ice removal during the winter months, the Court found that the respondent was aware of the ongoing deteriorating condition of the bridge in question and had a duty to place warning signs to alert drivers of the poor condition of the bridge deck. Award of $197.05.. . . . . p. 119

CONTRACTS

FAHLGREN, INC., VS. LOTTERY COMMISSION (CC-93-473)

Where the Attorney General refused to approve a change order in claimant's advertising contract, and where claimant performed the advertising services for which it should be compensated, the Court held that claimant should recover *quantum meruit*. Award of $200,000.. . . . p. 83

DAMAGES

RIGGAN VS. DIVISION OF HIGHWAYS (CC-94-136a)
SAMMS VS. DIVISION OF HIGHWAYS (CC-94-136b)

In an action for damages when claimant's van struck a large pothole, the Court awarded lost wages, cost for substitute transportation and a damaged antennae. The Court disallowed a claim for $80 for missed ice-skating classes because claimant's daughter was injured.. . . . . p. 126

DRAINS, SEWERS and WATER DAMAGE

ANDERSON VS. DIVISION OF HIGHWAYS (CC-91-67)

Claimants sought compensation for flooding they alleged was caused by respondent's failure to clear debris from a box culvert abutting their property. The Court said that while there is evidence of flooding, there is insufficient evidence that respondent was negligent in placement of the drainage system.. . . . . p. 95

ELTRINGHAM VS. DIVISION OF HIGHWAYS (CC-94-393)

Parties stipulated that deterioration of galvanized pipe caused water flow to be directed to the foundation of claimant's residents. Award of $2,487.28.. . . . . p. 131

MILLER VS. DIVISION OF HIGHWAYS (CC-91-185)

Claimants alleged water damage to their real property over a nine-year period dating back to 1981, resulting from placement of a culvert by respondent. The Court ruled that it will only make an award for damages incurred within two years prior to filing of the claim on January 3, 1991. WV Code §§55-2-12, 55-2-19, 14-2-21. Award of $14,996.84.. . . . . p. 16

PANDELOS, d.b.a ESQUIRE SUPPER CLUB, INC. VS. DIVISION OF HIGHWAYS (CC-92-287)

Claimant sought compensation for water damage and flooding to his property caused by run-off from WV Route 88 in Ohio County, which clogged drains and undermined pavement in the parking lot. The Court said there were many contributing factors, including the age of the pavement and runoff from other sources. Claim disallowed.. . . . . p. 103

SCHANZ VS. DIVISION OF HIGHWAYS (CC-93-230)

Where claimant was experiencing water drainage problems from I-64 run-off, and where the problems ceased to exist following installation of a leach bed and drainage pipe by respondent, the Court awarded $1,117.94 for property damage.. . . . . p. 72

STEPP VS. DIVISION OF HIGHWAYS (CC-93-114)

The Court disallowed a claim for flood damage to claimant's property where the respondent had installed adequate drainage on the road for normal rainfall but that the damage was caused by excessive snowmelt and heavy rainfall.. . . . . p. 118

WAYSIDE METHODIST CHURCH, ET AL. VS. DIVISION OF HIGHWAYS (CC-94-574)

Claimant sought $3,336.51 for flood-related damages caused by negligent design and maintenance of a culvert near Elkins. The Court said adequate drainage and proper culverts must be maintained to protect against foreseeable flood damage. The Court disallowed the claim on the basis that there had been unusual rainfall on top of saturated ground conditions. . . . . p. 150

FALLING ROCKS -- See also Landslides

BRYANT VS. DIVISION OF HIGHWAYS (CC-94-128)

Claim for damage caused by rocks that had fallen on the road. The Court found respondent had no notice of the hazard. Claim disallowed.. . . . . p. 97

CONLEY VS. DIVISION OF HIGHWAYS (CC-94-401)

Claimant struck a block of ice in the center of his lane on Route 10. The Court said that it will apply the same legal standard that applies in rock fall cases. Without a positive showing that the respondent knew or had reason to know of the defect or hazard, the claim will be disallowed.. . . . . p. 149

EARP VS. DIVISION OF HIGHWAYS (CC-93-71)

The Court awarded $494.23 for damage caused by rockfall, where respondent, while not on notice of this particular rock fall, did have notice of multiple other rock falls in the area and was aware of the continuing problem.. . . . . p. 60

HUGHES VS. DIVISION OF HIGHWAYS (CC-94-36)

The Court denied an award where claimant's vehicle had been damaged by rock debris, as respondent had no notice that there had been a rockfall and it was unclear when "Falling Rock" rock signs had been installed. . . . . p. 112

SMITH VS. DIVISION OF HIGHWAYS (CC-93-58)

Where claimant's car was damaged when he encountered a rock slide, and the evidence indicates that a warning sign had been posted and that respondent had no actual notice of the slide, the Court disallowed a claim for damage to claimant's car.. . . . . p. 22

VIA VS. DIVISION OF HIGHWAYS (CC-93-8)

The Court disallowed a claim for damage caused by rocks scattered on the road which had come from respondent's stockpile. The Court found no actual or constructive notice. Claim disallowed.. . . . . p. 25

WITHROW VS. DIVISION OF HIGHWAYS (CC-95-07)

The mountainous terrain of West Virginia requires respondent to build a large number of roads with potential for rock slides. Respondent lacks sufficient funding to entirely eliminate the danger of rock slides. Unexplained rock slides, without a positive showing that respondent knew or should have known of the dangerous condition is insufficient to justify an award. *Hammond vs. Dept. of Highways*, 11 Ct. Cl. 234 (1977).. . . . . p. 162

INTEREST

MILBURN COLLIERY COMPANY VS. DEPT. OF COMMERCE, LABOR AND ENVIRONMENTAL RESOURCES (CC-93-137)

Claimant sought $84.51, which represents the interest lost on funds deposited for posting a bond with respondent. The Court allowed the award, as the respondent conceded that claimant did not receive its refund in a timely fashion.. . . . . p. 42

MPL CORP. VS. BOARD OF COAL MINE SAFETY AND TECHNICAL REVIEW COMMITTEE (CC-93-80)

The Court awarded $1,519.25 for computer services provided respondent. The invoice was not provided in the proper fiscal year. Respondent admitted the validity of the claim and stated that there were sufficient funds expired in the appropriate fiscal year from which the claim could have been paid. The Court denied interest. WV Code §14-2-12.. . . . . p. 8

LANDSLIDES -- See also Falling Rocks

BAILEY VS. DIVISION OF HIGHWAYS (CC-92-324)
LUCION VS. DIVISION OF HIGHWAYS (CC-92-335)

Claimants sought compensation for damage to their property caused by two rock and landslides in July 1992, which originated from a nearby embankment supporting WV Secondary Route 7 in McDowell County. Respondent had received complaints about surface water coming down the embankment and was on notice of its instability.
Award of $5,784.95 and $5,943.04.. . . . . p. 55

MOORE VS. DIVISION OF HIGHWAYS (CC-94-394)

Where claimant was aware of rock fall hazards on Route 48 and where respondent had instituted a system of monitoring the road section for rock fall hazards, the Court said the respondent could not be responsible for preventing rock slide on all secondary roads within the state. Claim disallowed. . . . . p. 154

SMITH VS. DIVISION OF HIGHWAYS (CC-93-58)

Where claimant's car was damaged when he encountered a rock slide, and the evidence indicates that a warning sign had been posted and that respondent had no actual notice of the slide, the Court disallowed a claim for damage to claimant's car.. . . . . p. 22

LEASES

KANAWHA COUNTY COMMISSION VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-93-427)

The claimant leased office and parking space to law masters, employees of respondent. Where both parties failed to detect an error in the amount of monthly lease payments submitted to claimant, the Court awarded $18,896.00 in back rent due. . . . . p. 67

PUTNAM COUNTY COMMISSION VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-94-22)

The Court awarded $14,850 for back rent due to the claimant for law master's office space. Respondent was responsible for paying the rent for law masters.. . . . . p. 85

LIMITATION OF ACTIONS

MILLER VS. DIVISION OF HIGHWAYS (CC-91-185)

Claimants alleged water damage to their real property over a nine-year period dating back to 1981, resulting from placement of a culvert by respondent. The Court ruled that it will only make an award for damages incurred within two years prior to filing of the claim on January 3, 1991. WV Code §§55-2-12, 55-2-19, 14-2-21. Award of $14,996.84.. . . . . p. 16

MOTOR VEHICLES

BROCK VS. DIVISION OF MOTOR VEHICLES (CC-94-775)
The claimant-employee sought an award for damage to her skirt, which got stuck on a desk drawer and began to unravel. Claim disallowed.. . . . . p. 158

NEGLIGENCE -- See also Streets and Highways

DAWSON VS. DIVISION OF HIGHWAYS (CC-92-406)
The Court disallowed a claim for damage to claimant's car when it was struck by a deer on respondent's highway. The Court said there is no way to ensure deer will not cross the road. Claim disallowed.. . . . . p. 2

FLESHMAN VS. DIVISION OF HIGHWAYS (CC-94-152)
The Court disallowed a claim for pothole-related vehicle damage, saying that during the winter, the respondent must concentrate maintenance efforts on snow and ice removal.. p. 108

HARRIS VS. DIVISION OF HIGHWAYS (CC-93-157)
Claimant's son was injured when he road is bicycle through a three-way intersection when he was struck by a car. Claimant's sought installation of a four-light traffic control device. The Court has no statutory authority to order a light to be installed. Claim disallowed.. . . . . p. 92

PERINE VS. DIVISION OF HIGHWAYS (CC-94-124)
Where claimant encountered a pothole and the car was driven approximately 20 miles before becoming difficult to steer, the Court said it would not speculate as to what caused the control arm to break. Claimant's negligence was equal to or greater than any negligence on the part of respondent. Claim disallowed.. . . . . p. 156

SAMS, ET AL. VS. DIVISION OF HIGHWAYS (CC-92-84)
Claimants, guardians of two infants, brought a claim for personal injuries sustained when the two children fell from a bridge when a guardrail gave way. The Court found that respondent had inspected the bridge previously and had prepared a report documenting the need for repairs. Award of $11,029.81.. . . . . p. 48

SIMMONS VS. DIVISION OF HIGHWAYS (CC-93-64)
Where claimant's car slid into a rock cliff after encountering ice on the road, and where a sign warning of ice conditions was located in weeds on the berm, the Court said there was nothing respondent could do to remedy water-related problems on the road due to underground springs. However, the court said the signs were insufficient to warn against ice when the road surface and weather, on a whole, were dry. The Court awarded the amount of claimant's insurance deductible: $250. . . . . p. 74

STICKLEY, ET AL. VS. DIVISION OF HIGHWAYS (CC-93-227)
The claimant was rendered unconscious for three weeks after she lost control of her vehicle and struck a tree. Claimant alleged there had been an elevated portion of the road near the berm that caused her to lose control. The court said the claimant was careless in and non-attentive to the operation of her car. Claim disallowed.. . . . . p. 127

TRI-STATE SALVAGE VS. DIVISION OF HIGHWAYS (CC-92-260)
The Court disallowed an award when claimant's truck turned over on its side after the driver pulled over onto an unstable part of the berm on an I-77 entrance ramp. The Court said the driver should have known the area was not safely designated for parking.. . . . . p. 120

WAYSIDE METHODIST CHURCH, ET AL. VS. DIVISION OF HIGHWAYS (CC-94-574)
Claimant sought $3,336.51 for flood-related damages caused by negligent design and maintenance of a culvert near Elkins. The Court said adequate drainage and proper culverts must be maintained to protect against foreseeable flood damage. The Court disallowed the claim on the basis that there had been unusual rainfall on top of saturated ground conditions. . . . . p. 150

WILLIAMS VS. DIVISION OF ENVIRONMENTAL PROTECTION (CC-93-422)
The Court disallowed a claim for pollution of claimant's well water, which resulted from a leak in an abandoned oil and gas well. The Court held that WV Code §22B-5-1, et seq., the WV Abandoned Well Act, does not establish a cause of action against the state for problems caused by abandoned wells. . . . . p. 101

NOTICE

BRYANT VS. DIVISION OF HIGHWAYS (CC-94-128)
Claim for damage caused by rocks that had fallen on the road. The Court found respondent had no notice of the hazard. Claim disallowed.. . . . . p. 97

FERNATT, MICHAEL AND BRENDA VS. DIV. OF HIGHWAYS (CC-92-374)
The Court disallowed a claim where the claimant's vehicle struck a tire lying in the road as the respondent had no actual or constructive notice of the road hazard or reasonable opportunity to take corrective action.. . . . . p. 87

GALLOWAY VS. DIVISION OF HIGHWAYS (CC-94-103)
Claimant was driving 35 to 40 miles per hour on US Route 60 near Montgomery, a heavily traveled road, when she encountered a break in the pavement across the entire right lane. The Court said this defect could not have occurred overnight and therefore the respondent had constructive, if not actual, of the defect. Award of $216.99.. . . . . p. 145

GRIMMET, JOHN P. II VS. DIV. OF HIGHWAYS (CC-93-1)

Where claimant's vehicle was damaged after striking a hole in the pavement on a heavily traveled road within a mile of the respondent's headquarter's and where the respondent's road supervisor stated he might have noticed the hole prior to the accident, the Court found the respondent had actual or constructive notice of the road defect. Award of $500.. . . . . p. 63

JETT VS. DIVISION OF HIGHWAYS (CC-94-110)

The Court disallowed a pothole claim, saying that during the winter months respondent's employees were occupied with snow and ice removal and had no notice of the pothole.. p. 100

THOMPSON VS. DIVISION OF HIGHWAYS (CC-93-181)

Where claimant struck a pothole approximately five to seven inches deep, which extended into the berm, the Court said a hole of this size in the pavement would not have developed overnight. Respondent had constructive notice of the hole. Respondent struck the hole after moving to the right to avoid oncoming traffic, constituting an emergency. Accordingly, respondent had a duty to maintain the area safe for use under such circumstances. Award of $311.18.. . . . . p. 77

OFFICE EQUIPMENT and SUPPLIES

IBM CORP. VS. DEPT. OF TAX AND REVENUE (CC-93-403)

The Court made an award of $1,012.00 for computer equipment provided respondent. The invoice was not processed in the proper fiscal year. Respondent admitted the validity of the claim and stated that there were sufficient funds expired in the appropriate fiscal year from which the claim could have been paid.. . . . . p. 40

PRISONS and PRISONERS

ADKINS VS. DIVISION OF CORRECTIONS (CC-92-248)

The Court awarded $150.00 in compensation for a lost ring, entrusted to respondent when claimant was an inmate at the West Virginia State Penitentiary at Moundsville.. . . . . p. 29

CABELL COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-93-394)

The Court awarded $168,150.00 for claimant's cost of housing inmates sentenced to a state penal institution, but who have remained in custody of the county for periods of time beyond the date of commitment order. *County Commission of Mineral County vs. Div. of Corrections*, Unpublished opinion issued November 21, 1990. See also:. . . . . p. 32

BOONE COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-94-21) . . . .

Award of $74,025.00.. . . . . p. 57

RALEIGH COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-94-9)

Award of $32,161.78.. . . . . p. 71

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY VS. DIVISION OF . CORRECTIONS (CC-93-329)
Award of $579,335.69.. . . . . p. 47

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY VS. DIVISION OF CORRECTIONS (CC-94-827)
Award of $841,731.02.. . . . . p. 142

UPSHUR COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-93-380)
Award of $25,953.95.. . . . . p. 79

HAWLEY VS. DIVISION OF CORRECTIONS (CC-93-385)
The Court awarded $200.00 as the fair and reasonable value of missing items contained in a package mailed to the claimant at Pruntytown Correctional Center, a facility of the respondent.. . . . . p. 65

HUMPHREY VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-94-825)
The Court awarded $75 to a jail employee whose glasses were broken during an altercation with an inmate.. . . . . p. 139

LEWIS VS. STATE OF WEST VIRGINIA (CC-93-220)
Claimant seeks an award for unjust arrest and imprisonment after he pleaded guilty to misdemeanor batter. Claimant was arrested after initiating an attack upon a third party in an attempt to make a citizens arrest. The Court granted the state's motion to dismiss on the grounds that claimant was unlikely to prevail on the merits of his claim. WV Code §14-2-13a(e).. . . p. 160

PORTER VS. DIVISION OF CORRECTIONS (CC-92-164)
The Court awarded $1,163.08 for damage to claimant's home caused by an escape from the State Penitentiary at Moundsville, a facility of the respondent.. . . . . p. 70

SMITH VS. STATE OF WEST VIRGINIA (CC-93-29)
Claimant brought an action for compensation for unjust arrest, following dismissal of sexual assault charges. The court disallowed the claim because no other person was arrested or prosecuted or convicted of the offense for which the claimant was arrested. WV Code §14-2-13a(c).. p. 93

ST. ALBANS PSYCHIATRIC HOSPITAL, INC., VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-93-128)
The Court awarded $13,372.97 for the cost of caring for a juvenile client of the respondent at claimant's hospital in Virginia.. . . . . p. 82

PUBLIC EMPLOYEES

DIVISION OF PERSONNEL VS. DIVISION OF CORRECTIONS (CC-94-144)

The Court awarded $32,210.94 for administrative fees due for full-time equivalent positions in fiscal 1993. The respondent admits the validity of the claim and states that there were sufficient funds expired in the appropriate fiscal year from which the bill could have been paid. . . p. 89

HAAS VS. BUREAU OF EMPLOYMENT PROGRAMS (CC-94-458)

Claimant sought $145.41 for travel expenses incurred as an administrative law judge for the Workers Compensation Division. Travel vouchers were not processed in the proper fiscal year. Respondent admits the validity and amount of the claim; sufficient funds were expired. Award of $145.41.. . . . . p. 125

HAMMACK, ET AL. VS. DIVISION OF HIGHWAYS (CC-93-176a-f)

Claimants, employees of the respondent, sought reimbursement for value of personal items of clothing destroyed when a truck belonging to respondent was stolen and burned. The Court made an award for various amounts, as respondent does not have an appropriate fiscal method for this purpose.. . . . . p. 38

TYBURSKI VS. BUREAU OF EMPLOYMENT PROGRAMS (CC-93-36)

Where claimant's leather jacket and other items of apparel were stolen from her place of employment at respondent's Wheeling area office, and where claimant's insurance carrier covered all but the $250 deductible, the Court awarded her $250.. . . . . p. 78

WHITE, CAROL J. VS. DEPT. OF EDUCATION (CC-93-82)

The Court awarded $293 to reimburse the claimant for a course to taken to renew her teaching certificate for FY 1991-92. Invoice was not processed in the proper fiscal year. Respondent admits validity of the claim and sufficient funds were available from which the claim could have been paid. . . . . p. 12

WILLIAMS, SALENA M. VS. DEPT. OF EDUCATION (CC-93-98)

The Court awarded $165 to reimburse the claimant for a course taken to renew her teaching certificate. Invoice was not processed for payment in the proper fiscal year and sufficient funds were available from which the claim could have been paid.. . . . . p. 26

STATE AGENCIES

HODGES VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-92-326)

The Court awarded $400.00 for lost personal property when claimant was admitted to Huntington State Hospital as a patient.. . . . . p. 3

PUBLIC EMPLOYEES INSURANCE AGENCY VS. DIVISION OF CORRECTIONS (CC-94-810)

The Court awarded $11,906.68 for insurance premiums due for employees of the Anthony Correctional Center. Respondent admits the claim and states there were sufficient funds expired win the appropriate fiscal year from which the claim could have been paid.. . . . . p. 141

ST. MARY'S HOSPITAL VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-92-356)

The Court award $74,611.27, in a case where the claimant hospital sought Medicaid reimbursement through the respondent for services rendered a patient involuntarily committed to the care of the claimant.. . . . . p. 52

STREETS and HIGHWAYS -- See also Falling Rocks; Landslides; Negligence

ADKINS, JULIA VS. DIVISION OF HIGHWAYS (CC-90-177)

Claimant lost control of her car after encountering rough road surface. The Court said the secondary road develops potholes during the winter months that respondent is unable to repair immediately or permanently. The Court said that claimant was familiar with the road and was unable to identify a specific pothole large enough to cause her to lose control.
Claim disallowed.. . . . . p. 27

ADKINS, VIRGIL VS. DIVISION OF HIGHWAYS (CC-94-187)

Where claimant was forced to steer to the right to avoid oncoming traffic, and where the respondent had received complaints about the condition of the road, the Court awarded $244.88 caused when claimant's vehicle struck a pothole.. . . . . p. 105

ARNETT VS. DIVISION OF HIGHWAYS (CC-93-154)

Claimant's car hit a pothole on I-64, which had recently been temporarily repaired with cold mix -- a winter repair measure. The Court said respondent could not be held responsible as it acted to alleviate road hazards to the best of its ability. Claim disallowed.. . . . . p. 30

BELCHER, MARTHA VS. DIVISION OF HIGHWAYS (CC-94-178)

When the respondent failed to warn motorists of holes in the road that it had been cut for paving purposes, the Court awarded $378 in damages to claimant's car.. . . . . p. 106

BILLIPS VS. DIVISION OF HIGHWAYS (CC-92-350)

The Court disallowed an award, where claimant lost control on gravel and slid into an oncoming car. Respondent had no actual or constructive notice of road hazard.. . . . . p. 31

CHEETHAM VS. DIVISION OF HIGHWAYS (CC-93-11)

Where the evidence from a separate claim indicates that respondent had notice of a defective expansion joint, the Court awarded $2,019.58 for resulting damage to claimant's vehicle.. . . . . p. 13

CONLEY VS. DIVISION OF HIGHWAYS (CC-94-401)

Claimant struck a block of ice in the center of his lane on Route 10. The Court said that it will apply the same legal standard that applies in rock fall cases. Without a positive showing that the respondent knew or had reason to know of the defect or hazard, the claim will be disallowed.. . . . . p. 149

DINGESS VS. DIVISION OF HIGHWAYS (CC-93-118)

The Court found that respondent had constructive notice of a pothole, approximately 20 inches wide and 17 inches deep, which could not have developed over a short period of time. Award of $100.00.. . . . . p. 34

DORIS TRENT, Administratrix of the Estate of MINA FERGUSON, deceased
VS. DIVISION OF HIGHWAYS (CC-91-340)

Claimant's decedent was killed when an oncoming car, driven by Joseph Cantrell, swerved left of center to avoid accumulated mud and water and collided with decedent's vehicle. Claimant alleged negligence in allowing water and mud to accumulate. The Court found the cause of the accident was Mr. Cantrell's crossing left of center. Claim disallowed. . . . . p. 10

DORSEY, JENNIFER F. VS. DIV. OF HIGHWAYS (CC-94-234)

Where the respondent had actual notice of two holes on Route 1 prior to the date of the accident which had been patched temporarily, the Court found that claimant should have placed signs along the road because the respondent is aware that temporary patching material does not remain in place. Award of $179.64.. . . . . p. 135

EDDY VS. DIVISION OF HIGHWAYS (CC-93-179)

The respondent will not be protected from a claim of negligence merely by calling a witness to testify to lack of personal knowledge of a defective road condition to wit: a hole four feet wide and ten inches deep, which caused damage to claimant's car. Award of $221.72.. . . . . p. 61

FAWCETT VS. DIVISION OF HIGHWAYS (CC-94-267)

The Court said that a pothole approximately three feet wide and 18 inches deep would develop over a prolonged period of time. Award of $500, the amount of claimant's insurance deductible.. . . . . p. 137

FERNATT, MICHAEL AND BRENDA VS. DIV. OF HIGHWAYS (CC-92-374)

The Court disallowed a claim where the claimant's vehicle struck a tire lying in the road as the respondent had no actual or constructive notice of the road hazard or reasonable opportunity to take corrective action.. . . . . p. 87

FIELDS VS. DIVISION OF HIGHWAYS (CC-93-79)

The Court disallowed a claim for defective expansion joint, where evidence was that respondent had no notice the joint would come loose from the pavement.. . . . . p. 14

FLESHMAN VS. DIVISION OF HIGHWAYS (CC-94-152)

The Court disallowed a claim for pothole-related vehicle damage, saying that during the winter, the respondent must concentrate maintenance efforts on snow and ice removal.. p. 108

FORTNER VS. DIVISION OF HIGHWAYS (CC-93-67)

The Court disallowed a claim alleging that respondent was negligent in failing to properly maintain a stop sign at an intersection. The Court said the claimant should have seen the approaching vehicle but nevertheless pulled into the intersection, causing the accident.
WV Code §17C-9-2.. . . . . p. 98

GAINER VS. DIVISION OF HIGHWAYS (CC-93-110)

Where respondent's maintenance supervisor had noticed a pothole one foot in diameter two days prior to the accident and no warning signs were in place, the Court awarded claimant $427.90 for damage to her vehicle.. . . . . p. 35

GENERAL DELIVERY, INC. VS. DIVISION OF HIGHWAYS (CC-92-251)

Claimant's tractor trailer was severely damaged when the driver steered it onto the truck escape ramp after brake failure. The Court disallowed the claim, as the evidence indicated that the driver steered the truck onto the ramp with right tires on the paved portion and left tires on loose gravel, causing the truck to go over a hill.. . . . . p. 36

GIBBS VS. DIVISION OF HIGHWAYS (CC-94-360)

Claimant encountered a "crumbled" area when she was forced over to the berm area to avoid oncoming traffic. Respondent knew the road was heavily traveled by coal trucks, and some of these trucks were known to be overloaded. Notwithstanding the severe winter weather, respondent should have performed some remedial action. Award of $250.. . . . . p. 138

GRIMMET, JOHN P. II VS. DIV. OF HIGHWAYS (CC-93-01)

Where claimant's vehicle was damaged after striking a hole in the pavement on a heavily traveled road within a mile of the respondent's headquarter's and where the respondent's road supervisor stated he might have noticed the hole prior to the accident, the Court found the respondent had actual or constructive notice of the road defect. Award of $500.. . . . . p. 63

HALL VS. DIVISION OF HIGHWAYS (CC-94-350)

Where respondent used a hybrid patching material to temporarily repair a pothole prior to claimant's accident, the Court said the respondent failed to use proper diligence in monitoring and maintaining the road. Award of $250, the amount of claimant's insurance deductible.. p. 146

HAMPSHIRE DISTRIBUTOR, INC. VS. DIVISION OF HIGHWAYS (CC-93-171)

The Court awarded $95.40, where claimant's driver was forced to pull to the side of the road to avoid oncoming traffic and hit a reflector sign.. . . . . p. 64

HENSLEY VS. DIVISION OF HIGHWAYS (CC-94-146)

Where an underground drain had collapsed, causing the road surface to give way, and where a contractor had placed a steel plate over the hole, the Court disallowed a claim for vehicle tire damage as there was no notice to the respondent of the hole or the temporary steel plate. . . . . p. 111

HUNDLEY, JACKIE AND MARICA VS. DIV. OF HIGHWAYS (CC-95-08)

Where respondent's office staff had been informed of the defective pavement condition on Route 119 in Logan County, but had not advised the road maintenance supervisor, the Court held that the respondent was nevertheless on notice of the hazard giving rise to the claim. Award of $250.. . . . . p. 159

JARRELL VS. DIVISION OF HIGHWAYS (CC-94-611)

Claimant's door was damaged when he struck a sign post left by respondent's road crew during resurfacing. The Court said use by the road crew indicates that respondent had notice that the post was too close to the road. Award of $500, the amount of claimant's insurance deductible.. . . . . p. 152

JETT VS. DIVISION OF HIGHWAYS (CC-94-110)

The Court disallowed a pothole claim, saying that during the winter months respondent's employees were occupied with snow and ice removal and had no notice of the pothole.. . . . . p. 100

JORDAN VS. DIVISION OF HIGHWAYS (CC-93-92)

Claimant alleged respondent was negligent in failure to adequately apply salt to prevent ice conditions when a water main broke. The Court found no actual or constructive notice and the claim was denied. . . . . p. 41

KENNEDY VS. DIVISION OF HIGHWAYS (CC-94-367)

Where claimant encountered an icy section of the Route 83 near Bradshaw, the Court said the State cannot be expected to to keep its highways totally free of ice at all times. Claim disallowed.. . . . . p. 153

LAFFERTY, JOHN VS. DIV. OF HIGHWAYS (CC-94-256)

Where the respondent's employees had patched a recurring hole with cold mix prior to the accident, and where some of the repairs had subsequently broken loose, the Court found that the respondent was aware of the propensity of temporary patching material to deteriorate in a short period of time. The Court also said the respondent was aware of an ongoing drainage problem in the area. Award of $677. . . . . p. 140

LUCAS VS. DIVISION OF HIGHWAYS (CC-91-348)

Claimant was injured and his father's pick-up truck was damaged when, as a result of a blown tire, claimant drove off the berm onto a grassy area and encountered an exposed I-beam installed by respondent. The Court said the berm area had been rendered unsafe for an emergency situation. Award of $4,720.00.. . . . . p. 5

McCALLISTER VS. DIVISION OF HIGHWAYS (CC-92-310)

The Court granted $1,501.73 to claimant whose vehicle was damaged when broken asphalt spun up and cracked the windshield. The court found constructive notice of the deteriorated expansion joint. . . . . p. 7

NOE VS. DIVISION OF HIGHWAYS (CC-92-81)

Claimant asserted that respondent was negligent in allowing mud and water to accumulate on the road surface from an adjacent bank. The evidence was that claimant was speeding and had knowledge of a mud slide near the accident location, but which did not appear to cause the accident. Claim disallowed.. . . . . p. 44

PRATER VS. DIVISION OF HIGHWAYS (CC-09-409)

Where respondent knew of the deteriorated condition of Route 49, and said the poor condition was due to coal trucks, and where claimants' vehicle lost control after striking a large hole in the pavement while trying to avoid other traffic, the Court made awards in the amount of $11,549.12 and $16,750.00 . . . . . p. 45

PRESLEY VS. DIVISION OF HIGHWAYS (CC-93-210)

The respondent had actual notice of a pothole damaging claimant's vehicle, where an earlier claim against respondent was based upon the same defect and the respondent had failed to patch the area. Award of $871.32.. . . . . p. 70

SHAMBLIN, CHARLOTTE A. VS. DIV. OF HIGHWAYS (CC-94-166)

Claimant's vehicle was damaged after encountering a hole on the Tuppers Creek bridge. Although the respondent must by necessity concentrate maintenance efforts on snow and ice removal during the winter months, the Court found that the respondent was aware of the ongoing deteriorating condition of the bridge in question and had a duty to place warning signs to alert drivers of the poor condition of the bridge deck. Award of $197.05.. . . . . p. 119

SIMMONS VS. DIVISION OF HIGHWAYS (CC-93-64)

Where claimant's car slid into a rock cliff after encountering ice on the road, and where a sign warning of ice conditions was located in weeds on the berm, the Court said there was nothing respondent could do to to remedy water-related problems on the road due to underground springs. However, the court said the signs were insufficient to warn against ice when the road surface and weather on a whole were dry. The Court awarded the amount of claimant's insurance deductible: $250.00.. . . . . p. 74

STARKEY VS. DIVISION OF HIGHWAYS (CC-92-381)

The Court found that the design of a three-way intersection in East Bank, Secondary Route 61/8, constituted a hazard for unwary motorists absent any warning signs. Local residents, as well as respondent, had previously installed warning markers, which had been removed by vandals. The intersection gave the impression of being four-way. Award of $2,142.45.. . . . . p. 75

TORBETT, LEAH K. VS. DIV. OF HIGHWAYS (CC-94-296)

Where the evidence was that the respondent was aware of potholes on Dallas Pike Road in Ohio County, had received complaints of holes, and had undertaken temporary cold patch work along the road, the Court said that respondent had notice of the defective condition giving rise to the claim. Moreover, the hole which damaged claimant's vehicle was roughly the size of a bathtub and presented a serious threat to motorists. Award of $250.. . . . . p. 143

TORRES VS. DIVISION OF HIGHWAYS (CC-94-335)

Where the respondent's maintenance supervisor testified the expansion joint was located in an elevated curve that was difficult to maintain, the Court found the respondent had constructive notice of the exposed expansion joint which damaged claimant's wheel rims. Temporary patching without warning signs was inadequate. Award of $205.96. . . . . p. 144

TREADWAY VS. DIVISION OF HIGHWAYS (CC-92-237)

The Court awarded $81.00 for tire damage caused by a hole, created while respondent was installing a culvert.. . . . . p. 23

WATERS, VICKI L. VS. DIV. OF HIGHWAYS (CC-94-66)

Where claimant's vehicle was damaged after striking two deep holes in US Route 60, the Court said respondent was aware that the road is heavily traveled and was in poor condition. While permanent repairs could not be made during the winter months, the respondent should have placed warning signs to alert motorists of poor road conditions. . . . . p. 122

WILLIAMS, LINDA VS. DIVISION OF HIGHWAYS (CC-94-153)

Where the respondent was aware of a large pothole on Virginia Street (Route 61/28) in Oak Hill, and had placed cold patch on it during the winter months as a temporary repair, the Court said respondent was negligent in maintaining the road as it knew of the severity of the hole and had not installed warning signs.. . . . . p. 123

TREES and TIMBER

HAMILTON VS. DIVISION OF HIGHWAYS (C-94-37)

The Court disallowed a claim for windshield damage caused by a tree limb, which claimant encountered in a slipped area on U.S. Route 60. The Court said respondent, by necessity, had to concentrated maintenance activities on snow and ice removal at the time of the accident.p. 110

NEWKIRK VS. DIVISION OF HIGHWAYS (CC-92-244)

The Court disallowed a claim for property damage to claimant's car caused by a tree branch, as the evidence was that the tree in question was not upon respondent's right of way.. . . p. 18

TRESPASS

BREWER VS. DIVISION OF HIGHWAYS (CC-91-355)

Claimants alleged the respondent's employees came onto their property and removed their split-rail fence and damaged a culvert and driveway during widening of a road erroneously thought to be property of respondent. After the circuit court held that the road was in fact private, the Court awarded claimants a total of $4,450. . . . . p. 58

VENDORS

The following claims represent a sampling of the vendor claims decided by the Court. Some claims were omitted due to lack of space. The Court will deny vendor claims when insufficient funds were available during the relevant fiscal year based on its decision in *Airkem Sales and Service vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Vendors -- admit with sufficient funds.

BELL ATLANTIC-WEST VIRGINIA VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-94-735)

The Court awarded $117,620.02 for telephone services provided to the respondent. Invoices were not processed in the proper fiscal year. Respondent admits the claim and stated that there were sufficient funds from which the claim could have been paid.. . . . . p. 132

CHESAPEAKE AND POTOMAC TELEPHONE CO. VS. DEPT. OF ADMINISTRATION (CC-93-310).

The Court awarded $656.88 for telephone services provided respondent, but not processed for payment within the proper fiscal year. Respondent admits the validity of the claim and states there were sufficient funds expired with which the claim could have been paid.. . . . . p. 33

HELICOPTER FLIGHT SERVICES, INC. VS. DIVISION OF PUBLIC SAFETY (CC-93-458)

Bill for maintenance work on respondent's aircraft was not processed for payment in the proper fiscal year. Respondent admitted the claim and there were sufficient funds available in the fiscal year from which the bill could have been paid. Award of $2,850.69.. . . . . p. 66

KAWASH VS. DIVISION OF NATURAL RESOURCES (CC-93-470)

Bill for accounting services was not processed for payment in the proper fiscal year. Respondent admitted the claim and there were sufficient funds available from which the bill could have been paid. Award of $18.025.00. . . . . p. 62

MANPOWER TEMPORARY SERVICES, INC. VS. DIVISION OF ENVIRONMENTAL PROTECTION (CC-93-129)

Bill for temporary employees was not processed for payment in the proper fiscal year. Respondent admitted the claim and stated that there were sufficient funds available from which the bill could have been paid. Award of $3,844.65.. . . . . p. 68

MARC TRAIN SERVICE VS. RAILROAD MAINTENANCE AUTHORITY (CC-93-130)

The Court awarded $10,000 for operation of the MARC Train Service in West Virginia. The invoice for service was not processed in the proper fiscal year. Respondent admits the validity of the claim and states there were sufficient funds expired in the proper fiscal year from which the claim could have been paid.. . . . . p. 7

MPL CORP. VS. BOARD OF COAL MINE SAFETY AND TECHNICAL REVIEW COMMITTEE (CC-93-80)

The Court awarded $1,519.25 for computer services provided respondent. The invoice was not provided in the proper fiscal year. Respondent admitted the validity of the claim states that there were sufficient funds expired in the appropriate fiscal year from which the claim could have been paid. The Court denied interest. WV Code §14-2-12.. . . . . p. 8

Similar admitted claims include:

DICKSTEIN, SHAPIRO & MORIN VS. OFFICE OF STATE TREASURER (CC-94-626) Legal services.. . . . . p. 130

MARION COUNTY COMMISSION VS. DEPT. OF HEALTH AND HUMAN RESOURCE (CC-93-414)—$718.11 for rent. . . . . p. 68

MEDICAL CLAIMS REVIEW SERVICES, INC. VS. BUREAU OF EMPLOYMENT PROGRAMS (CC-93-84)—$6,422.65 for medical review services.. . . . . p. 69

R. DEAN CODDINGTON, MD, VS. DEPT. OF HEALTH AND HUMAN SERVICES (CC-94-20)—$1,170.00 for medical services provided a client of the respondent.. p. 81

WOOD VS. BOARD OF BARBERS AND COSMETOLOGISTS (CC-93-463)—$106.50 for employee's travel expenses.. . . . . p. 82

WVU EXTENSION CONTINUING EDUCATION VS. DIVISION OF ENVIRONMENTAL PROTECTION (CC-93-251)—$4,022.00 for asbestos building inspection course.. . . . . p. 80

Vendors -- deny due to insufficient funds appropriated. Airkem Sales and Service vs. Dept. of Mental Health, 8 Ct.Cl. 180 (1971)

CORRECTIONAL MEDICAL SERVICES, INC. VS. REG. JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-94-847)

The Court denied payment of $25,753.63 for medical services rendered to inmates in the South Central Regional Jail, as there were insufficient funds in the respondent's budget appropriation for the year in question from which to pay the claim. *Airkem*.. . . . . p. 134

LOWERY VS. DEPT. OF TAX AND REVENUE (CC-93-183)

Claimant sought $1,044.80 for travel expenses as an employee of respondent. Respondent admitted the validity but stated there were insufficient funds in the fiscal year appropriation with which to pay the claim. Claim disallowed. *Airkem*.. . . . . p. 15

ROSE AND QUESENBERRY FUNERAL HOME, INC. VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-93-93)

The Court denied payment of $400.00 for funeral services under the indigent burial fund because there were insufficient funds appropriated in the fiscal year in question.. . . . . p. 9

WILD ANIMALS

DAWSON VS. DIVISION OF HIGHWAYS (CC-92-406)

The Court disallowed a claim for damage to claimant's car when it was struck by a deer on respondent's highway. The Court said there is no way to ensure deer will not cross the road. Claim disallowed.. . . . . p. 2

W.VA. UNIVERSITY

DIMMICK VS. BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM OF WEST VIRGINIA (CC-94-520)

A student at WVU brought a claim for damage to her carpet after a pipe burst and the room

was flooded. Respondent lacks a fiscal method for reimbursement and admits the validity and amount of the claim. Award of $75.. . . . . p. 124

HICKS VS. BOARD OF DIRECTORS OF THE STATE COLLEGE SYSTEM (CC-94-26)

The Court made an award of $151.57 for damaged and missing items taken from claimant's dorm room at Concord College. Respondent does not have a fiscal method to pay the claim.. . . . . p. 88

RIVERA VS. BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM OF WEST VIRGINIA (CC-88-168)

The Court awarded $41,544 in a breach of employment contract, finding that the Board had failed to comply with its guidelines for probationary and terminal contracts.. . . . . p. 113

TAYLOR VS. BOARD OF TRUSTEES (CC-93-57)

The Court awarded $59.63, representing payment for an article of clothing that was damaged on a piece of metal in a facility of the respondent.. . . . . p. 54

WHITING VS. BOARD OF TRUSTEES (CC-94-377)

The Court disallowed a claim for stolen books where the claimant-professor alleged that the location of his office and the posting of his schedule enabled people to quickly enter his office. The Court said that respondent is not an insurer of personal property in faculty offices and that there must be some negligent act on the part of respondent.. . . . . p. 157